Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

MOTION RECORD OF THE RESPONDING PARTY, AIR PASSENGER RIGHTS

Respondent's Motion to Strike

VOLUME 1 of 2

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TO: **CANADIAN TRANSPORTATION AGENCY**

Table of Contents of Volume 1

Appendix A – Statutes and Regulations

Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

AFFIDAVIT OF DR. GÁBOR LUKÁCS
(Affirmed: August 18, 2020)

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

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

A. Confusion Created by the Agency's Actions

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

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

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

B. Application for Leave to Appeal to the Supreme Court of Canada

3. On August 3, 2020, Air Passenger Rights [**APR**] brought an application for leave to appeal to the Supreme Court of Canada from the May 22, 2020 Order of Mactavish, J.A. A copy of APR's Notice of Application for Leave to Appeal is attached and marked as **Exhibit "B"**. A copy of APR's Memorandum of Arguments is attached and marked as **Exhibit "C"**.

4. On August 3, 2020, I served the Canadian Transportation Agency with APR's complete application for leave to appeal to the Supreme Court of Canada by email.

5. On August 7, 2020, APR's application for leave to appeal to the Supreme Court of Canada was accepted for filing. A copy of the letter of Ms. Georgia Gallup, Registry Officer at the Supreme Court of Canada, dated August 7, 2020, is attached and marked as **Exhibit "D"**.

AFFIRMED before me by video conference
From the City of Halifax, Nova Scotia
To the City of Coquitlam, British Columbia
On August 18, 2020.

_____
A Commissioner for Taking Affidavits
in the Province of Ontario

Simon P. Lin, *Barrister & Solicitor*
Evolink Law Group
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Burnaby, BC V5C 6C6

_____
Dr. Gábor Lukács

Halifax, NS
Tel:
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This is **Exhibit "A"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on August 18, 2020

_____

Signature

HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

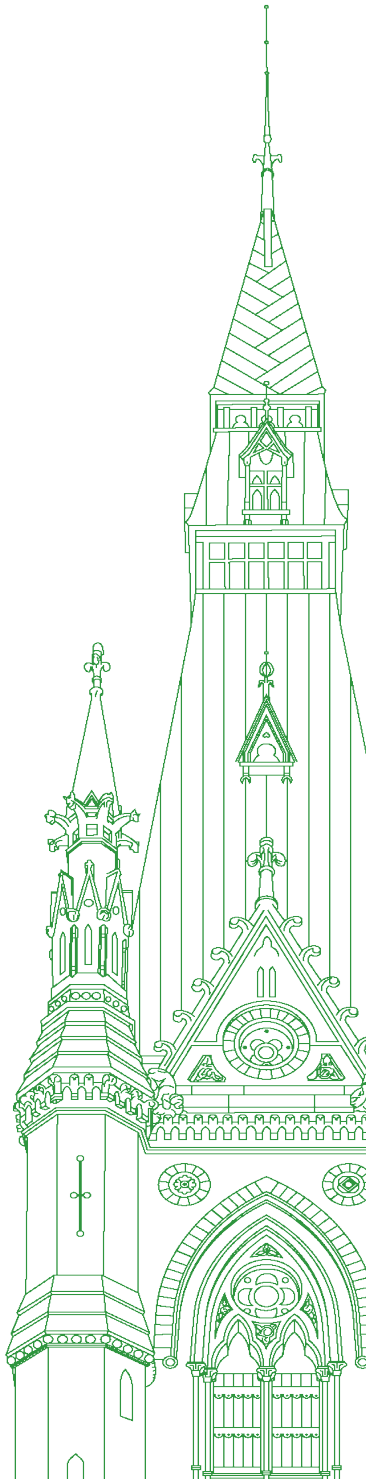
43rd PARLIAMENT, 1st SESSION

Special Committee on the COVID-19 Pandemic

EVIDENCE

NUMBER 013

Thursday, May 28, 2020



Chair: The Honourable Anthony Rota

At the beginning of the crisis, the government called on entrepreneurs in Quebec and Canada, inviting them to set an example in the situation we are experiencing. Many of them turned to the supplemental unemployment benefit (SUB) plan to maintain the employment relationship and to preserve some security, enabling their employees to get through this difficult period with more peace of mind.

However, on May 22, despite the fact that these entrepreneurs had made sure that the SUB program would still be in place when the CERB was introduced, they were surprised. Employees were told at that time that they would have to repay the CERB because of the alleged gains they had made under the SUB program. At SOPREMA, one of the large employers in the Drummondville region, 150 employees are affected. At Bridgestone, in Joliette, 1,100 employees are affected by this decision. At Goodyear, in Valleyfield, 150 employees are affected, and there are dozens more.

Does the minister intend to correct this mistake so that employers who are able and willing to do so can treat their employees better during this difficult period?

● (1315)

[*English*]

Hon. Carla Qualtrough: When we put in place the Canada emergency response benefit, the underlying goal was to make sure that every worker who needed it had access to income support as they were losing their employment for COVID reasons. We understood that meant some workers would not have access moving forward, although let me clarify that SUB plans that existed prior to March 15 are definitely in place. We consider the fact that workers have access to $1,000 a month in addition to CERB—and we've spoken with employers about this—to permit employers to assist their employees in an equitable way.

[*Translation*]

The Chair: Mr. Champoux, you have 15 seconds for your question.

Mr. Martin Champoux: Mr. Chair, employers received absolutely no news from the government before this measure was implemented, despite the fact that they were assured that this measure would be transferred to the CERB. That's not an answer when those folks acted honestly and in good faith. They feel cheated, and rightly so.

Does the government intend to fix this mistake, which would simply be the right thing to do?

[*English*]

Hon. Carla Qualtrough: Mr. Chair, I can assure the member opposite that the SUB plans that were in place prior to March 15 are indeed in place now. In addition, employees who are now on the CERB as an alternative have access to $1,000 of income in addition to their CERB. We are working with employers to perhaps provide the $1,000 in lieu of the SUB plans.

[*Translation*]

The Chair: We will continue with you, Mr. Barsalou-Duval.

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

On April 27, Option consommateurs sent a letter to the Minister of Transport to warn him that the airlines' refusal to reimburse their customers for cancelled flights was contrary to Quebec's laws.

What is the minister going to do to put an end to this situation?

Hon. Marc Garneau (Minister of Transport): Mr. Chair, I sympathize with the people who would have preferred to get a refund, and I understand their frustration. It is not an ideal situation. The airlines are going through a very difficult time right now. If they were forced to refund their customers immediately, many of them would go bankrupt.

Mr. Xavier Barsalou-Duval: Mr. Chair, the minister sounds like a broken record.

A few hours ago, the following motion was passed unanimously: "THAT the National Assembly ask the Government of Canada to order airlines and other carriers under federal jurisdiction to allow customers whose trips have been cancelled because of the current pandemic to obtain a refund."

What will the Minister of Transport tell the National Assembly of Quebec?

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

The Chair: Mr. Barsalou-Duval, you have about 15 seconds for a question.

Mr. Xavier Barsalou-Duval: Mr. Chair, I find it rather odd that the Minister of Transport and the Canadian Transportation Agency are telling the airlines that Quebec's regulations and laws are not important and that they can override them. It seems to me that this is a strange way to operate. Theoretically, under the famous Canadian Constitution, which they imposed on us, that is not how it should work.

Can they uphold their own constitution?

The Chair: The hon. minister can answer in 15 seconds or less, please.

Hon. Marc Garneau: Mr. Chair, as my hon. colleague probably knows, the Canadian Transportation Agency is a quasi-judicial body that operates at arm's length from Transport Canada and the Government of Canada.

The Chair: We will now take a short break.

[*English*]

We're going to take a short break to allow employees supporting the meeting to switch in safety, including myself.

The Acting Chair (Mr. Bruce Stanton (Simcoe North, CPC)): We will now carry on with Mr. Baker for Etobicoke Centre.

Mr. Baker, go ahead.

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

affirmed before me on August 18, 2020

_____

Signature

7

SCC File No.: _____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

AIR PASSENGER RIGHTS

APPLICANT
(Applicant)

– and –

CANADIAN TRANSPORTATION AGENCY

RESPONDENT
(Respondent)

NOTICE OF APPLICATION FOR LEAVE TO APPEAL
(AIR PASSENGER RIGHTS, APPLICANT)
(Pursuant to Rule 25(1)(a) of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

TAKE NOTICE that AIR PASSENGER RIGHTS hereby applies for Leave to Appeal to the Court, pursuant to section 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, from the judgment of the Honourable Madam Justice Mactavish of the Federal Court of Appeal in File No. A-102-20 made on May 22, 2020, and for:

1. an order granting leave to appeal;

2. alternatively, pursuant to subsection 43(1.1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26, remanding for re-hearing by a five-judge panel of the Federal Court of Appeal and an order to review whether the subject administrative action could be amenable to judicial review and the Federal Court of Appeal's formulation of the *RJR-Macdonald* test for injunctions;

3. an order for costs or, alternatively, disbursements only; and

4. any other order that this Court may deem appropriate.

AND TAKE FURTHER NOTICE that this Application for Leave is made on the following grounds:

1. The Federal Court of Appeal motions judge erred in law by resurrecting an outmoded and restrictive test for the availability of judicial review in the federal courts that is:

   (a) inconsistent with the test applied by provincial appellate and superior courts;

   (b) inconsistent with the statutory language, context, and legislative intent of the judicial review provisions of the *Federal Courts Act*; and

   (c) incongruent with the test articulated by this Court in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 and affirmed in *J.W. v. Canada (Attorney General)*, 2019 SCC 20.

2. The Federal Court of Appeal motions judge erred in applying her court's mechanistic formulation of the *RJR-MacDonald* framework that drastically differs from the contextual approach of the vast majority of Canadian courts, including this Court. The motion judge's reasons exemplify the frequently criticized flaws in the Federal Court of Appeal's approach. These flaws make obtaining interlocutory relief in the federal courts nearly impossible by:

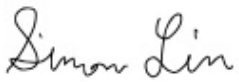
   (a) applying a tick-box checklist without properly weighing and balancing the *RJR-MacDonald* factors in an equitable and contextual fashion;

   (b) imposing a comparatively onerous "irreparable harm" criterion that is impossible to meet by litigants seeking interlocutory relief in the public interest, and nearly impossible to meet in any other context;

   (c) requiring proof with certainty that harm will be suffered, and that it cannot be repaired later via theoretical means, without consideration of its practicalities; and/or

   (d) failing to consider the primacy of injunctive relief as a preventative and effective measure for protection of consumers and the public interest.

DATED at Vancouver, British Columbia, this 3rd day of August, 2020.



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Counsel for the Respondent,
Canadian Transportation Agency

NOTICE TO THE RESPONDENT OR INTERVENER: A respondent or intervener may serve and file a memorandum in response to this application for leave to appeal within 30 days after the day on which a file is opened by the Court following the filing of this application for leave to appeal or, if a file has already been opened, within 30 days after the service of this application for leave to appeal. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration under section 43 of the Supreme Court Act.

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

affirmed before me on August 18, 2020

_____

Signature

SCC File No.: _____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

AIR PASSENGER RIGHTS

APPLICANT
(Applicant)

– and –

CANADIAN TRANSPORTATION AGENCY

RESPONDENT
(Respondent)

APPLICATION FOR LEAVE TO APPEAL
(AIR PASSENGER RIGHTS, APPLICANT)
(Pursuant to s. 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26 and
Rule 25 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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Counsel for the Respondent,
Canadian Transportation Agency

TABLE OF CONTENTS

DOCUMENTS RELIED UPON

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The proposed appeal seeks to restore doctrinal uniformity across Canada on both the availability of interlocutory relief and the constitutional right to access judicial review. The Federal Court of Appeal [**FCA**] has diverged from the approaches of this Court and provincial appellate and superior courts, and most importantly, its enabling statute, the *Federal Courts Act*.

2. The case arises from a motion for interlocutory relief to compel the Canadian Transportation Agency to remove and/or clarify misleading Publications it widely disseminated to the travelling public, and to enjoin the Agency's members from adjudicating on the subject matter expressed in the Publications. The FCA denied the motion on the basis that: (a) judicial review was not available in relation to the Publications; (b) a public interest advocacy group cannot rely on the "irreparable harm" to the vulnerable people it represents, but rather must show harm to the Applicant itself; (c) the Applicant must prove that "irreparable harm" **would** result, not simply that it **may** result. On each of these points, the FCA adopted tests that are at odds with the jurisprudence of provincial courts, with the objectives of judicial review and public interest litigation, and with common sense.

3. The *Federal Courts Act* confers on federal courts the same extensive and constitutionally guaranteed judicial review jurisdiction with respect to federal administrative bodies as provincial superior courts have with respect to provincial administrative bodies. Yet, over the past decade, the FCA has imposed an onerous non-statutory prerequisite for the availability of judicial review, which is not in the text of the *Federal Courts Act* and is also inconsistent with the test applied in the provincial courts.[1] By so doing, the FCA restricted Canadians' access to judicial review of federal administrative acts that affect citizens from coast to coast, and departed from Parliament's will.

4. The FCA has also diverged from other Canadian courts with respect to the *RJR-MacDonald* framework for interlocutory relief. In the past decades, the FCA imposed a mechanistic and onerous approach to "irreparable harm," diverging from the analysis adopted in this Court, the provincial appellate and superior courts, and even the Federal Court. The FCA's approach makes it nearly impossible for litigants to obtain interlocutory relief in the federal courts in all areas of law within the

[1] *Highwood Congregation of Jehovah's Witnesses (Jud. Comm.) v. Wall*, 2018 SCC 26 at para. 14.

subject-matter expertise of the federal courts, including immigration and refugee law, intellectual property law, admiralty law, and aboriginal claims involving the federal crown.

5. The combined effect of the FCA's diverging approaches effectively forecloses interlocutory relief in judicial reviews of federal administrative actions that have a broad public interest implication, contrary to Parliament's expressed intent in s. 18.2 of the *Federal Courts Act*. The proposed appeal offers the Court an opportunity to restore doctrinal uniformity across Canada and address the FCA's diverging approaches to both of the aforementioned, seemingly unrelated areas of law that touch upon the daily lives of those in Canada, in one form or another.

B. Facts

6. Air Passenger Rights [**APR**] is a non-profit advocacy group representing and advocating for the rights of the public who travel by air. Dr. Gábor Lukács is the founder and president of APR, and he has been a recognized advocate for the Canadian travelling public for more than a decade. Dr. Lukács's public interest advocacy work involved appearances as a stakeholder or public interest litigant before the Canadian Transportation Agency [**Agency**] and invitations to appear before Parliamentary committees to represent the interest of air passengers. Dr. Lukács has also appeared before all levels of Court in Canada, including this Court, as a public interest litigant or as a court-approved advocate for specific passengers on a *pro bono* and *pro hac vice* basis.[2]

7. The Agency is a statutory body that administers a regulatory scheme for transportation by air from, to, and within Canada. In respect of air travel, the Agency fulfills a dual role: (i) as a quasi-judicial tribunal, it adjudicates consumer disputes between passengers and carriers; (ii) as the economic regulator, it makes regulatory determinations and issues licenses or permits to air carriers.[3] The Agency is composed exclusively of its members appointed by the Governor in Council. Members of the Agency perform and are accountable for all of the Agency's work including its role to adjudicate passenger disputes.[4] Although the Agency's statutory functions are non-delegable unless authorized by statute, its members are assisted by a roster of civil service staff.[5]

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2 *Air Passenger Rights v. Canadian Transportation Agency*, 2020 FCA 92 [**FCA Reasons**] at para. 3 [Tab 2, p. 7]; Lukács Affidavit, paras. 2-27 [Tab 10, p. 93].

3 *Lukács v. Canada (Transportation Agency)*, 2014 FCA 76 at paras. 50-52.

4 *Canada Transportation Act*, ss. 7(2), 10, 13; and 85.1.

5 *Canada Transportation Act*, s. 19; *Code of Conduct for Members of the Agency* [***Code of Conduct***] paras. 4 and 36 – Lukács Affidavit, Exhibit "T" [Tab 10T, p. 186].

i. The Agency's *Code of Conduct* prohibits commentary on potential cases

8. As a quasi-judicial body, the Agency's Members are held to a high standard of professional and ethical conduct, akin to judicial members of a court. The Agency's *Code of Conduct* further reinforces the standard statutory and common law protections with a specific prohibition that:

> (40) Members shall not publicly express an opinion about any past, current, or potential cases or any other issue related to the work of the Agency, and shall refrain from comments or discussions in public or otherwise that may create a reasonable apprehension of bias.[6]

ii. The COVID-19 pandemic and the Agency's Publications

9. Air passengers and air carriers have been seriously affected by the COVID-19 pandemic that began with a World Health Organization declaration on March 11, 2020 and Canadian government advisory on non-essential travel on March 13, 2020.[7] The Agency issued two formal orders to suspend adjudication of passenger complaints until June 30, 2020, and two formal determinations to suspend or relax until June 30, 2020 some of the carriers' minimum compensation, rebooking, and complaint response time requirements under the *Air Passenger Protection Regulations*, SOR/2019-150 [***APPR***]. None of these four actions relieved the carriers from the fundamental obligation to refund passengers for unused airfares.[8] The legality of these actions are not in dispute in this case.

10. On March 25, 2020, the Agency published two commentaries on its website [**Publication(s)**]. The pertinent part of the first Publication, entitled "**Statement on Vouchers**," reads as follows:

> For flight disruptions that are outside an airline's control, the Canada Transportation Act and Air Passenger Protection Regulations only require that the airline ensure passengers can complete their itineraries. Some airlines' tariffs provide for refunds in certain cases, but may have clauses that airlines believe relieve them of such obligations in force majeure situations.
>
> The legislation, regulations, and tariffs were developed in anticipation of relatively localized and short-term disruptions. None contemplated the sorts of worldwide mass flight cancellations that have taken place over recent weeks as a result of the pandemic. It's important to consider how to strike a fair and sensible balance between passenger protection and airlines' operational realities in these extraordinary and unprecedented circumstances.

---

6 *Code of Conduct*, para. 40 – Lukács Affidavit, Exhibit "T" [Tab 10T, p. 186].
7 FCA Reasons, at para. 1 [Tab 2, p. 6].
8 Lukács Affidavit, Exhibits "H"-"K" [Tabs 10H-10K, pp. 145-155].

> On the one hand, passengers who have no prospect of completing their planned itineraries with an airline's assistance should not simply be out-of-pocket for the cost of cancelled flights. On the other hand, airlines facing huge drops in passenger volumes and revenues should not be expected to take steps that could threaten their economic viability.
>
> While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases).[9]

11. The Agency has not revealed the author(s) of the Statement on Vouchers; however, its text indicates that it represents the Agency's position as a whole. The author(s) were fully aware that carriers' refusal to refund passengers would potentially come before members of the Agency, but still chose to encourage carriers in issuing vouchers to protect the air carriers' economic viability.

12. The second Publication is a webpage detailing a carrier's legal obligations under the *APPR* to passengers whose flights were disrupted during the pandemic, and describing three types of disruptions distinguished under the *APPR*: outside the carrier's control, within the carrier's control, or within the carrier's control but required for safety reasons [**COVID-19 Agency Page**].[10] That page gives the impression that **all** flight disruptions during the pandemic would be categorized as outside the carrier's control, and as such passengers are not entitled to refunds of unused airfare.

13. The COVID-19 Agency Page further endorsed the Statement on Vouchers in all three types of flight disruptions under the *APPR*, giving lay passengers the inescapable impression that accepting a voucher was their only viable option. The Agency did not state why it endorsed the Statement on Vouchers for disruptions within the carrier's control (whether or not required for safety reasons), despite the *APPR* codifying passengers' right to a refund in the case of such disruptions.[11]

14. Inexplicably, the Agency omitted from both Publications its own long-standing jurisprudence affirming that passengers have a fundamental right to a refund when a carrier is unable to provide the air transportation for any reason, including reasons outside the carrier's control.[12] That

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[9] **Statement on Vouchers** – Lukács Affidavit, Exhibit "M" (emphasis added) [Tab 10M, p. 160].
[10] **COVID-19 Agency Page** – Lukács Affidavit, Exhibit "P" [Tab 10P, p. 170].
[11] *Air Passenger Protection Regulations*, ss. 17(2) and 17(7).
[12] *Re: Air Transat*, CTA Decision No. 28-A-2004; *CTA Lukács v. Sunwing*, Decision No. 313-C-

jurisprudence is anchored in the legislative requirement that carriers must have just and reasonable terms and conditions[13] that address "refunds for services purchased but not used" for any reason.[14] The *APPR*'s codification of some existing rights did not extinguish this entrenched jurisprudence.

iii. Confusion to the public caused by the Agency's Conduct and Publications

15. If the Agency intended the Statement on Vouchers to clarify and assist passengers in ascertaining their rights to a refund, the Agency has failed. The Statement on Vouchers had the opposite effect, causing confusion and frustration for passengers.

16. The Agency widely disseminated the Statement on Vouchers to passengers via public and private platforms, including Twitter and email.[15] In response to specific passenger inquiries, the Agency indiscriminately regurgitated or directed passengers to the Statement on Vouchers and, in some instances, stated that the Agency will not be dealing with passenger complaints at this time. The incongruity of the Publications and the Agency's boilerplate replies to passengers' cries for assistance gave passengers an impression that they had no right to a refund for unused airfares.

17. Major Canadian air carriers used the Statement on Vouchers as an excuse to refuse refunds to passengers. Sunwing passed it off as the Agency's binding ruling. Westjet claimed the Agency had approved the issuance of vouchers. Air Canada represented it as a form of temporary exemption formally granted by the Agency, or that issuing vouchers is a policy mandated by the Agency. Air Transat characterized it as an opinion supporting the air carriers' decision to refuse refunds. Swoop represented it as a clarification of the Agency's position to endorse carriers in issuing vouchers.[16]

18. The Statement on Vouchers also inspired the travel industry to undermine rights under various provincial consumer protection legislation to a credit card chargeback for unperformed services, and offered insurers an excuse to deny policy coverage for actual travel disruptions.[17]

A-2013 at para. 15; *Lukács v. Porter*, CTA Decision No. 344-C-A-2013 at para. 88; and *Lukács v. Porter*, CTA Decision No. 31-C-A-2014 at para. 137.

[13] *Air Transportation Regulations*, s. 111(1); and *Canada Transportation Act*, s. 67.2.

[14] *Air Transportation Regulations*, ss. 107(1)(n)(xii) and 122(c)(xii).

[15] Order of Locke, J.A., dated April 16, 2020 [Tab 5, p. 27]; Lukács Affidavit, paras. 48-49, 54, and 56-58 [Tab 10, pp. 102-105].

[16] Lukács Affidavit, paras. 60-65 [Tab 10, pp. 106-108].

[17] Lukács Affidavit, paras. 68 and 74 [Tab 10, pp. 110 and 113].

19. The Agency had full knowledge of the carriers' systematic misrepresentation of the Statement on Vouchers.[18] Yet, the Agency took no remedial action to protect passengers from the deception, nor did the Agency distance itself from those misleading statements to the public. Most disturbingly, the Agency did not denounce Westjet's claim that the Statement on Vouchers was a "decision [that] was reached in conjunction with the [Agency] regarding the refund of itineraries."[19]

20. In short, the Agency abdicated its mandate to provide guidance to protect passengers, and instead its actions frustrated all practical remedies for lay passengers to recover funds for travel services they had paid for but never received and may never receive in the foreseeable future.

21. The confusion created by the Agency's actions is underscored by the Transport Minister referring to the impugned statements as expressing what the Agency had already "ruled" upon:

> Mr. Chair, as my hon. colleague knows, the Canadian Transportation Agency has ruled on this issue and has ruled that, in the present circumstances and in a non-binding way, it is acceptable for airlines to offer credits for up to two years. In the case of Air Canada, the credit has no expiry date.[20]

C. Proceedings before the Federal Court of Appeal

22. APR promptly brought a judicial review application upon learning of the potential harm to passengers arising from the Agency's Publications. The application was brought to the Federal Court of Appeal as the court of first instance pursuant to s. 28 of the *Federal Courts Act*. APR also brought a motion seeking firstly interim *ex parte* injunctions, followed by interlocutory injunctions to remove and/or clarify the Publications and to enjoin the Agency's members from dealing with passenger refund claims related to COVID-19 until further order of the court.[21]

23. On April 9, 2020, Pelletier, J.A. held that while the Applicant raised important matters, they were not sufficiently urgent to be heard *ex parte*, without hearing from the Agency. He granted leave to refile the interlocutory injunctions motion, which is the subject of this proposed appeal.[22]

---

[18] The Agency was duly served with the Lukács Affidavit on April 9, 2020.
[19] Lukács Affidavit, para. 45 (emphasis added) [Tab 10, p. 99].
[20] COVI Committee, Evid., 43rd Parl., 1st Sess., No. 013, p. 14 (emphasis added) [Tab 11, p. 262].
[21] Notice of Motion, dated April 7, 2020 [Tab 9, p. 77]; and FCA Reasons at para. 3 [Tab 2, p. 7].
[22] Order of Pelletier, J.A., dated April 9, 2020 [Tab 6, p. 28].

24. On April 16, 2020, Locke, J.A. recognized that the Statement on Vouchers' timing suggested it was intended to immediately affect the relations between carriers and passengers, and that there was potential for confusion to non-parties that rely on that statement, whose rights might be irrevocably affected. He ordered the Applicant's motion to be expedited despite the Suspension Period.[23]

25. On May 22, 2020, Mactavish, J.A. [**Motions Judge**] issued reasons for her judgment dismissing both the interlocutory mandatory and prohibitory injunctions.

26. The Motions Judge acknowledged the Applicant's argument that the Agency's established jurisprudence confirms the passengers' right to a refund when carriers are unable to provide the service, including situations beyond a carrier's control, and its omissions from the Publications.[24]

27. The Motions Judge applied a mechanistic, tick-box approach to the *RJR-Macdonald* framework for interlocutory relief, and held that the Applicant must satisfy all three factors in order to be entitled to relief,[25] an approach that differs from that of most provincial courts.

28. The Motions Judge correctly held that mandatory interlocutory relief requires meeting a higher threshold of strong *prima facie* case, and correctly acknowledged the Applicant's submission that section 18.1 of the *Federal Courts Act* is not limited to formal decisions and orders but allows judicial review "by anyone directly affected by the matter in respect of which relief is sought."[26]

29. The Motions Judge did not consider this Court's guidance on availability for judicial review. Instead, she applied an outmoded test that restricted judicial review to administrative actions that "affect rights, impose legal obligations, or cause prejudicial effects," and concluded on that basis that judicial review was not available and this case did not meet the strong *prima facie* threshold.[27]

30. Departing further from the provincial courts' approach, the Motions Judge also held that the "irreparable harm" element required proof with clear and non-speculative evidence that the Applicant itself **would** suffer the harm. She noted a narrow exception where charities can rely on

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[23] Order of Locke, J.A., dated April 16, 2020 [Tab 5, p. 24].
[24] FCA Reasons at para. 10 [Tab 2, p. 9].
[25] FCA Reasons at para. 15 [Tab 2, p. 10].
[26] FCA Reasons at paras. 19 and 21 [Tab 2, pp. 11-12].
[27] FCA Reasons at paras. 22-23 and 26-27 [Tab 2, pp. 12-14].

the harm of those that rely on the charity, but did not explain why a similar reasoning could not equally apply to a public interest non-profit advocacy group[28] that speaks on behalf of passengers.[29]

31. The Motions Judge then concluded that there was no "irreparable harm," because rather than curtailing the misinformation at the main source, there is a theoretical possibility of passengers individually seeking legal recourse against air carriers for repeating or using that misinformation.[30]

32. For the prohibitory relief to temporarily enjoin the Agency's members from dealing with refund complaints arising from COVID-19, the Motions Judge assumed that the *serious issue to be tried* threshold was met in respect of the allegation that the Agency's members violated the *Code of Conduct*, or otherwise displayed a reasonable apprehension of bias.[31]

33. The Motions Judge denied the prohibitory relief under the "irreparable harm" heading, because she found that there was no evidence that members of the Agency were involved in formulating or endorsing the Publications. The Motions Judge opined that statements by Agency staff cannot "taint" the Agency's members.[32] However, there was equally no evidence that the Agency's civil service staff exclusively authored the Publications, or formulated a policy shift that undermines the *APPR* and the Agency's jurisprudence without any support from the Agency's members.

34. The Motions Judge then opined that if it subsequently turned out that the Agency's members formulated the Publications, the passengers could, in theory, individually raise the ground of bias and then seek leave to appeal to the Federal Court of Appeal if unsatisfied.[33] There was no evidence that the Agency would voluntarily divulge the authors of the Publication, even before the FCA. The Motions Judge did not explain how lay passengers would be expected to navigate the Agency's procedures, and then the *Federal Courts Rules*, to compel the Agency to disclose the Publications' author(s) and then advance a serious argument against an adjudicator. The Motions Judge's reasons are also silent about access to justice considerations and the harms to the administration of justice in allowing such a serious issue to go unchecked.

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[28] FCA Reasons at paras. 28 and 30. [Tab 2, p. 14].
[29] FCA Reasons at para. 3 [Tab 2, p. 7]; Purpose of Corporation for Air Passenger Rights – Lukács Affidavit, Exhibit "D" [Tab 10D, p. 127].
[30] FCA Reasons at para. 37 [Tab 2, p. 17].
[31] FCA Reasons at para. 17 [Tab 2, p. 11].
[32] FCA Reasons at para. 35 [Tab 2, p. 16].
[33] FCA Reasons at para. 36 [Tab 2, p. 16].

PART II – QUESTIONS IN ISSUE

35. This case raises the following questions of national, public, and constitutional importance:

Issue 1: What is the correct test for availability of judicial review in the federal courts?

Issue 2: What is the national and consistent approach to "irreparable harm" in the *RJR-MacDonald* framework for litigants seeking interim relief in the public interest?

PART III – STATEMENT OF ARGUMENT

Issue 1: What is the correct test for availability of judicial review in the federal courts?

36. Sections 96 to 101 of the *Constitution Act, 1867* guarantee all Canadians access to a superior court for judicial review of administrative actions.[34] Administrative bodies are vested with statutory powers for the public's benefit, such powers that do not accrue to private entities. Consequently, these administrative bodies are subject to judicial review when they purport to exercise their statutory powers or mandate.[35]

37. Judicial review is a public law remedy by which courts uphold the rule of law and ensure that administrative bodies act within the bounds of their statutory mandate provided by the law.[36] The function of judicial review therefore is not merely to aright individual injustices, but also to protect society as a whole from administrative overreach.[37]

38. In *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 at para. 14, this Court articulated the test for availability of judicial review as whether the administrative bodies' action is an exercise of state authority that is of a sufficiently public character [***Wall*-test**]. In *J.W. v. Canada (Attorney General)*, 2019 SCC 20 at para. 101, this Court reaffirmed the applicability of the *Wall*-test.

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[34] *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 31; and *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 at para. 13.

[35] *Knox v. Conservative Party of Canada*, 2007 ABCA 295 at para. 20.

[36] *Highwood Congregation of Jehovah's Witnesses (Judicial Comm.) v. Wall*, 2018 SCC 26 at para. 13 citing with approval *Knox v. Conservative Party of Canada*, 2007 ABCA 295 at para. 14.

[37] *Martineau v. Matsqui Institution Disciplinary Board*, [1980] S.C.R. 602 at 619.

39. There is a divide among FCA judges as to the correct test for availability of judicial review. Since 2018, at least three different panels of the FCA have acknowledged or applied the *Wall*-test.[38] However, in 2020, the FCA reverted back to an outmoded and more restrictive test, which superimposes a non-statutory prerequisite that the challenged administrative act must "affect rights, impose legal obligations, or cause prejudicial effects."[39] This extra prerequisite is not in the text of s. 18.1(1) of the *Federal Courts Act*, and does not accord with Parliament's intent in the 1992 reform to guarantee broad unimpeded access to judicial reviews for supervising federal administrative actions.

40. In the case at bar, the Motions Judge failed to apply the *Wall*-test, and instead applied the aforementioned outmoded and restrictive test for determining whether judicial review was available.[40] By so doing, the Motions Judge overlooked not only the principle of *stare decisis*, but also Parliamentary supremacy in not giving effect to Parliament's clear guidance in the 1992 reform for the broad availability of judicial review in the federal courts.

A. The Plenary Scope of Judicial Review in the Federal Courts

41. Judicial review in the federal courts originated from the 1971 *Federal Court Act*, but reached its current plenary scope only after the 1992 legislative reform.

42. In 1971, Parliament first enacted section 18 of the 1971 *Federal Court Act* to fully transfer the constitutional role to judicially supervise every "federal board, commission or other tribunal," from the provincial superior courts to a unified court,[41] whose judicial review decisions would affect the daily lives of every Canadian from coast to coast. Section 28 of the 1971 *Federal Court Act* carved out an exception for the appeal division to exclusively review a "decision or order" of a "federal board, commission or other tribunal" that is of a non-administrative (i.e., judicial or quasi-judicial) nature, based on three specifically enumerated grounds under the then s. 28(a)-(c).

43. In 1992, the *Federal Court Act* was amended to clarify the dichotomy and confusion that previously surrounded the different remedial powers exercised by the trial and appeal divisions

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[38] *Wenham v. Canada (Attorney General)*, 2018 FCA 199 at para. 36; *Canada (Attorney General) v. Public Service Alliance of Canada*, 2019 FCA 41 at para. 30; and *Oceanex Inc. v. Canada (Transport)*, 2019 FCA 250 at para. 30.

[39] *Canada (Attorney General) v. Democracy Watch*, 2020 FCA 69 at paras. 15 and 19.

[40] FCA Reasons at paras. 22-23 [Tab 2, p. 12].

[41] *Canada (Human Rights Comm.) v. Canadian Liberty Net*, [1998] 1 SCR 626 at paras. 33-36.

under ss. 18 and 28 of the 1971 *Federal Court Act*, respectively.[42] In place of the former s. 28 that carved out the appeal division's jurisdiction based on the remedies being sought, the new s. 28 of the 1992 *Federal Court Act* now assigns exclusive judicial review jurisdiction to the Federal Court of Appeal with respect to enumerated federal administrative bodies, including the Agency.

44. In 1992, Parliament also enacted a unified s. 18.1, replacing the "decisions or orders" limitation in the former s. 28(1) with "matter" in the new s. 18.1(1).[43] Parliament also retired the exclusion of "decisions or orders" of an administrative nature from judicial review under the former s. 28(1). The three limited grounds for judicial review have been expanded to include an all-encompassing ground where the public body "acted in any other way that was contrary to law."[44]

45. Section 18.1 of the *Federal Courts Act* reaffirms the plenary scope of judicial review of federal administrative acts in the federal courts, which is coextensive with the constitutionally guaranteed common law right of judicial review before the provincial superior courts.[45] Today, the federal courts enjoy the same extensive and constitutionally guaranteed judicial review jurisdiction with respect to federal administrative bodies as provincial superior courts do with respect to provincial administrative bodies. Section 18.1 of the *Federal Courts Act* does not constrain the federal courts' constitutional role and jurisdiction, but rather breathes life into it.

B. The Motions Judge Erred by Failing to Apply the *Wall*-Test

46. The *Wall*-test, articulated by this Court for the availability of judicial review,[46] equally applies before the federal courts,[47] courts that carry out an identical constitutional role with respect to federal administrative bodies as provincial superior courts do for provincial administrative bodies.[48]

47. In this case, the Motions Judge overlooked the *Wall*-test, and resurrected the outmoded and

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[42] *Martineau v. Matsqui Institution Disciplinary Board*, [1980] S.C.R. 602 at 606 and 609.
[43] *Krause v. Canada*, [1999] 2 FC 476 at paras. 22-24; *Markevich v. Canada*, [1999] 3 FC 28 at paras. 9-13; *Larny Holdings Ltd. v. Canada (Minister of Health)*, 2002 FCT 750 at paras. 14-22; and *Morneault v. Canada*, [2001] 1 FC 30 at paras. 42-44.
[44] *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116 at paras. 29-31; and *Federal Courts Act*, s. 18.1(4)(f) – see *Morneault v. Canada*, [2001] 1 FC 30 at para. 44.
[45] *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at paras. 33-34 and 48.
[46] *Highwood Congregation of Jehovah's Witnesses (Jud. Comm.) v. Wall*, 2018 SCC 26 at para. 14.
[47] *Oceanex Inc. v. Canada (Transport)*, 2019 FCA 250 at para. 30.
[48] *Canada (Human Rights Comm.) v. Canadian Liberty Net*, [1998] 1 SCR 626 at paras. 32-36.

restrictive test for assessing the availability of judicial review.[49] Had the Motions Judge applied the *Wall*-test, she would have reached the inevitable conclusion that judicial review must be available for the Agency's act of publishing non-binding guidance for consumption by the travelling public.

48. First, the Agency was purporting to exercise state authority. The Motions Judge found that the Agency's provision of non-binding guidance is part of their mandate and the Agency's impugned acts were in furtherance of that mandate.[50] Subsequently, the Transport Minister acknowledged that the impugned statements expressed what the Agency had already "ruled" upon.[51]

49. Second, the Agency's actions were of a sufficiently public character. The Agency is a statutory economic regulator of air carriers and a quasi-judicial adjudicator of air travel disputes.[52] Under the guise of a policy statement or guidance,[53] the Agency opined on the merits of a live controversy that would land on its adjudicative docket in short order. The Agency claims that the purpose of its commentary was to offer the public a "fair and sensible balance between passenger protection and airlines' operational realities" in order to protect the airlines' "economic viability."[54] In other words, the Agency claims it was its role to step in and settle the debate in some fashion, and as the Transport Minister acknowledged, the Agency has publicly sealed the debate.[55]

50. The recent April 2020 FCA panel's resurrection of the outmoded and restrictive test and the Motions Judge's application thereof undermines the predictability of and access to judicial reviews at the federal level. A close review of the jurisprudence demonstrates that the non-statutory prerequisite in that test has its origin rooted in jurisprudence before the 1992 Parliamentary reform, when federal judicial review focused on "decisions or orders" rather than "matters."[56]

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[49] FCA Reasons at paras. 22-23 [Tab 2, p. 12].
[50] FCA Reasons at para. 34 [Tab 2, p. 16].
[51] COVI Committee, Evidence, 43rd Parl., 1st Sess., No. 013, p. 14 [Tab 11, p. 262].
[52] FCA Reasons at para. 34 [Tab 2, p. 16].
[53] FCA Reasons at paras. 25-26 [Tab 2, p. 13].
[54] FCA Reasons at paras. 5-6 [Tab 2, pp. 7-8].
[55] COVI Committee, Evidence, 43rd Parl., 1st Sess., No. 013, p. 14 [Tab 11, p. 262].
[56] *Air Canada v. Toronto Port Authority et al*, 2011 FCA 347 at para. 29 [***Air Canada***] cites both *Irving Shipbuilding Inc. v. Canada (A.G.)*, 2009 FCA 116 (which does not support the *ratio* in *Air Canada*) and *Democracy Watch v. Conflict of Interest and Ethics Commission*, 2009 FCA 15 at para. 10 which relies on *Canadian Institute of Public and Private Real Estate Co. v. Bell Canada*, 2004 FCA 243 at paras. 5 and 7, which further relies on *Re Attorney-General of Canada and Cylien*, 1973 CanLII 1163 (FCA) that deals exclusively with "decisions" and not "matters."

51. This Court's swift correction and prompt settling of any division of opinion among FCA panels is essential to restore constitutional order, to enable full access to the constitutionally guaranteed federal judicial review, and to uphold the rule of law at the federal administrative agencies.

Issue 2: What is the national and consistent approach to "irreparable harm" in the *RJR-MacDonald* framework for litigants seeking interim relief in the public interest?

52. For over a decade, a spectrum of vastly different formulations of the "irreparable harm" criteria for interlocutory relief under the *RJR-MacDonald* framework have permeated among appellate and superior courts across Canada.[57] On one end of the spectrum, the New Brunswick Court of Appeal does not require demonstration of "irreparable harm" at all.[58] On the other end, the FCA requires clear, real and not speculative evidence that irreparable harm **will** result,[59] which is on its face contrary to this Court's guidance that this factor refers to harm that **may** result.[60]

53. In between those ends of the spectrum, various provincial appellate and superior courts have treated the three *RJR-MacDonald* criteria contextually, not as watertight compartments or a checklist, but rather as interrelated factors, where the strength of one may compensate for the weakness of another. Most importantly, these middle-of-the-road courts only require that "irreparable harm" **may** result absent the interim relief. Even the Federal Court has begun to join the middle-of-the-road approach in moving away from a box-ticking exercise in favour of a contextual analysis.[61] An additional point of diversion between these courts across Canada is whether a party seeking the interim relief on behalf of the public must itself suffer the "irreparable harm" directly or this criteria may also be satisfied through a flexible application of the relevant contextual factors. These inconsistencies undermine predictability for litigants and restrict access to justice in the federal courts, calling for this Court's intervention to establish a consistent national approach.

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[57] *The Commissioner of Competition v. HarperCollins Publishers LLC, et al.*, 2017 CACT 14 [***HarperCollins***] at para. 38 (*per* Justice D. Gascon); see *Mosaic Potash Esterhazy L.P. v. Potash Corp. of Saskatchewan Inc*, 2011 SKCA 120 [***Mosaic***] paras. 51-67 for a detailed review of the spectrum of formulations, and *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 [***Vancouver Aquarium***] at paras. 58-60 rejecting the FCA approach.

[58] *Imperial Sheet Metal Ltd. v. Landry and Gray Metal Products*, 2007 NBCA 51 at paras. 25-30.

[59] *Janssen Inc. v. Abbvie Corporation*, 2014 FCA 112 at paras. 19, 21, and 24

[60] *Tabah v. Quebec (A.G.)*, [1994] 2 SCR 339 at 359 (*per* La Forest J, in dissent on other grounds).

[61] *Letnes v. Canada (A.G.)*, 2020 FC 636 at para. 36; *Okojie v. Canada (C.I.)*, 2019 FC 880 at para. 35; and *Ahousaht First Nation v. Canada (Fisheries)*, 2019 FC 1116 at para. 51.

54. In this case, the disparity is particularly striking as the Applicant would likely have succeeded under the middle-of-the-road approach adopted in various provincial superior and appellate courts, and even the Federal Court. However, the Motions Judge applied a distinctively stringent formulation of "irreparable harm" for the *RJR-MacDonald* framework and refused any relief.

C. A Contextual Application of the *RJR-MacDonald* Framework is the Correct Approach

55. Returning to first principles, equitable doctrines are inherently contextual, flexible, not easily framed by formulas, and are based on what is just in all the circumstances.[62] The *RJR-MacDonald* framework guides a court's exercise of its equitable jurisdiction to grant interim or interlocutory relief, often on an urgent basis, before a full evidentiary record could be developed.

56. In *Google Inc. v. Equustek Solutions Inc.* [***Google***], this Court reaffirmed the centuries old principle that a court's exercise of its equitable jurisdiction to grant interim equitable relief must be based on a contextual analysis of the fundamental question of whether it would be just and equitable in the circumstances of that particular case (i.e., in the interests of justice).[63] The purpose of the *RJR-MacDonald* framework and its three interrelated factors is to assist the courts in carrying out this contextual analysis, not to bind their discretion with a specific, closed tick-box formula.

57. The contextual application of the *RJR-MacDonald* framework has been adopted by provincial appellate and superior courts across Canada,[64] and more recently even the Federal Court has

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[62] *Uber Technologies Inc. v. Heller*, 2020 SCC 16 at paras. 58 and 78; and *Soulos v. Korkontzilas*, [1997] 2 SCR 217 at para. 34; see also *Federal Courts Act*, s. 44.

[63] *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34 at para. 23-25.

[64] *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2019 BCCA 29 at para. 19; *Vancouver Aquarium*, *supra*, at paras. 91 and 94-5; *Nova Scotia (Minister of Health) v. J. (J.)*, 2003 NSCA 71 at para. 30; *Northway Aviation Ltd. v. Southeast Resource Development Council Corp. Ltd. et al.*, 2008 MBCA 93 at para. 19; *Livent Inc. v. Deloitte & Touche*, 2016 ONCA 395 at para. 5; *Vidéotron ltée c. Industries Microlec produits électroniques inc.*, 1987 CanLII 658 (QC CA) at para. 29; *Entreprises Jacques Despars inc. c. Pelletier*, 1992 CanLII 3130 (QC CA) at para. 13; *Wildman v. Kulyk*, 2013 SKCA 55 at para. 28; *Zipper Transportation Services ltd. v. Korstrom*, 1998 CanLII 5440 (MB CA) at para. 11; *Royal Bank of Canada v. Saulnier*, 2006 NSCA 108 at para. 9; *Govt. P.E.I. v. Summerside Seafood*, 2006 PESCAD 11 at para. 61; *Henderson v. Quinn*, 2019 NSSC 190 at para. 44; *William v. British Columbia (A.G.)*, 2019 BCCA 112 at para. 30; *Mosaic*, *supra*, at paras. 26 and 51; and *M & M Homes Inc. v. 2088556 Ontario Inc.*, 2020 ONCA 134 at para. 42.

shifted towards the contextual application of *RJR-MacDonald*, in line with the provincial courts.[65]

58. Despite this Court's guidance in *Google*, the Federal Court of Appeal remains an outlier. For decades, the FCA has adopted a mechanistic and onerous approach to this Court's *RJR-MacDonald* framework in three respects: first, the factors have been treated as tick-box formulas;[66] second, the level of certainty and the quality of evidence to demonstrate "irreparable harm" is distinctly more onerous than what is required in the provincial courts;[67] and third, the "irreparable harm" must be suffered by the person seeking interim relief, with a narrow exception for registered charities.[68]

59. The FCA's approach of requiring litigants to prove "irreparable harm" at the outset with a high degree of certainty defeats the very objective of making interim equitable relief available to litigants, because fact finding at the interlocutory stage is necessarily speculative in nature.[69] Such an onerous approach creates a threshold that arguably can never be met, and undermines the role of equity in balancing which party may suffer greater harm if the relief were to be granted, tips the balance heavily against moving parties, and risks that interim relief could be denied even when the possible harm to the moving party outweighs any potential harm to the non-moving party.[70]

60. The wisdom of the contextual approach is apparent in cases affecting the public interest, where a mechanistic requirement that the moving party suffer the "irreparable harm" can practically

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[65] *Letnes v. Canada (Attorney General)*, 2020 FC 636 at para. 36; *Okojie v. Canada (Citizenship and Immigration)*, 2019 FC 880 at para. 35; *Ahousaht First Nation v. Canada (Fisheries, Oceans and Coast Guard)*, 2019 FC 1116 at para. 51; *Robinson v. Canada (Attorney General)*, 2019 FC 876 at para. 67; *Namgis First Nation v. Canada (Fisheries, Oceans and Coast Guard)*, 2018 FC 334 at para. 98; *Baciu v. Canada (Citizenship and Immigration)*, 2020 FC 7 at para. 10; *Awashish v. Conseil des Atikamekw d'Opitciwan*, 2019 FC 1131 at para. 11; and *British Columbia (Attorney General) v. Alberta (Attorney General)*, 2019 FC 1195 at paras. 96-97.

[66] *Ahlul-Bayt Centre, Ottawa v. Canada (N.R.)*, 2018 FCA 61 at para. 8; *Canada (A.G.) v. Oshkosh Defense Canada Inc.*, 2018 FCA 102 at para. 21; *Western Oilfield Equipment Rentals Ltd. v. M-I L.L.C.*, 2020 FCA 3 at paras. 6-7; and *Janssen Inc. v. Abbvie Corporation*, 2014 FCA 112 at paras. 13-14. See also *HarperCollins*, *supra* at paras. 35 and 56.

[67] Norman Siebrasse, Interlocutory Injunctions and Irreparable Harm in the Federal Courts, 2010 88-3 Canadian Bar Review 515, 2010 CanLIIDocs 93 [**Bar Review Article**], cited with approval in *Mosaic*, *supra*, at paras. 58-59; *HarperCollins*, *supra* at paras. 38 and 56.

[68] *Glooscap Heritage Society v. M.N.R.*, 2012 FCA 255 at paras. 33-34.

[69] *Mosaic*, *supra*, at para. 59; and Bar Review Article, *supra*, p. 523.

[70] Bar Review Article, *supra*, pp. 525 and 529.

never be met.[71] Under this approach, the fairly low threshold[72] for "irreparable harm" may be met by harm to the community at large instead of narrowly focusing on the moving party, or by showing impropriety of an administrative act, or otherwise relaxed when monetary damages are not sought.[73]

61. The FCA's approach has been impeding interlocutory relief for litigants in all matters within the federal courts' jurisdiction, such as intellectual property, immigration, and admiralty. This Court's guidance could restore access to such relief as intended in the *Federal Courts Act*.

D. The Motions Judge Erred by Failing to Follow the Contextual Approach

62. The Motions Judge's reasons manifested all of the indicia of the FCA's mechanistic and onerous approach in assessing the "irreparable harm" factor under the *RJR-MacDonald* framework.[74] The Motion Judge erred by failing to apply the contextual approach and overlooking the public interest nature of the proceedings and proposed relief, thereby creating a cascading effect.

63. Had the Motions Judge taken into account the *Wall*-test and the public interest nature of the relief sought, she would have granted the relief under a contextual analysis.

i. The *RJR-MacDonald* factors are not cumulative tick-boxes

64. The Motions Judge treated the *RJR-MacDonald* factors as cumulative tick-boxes, each of which must be met separately.[75] By so doing, the Motions Judge overlooked the public interest dimension of the case, which allows for the strong merits of the case and/or the obvious improprieties of the administrative acts to make up for perceived frailties to the "irreparable harm" aspect.[76]

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[71] *Vancouver Aquarium*, *supra*, at paras. 92-93.

[72] *Mosaic*, *supra*, at para. 61; and Bar Review Article, pp. 528 and 533.

[73] *Newlab Clinical Research Inc. v. N.A.P.E.*, 2003 NLSCTD 167 at paras. 42-44 and 49; *Island Telephone Company, Re*, 1987 CanLII 192 (PE SCAD); *N.A.P.E. v. Western Regional Integrated Health Authority*, 2008 NLTD 20 at para. 9; *Cambie Surgeries Corp. v. B.C. (A.G.)*, 2018 BCSC 2084 at paras. 123-124; leave to appeal ref'd: 2019 BCCA 29 at paras. 18-19; *PT v. Alberta*, 2019 ABCA 158 at para. 69; *Edmonton Northlands v. Edmonton Oilers Hockey Club*, 1993 CanLII 7234 (AB QB) at para. 85; affirmed: 1994 ABCA 90; and *M & M Homes Inc. v. 2088556 Ontario Inc.*, 2020 ONCA 134 at para. 42.

[74] See paragraph 58 on page 44.

[75] FCA Reasons at para. 15 [Tab 2, p. 10].

[76] See paragraph 60 on page 44.

65. The cascading error from the Motions Judge's approach is that she also fettered her discretion in failing to consider where the balance of convenience lied in this case.[77] The balance of convenience is key for assessing whether it is "just or convenient" in the circumstances,[78] a principle of equity that Parliament enshrined in ss. 18.2 and 44 of the *Federal Courts Act*.

66. Had the Motions Judge considered the balance of convenience, she would have reached the inevitable conclusion that this factor favoured granting the relief. There was no evidence before the Motions Judge of any inconvenience or harm to the Agency or any persons in granting the interim relief preserving the *status quo* that ensued before the Agency engaged in the impugned acts.

ii. "Irreparable harm" may be demonstrated by risk of harm to the public

67. The Motions Judge erred in law by holding that "**only** harm suffered **by the party** seeking the injunction will qualify" as irreparable harm under the *RJR-MacDonald* framework. There are two difficulties with this proposition. First, this Court held that "[h]arm is generally viewed from **the standpoint of the person seeking to benefit** from the interlocutory relief," which implies that the harm does not have to be suffered by the party seeking the relief before the court.[79]

68. Second, and more importantly, parties that seek relief for the public benefit or the benefit of others would not themselves be suffering the alleged harm. Frequently, those at risk of suffering the harm, and in turn, benefiting from the requested interlocutory relief, are the most vulnerable who would be unable, incapable, or inexperienced in advancing the grievance themselves.[80] The Motion Judge's narrow interpretation of "irreparable harm" therefore can arguably never be met in litigation that transcends the interest of the parties, foreclosing interlocutory relief for such litigation in the federal courts. As this Court confirmed in *Delta Air Lines v. Lukács*, the imposition of a legal test that can arguably never be met is unreasonable, and such a test should not be applied.[81]

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[77] FCA Reasons at para. 38 [Tab 2, p. 17].
[78] Bar Review Article, *supra*, pp. 520, 523, 528, 534, and 539.
[79] *PT v. Alberta*, 2019 ABCA 158 at para. 50, following *Tabah v. Quebec (A.G.)*, [1994] 2 SCR 339 at 359 (*per* La Forest J, in dissent on other grounds).
[80] *Richard v. Time Inc.*, 2012 SCC 8 at paras. 36-37, 72, and 74; *Canada (A. G.) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at paras. 71 and 73-74.
[81] *Delta Air Lines v. Lukács*, 2018 SCC 2 at paras. 17-18.

69. The FCA's stringent approach is exhibited by its recognition of only one exception to the rule that "only harm suffered by the party seeking the injunction will qualify." The FCA narrowly permits registered charities to rely on risk of harm to persons that depend on that charity.[82] There is no reason why the same exception should not apply to a non-profit entity, such as the Applicant.

70. The correct and equitable approach to "irreparable harm" would be to assess the risk of harm to the beneficiaries, or group of beneficiaries, that the interlocutory relief seeks to protect or benefit.[83] For example, "irreparable harm" was previously assessed from the perspective of the beneficiaries, such as the risk of harm to children, when parents, grandparents, or a school board applied for relief.[84]

71. Had the Motions Judge turned her mind to the contextual approach and this Court's guidance, she would have found that when a non-profit advocacy organization, like the Applicant, seeks relief to benefit consumers, the risk of harm should be assessed from the consumers' perspective.

iii. "Irreparable harm" concerns assessment of risks, not absolute certainties

72. The Motions Judge required the Applicant to "demonstrate with clear and **non-speculative evidence** that it **will suffer** irreparable harm."[85] That approach to the evidentiary threshold and the level of certainty of the harm the evidence should demonstrate detracts from the equitable objective underlying interlocutory relief. The exercise of equitable jurisdiction on an interlocutory basis is comprised of balancing and minimizing risks of harm pending final adjudication, and is not about making conclusive findings based on certainties.[86] Irreparable harm concerns **risks** of what harms might occur in the future, which cannot be predicted with certainty.[87] A requirement for proof with certainty of the harm occurring is an impossible burden, which therefore should not be applied.[88]

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[82] *Glooscap Heritage Society v. M.N.R.*, 2012 FCA 255 at paras. 33-34.
[83] *Tabah v. Quebec (A.G.)*, [1994] 2 SCR 339 at 360 (*per* La Forest J, in dissent on other grounds).
[84] *C.D. v. A.B.*, 2004 CanLII 43691 (NB CA) at para. 28; and *Whitecourt Roman Catholic Separate School District No. 94 v. Alberta*, 1995 ABCA 260 at para. 29.
[85] FCA Reasons at para. 28 [Tab 2, p. 14].
[86] *Mosaic*, *supra*, at paras. 58-60; see also paragraph 59 on page 44 above.
[87] *Minister of Community Services v. B.F.*, 2003 NSCA 125 at para. 19; and *C.D. v. A.B.*, 2004 CanLII 43691 (NB CA) at para. 30.
[88] *Manto v. Canada (IRC)*, 2018 FC 335 at para. 22; *Wang v. Luo*, 2002 ABCA 224 at para. 17.

73. The Motions Judge erred by finding that the mere *theoretical* possibility of *individual* passengers bringing separate recourses rendered the alleged *aggregate* harm to every passenger reparable.[89] This Court has cautioned that consideration be given to *realistic* alternative recourses that are practically, not merely in theory, possible.[90] The Motions Judge did not heed that caution.

74. The Motions Judge did not appreciate that average passengers are not legally savvy and are unable to pierce through deceptions on their own.[91] Such passengers trust and rely on the Agency's Publications' accuracy, unaware that those Publications enabled air carriers to deceive passengers and to trample upon their rights. Even if a passenger were to break through the cloud of deceit, it would be unworkable for them to retain counsel for individual claims.[92] Furthermore, it is impractical for a self-represented passenger to advance complex bias arguments before the Agency or to individually challenge the Agency's conduct via a leave to appeal motion to the FCA.

iv. Injunction: Most effective consumer and public interest remedy

75. Courts have recognized the principle that "information is power" (*scientia potestas est*).[93] Conversely, disinformation is an abuse of that power, to the prejudice of its audiences, which can lead to serious ramifications and repercussions for the audiences and the public.[94] In the consumer context, misinformed consumers are at risk of their legal rights being trampled upon without their knowledge,[95] which is precisely what this interlocutory injunction seeks to protect against.

76. In this instance, the Motions Judge stated that any proliferation of misinformation from the Agency (i.e., the Publications) and the travel industry quoting or relying on the Agency's publications can be adequately "repaired" by passengers later seeking separate recourse against those third parties.[96] The Motions Judge's finding is unsupportable in law or logic in three respects.

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[89] FCA Reasons at paras. 36-37 [Tab 2, pp. 16-17].
[90] *Canada (A. G.) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para. 51.
[91] *Richard v. Time Inc.*, 2012 SCC 8 at paras. 36-37, 72, and 74.
[92] *AIC Limited v. Fischer*, 2013 SCC 69 at para. 27.
[93] *Cote v. Canada (Treasury Board)*, 1993 CanLII 9382 (FCA) at para. 15.
[94] Lee, Newton. "Misinformation and Disinformation," in Newton Lee, ed., *Facebook Nation: Total Information Awareness*, 2nd ed. Springer, 2014. [Tab 12, pp. 269, 279, and 280]; and *Stagg v. Condominium Plan No. 882-2999*, 2013 ABQB 684 at para. 50.
[95] *Richard v. Time Inc.*, 2012 SCC 8 at paras. 36-37, 72, and 74.
[96] FCA Reasons at para. 37 [Tab 2, p. 17].

77. Firstly, the Motions Judge overlooked the difficulty, if not impossibility, of tracking and tracing the effects of disinformation after the fact, especially considering the sheer number of passengers.[97] Secondly, the Motions Judge failed to adhere to this Court's guidance on the primacy of injunctions as the most efficient remedy in protection of vulnerable consumers and deterrence of wrongful conduct against them.[98] Thirdly, the Motions Judge's approach is tantamount to holding that disinformation should not be swiftly curtailed and corrected at its source (i.e., the Agency), but rather should be addressed through relief against the multitude of third persons that proliferate it.

PART IV – SUBMISSIONS CONCERNING COSTS

78. The Applicant seeks its costs, or alternatively, disbursements only. The Applicant also asks that considering the public interest nature of the issues raised, no costs be awarded against it.

PART V – ORDER SOUGHT

79. The Applicant seeks an order granting leave to appeal, or alternatively, an order remanding the case to a five-judge panel of the Federal Court of Appeal for re-hearing, pursuant to subsection 43(1.1) of the *Supreme Court Act*, with an order for a *de novo* review whether the subject administrative action could be amenable to judicial review and the Federal Court of Appeal's formulation of the *RJR-Macdonald* test for interlocutory relief.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of August, 2020.

Simon Lin

SIMON LIN
Counsel for the Applicant,
Air Passenger Rights

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[97] *Bell Canada v. Cogeco Cable Canada*, 2016 ONSC 6044 at para. 37; and *B.C. Tel Mobility Cellular Inc. v. Rogers Cantel Inc.*, 1995 CanLII 1679 (BC SC) at para. 31.

[98] *Seidel v. TELUS Communications Inc.*, 2011 SCC 15 at para. 35.

PART VI – TABLE OF AUTHORITIES

PART VII

STATUTES AND REGULATIONS WITHOUT HYPERLINKS

19 ELIZABETH II

CHAPTER 1†

An Act respecting the Federal Court of Canada

[*Assented to 3rd December, 1970*]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

SHORT TITLE

Short title

1. This Act may be cited as the *Federal Court Act*.

INTERPRETATION

Definitions

2. In this Act,

"Associate Chief Justice"

(*a*) "Associate Chief Justice" means the Associate Chief Justice of the Court;

"Canadian maritime law"

(*b*) "Canadian maritime law" means the law that was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the *Admiralty Act* or any other statute, or that would have been so administered if that Court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, as that law has been altered by this or any other Act of the Parliament of Canada;

"Chief Justice"

(*c*) "Chief Justice" means the Chief Justice of the Court;

"Court" or "Federal Court"

(*d*) "Court" or "Federal Court" means the Federal Court of Canada;

"Court of Appeal" or "Federal Court of Appeal"

(*e*) "Court of Appeal" or "Federal Court of Appeal" means that division of the Court referred to as the Court of Appeal or Federal Court of Appeal by this Act;

† *See* R.S.C., 1970 (2nd Supp.), c. 10.

19 ELIZABETH II

CHAPITRE 1†

Loi concernant la Cour fédérale du Canada

[*Sanctionnée le 3 décembre 1970*]

Sa Majesté, sur l'avis et du consentement du Sénat et de la Chambre des communes du Canada, décrète:

TITRE ABRÉGÉ

Titre abrégé

1. La présente loi peut être citée sous le titre: *Loi sur la Cour fédérale.*

INTERPRÉTATION

Définitions

2. Dans la présente loi,

«juge en chef adjoint»

a) «juge en chef adjoint» désigne le juge en chef adjoint de la Cour;

«droit maritime canadien»

b) «droit maritime canadien» désigne le droit dont l'application relevait de la Cour de l'Échiquier du Canada, en sa juridiction d'amirauté, en vertu de la *Loi sur l'Amirauté* ou de quelque autre loi, ou qui en aurait relevé si cette Cour avait eu, en sa juridiction d'amirauté, compétence illimitée en matière maritime et d'amirauté, compte tenu des modifications apportées à ce droit par la présente loi ou par toute autre loi du Parlement du Canada;

«juge en chef»

c) «juge en chef» désigne le juge en chef de la Cour;

«Cour» ou «Cour fédérale»

d) «Cour» ou «Cour fédérale» désigne la Cour fédérale du Canada;

«Cour d'appel» ou «Cour d'appel fédérale»

e) «Cour d'appel» ou «Cour d'appel fédérale» désigne la division de la Cour appelée Cour d'appel ou Cour d'appel fédérale;

† *Voir* S.R.C. de 1970 (2e Supp.), c. 10.

"Crown" (*f*) "Crown" means Her Majesty in right of Canada;

"Federal board, commission or other tribunal" (*g*) "federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of *The British North America Act, 1867*;

"Final judgment" (*h*) "final judgment" means any judgment or other decision that determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding;

"Judge" (*i*) "judge" means a judge of the Court and includes the Chief Justice and Associate Chief Justice;

"Laws of Canada" (*j*) "laws of Canada" has the same meaning as those words have in section 101 of *The British North America Act, 1867*;

"Practice and procedure" (*k*) "practice and procedure" includes evidence relating to matters of practice and procedure;

"Property" (*l*) "property" means property of any kind whether real or personal, movable or immovable or corporeal or incorporeal and, without restricting the generality of the foregoing, includes a right of any kind, a share or a chose in action;

"Relief" (*m*) "relief" includes every species of relief whether by way of damages, payment of money, injunction, declaration, restitution of an incorporeal right, return of land or chattels or otherwise;

"Rules" (*n*) "Rules" means provisions of law and rules and orders made under section 46 or continued in force by subsection (6) of section 62;

"Ship" (*o*) "ship" includes any description of vessel or boat used or designed or use in navigation without regard to method or lack of propulsion;

«Couronne» *f*) «Couronne» désigne Sa Majesté du chef du Canada;

«office, commission ou autre tribunal fédéral» *g*) «office, commission ou autre tribunal fédéral» désigne un organisme ou une ou plusieurs personnes ayant, exerçant ou prétendant exercer une compétence ou des pouvoirs conférés par une loi du Parlement du Canada ou sous le régime d'une telle loi, à l'exclusion des organismes de ce genre constitués ou établis par une loi d'une province ou sous le régime d'une telle loi ainsi que des personnes nommées en vertu ou en conformité du droit d'une province ou en vertu de l'article 96 de l'*Acte de l'Amérique du Nord britannique, 1867*;

«jugement final» *h*) «jugement final» désigne tout jugement ou toute autre décision qui statue en totalité ou en partie sur le fond au sujet d'un droit d'une ou plusieurs des parties à une procédure judiciaire;

«juge» *i*) «juge» désigne un juge de la Cour, y compris le juge en chef et le juge en chef adjoint;

«droit du Canada» *j*) «droit du Canada» a le sens donné, à l'article 101 de l'*Acte de l'Amérique du Nord britannique, 1867*, à l'expression «Laws of Canada» traduite par l'expression «lois du Canada» dans les versions françaises de cet Acte;

«pratique et procédure» *k*) «pratique et procédure» s'entend également de la preuve relative aux questions de pratique et de procédure;

«bien» *l*) «bien» désigne n'importe quelle sorte de bien, mobilier ou immobilier, corporel ou incorporel, et notamment, sans restreindre la portée générale de ce qui précède, un droit de n'importe quelle nature, une part ou un droit d'action;

«redressement» *m*) «redressement» comprend toute espèce de redressement judiciaire, qu'il soit sous forme de dommages-intérêts, de paiement d'argent, d'injonction, de déclaration, de restitution d'un droit incorporel, de restitution d'un bien mobilier ou immobilier, ou sous une autre forme;

«Règles» *n*) «Règles» désigne les règles et ordonnances établies en vertu de l'article 46 ou qui demeurent en vigueur aux termes du paragraphe (6) de l'article 62, ainsi

"Supreme Court"

(*p*) "Supreme Court" means the Supreme Court of Canada; and

"Trial Division"

(*q*) "Trial Division" means that division of the Court called the Federal Court—Trial Division.

que toute autre disposition du droit en la matière;

«navire»

o) «navire» comprend toute espèce de bâtiment ou bateau utilisé ou conçu pour la navigation, indépendamment de son mode de propulsion ou même s'il n'en a pas;

«Cour suprême»

p) «Cour suprême» désigne la Cour suprême du Canada; et

«Division de première instance»

q) «Division de première instance» désigne la division de la Cour appelée Division de première instance de la Cour fédérale.

THE COURT

LA COUR

Original Court continued

3. The court of law, equity and admiralty in and for Canada now existing under the name of the Exchequer Court of Canada is hereby continued under the name of the Federal Court of Canada as an additional court for the better administration of the laws of Canada and shall continue to be a superior court of record having civil and criminal jurisdiction.

Maintien du tribunal existant

3. Le tribunal de *common law*, d'*equity* et d'amirauté du Canada existant actuellement sous le nom de Cour de l'Échiquier du Canada est maintenu sous le nom de Cour fédérale du Canada, en tant que tribunal supplémentaire pour la bonne application du droit du Canada, et demeure une cour supérieure d'archives ayant compétence en matière civile et pénale.

Court to consist of two divisions

4. The Federal Court of Canada shall hereafter consist of two divisions, called the Federal Court—Appeal Division (which may be referred to as the Court of Appeal or Federal Court of Appeal) and the Federal Court—Trial Division.

La Cour est formée de deux divisions

4. La Cour fédérale du Canada est désormais formée de deux divisions appelées Division d'appel de la Cour fédérale qui peut être appelée Cour d'appel ou Cour d'appel fédérale et Division de première instance de la Cour fédérale.

THE JUDGES

LES JUGES

Constitution of Court

5. (1) The Federal Court of Canada shall consist of the following judges:

(*a*) a chief justice called the Chief Justice of the Federal Court of Canada, who shall be the president of the Court, shall be the president of and a member of the Court of Appeal and shall be *ex officio* a member of the Trial Division;

(*b*) an associate chief justice called the Associate Chief Justice of the Federal Court of Canada, who shall be the president of and a member of the Trial Division and shall be *ex officio* a member of the Court of Appeal; and

Composition de la Cour

5. (1) La Cour fédérale du Canada est composée des juges suivants:

a) un juge en chef, appelé juge en chef de la Cour fédérale du Canada, qui est président de la Cour, président et membre de la Cour d'appel et membre de droit de la Division de première instance;

b) un juge en chef adjoint, appelé juge en chef adjoint de la Cour fédérale du Canada, qui est président et membre de la Division de première instance et qui est membre de droit de la Cour d'appel; et

Extraordinary remedies

18. The Trial Division has exclusive original jurisdiction

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

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

Recours extraordinaires

18. La Division de première instance a compétence exclusive en première instance

a) pour émettre une injonction, un bref de *certiorari*, un bref de *mandamus*, un bref de prohibition ou un bref de *quo warranto*, ou pour rendre un jugement déclaratoire, contre tout office, toute commission ou tout autre tribunal fédéral; et

b) pour entendre et juger toute demande de redressement de la nature de celui qu'envisage l'alinéa *a*), et notamment toute procédure engagée contre le procureur général du Canada aux fins d'obtenir le redressement contre un office, une commission ou à un autre tribunal fédéral.

Inter-governmental disputes

19. Where the legislature of a province has passed an Act agreeing that the Court, whether referred to in that Act by its new name or by its former name, has jurisdiction in cases of controversies,

(*a*) between Canada and such province, or

(*b*) between such province and any other province or provinces that have passed a like Act,

the Court has jurisdiction to determine such controversies and the Trial Division shall deal with any such matter in the first instance.

Différends entre gouvernements

19. Lorsque l'assemblée législative d'une province a adopté une loi reconnaissant que la Cour, qu'elle y soit désignée sous son nouveau ou son ancien nom, a compétence dans les cas de litige

a) entre le Canada et cette province, ou

b) entre cette province et une ou plusieurs autres provinces ayant adopté une loi au même effet,

la Cour a compétence pour juger ces litiges et la Division de première instance connaît de ces questions en première instance.

Industrial property

20. The Trial Division has exclusive original jurisdiction as well between subject and subject as otherwise,

(*a*) in all cases of conflicting applications for any patent of invention, or for the registration of any copyright, trade mark or industrial design, and

(*b*) in all cases in which it is sought to impeach or annul any patent of invention, or to have any entry in any register of copyrights, trade marks or industrial designs made, expunged, varied or rectified,

and has concurrent jurisdiction in all other cases in which a remedy is sought under the authority of any Act of the Parliament of Canada or at law or in equity, respecting

Propriété industrielle

20. La Division de première instance a compétence exclusive en première instance, tant entre sujets qu'autrement,

a) dans tous les cas où des demandes de brevet d'invention ou d'enregistrement d'un droit d'auteur, d'une marque de commerce ou d'un dessin industriel sont incompatibles, et

b) dans tous les cas où l'on cherche à faire invalider ou annuler un brevet d'invention ou insérer, rayer, modifier ou rectifier une inscription dans un registre des droits d'auteur, des marques de commerce ou des dessins industriels,

et elle a compétence concurrente dans tous les autres cas où l'on cherche à obtenir un redressement en vertu d'une

(*b*) in the case of any other judgment within thirty days (in the calculation of which July and August shall be excluded),

from the pronouncement of the judgment appealed from or within such further time as the Trial Division may, either before or after the expiry of those ten or thirty days, as the case may be, fix or allow.

b) dans le cas de tout autre jugement, dans les trente jours (les mois de juillet et août devant être exclus pour le calcul de ce délai),

à compter du prononcé du jugement dont il est fait appel ou dans le délai supplémentaire que la Division de première instance peut, soit avant, soit après l'expiration de ces dix ou trente jours, selon le cas, fixer ou accorder.

Service

(3) All parties directly affected by the appeal shall be served forthwith with a true copy of the notice of appeal and evidence of service thereof shall be filed in the Registry of the Court.

Signification

(3) Une copie certifiée conforme de l'avis d'appel doit être immédiatement signifiée à toutes les parties directement intéressées dans l'appel et la preuve de cette signification doit être déposée au greffe de la Cour.

Final judgment

(4) For the purposes of this section a final judgment includes a judgment that determines a substantive right except as to some question to be determined by a referee pursuant to the judgment.

Jugement final

(4) Aux fins du présent article, un jugement final comprend notamment un jugement qui statue sur le fond au sujet d'un droit, à l'exception d'un point litigieux laissé à la décision ultérieure d'un arbitre qui doit statuer en conformité du jugement.

Review of decisions of federal board, commission or other tribunal

28. (1) Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, upon the ground that the board, commission or tribunal

(*a*) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

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

(*c*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

Examen des décisions d'un office, d'une commission ou d'un autre tribunal *fédéral*

28. (1) Nonobstant l'article 18 ou les dispositions de toute autre loi, la Cour d'appel a compétence pour entendre et juger une demande d'examen et d'annulation d'une décision ou ordonnance, autre qu'une décision ou ordonnance de nature administrative qui n'est pas légalement soumise à un processus judiciaire ou quasi judiciaire, rendue par un office, une commission ou un autre tribunal fédéral ou à l'occasion de procédures devant un office, une commission ou un autre tribunal fédéral, au motif que l'office, la commission ou le tribunal

a) n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;

b) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier; ou

c) a fondé sa décision ou son ordonnance sur une conclusion de fait erronée, tirée de façon absurde ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.

When application may be made

(2) Any such application may be made by the Attorney General of Canada or any party directly affected by the decision or order by filing a notice of the application in the Court within ten days of the time the decision or order was first communicated to the office of the Deputy Attorney General of Canada or to that party by the board, commission or other tribunal, or within such further time as the Court of Appeal or a judge thereof may, either before or after the expiry of those ten days, fix or allow.

Délai de présentation de la demande

(2) Une demande de ce genre peut être faite par le procureur général du Canada ou toute partie directement affectée par la décision ou l'ordonnance, par dépôt à la Cour d'un avis de la demande dans les dix jours qui suivent la première communication de cette décision ou ordonnance au bureau du sous-procureur général du Canada ou à cette partie par l'office, la commission ou autre tribunal, ou dans le délai supplémentaire que la Cour d'appel ou un de ses juges peut, soit avant soit après l'expiration de ces dix jours, fixer ou accorder.

Trial Division deprived of jurisdiction

(3) Where the Court of Appeal has jurisdiction under this section to hear and determine an application to review and set aside a decision or order, the Trial Division has no jurisdiction to entertain any proceeding in respect of that decision or order.

Cas où la Division de première instance n'a pas compétence

(3) Lorsque, en vertu du présent article, la Cour d'appel a compétence pour entendre et juger une demande d'examen et d'annulation d'une décision ou ordonnance, la Division de première instance est sans compétence pour connaître de toute procédure relative à cette décision ou ordonnance.

Reference to Court of Appeal

(4) A federal board, commission or other tribunal to which subsection (1) applies may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Court of Appeal for hearing and determination.

Renvoi à la Cour d'appel

(4) Un office, une commission ou un autre tribunal fédéral auxquels s'applique le paragraphe (1) peut, à tout stade de ses procédures, renvoyer devant la Cour d'appel pour audition et jugement, toute question de droit, de compétence ou de pratique et procédure.

Hearing in summary way

(5) An application or reference to the Court of Appeal made under this section shall be heard and determined without delay and in a summary way.

Procédure sommaire d'audition

(5) Les demandes ou renvois à la Cour d'appel faits en vertu du présent article doivent être entendus et jugés sans délai et d'une manière sommaire.

Limitation on proceedings against certain decisions or orders

(6) Notwithstanding subsection (1), no proceeding shall be taken thereunder in respect of a decision or order of the Governor in Council, the Treasury Board, a superior court or the Pension Appeals Board or in respect of a proceeding for a service offence under the *National Defence Act*.

Restriction relative aux procédures d'opposition à certaines décisions ou ordonnances

(6) Nonobstant le paragraphe (1), aucune procédure ne doit être instituée sous son régime relativement à une décision ou ordonnance du gouverneur en conseil, du conseil du Trésor, d'une cour supérieure ou de la Commission d'appel des pensions ou relativement à une procédure pour une infraction militaire en vertu de la *Loi sur la défense nationale*.

Where decision not to be restrained

29. Notwithstanding sections 18 and 28, where provision is expressly made by an Act of the Parliament of Canada for an appeal as such to the Court, to the Supreme Court, to the Governor in Council or to the Treasury Board from a decision or order

Cas où il ne doit pas être mis obstacle à la décision

29. Nonobstant les articles 18 et 28, lorsqu'une loi du Parlement du Canada prévoit expressément qu'il peut être interjeté appel, devant la Cour, la Cour suprême, le gouverneur en conseil ou le conseil du Trésor, d'une décision ou ordonnance d'un

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

affirmed before me on August 18, 2020

_____

Signature

August 7, 2020

Evolink Law Group
4388 Still Creek Drive, Suite 237
Burnaby, British Columbia
V5C 6C6

Attention: Simon Lin

Dear Mr. Lin,

RE: *Air Passenger Rights*
v.
Canadian Transportation Agency
File No.: 39266

This will acknowledge receipt of your application for leave to appeal to the Supreme Court of Canada, which has been accepted for filing.

The Court file number in this case is 39266. All parties are asked to refer to this number in any communication with the Registry Branch concerning these proceedings.

I refer you to Rule 92.1 of the *Rules of the Supreme Court of Canada* which states that parties are required to advise the Court in writing of any changes that affect the record in any motion, application for leave to appeal or appeal. In family matters, any changes pertaining to the child (children) must be brought to the Court's attention as soon as possible.

If you have any questions, please do not hesitate to get in touch with the Registry of the Supreme Court of Canada at 1-844-365-9662 or registry-greffe@scc-csc.ca.

Yours truly,

Georgia Gallup
Registry Officer

c.c.: Mr. Allan Matte

Note to the respondent:

Further to the current COVID19 pandemic, deadlines that are imposed by the *Rules of the Supreme Court of Canada* are suspended until further notice. However, deadlines that are imposed by statute, including s. 40 of the *Supreme Court Act*, remain in force. Any party concerned about the ability to meet a deadline imposed by statute should contact the Registry by email. Parties are encouraged to continue to serve and file documents, whether originating or otherwise, by email. Parties who do not intend to serve and file a response or reply should notify the Registry promptly. For more information regarding the impact of COVID-19 on case-related matters, please visit https://www.scc-csc.ca/parties/COVID-FAQ-eng.aspx

Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT:

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

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

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

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

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

Date: April 8, 2020

Issued by: _____

JEAN-FRANÇOIS DUPORT
REGISTRY OFFICER
AGENT DU GREFFE

Address of
local office: Federal Court of Appeal
90 Sparks Street, 5th floor
Ottawa, Ontario, K1A 0H9

TO: **CANADIAN TRANSPORTATION AGENCY**

APPLICATION

This is an application for judicial review pursuant to section 28 of the *Federal Courts Act* in respect of two public statements issued on or about March 25, 2020 by the Canadian Transportation Agency [**Agency**], entitled "Statement on Vouchers" [**Statement**] and the "Important Information for Travellers During COVID-19" page [**COVID-19 Agency Page**] that cites the Statement.

These public statements, individually or collectively, purport to provide an unsolicited advance ruling on how the Agency will treat and rule upon complaints of passengers about refunds from air carriers relating to the COVID-19 pandemic.

The Statement was issued without hearing the perspective of passengers whatsoever.

The Applicant makes application for:

1. a declaration that:

   (a) the Agency's Statement **is not** a decision, order, determination, or any other ruling of the Agency and has no force or effect of law;

   (b) the issuance of the Statement on or about March 25, 2020, referencing of the Statement within the COVID-19 Agency Page, and the subsequent distribution of those publications is contrary to the Agency's own *Code of Conduct* and/or gives rise to a reasonable apprehension of bias for:

      i. the Agency as a whole, or

      ii. alternatively, the appointed members of the Agency who supported the Statement;

   (c) further, the Agency, or alternatively the appointed members of the Agency who supported the Statement, exceeded and/or lost its (their) jurisdiction under the *Canada Transportation Act*, S.C. 1996, c. 10 to rule upon any complaints of passengers about refunds from carriers relating to the COVID-19 pandemic;

2. an interim order (*ex-parte*) that:

(a) upon service of this Court's interim order, the Agency shall prominently post the interim clarification (below) at the top portion of both the French and English versions of the "Statement on Vouchers" [**Statement**] and the "Important Information for Travellers During COVID-19" page [**COVID-19 Agency Page**] (both defined in paragraphs 11-12 of the Notice of Application):

> The Canadian Transportation Agency's "Statement on Vouchers" is not a decision, order, determination, or any legal ruling of the Canadian Transportation Agency. It does **not** have the force of law. The "Statement on Vouchers" is currently pending judicial review by the Federal Court of Appeal. This notice is posted by Order [insert URL link to PDF of order] of the Federal Court of Appeal.;

(b) starting from the date of service of this Court's interim order, the Agency shall bring the above interim clarification to the attention of anyone that contacts the Agency with a formal complaint and/or informal inquiry regarding air carriers' refusal to refund arising from the COVID-19 pandemic;

(c) the Agency shall not issue any decision, order, determination, or any other ruling with respect to refunds from air carriers in relation to the COVID-19 pandemic; and

(d) this interim order is valid for fourteen days from the date of service of this Court's interim order on the Agency, and may be renewed by the Applicant under Rule 374(2);

3. an interlocutory order that:

(a) the Agency shall forthwith completely remove the Statement from the Agency's website including any references to the Statement within the COVID-19 Agency Page and substitute it with this Court's interlocutory order, or alternatively the order renewing the interim clarification (subparagraph 2(a) above), until final disposition of the Application;

(b) the interim orders in subparagraphs 1(b)-(c) above are maintained until final disposition of the Application;

(c) the Agency shall forthwith communicate with persons that the Agency has previously communicated with regarding the Statement and bring those persons' attention to this Court's interlocutory order and the removal or clarification of the Statement; and

(d) the Agency shall forthwith communicate with air carriers under the Agency's jurisdiction, the Association of Canadian Travel Agencies, and Travel Pulse and bring those persons' attention to this Court's interlocutory order and the removal or clarification of the Statement;

4. a permanent order that:

(a) the Agency prominently post at the top portion of the COVID-19 Agency Page that the Agency's Statement has been ordered to be removed by this Court;

(b) the Agency remove the Statement, and references to the Statement within the COVID-19 Agency Page, from its website and replace the Statement with a copy of this Court's judgment;

(c) in the event the Agency receives any formal complaint or informal inquiry regarding air carriers' refusal to refund in respect of the COVID-19 pandemic, promptly and prominently inform the complainant of this Court's judgment; and

(d) the Agency, or alternatively the appointed members of the Agency who supported the Statement, be enjoined from dealing with any complaints involving air carriers' refusal to refund passengers in respect of the COVID-19 pandemic, and enjoined from issuing any decision, order, determination or any other ruling with respect to refunds from air carriers for the COVID-19 pandemic;

5. costs and/or reasonable out-of-pocket expenses of this Application; and

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

The grounds for the application are as follows:

A. Overview

1. The present Application challenges the illegality of the Canadian Transportation Agency's Statement, which purports to provide an unsolicited advance ruling in favour of air carriers without having heard the perspective of passengers beforehand.

2. The Statement and the COVID-19 Agency Page preemptively suggest that the Agency is leaning heavily towards permitting the issuance of vouchers in lieu of refunds. They further suggest that the Agency will very likely dismiss passengers' complaints to the Agency for air carriers' failure to refund during the COVID-19 pandemic, irrespective of the reason for flight cancellation.

3. Despite the Agency having already determined in a number of binding legal decisions throughout the years that passengers have a fundamental right to a refund in cases where the passengers could not travel for events outside of their control, the Agency now purports to grant air carriers a blanket immunity from the law via the Statement, without even first hearing passengers' submissions or perspective as to why a refund is **mandated** by law. This is inappropriate.

4. The Agency, as a quasi-judicial tribunal, must at all times act with impartiality. That impartiality, unfortunately, has clearly been lost, as demonstrated by the Agency's issuance of the unsolicited Statement and usage thereof.

5. The fundamental precept of our justice system is that "*justice should not only be done, but should manifestly and undoubtedly be seen to be done*" (*R. v. Yumnu*, 2012 SCC 73 at para. 39). This fundamental precept leaves no room for any exception, even during difficult times like the COVID-19 pandemic.

6. Impartiality is further emphasized in the Agency's own *Code of Conduct* stipulating that the appointed members of the Agency shall not express an opinion on potential cases.

B. The COVID-19 Pandemic

7. The coronavirus [**COVID-19**] is a highly contagious virus that originated from the province of Hubei in the Peoples Republic of China, and began spreading outside of the Peoples Republic of China on or around January 2020.

8. On or about March 11, 2020, the World Health Organization declared COVID-19 a global pandemic.

9. On or about March 13, 2020, the Government of Canada issued a blanket travel advisory against non-essential travel outside of Canada until further notice and restricting entry of foreign nationals into Canada, akin to a "declaration of war" against COVID-19, and that those in Canada should remain at home unless absolutely necessary to be outside of their homes [**Declaration**].

10. COVID-19 has disrupted air travel to, from, and within Canada. The disruption was brought about by the COVID-19 pandemic and/or the Declaration, such as:

    (a) closure of borders by a number of countries, resulting in cancellation of flights by air carriers;

    (b) passengers adhering strictly to government travel advisories (such as the Declaration) and refraining from air travel (and other forms of travel) unless absolutely necessary; and

    (c) air carriers cancelling flights on their own initiative to save costs, in anticipation of a decrease in demand for air travel.

C. The Agency's Actions in Relation to COVID-19, Including the "Statement on Vouchers"

11. Since March 13, 2020 and up to the date of filing this Application, the Agency has taken a number of steps in relation to COVID-19. Those listed in the four sub-paragraphs below are **not** the subject of review in this Application.

    (a) **On March 13, 2020**, the Agency issued Determination No. A-2020-42 providing, *inter alia*, that various obligations under the *Air Passen-*

ger Protection Regulations, SOR/2019-150 [**APPR**] are suspended until April 30, 2020:

i. Compensation for Delays and Inconvenience for those that travel: compensation to passengers for inconvenience has been reduced and/or relaxed (an air carrier's obligation imposed under paragraphs 19(1)(a) and 19(1)(b) of the *APPR*);

ii. Compensation for Inconvenience to those that do not travel: the air carrier's obligation, under subsection 19(2) of the *APPR* to pay compensation for inconvenience to passengers who opted to obtain a refund instead of alternative travel arrangement, if the flight delay or the flight cancellation is communicated to passengers more than 72 hours before the departure time indicated on the passengers' original ticket; and

iii. Obligation to Rebook Passengers on Other Carriers: the air carrier's obligation, under paragraphs 17(1)(a)(ii), 17(1)(a)(iii), and 18(1)(a)(ii) of the *APPR*.

(b) **On or about March 25, 2020**, the Agency issued Determination No. A-2020-47 extending the exemptions under Decision No. A-2020-42 (above) to June 30, 2020. This Determination further exempted air carriers from responding to compensation requests within 30 days (s. 19(4) of *APPR*). Instead, air carriers would be permitted to respond to compensation requests 120 days *after* June 30, 2020 (e.g. October 28, 2020).

(c) **On or about March 18, 2020**, the Agency issued Order No. 2020-A-32, suspending **all** dispute proceedings until April 30, 2020.

(d) **On or about March 25, 2020**, the Agency issued Order No. 2020-A-37, extending the suspension (above) to June 30, 2020.

12. On or about March 25, 2020, almost concurrently with the Order and Determination on the same date (above), the Agency publicly posted the Statement on its website (**French**: https://otc-cta.gc.ca/fra/message-concernant-credits; **En-**

glish: https://otc-cta.gc.ca/eng/statement-vouchers) providing that:

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

13. On or about March 25, 2020, concurrently with the Statement, the Agency posted an amendment to the COVID-19 Agency Page on its website, adding four references to the Statement (French: **Information importante pour les voyageurs pour la periode de la COVID-19** [https://otc-cta.gc.ca/fra/information-

importante-pour-voyageurs-pour-periode-covid-19]; English: **Important Information for Travellers During COVID-19** [https://otc-cta.gc.ca/eng/important-information-travellers-during-covid-19]).

14. The COVID-19 Agency Page cites and purports to apply the Statement in the context of an air carrier's legal obligation in three circumstances: (1) situations outside airline control (including COVID-19 situations); (2) situations within airline control; and (3) situations within airline control, but required for safety.

15. In effect, the COVID-19 Agency Page purports to have relieved air carriers from providing passengers with refunds in practically **every** imaginable scenario for cancellation of flight(s), contrary to the Agency's own jurisprudence and the minimum passenger protections under the *APPR*.

D. Jurisprudence on Refunds for Passengers

16. Since 2004, in a number of decisions, the Agency confirmed passengers' fundamental right to a refund when, for whatever reason, an air carrier is unable to provide the air transportation, including those outside of the air carrier's control:

(a) *Re: Air Transat*, Decision No. 28-A-2004;
(b) *Lukács v. Porter*, Decision No. 344-C-A-2013, para. 88;
(c) *Lukács v. Sunwing*, Decision No. 313-C-A-2013, para. 15; and
(d) *Lukács v. Porter*, Decision No. 31-C-A-2014, paras. 33 and 137.

17. The Agency's jurisprudence was entirely consistent with the common law doctrine of frustration, the civil law doctrine of *force majeure*, and, most importantly, common sense.

18. The *APPR*, which has been in force since 2019, merely provides **minimum** protection to passengers. The *APPR* does not negate or overrule the passengers' fundamental right to a refund for cancellations in situations outside of a carrier's control.

19. Furthermore, the COVID-19 Agency Page also suggests that the Statement *would* apply to cancellations that are within airline control, or within airline control but required for safety purposes, squarely contradicting the provisions

of subsection 17(7) of the *APPR*. Subsection 17(7) clearly mandates that any refund be in the original form of payment, leaving no room for the novel idea of issuing a voucher or credit.

20. Finally, whether an air carrier's flight cancellation could be characterized as outside their control, or within their control, remains to be seen. For example, if a cancellation was to save costs in light of shrinking demand, it may be considered a situation within an air carrier's control. However, the Statement and the COVID-19 Agency Page presuppose that **any and all** cancellations at this time should be considered outside an air carrier's control.

21. The combined effect of the Statement and the COVID-19 Agency Page purports to ignore decade old and firmly established jurisprudence of the Agency. This all occurred without any formal hearing, adjudication, determination, or otherwise, or even a single legal submission or input from the passengers.

22. As described further below, the Agency does not even outline its legal basis or provide any support for those public statements.

23. The Agency's public statements are tantamount to endorsing air carriers in illegally withholding the passengers' monies, all without having to provide the services that were contracted for. The air carriers all seek to then issue vouchers with varying expiry dates and usage conditions to every passenger, effectively depriving all the passengers of their fundamental right to a refund, which is a right the Agency itself firmly recognized.

E. The Agency's Conduct Gives Rise to a Reasonable Apprehension of Bias

24. The Agency is a quasi-judicial tribunal that is subject to the same rules of impartiality that apply to courts and judges of the courts.

25. Tribunals, like courts, speak through their legal judgments and not media postings or "statements."

26. The Statement and/or the COVID-19 Agency Page is not a legal judgment. They give an informed member of the public the perception that it would be more

likely than not that the Agency, or the members that supported the Statement, will not be able to fairly decide the issue of refunds relating to COVID-19.

27. The Agency has already stipulated a general rule, outside the context of a legal judgment, that refunds need not be provided. No support was provided for this radical departure from the fundamental rights of passengers. The Agency merely provided a bald assertion or conclusion that passengers are not entitled to any refund.

28. The Agency's own Code of Conduct expressly prohibits members of the Agency from expressing an opinion about potential cases or any other issue related to the Agency's work, or comments that may create a reasonable apprehension of bias:

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

29. Although neither the Statement, nor the COVID-19 Agency Page, contain the signature or names of any specific member of the Agency, given the circumstances and considering the Agency's own Code of Conduct providing that the professional civilian staff's role are to **fully** implement the appointed member(s)' directions, the Statement and the COVID-19 Agency Page ought to be attributed to the member(s) who supported the Statement either before or after its posting on the internet.

30. In these circumstances, the Court must proactively step in to protect the passengers, to ensure that "justice should not only be done, but should manifestly and undoubtedly be seen to be done," and to ensure that the administration of justice is not put to disrepute.

31. The Court ought to issue an interim, interlocutory, and/or permanent order restricting the Agency's involvement with passengers' COVID-19 related refunds against air carriers.

F. The Applicant

32. The Applicant is a non-profit corporation under the *Canada Not-for-profit Corporations Act*, SC 2009 that is an advocacy group representing the rights of air passengers.

33. Air Passenger Rights is led by a Canadian air passenger rights advocate, Dr. Gábor Lukács, whose work and public interest litigation has been recognized by this Honourable Court in a number of judgments:

(a) *International Air Transport Assn et al. v. AGC et al.* (Federal Court of Appeal File No. A-311-19, Order of Near J.A., dated March 3, 2020) that:

> [...] the Court is of the view that the case engages the public interest, that the proposed intervener [Dr. Gábor Lukács] would defend the interests of airline passengers in a way that the parties [the Agency, the Attorney General of Canada, and an airlines trade association] cannot, that the interests of justice favour allowing the proposed intervention in the appeal, and that the proposed intervention would be of assistance to the Court in deciding the appeal [...]

(b) *Lukács v. Canada (Transportation Agency)* 2016 FCA 174 at para. 6;

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

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

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

G. Statutory provisions

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

(a) *Canada Transportation Act*, S.C. 1996, c. 10 and, in particular, sections

25, 37, and 85.1;

(b) *Federal Courts Act*, R.S.C. 1985, c. F-7, and in particular, sections 18.1, 18.2, 28, and 44; and

(c) *Federal Courts Rules*, S.O.R./98-106, and in particular, Rules 300, 369, and 372-374; and

35. Such further and other grounds as counsel may advise and this Honourable Court permits.

This application will be supported by the following material:

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

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

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

1. Complete and unredacted copies of all correspondences, meetings, notes, and/or documents involving the appointed members of the Agency relating to the Statement and/or issuance of vouchers or credits in relation to the COVID-19 incident, including both before and after publication of the Statement;

2. The number of times the URLs for the Statements were accessed (**French**: https://otc-cta.gc.ca/fra/message-concernant-credits; **English**: https://otc-cta.gc.ca/eng/statement-vouchers) from March 24, 2020 onward;

3. Complete and unredacted copies of all correspondences, meetings, notes, and/or documents between the Canadian Transportation Agency and the travel industry (including but not limited to any travel agencies, commercial airlines, industry groups, etc.) from February 15, 2020 to the present in respect to issuing of credits, coupons, or vouchers to passengers in lieu of a refund for travel affected

by COVID-19; and

4. Complete and unredacted copies of all correspondences, e-mails, and/or complaints that the Agency received from passengers between February 15, 2020 to the present in respect to issuing of credits, coupons, or vouchers to passengers in lieu of a refund for travel affected by COVID-19.

April 6, 2020

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Counsel for the Applicant,
Air Passenger Rights

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

Date: 20200416

Docket: A-102-20

Ottawa, Ontario, April 16, 2020

Present: LOCKE J.A.

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

ORDER

WHEREAS the applicant has filed an application for judicial review of two public statements made by the respondent on its website; these two public statements comprise (i) a Statement on Vouchers published on March 25, 2020 concerning the propriety of airlines offering vouchers or credits for future travel (instead of refunds) to passengers affected by flight disruptions caused by COVID-19, and (ii) a webpage entitled Important Information for Travellers During COVID-19 which refers to the Statement on Vouchers; the applicant argues that the Statement on Vouchers was published contrary to the respondent's own *Code of Conduct*, and further that it misleads passengers concerning their rights;

AND WHEREAS, in the context of this application, the applicant has made a motion in writing (under Rule 369 of the *Federal Courts Rules*, SOR/98-106) for an interlocutory order that, among other things, the two public statements in question be removed from the respondent's website;

AND WHEREAS there appears no longer to be any dispute that the applicant's motion record has been properly served on the respondent;

AND WHEREAS on March 19, 2020, this Court issued a *Notice to the Parties and the Profession*; the Notice provided, among other things, for a suspension period ("suspension period"); this is a period during which time will not run under the *Federal Courts Rules*, judgments and directions; the Notice set the suspension period from March 16, 2020 to April 17, 2020;

AND WHEREAS on April 2, 2020, this Court issued a further *Notice to the Parties and the Profession* extending the suspension period to May 15, 2020;

AND WHEREAS the March 19, 2020 Notice suggests that the suspension period may not apply in cases of genuine urgency, and that such cases should be dealt with case-by-case;

AND WHEREAS the applicant requests that its motion be dealt with on an expedited basis and as a case of genuine urgency not subject to the suspension period; among other things, the applicant alleges that the Statement on Vouchers is being cited by members of the travel industry, including air carriers, travel agencies and travel insurance companies, to convince passengers (wrongly, it is alleged) that they are not entitled to refunds for travel disruptions caused by COVID-19, and must instead be satisfied with vouchers, credits, cancellation fees, or

reduced refunds; the applicant argues that, since the Statement on Vouchers is affecting relations between non-parties, any delay in addressing the concerns raised in its application and its motion may give rise to irreparable harm, and that this matter is therefore urgent;

AND WHEREAS the respondent opposes the request that the applicant's motion be dealt with on an expedited basis; the respondent notes that its operations have been significantly affected by various measures put in place in the context of COVID-19, though it does acknowledge on its website that it "continues to maintain its normal operations" other than dispute resolution activities involving air carriers and their passengers; the respondent also notes that the Statement on Vouchers has already been widely publicized, and that little benefit would therefore be achieved by dealing with the applicant's motion on an expedited basis; the respondent further alleges that it will suffer significant prejudice if required to respond to the applicant's motion in the normal course;

AND WHEREAS it is not the role of this Court to reach any conclusions at this time concerning the issues that will be considered in the context of the applicant's motion or the applicant's application;

AND WHEREAS the Court is satisfied that, if the applicant is successful in its arguments on the motion, there is potential for reliance by non-parties on the Statement on Vouchers such that their rights might be irrevocably affected - indeed the timing of the publication of the Statement on Vouchers (in the midst of the COVID-19 pandemic) suggests that it was intended to have an immediate effect on relations between air carriers and their passengers;

AND WHEREAS the Court is also satisfied that, though the respondent's resources are limited at present, it is not unable to deal with the applicant's motion during the suspension period, especially if the usual timelines are relaxed somewhat; the Court is not convinced that the respondent will suffer significant prejudice under these circumstances;

AND WHEREAS the Court is also not convinced that the wide dissemination of the Statement on Vouchers is a reason not to expedite the applicant's motion; the apparently urgent basis on which the Statement on Vouchers was prepared and published suggests that the question of its removal should likewise be considered on an expedited basis;

AND WHEREAS the Court is therefore satisfied that it is in the interest of justice that the applicant's motion be dealt with during the suspension period despite the March 19 and April 2, 2020 Notices;

THIS COURT ORDERS that:

1. The applicant's request that its motion for an interlocutory order shall be dealt with on an expedited basis is granted.

2. The respondent shall serve and file its record no later than April 29, 2020.

3. The applicant may serve and file its written representations in reply within eight days after being served with the respondent's record.

"George R. Locke"
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

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:

Evolink Law Group Burnaby, British Columbia	FOR THE APPLICANT
Legal Services Directorate Canadian Transportation Agency Gatineau, Quebec	FOR THE RESPONDENT

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Court File No. A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant
(Moving Party)

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent
(Responding Party)

**COSTS SUBMISSIONS OF THE RESPONDENT,
CANADIAN TRANSPORTATION AGENCY**
(Motion for Mandatory Interlocutory Injunction)

A. Overview

1. The Applicant's motion for an interlocutory injunction has been dismissed by the Court.[1] The motion was frivolous, an abuse of process and should not have been brought. As the successful party, the Canadian Transportation Agency ("Agency") should be awarded costs.

B. The successful party is entitled to costs

2. It is a well-recognized presumption that costs should follow the event, that is, the successful party should be awarded costs unless there is reason for otherwise.[2]

3. The Agency was completely successful in defending the motion for interlocutory relief. The Court accepted that the Applicant had failed to establish a strong *prima facie* case because the statements that are the subject of the application for judicial review ("Application") are not amenable to judicial review. The Court accepted that the statements do not determine the rights of airline passengers to refunds where their flights have been cancelled as a result of the

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[1] *Air Passenger Rights v Canada (Transportation Agency)*, 2020 FCA 92.

[2] *Stubicar v Canada*, 2020 FCA 66 at para 27; *Knebush v Maygard*, 2014 FC 1247 at para 24; *Carten & Gibbs v Canada*, 2011 FCA 48 at para 16. *See also Federal Courts Rules*, SOR/98-106, r 400(3)(a) [*Federal Courts Rules*], which provides specifically that the result of the proceeding is one of the factors that the Court may consider in exercising its discretion to award costs.

COVID-19 pandemic. The Agency also successfully argued that the Applicant is not affected by the Agency's statements, and that air passengers are not affected either.

4. In light of the Agency's complete success in defending the motion for interlocutory relief, it is submitted that the Agency would be entitled to its costs. Normally, the Agency would not seek costs in the context of a *bona fides* challenge of an Agency decision. However, this was not such a challenge.

C. The motion was devoid of merit

5. In exercising its discretion to award costs the Court may also consider whether any step in the proceeding was improper, vexatious or unnecessary.[3] Both the interim *ex parte* motion and the motion for interlocutory relief were completely devoid of merit. They should not have been brought. This factor further supports an award of costs in the Agency's favour.

6. The Applicant acknowledged in its motion materials that the statement which is the subject of the Application has no legal effect.[4] Mr. Lukacs, the directing mind of the Applicant and frequent litigant before the Courts, was even stating publicly, while pursuing the interlocutory motion, that the Agency's statement "doesn't affect the rights of passengers or obligations of airlines".[5] Put simply, the Applicant knew that the rights of passengers are not affected by the Agency's statement, and yet pursued these claims regardless. The motions appear to have been pursued more as a means to garner publicity and to protest the Agency's statements, rather than to serve any legitimate purpose. This is an abuse of the Court's process which is particularly troublesome given that it was undertaken in the context of a global pandemic when government offices are closed and the Court's resources are strained.

D. The public interest is not engaged

7. This Court has properly noted that the Applicant has not requested nor has it been granted public interest standing. A review of the motion and the Court's decision establishes that the Applicant was not acting in the public interest in bringing the motion.

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[3] *Federal Courts Rules, supra* note 2 at r 400(3)(k).

[4] Memorandum of Fact and Law of the Applicant dated April 7, 2020 at paras 3, 61 and 63.

[5] Global News, "Canadian Transportation Agency clarifies statement on travel vouchers during COVID-19 pandemic" (24 April 2020), online: <https://globalnews.ca/news/6861073/cta-travel-voucher-statements/>, Affidavit of Meredith Desnoyers, sworn the 28th day of April, 2020, Exhibit "P".

8. Both parties agreed, and the Court accepted, that the Agency's statements posted on its website do not affect the rights of passengers or the obligations of air carriers. The motion therefore did not raise any issues of public interest. The Applicant cannot therefore rely on public interest as a justification for bringing the motion for interlocutory injunctive relief.

9. The Applicant argues that the motion brought about some "behavioural modification" on the part of the Agency in the form of the FAQ's issued on April 22, 2020.[6] However, the Court completely dismissed the Applicant's motion for interlocutory relief. The Court did not order the Agency to issue the FAQ's, or take any action of any form. The Applicant cannot therefore claim that the motion had any level of success that would justify a costs award.

E. The Applicant's conduct should be addressed by an award of costs

10. There are two specific aspects of the Applicant's conduct in pursuing the interim and interlocutory motions which warrant the Court's attention.

11. Firstly, the evidence filed by the Agency in response to the interlocutory motion, and the Agency's responding submissions, establish clearly that this was not an urgent matter. The Applicant pursued, first, an interim *ex parte* motion for injunctive relief, and then this interlocutory motion on notice on an expedited basis. Moreover, the Applicant did this in the context of the COVID-19 pandemic when the Agency's offices were closed and the Court had issued a general stay of proceedings. As revealed in the Agency's materials, Mr. Lukacs was, while the interlocutory motion was being aggressively pursued purportedly in the interest of air passengers, stating publicly that the rights of air passengers were not affected by the Agency's statements. Not only was the motion without merit, but the Applicant's decision to pursue the matter on an expedited basis was improper and an abuse of the Court's process.[7]

12. Secondly, the Applicant improperly moved to obtain a Certificate of Non-Attendance on the cross-examination of the Agency's affiant. This was done when the Agency made it clear

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[6] Applicant's written representations on costs of the interlocutory injunctions motion dated June 1, 2020 at para 17.

[7] Mr. Lukacs has brought previous proceedings on an expedited basis which were then dismissed by the Court. Mr. Lukacs sought judicial review challenging the jurisdiction of the Agency to conduct an Inquiry, and then sought leave to appeal the decision which resulted from that Inquiry – *Lukacs v Canada (Transportation Agency)*, 2016 FCA 174. The application for judicial review was dismissed as moot. The Court determined that there was no reason why it should be pursued, and that the only impact of the application would be the incurring of unnecessary costs by the parties and the expenditure of unnecessary time by the Court – *Lukacs v Canada (Transportation Agency)*, 2016 FCA 227. The related appeal was dismissed on the merits - *Lukacs v Canada (Transportation Agency)*, 2016 FCA 314.

that the witness would not be attending, and the issues of whether the Applicant should be permitted to cross-examine the Agency's affiant, when the cross-examination should proceed if permitted, and the timing of submissions were a transcript to be filed, were all before the Court by way of a request for Directions. The Applicant then advised the Court that it did not intend to cross-examine the Agency's affiant and instead intended to rely on the failure to attend.[8] This establishes clearly that the Applicant never had any *bona fides* reason to cross-examine the Agency's affiant.

F. The Agency is requesting costs

13. The Agency's response to the motion does not contain a request for costs. For the reasons set out below, it is submitted that the Court retains absolute discretion to award costs to the Agency.

14. By way of these submissions, the Agency is requesting costs. The Applicant has notice of this request and a right to respond thereto. There is therefore no prejudice to the Applicant should the Court consider whether to grant the Agency costs.

15. The jurisprudence relied upon by the Applicant indicates that costs should not be awarded where they have not been requested. This is an issue of procedural fairness because a party should have notice of the claim being made against them. None of these cases apply in these circumstances.

16. In *Bolugun v Canada*[9] the Court concluded that costs should not have been awarded on an application for judicial review since none were requested either in written submissions or in the oral submissions before the Court. In *Exeter v Canada (Attorney General)*[10] it was determined that costs should not be awarded if not requested because to do so would be a breach of procedural fairness since the party against whom they are awarded would have no notice or an opportunity to respond.[11] In *Chen v Canada (Public Safety and Emergency Preparedness)*[12]

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[8] *See* Agency's Request for Directions dated April 30, 2020, and subsequent correspondence dated April 30, 2020, May 1, 2020, and May 3, 2020, filed with the Court.

[9] 2005 FCA 350.

[10] 2013 FCA 134.

[11] *Ibid* at paras 12 and 16.

[12] 2019 FCA 170.

the Court cites the rule as stated in *Exeter*, and confirms that the rule is based on procedural fairness. However, in *Chen*, the parties had agreed on the quantum of costs which should be awarded. There was no allegation of a failure to request costs. Moreover, the Court confirmed that the discretion of the Court to award costs is unfettered.[13]

17. It follows that since the Applicant has notice of the Agency's request for costs, the Court retains the discretion to award them to the Agency.

G. The Applicant should not be awarded costs

18. The Applicant's request for costs is without merit. Firstly, the Applicant points to the Agency's failure to attend a cross-examination. However, as stated above, the Applicant's conduct in obtaining a Certificate of Non-Attendance in the circumstances warrants a strong statement from the Court condemning the Applicant's conduct, not an award of costs in its favour. Secondly the Applicant relies on its contention that the motion somehow engaged the public interest. However, there is no evidence that the Applicant was pursuing any public interest in this case.

19. The Agency seeks costs in the modest amount of $750.00 which represents the mid-range of Column III of Tariff B for a response to a contested motion.[14]

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Ottawa, in the Province of Ontario, this 5th day of June, 2020.

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[13] *Ibid* at para 62.

[14] *Federal Courts Rules, supra* note 2 at Tariff B, Item #5, 5 units @ $150.00 = $750.00.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20200616

Docket: A-102-20

Ottawa, Ontario, June 16, 2020

Present: MACTAVISH J.A.

BETWEEN:

AIR PASSENGERS RIGHTS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

ORDER

WHEREAS by Order dated May 22, 2020, I dismissed the applicant's motion for an interlocutory injunction;

AND WHEREAS the applicant sought an opportunity to deal with the question of costs once I rendered my decision with respect to the merits of the motion;

AND WHEREAS the parties have now had the opportunity to make submissions with respect to the question of costs;

AND WHEREAS both the applicant and the respondent seek their costs of this matter;

AND WHEREAS the ordinary rule is that costs follow the event;

AND WHEREAS the respondent states that it would not normally seek costs in the context of a *bona fide* challenge to one of its decisions, but that this was not such a case;

AND WHEREAS I noted in my decision dismissing the applicant's motion that although it had not yet sought or been granted public interest standing in this matter, it nevertheless appeared to be pursuing this matter as a public interest litigant;

AND WHEREAS the respondent has not persuaded me that the conduct of the applicant in relation to this matter was such that the respondent should be entitled to an order of costs in its favour;

AND WHEREAS the applicant has not persuaded me that the conduct of the respondent in relation to this motion was such as to entitle the applicant to costs notwithstanding the fact that it was unsuccessful on the motion;

THIS COURT ORDERS THAT:

1. Both sides shall bear their own costs with respect to the motion.

"Anne L. Mactavish"

J.A.

Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

MEMORANDUM OF FACT AND LAW OF THE RESPONDING PARTY

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. At the outset of the COVID-19 pandemic, the Canadian Transportation Agency [**Agency**] widely disseminated two public statements[1] [the **Publications**] purporting to inform or guide the travelling public about their legal rights vis-á-vis the airlines in respect of refunds for affected flights.

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

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

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

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[1] Notice of Application, grounds, paras. 12-13 [Tab 2, pp. 60-61].

3. Mactavish, J.A. denied a motion by the Applicant for interlocutory injunctions. She decided the motion on the basis that the RAB Ground raised a serious issue to be tried, but held on an interlocutory basis that judicial review was not available on the Misinformation Ground. Mactavish, J.A. declined to dismiss the Application, and held that the Agency must bring a proper motion to strike to be decided by a panel of judges.

4. On the present motion to strike, the Agency erroneously claims that "the Court has already conclusively found" that judicial review was not available with respect to the Application as a whole, and asks the Court to strike the Application on that basis.

5. The Agency's motion is devoid of merit for the following reasons:

(a) The Agency mischaracterizes the interlocutory finding of Mactavish, J.A. sitting as a single judge on a motion as the conclusive finding of this Honourable Court, which can be made only by a panel of judges.

(b) Mactavish, J.A. **did not** find that judicial review was unavailable on the RAB Ground. On the contrary, she assumed that the RAB Ground raised a serious issue to be tried, and also rejected the Agency's "abuse of process" argument.

(c) It is not plain and obvious that judicial review is unavailable on the Misinformation Ground, because various panels of his Honourable Court are divided about the correct legal test for availability of judicial review.

(d) Under the Supreme Court's binding authority on the availability of judicial review,[2] which was overlooked by Mactavish, J.A., it is fairly arguable that judicial review is available on the Misinformation Ground.

6. The Applicant is asking that if the Agency's motion to strike is not dismissed by a single judge, then it be referred to an oral hearing before a 5-judge panel to settle the question of the correct legal test for availability of judicial review.

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[2] *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 at para. 14 [Vol. 2, Tab 20, p. 524]; and *J.W. v. Canada (Attorney General)*, 2019 SCC 20 at para. 101 [Vol. 2, Tab 23, p. 600].

B. The Notice of Application

7. The Applicant is a non-profit group that advocates for the travelling public's rights. Its president, Dr. Gabor Lukacs, is a prominent public interest advocate who has appeared before courts across Canada, including this Court, on air passenger matters.[3]

8. In the Notice of Application, the Applicant seeks, on behalf of and for the benefit of the travelling public, judicial review in respect of the Publications posted by the Agency on or about March 25, 2020:[4] (1) "Statement on Vouchers," a public statement that communicates the Agency's support for airlines' issuance of vouchers or credits to passengers in lieu of cash refunds for affected flights during the COVID-19 pandemic;[5] and (2) "COVID-19 Agency Page," which endorses the Statement on Vouchers regardless of the airlines' reason(s) for not performing the services.[6] The Agency has widely disseminated the Publications through various channels.[7]

9. The Applicant alleges that the Agency's action of publicly posting and widely disseminating the Publications gives rise to two **distinct** and **independent** grounds for judicial review: the RAB Ground and the Misinformation Ground.

i. The RAB Ground for judicial review

10. The Agency's own *Code of Conduct*, at section 40, stipulates that:

> Members shall not publicly express an opinion about any past, current, or potential cases or any other issue related to the work of the Agency, and shall refrain from comments or discussions in public or otherwise that may create a reasonable apprehension of bias.[8]

11. The Applicant alleges that the Agency is a quasi-judicial tribunal whose members would be subject to the same rules in respect of impartiality that apply to courts

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3 Notice of Application, grounds, paras. 32-33 [Tab 2, p. 65].
4 Notice of Application, relief, paras. 1-4 [Tab 2, pp. 55-57].
5 Notice of Application, grounds, para. 12 [Tab 2, pp. 60-61].
6 Notice of Application, grounds, paras. 13-14 [Tab 2, pp. 61-62].
7 Order of Locke, J.A., dated April 16, 2020 [Tab 4, p. 73].
8 Notice of Application, grounds, para. 28 (emphasis added) [Tab 2, p. 64].

and judges of the courts.[9] The Applicant further alleges that it gives rise to a reasonable apprehension of bias for members of the Agency to be issuing *ad hoc* opinions or comments, like the Publications, on potential cases that would come before the Agency.[10]

12. The Statement on Vouchers, on its face, purports to speak on behalf of and to convey the position of the whole Agency. The Applicant alleges that the Agency's civil service staff merely implement the Agency's appointed members' directions,[11] and as such the Publications ought to be attributed to those appointed members who supported the Statement on Vouchers before or after its posting on the Internet.[12]

13. The Applicant recognized at the time of filing the Notice of Application that the identity of the specific member(s) who have supported and/or endorsed the Publications remains to be ascertained as a question of fact through this Court's procedures, including but not limited to records to be transmitted pursuant to Rules 317-318 of the *Federal Courts Rules*, which are due on August 24, 2020.[13]

14. The Applicant seeks a declaration and a permanent injunction enjoining the Agency's appointed member(s) who have supported or endorsed the Publications from adjudicating on the subject matter expressed in those Publications.[14]

ii. The Misinformation Ground for judicial review

15. The Applicant alleges that the Publications misinform the travelling public on their legal rights vis-á-vis the airlines. Firstly, the Publications fail to disclose the Agency's own long-standing and legally binding jurisprudence confirming passengers' "fundamental right" to a refund when the airline fails to perform the services, even if for reasons outside the airline's control.[15]

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9 Notice of Application, grounds, para. 24 [Tab 2, p. 63].
10 Notice of Application, grounds, paras. 25-27 and 30 [Tab 2, pp. 63-64].
11 *Canada Transportation Act*, ss. 7(2), 13, and 19 [Appendix A, pp. 125-127].
12 Notice of Application, grounds, para. 29 [Tab 2, p. 64].
13 Notice of Application, request to transmit, para. 1 [Tab 2, p. 66].
14 Notice of Application, relief, paras. 1(b)-(c) and 4(d) [Tab 2, pp. 55 and 57].
15 Notice of Application, grounds, paras. 16, 21, and 23 [Tab 2, pp. 62 and 63].

16. The Applicant further alleges that the Agency's Publications endorse airlines in withholding refunds from passengers and instead issuing vouchers or credits, even when the applicable regulations require refunds to the original form of payment.[16]

17. In short, the Publications give lay passengers the perception that a government body has "ruled" that passengers have no legal right to refund of unused airfares even when airlines do not perform the services.[17] The Publications would effectively mislead lay passengers into foregoing and/or abandoning their "fundamental right" to a refund, unless those passengers could discover the misinformation and omission(s).[18]

18. The Applicant seeks a permanent injunction requiring the Agency to remove the Publications. The Applicant also seeks an order that the Agency bring this Court's order to any affected passengers' attention when they contact the Agency.[19]

C. Relevant Procedural History

i. The interim *ex parte* motion

19. Concurrent with the filing of the Notice of Application on April 7, 2020, the Applicant also brought a motion for interim *ex parte* injunctions, that is to be followed by interlocutory injunctions returnable at a later date, relying on the two aforementioned grounds for judicial review. Both the interim and interlocutory (mandatory and

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[16] Notice of Application, grounds, paras. 14-15, 19-20, and 23 [Tab 2, pp. 62 and 63].

[17] Even the Honourable Minister of Transport Marc Garneau was confused by the Publications, and stated in the House of Commons on May 28, 2020 that:

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

COVI Committee, Evidence, 43rd Parl., 1st Sess., No. 013, p. 14 (emphasis added) – Lukács Affidavit, Exhibit "A" [Tab 1A, p. 3].

[18] Notice of Application, grounds, paras. 23 and 27 [Tab 2, pp. 63-64]; see also Order of Locke, J.A., dated April 16, 2020 [Tab 4, p. 72].

[19] Notice of Application, relief, paras. 4(a)-(c) [Tab 2, p. 57].

prohibitory) injunctions sought to temporarily enjoin the Agency's member(s) from adjudicating on the subject matter expressed in the Publications, and also that the Agency remove and/or clarify the Publications pending final determination of the Application.

20. On April 9, 2020, Pelletier, J.A. dismissed the interim *ex parte* portion of the motion due to lack of sufficient urgency warranting *ex parte* relief. However, Pelletier, J.A. noted that the Notice of Application raised important matters and granted leave to refile the portion of the motion seeking interlocutory relief, which the Applicant did the same day.[20]

ii. The Reasons of Mactavish, J.A. on the interlocutory motion

21. On May 22, 2020, Mactavish, J.A. issued reasons for her judgment dismissing both the interlocutory prohibitory and mandatory injunctions. Mactavish, J.A. acknowledged the Applicant's argument on the Application relates to the Agency's established jurisprudence confirming the passengers' "fundamental right" to a refund when airlines do not perform the service, including situations beyond the airlines' control, and the Agency's omissions of such from the Publications. Mactavish, J.A. did not rule on the substance of this argument.[21]

22. Mactavish, J.A. correctly noted that the Applicant was seeking both prohibitory and mandatory interlocutory remedies (consistent with the two distinct grounds for judicial review), which attracted two different merits thresholds under the *RJR-Macdonald* test for interlocutory injunctions. Mactavish, J.A. correctly noted that the interlocutory prohibitory injunction for the RAB Ground attracted the serious issue to be tried standard and assumed that this merits threshold was satisfied.[22]

23. Mactavish, J.A. went on to consider whether the mandatory injunction based on the Misinformation Ground met the higher, strong *prima facie* case threshold.[23]

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[20] Order of Pelletier, J.A., dated April 9, 2020 [Tab 3, p. 68].
[21] Reasons of Mactavish, J.A., dated May 22, 2020, at para. 10 [Tab 5, p. 78].
[22] Reasons of Mactavish, J.A., dated May 22, 2020, at paras. 17-18 [Tab 5, p. 80].
[23] Reasons of Mactavish, J.A., dated May 22, 2020, at paras. 19-20 [Tab 5, pp. 80-81].

Mactavish J.A. then considered, on an interlocutory basis, whether the contents of the Publications were amenable to judicial review on the Misinformation Ground.

24. Mactavish, J.A. overlooked the Supreme Court's guidance on availability of judicial review.[24] Instead, she applied the outmoded test that restricted judicial review to administrative actions that "affect rights, impose legal obligations, or cause prejudicial effects."[25] She considered that the Publications were "non-binding" and equated that to the Publications not "affecting rights, imposing legal obligations, or causing prejudicial effects" in concluding that the strong *prima facie* case threshold was not met.[26]

25. Mactavish, J.A. correctly distinguished between the RAB Ground and the Misinformation Ground in her "irreparable harm" analysis, but concluded that the Applicant's concerns did not meet the high threshold under this Court's jurisprudence.[27]

26. Finally, Mactavish, J.A. noted that the Agency's request for dismissal of the Application on the ground that there was no matter amenable to judicial review was not properly before her. Mactavish, J.A. held that the Agency must bring a motion to seek such an order, and "any such motion would, in any event, have to be decided by a panel of judges, rather than a single judge."[28]

iii. Mactavish, J.A. rejected the Agency's "abuse of process" argument

27. Mactavish, J.A. invited the parties to make costs submissions for the Applicant's interlocutory injunction motion.[29] The Agency argued, as it does on the present motion, that the Applicant engaged in an "abuse of process."[30]

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[24] *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 at para. 14 [Vol. 2, Tab 20, p. 524]; and *J.W. v. Canada (Attorney General)*, 2019 SCC 20 at para. 101 [Vol. 2, Tab 23, p. 600].
[25] Reasons of Mactavish, J.A., dated May 22, 2020, at paras. 22-23 [Tab 5, pp. 81-82].
[26] Reasons of Mactavish, J.A., dated May 22, 2020, at paras. 24-27 [Tab 5, pp. 82-83].
[27] Reasons of Mactavish, J.A., dated May 22, 2020, at paras. 32-37 [Tab 5, pp. 84-86].
[28] Reasons of Mactavish, J.A., dated May 22, 2020, at para. 39 [Tab 5, p. 86].
[29] Reasons of Mactavish, J.A., dated May 22, 2020, at para. 40 [Tab 5, pp. 86-87].
[30] Agency's Costs Submissions, paras. 1, 5-6, 10-12, and 18 [Tab 6, p. 89].

28. Mactavish, J.A. rejected the Agency's "abuse of process" argument, and held:

> [...] the respondent has not persuaded me that the conduct of the applicant in relation to this matter was such that the respondent should be entitled to an order of costs in its favour;[31]

iv. Application for leave to appeal to the Supreme Court of Canada

29. The Order of Mactavish, J.A. dismissing the Applicant's motion for interlocutory injunctions is currently subject to an application for leave to appeal to the Supreme Court of Canada. The correct test for availability of judicial review in the federal courts is one of the two issues on which leave to appeal is being sought. The leave application was submitted on August 3, 2020 and accepted for filing on August 7, 2020.[32]

PART II – STATEMENT OF THE POINTS IN ISSUE

30. The issues to be decided on this motion are:

(a) whether it is plain and obvious that judicial review is not available on the RAB Ground; and

(b) whether it is plain and obvious that judicial review is not available on the Misinformation Ground.

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[31] Costs Order of Mactavish, J.A., June 15, 2020 [Tab 7, p. 94].
[32] Lukács Affidavit, Exhibits "B"-"D" [Tab 1B-1D, pp. 6-50].

PART III – STATEMENT OF SUBMISSIONS

31. On this preliminary motion, the Agency seeks to have the Application struck solely on the ground that the Publications are not amenable to judicial review. The issue of the Applicant's standing is not before the Court on this motion, because it was not raised in the Agency's Notice of Motion or its memorandum of fact and law. There is no requirement to bring a preliminary motion to seek public interest standing.[33]

32. An order to strike out an application for judicial review is a rare and exceptional remedy. It should be granted only in the clearest of cases, where the application is "so clearly improper as to be bereft of any possibility of success." To put it differently, there must be a "show stopper" or a "knockout punch": an obvious, fatal flaw striking at the root of the Court's power to entertain the Application.[34] Unless this stringent test can be met, the proper way to contest an Application is to appear and argue at the hearing of the Application.[35] These well-established principles apply with greater force when only a portion of the Notice of Application is under attack, which is the situation here:

> In my view, particular caution is required on a motion to strike when only a portion of a notice of application is impugned, and that portion is integrally related to the remaining portion of the application. As noted in *David Bull*, objections to the application can be dealt with promptly and efficiently in the context of consideration of the merits of the case, particularly where a portion of the application is to proceed to hearing in any event.[36]

33. The threshold on a motion to strike an application is the same "plain and obvious" threshold commonly used in motions to strike actions.[37] The allegations in the

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[33] *Canadian Council for Refugees v. Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1131 at paras. 19-21 [Vol. 2, Tab 12, pp. 344-345].

[34] *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 at paras. 10 and 15 [Vol. 2, Tab 13, pp. 361 and 364]; and *Canada (N.R.) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 [***JP Morgan***] at paras. 47-48 [Vol. 2, Tab 22, pp. 560-561].

[35] *876947 Ontario Limited (RPR Environmental) v. Canada (Attorney General)*, 2013 FCA 156 at para. 9 [Vol. 2, Tab 1, p. 150].

[36] *Ibid.*, at para. 10 (emphasis added) [Vol. 2, Tab 1, p. 151].

[37] *Wenham v. Canada (A.G.)*, 2018 FCA 199 at paras. 32-33 [Vol. 2, Tab 37, p. 888].

notice of application must be accepted as true, and affidavit evidence is generally not admissible. The notice of application must be read "holistically and practically without fastening onto matters of form" to get at its "real essence" and "essential character."[38] The respondent bringing a motion to strike must demonstrate the existence of an obvious and fatal flaw apparent on the face of the notice of application.[39]

34. The Applicant submits that the Agency's preliminary motion to strike is fatally flawed, should have never been brought, and consequently should be dismissed by a single judge of this Honourable Court, as was done in a similar motion brought by the Agency in another case.[40] Alternatively, a motion that results in dismissal of an application for judicial review can only be granted by a panel of judges of the Federal Court of Appeal.[41]

35. The Agency failed to demonstrate that it is "plain and obvious" that judicial review is not available on **both** the RAB Ground and the Misinformation Ground, and that the Application is "so clearly improper as to be bereft of any possibility of success."

(a) The Agency repeatedly mischaracterizes the interlocutory finding of Mactavish, J.A. sitting as a single judge on a motion as the conclusive finding of this Honourable Court, which can only be made by a panel of judges.

(b) Mactavish, J.A. **did not** find that judicial review was unavailable on the RAB Ground. On the contrary, she assumed that the RAB Ground raised a serious issue to be tried, and also rejected the Agency's "abuse of process" argument.

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[38] *Wenham v. Canada (A.G.)*, 2018 FCA 199 at para. 34 [Vol. 2, Tab 37, p. 888]; and *JP Morgan* at paras. 49-50 [Vol. 2, Tab 22, p. 561].

[39] *JP Morgan* at paras. 51-53 [Vol. 2, Tab 22, pp. 561-562].

[40] *Lukács v. Canadian Transportation Agency*, 2014 FCA 205 at para. 15 [Vol. 2, Tab 28, p. 727].

[41] *Federal Courts Act*, s. 16 [Appendix A, p. 129]; *Franke Kindred Canada Limited v. Gacor Kitchenware (Ningbo) Co. Ltd.*, 2012 FCA 316 at para. 1 [Vol. 2, Tab 18, p. 497]; *Boudreau v. Canada (Minister of National Revenue)*, 2005 FCA 304 at para. 3 [Vol. 2, Tab 6, p. 205]; and Reasons of Mactavish, J.A., dated May 22, 2020, at para. 39 [Tab 5, p. 86].

(c) It is not plain and obvious that judicial review is unavailable on the Misinformation Ground, because various panels of his Honourable Court are divided about the correct legal test for availability of judicial review.

(d) Under the Supreme Court's binding authority on the availability of judicial review,[42] which was overlooked by Mactavish, J.A., it is fairly arguable that judicial review is available on the Misinformation Ground.

A. Mactavish, J.A.'s Interlocutory Finding Does Not Bind a Panel of the Court

36. The Agency alleges in its Notice of Motion that "[t]his Court has already conclusively" decided the issue of amenability to judicial review, and invites this Honourable Court to simply rubber-stamp this motion as a mere "follow-up."

37. The Agency's novel theory suffers from two fundamental flaws: The Agency conflates a single judge with a panel of this Honourable Court, and conflates interlocutory findings with final ones. The Agency effectively argues that a single judge's interlocutory decision can be automatically converted into a final decision of a panel. Respectfully, the Agency's theory cannot be correct.

38. It is trite law that the decision of a single judge of the Federal Court of Appeal is not binding on a panel of the court,[43] and that an application for judicial review can be dismissed only by a panel.[44] Furthermore, findings on an interlocutory motion are not conclusive, and do not bind the judges that hear the merits of an application.[45]

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[42] *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 at para. 14 [Vol. 2, Tab 20, p. 524]; and *J.W. v. Canada (Attorney General)*, 2019 SCC 20 at para. 101 [Vol. 2, Tab 23, p. 600].

[43] *Sport Maska Inc. v. Bauer Hockey*, 2016 FCA 44 at para. 38 [Vol. 2, Tab 36, p. 872]; *Apotex Inc. v. Canada (Health)*, 2017 FCA 160 at para. 16 [Vol. 2, Tab 3, p. 187]; and *Canada (C.I.) v. Tennant*, 2019 FCA 206 at para. 51 [Vol. 2, Tab 10, p. 295].

[44] *Federal Courts Act*, s. 16 [Appendix A, p. 129]; *Franke Kindred Canada Limited v. Gacor Kitchenware (Ningbo) Co. Ltd.*, 2012 FCA 316 at para. 1 [Vol. 2, Tab 18, p. 497]; *Boudreau v. Canada (Minister of National Revenue)*, 2005 FCA 304 at para. 3 [Vol. 2, Tab 6, p. 205]; and Reasons of Mactavish, J.A., dated May 22, 2020, at para. 39 [Tab 5, p. 86].

[45] *Meeches v. Meeches*, 2013 FCA 177 at paras. 34-41 [Vol. 2, Tab 31, pp. 780-782].

39. Consequently, Mactavish, J.A.'s decision is neither a decision of "the Court" nor "conclusive." While the Agency may rely on Mactavish, J.A.'s interlocutory decision in an effort to persuade a panel, it is not binding on a panel, and it is inappropriate for the Agency to represent to this Honourable Court otherwise.

B. It is Not Plain and Obvious that Judicial Review is Unavailable on the RAB Ground

40. Contrary to the Agency's submission, Mactavish, J.A. proceeded on the basis that there was a serious issue to be tried with respect to the RAB Ground.[46] Consequently, Mactavish, J.A.'s decision does not stand for the proposition that judicial review is unavailable on the RAB Ground.

41. It is trite law that ensuring impartiality of decision-makers is part of the superior courts' supervisory role with respect to administrative bodies, and judicial review is available on the ground of tribunal members' reasonable apprehension of bias.[47]

42. Reasonable apprehension of bias is not merely a ground for quashing decisions or orders that have already been made, but also a "front-end" basis for prohibiting tribunal members whose conduct gives rise to reasonable apprehension of bias from dealing with certain matters that could otherwise come before them.[48]

43. There is ample authority for a remedy in the form of a permanent prohibitory injunction when reasonable apprehension of bias is established as a "front-end" ground. The Ontario Divisional Court held in *E.A. Manning* that the issuance of a "policy guidance" constituted prejudgment, and on that basis the court restrained tribunal members who participated in issuing that "policy guidance" from adjudicating a case on the subject matter expressed in that "policy guidance."[49]

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[46] Reasons of Mactavish, J.A., dated May 22, 2020, at para. 17 [Tab 5, p. 80].
[47] *Zündel v. Citron*, 2000 CanLII 17137 (FCA), [2000] 4 FC 225 [Vol. 2, Tab 38, p. 905].
[48] *Piikani Nation v. McMullen*, 2020 ABCA 183 at paras. 24-25 [Vol. 2, Tab 34, p. 845].
[49] *E.A. Manning Ltd. v. Ontario (Sec. Comm.)*, 1994 CarswellOnt 1015 at paras. 51-55 [Vol. 2, Tab 16, pp. 471-472]; aff'd: 1995 CarswellOnt 1057 [Vol. 2, Tab 17, p. 475].

44. In the present case, for the limited purposes of the Agency's motion to strike, the facts alleged in the notice of application, including the allegation that some or all of the Agency's appointed members were involved in the making of the Publications,[50] must be assumed to be true. Each of the appointed members of the Agency, and in particular, the Agency's chairperson, are the controlling minds behind the Publications, not the professional civil servants acting under the members' instructions and directions.[51] Consequently, the remedy of a declaration and a permanent injunction enjoining those members from adjudicating on the subject matter expressed in the Publications[52] is not "bereft of any chance of success."

45. On this basis alone, the Agency's motion to strike should be dismissed.

46. The Applicant accepts that the identity of the specific Agency member(s) who have supported and/or endorsed the Publications will have to be ascertained as a question of fact for the merits hearing. That will be accomplished via this Court's procedures, including but not limited to records to be transmitted pursuant to Rules 317-318 of the *Federal Courts Rules*,[53] which are due on August 24, 2020.[54] The Applicant need not rely on the "corporate taint" doctrine at the merits hearing since evidence about the identity of those who supported or endorsed the Publications will be in the record.

C. Panels of this Honourable Court are Divided on the Correct Legal Test

47. On a motion to strike, the Court is not free to dispose of issues of law which have not been fully settled in the jurisprudence.[55] In this case, the applicable legal test for the availability of judicial review in the federal courts is not settled, and is also a subject of division among different panels of this Court. The Agency therefore cannot meet the high "plain and obvious" threshold for the relief it is seeking.

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[50] Notice of Application, grounds, para. 29 [Tab 2, p. 64].
[51] *Canada Transportation Act*, ss. 7(2), 13, and 19 [Appendix A, pp. 125-127].
[52] Notice of Application, relief, paras. 1(b)-(c) and 4(d) [Tab 2, pp. 55 and 57].
[53] *Federal Courts Rules*, Rules 317-318 [Appendix A, pp. 143-144].
[54] Notice of Application, request to transmit, para. 1 [Tab 2, p. 66].
[55] *P.S.A.C. v. R.*, 2000 CanLII 15458 (FC) at para. 4, per Pelletier, J. (as he then was). [Vol. 2, Tab 35, p. 853].

48. Previously, this Court adopted a restrictive test for the availability of judicial review requiring not only that the administrative action be a "matter" under s. 18.1 of *Federal Courts Act*, but that the impugned matter must also "affect rights, impose legal obligations, or cause prejudicial effects" before it is reviewable by the federal courts.[56]

49. In 2018, in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, the Supreme Court recast the test for availability of judicial review as simply whether the administrative bodies' action is an exercise of state authority that is of a sufficiently public character [***Wall*-test**]. The *Wall*-test is based on delineating between administrative actions of private *versus* public character. Administrative actions of a private character, such as business decisions, are **not** amenable to judicial review even if they affect a broad segment of the public. On the other hand, administrative actions of a public character are not immune from judicial review. In 2019, in *J.W. v. Canada (Attorney General)*, the Supreme Court reaffirmed the applicability of the *Wall*-test.[57]

50. In *Oceanex Inc. v. Canada (Transport)*, a panel of this Court applied the *Wall*-test, and expressed the test for the availability of judicial review as follows:

> [30] The Supreme Court recently revisited the law governing the availability of judicial review in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750, a case decided after the Federal Court's decision here, and one not involving the *Federal Courts Act*. In doing so it emphasized (at para. 14) that judicial review is available only where two conditions are met – "where there is an exercise of state authority and where that exercise is of a sufficiently public character" (emphasis added). It agreed with the observation by my colleague Justice Stratas in *Air Canada v. Toronto Port Authority Et Al*, 2011 FCA 347 at para. 52, [2013] 3 F.C.R. 605, that bodies that are public may nonetheless make decisions that are private in nature – the Court referred as examples to renting premises and hiring staff – and that these private decisions are not subject to judicial review.[58]

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[56] *Air Canada v. Toronto Port Authority*, 2011 FCA 347 at para. 29 [Vol. 2, Tab 2, p. 168].

[57] *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 at para. 14 [Vol. 2, Tab 20, p. 524]; and *J.W. v. Canada (Attorney General)*, 2019 SCC 20 at para. 101 [Vol. 2, Tab 23, p. 600].

[58] *Oceanex Inc. v. Canada (Transport)*, 2019 FCA 250 at para. 30 [Vol. 2, Tab 33, p. 824].

51. Subsequent to *Oceanex*, another panel of this Honourable Court has also applied the *Wall*-test, and two additional panels have acknowledged the *Wall*-test.[59]

52. In 2020, yet another panel of this Honourable Court resurrected the restrictive test for the availability of judicial review, and applied it to overturn the Federal Court's decision that judicial review was available in *Canada (Attorney General) v. Democracy Watch*.[60] While the Federal Court applied *Wall* in *Democracy Watch*,[61] this Court neither applied nor acknowledged the Supreme Court's guidance in *Wall* and *JW*.

53. Considering that different panels of this Honourable Court are divided as to the correct legal test for the availability of judicial review (a question that may have to be settled by a 5-judge panel), it cannot be said that there is "a decided case directly on point, from the same jurisdiction, demonstrating that the very issue has been squarely dealt with and rejected."[62] Therefore, for this reason alone, the Agency cannot meet the high "plain and obvious" threshold necessary for granting its motion to strike.

D. It is Not Plain and Obvious that Judicial Review is Unavailable on the Misinformation Ground

54. The Applicant submits that the *Wall*-test is equally applicable for determining availability of judicial review pursuant to the *Federal Courts Act*. The Applicant further submits that under the *Wall*-test, it is fairly arguable that judicial review is available on the Misinformation Ground, because it is arguable that the Publications were purportedly released to the public under the Agency's state authority or status as the regulator of airlines and quasi-judicial tribunal in relation to air travel disputes.

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[59] *Guérin c. Canada (Procureur général)*, 2019 CAF 272 at para. 65 [Vol. 2, Tab 19, p. 518]; *Wenham v. Canada (Attorney General)*, 2018 FCA 199 at para. 36 [Vol. 2, Tab 37, pp. 888-889]; and *Canada (Attorney General) v. Public Service Alliance of Canada*, 2019 FCA 41 at para. 30 [Vol. 2, Tab 9, p. 278].

[60] *Canada (Attorney General) v. Democracy Watch*, 2020 FCA 69 at paras. 15 and 19 [Vol. 2, Tab 7, pp. 221 and 222].

[61] *Democracy Watch v. Canada (Attorney General)*, 2019 FC 388 at paras. 68-69 [Vol. 2, Tab 14, p. 380].

[62] *Lin v. Airbnb, Inc.*, 2019 FC 1563 at para. 59 (per Justice D. Gascon) [Vol. 2, Tab 27, p. 693].

i. The *Wall*-test is applicable to judicial review in the federal courts

55. The federal courts carry out an identical constitutional role with respect to federal administrative bodies as provincial superior courts do for provincial administrative bodies.[63] As such, the Supreme Court of Canada's guidance on the availability of judicial review equally applies in the federal courts.

56. Sections 96 to 101 of the *Constitution Act, 1867* guarantee all Canadians access to a superior court for judicial review of administrative actions.[64] Administrative bodies are vested with statutory powers for the public's benefit, such powers that do not accrue to private entities. Consequently, these administrative bodies are subject to judicial review when they purport to exercise their statutory powers or mandate.[65]

57. Judicial review is a public law remedy by which courts uphold the rule of law and ensure that administrative bodies act within the bounds of their statutory mandate provided by the law.[66] The function of judicial review therefore is not merely to aright individual injustices, but also to protect society as a whole from administrative overreach.[67]

58. Judicial review in the federal courts originated from the 1971 *Federal Court Act*, but reached its current plenary scope only after the 1992 legislative reform.

59. In 1971, Parliament first enacted section 18 of the 1971 *Federal Court Act* to fully transfer the constitutional role to judicially supervise every "federal board, com-

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[63] *Canada (Human Rights Comm.) v. Canadian Liberty Net*, [1998] 1 SCR 626 at paras. 32-36 [Vol. 2, Tab 11, pp. 325-327].

[64] *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 31 [Vol. 2, Tab 15, p. 415]; and *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 at para. 13 [Vol. 2, Tab 20, p. 524].

[65] *Knox v. Conservative Party of Canada*, 2007 ABCA 295 at para. 20 [Vol. 2, Tab 24, p. 639].

[66] *Highwood Congregation of Jehovah's Witnesses (Judicial Comm.) v. Wall*, 2018 SCC 26 at para. 13 [Vol. 2, Tab 20, p. 524] citing with approval *Knox v. Conservative Party of Canada*, 2007 ABCA 295 at para. 14 [Vol. 2, Tab 24, p. 637].

[67] *Martineau v. Matsqui Institution Disciplinary Board*, [1980] S.C.R. 602 at para. 50 [Vol. 2, Tab 30, p. 761].

mission or other tribunal" from the provincial superior courts to a unified court,[68] whose judicial review decisions would affect the daily lives of every Canadian from coast to coast. Section 28 of the 1971 *Federal Court Act* carved out an exception for the appeal division to exclusively review a "decision or order" of a "federal board, commission or other tribunal" that is of a non-administrative (i.e., judicial or quasi-judicial) nature, based on three specifically enumerated grounds under the then s. 28(a)-(c).[69]

60. In 1992, the *Federal Court Act* was amended to clarify the dichotomy and confusion that previously surrounded the different remedial powers exercised by the trial and appeal divisions under ss. 18 and 28 of the 1971 *Federal Court Act*, respectively.[70] In place of the former s. 28 that carved out the appeal division's jurisdiction based on the remedies being sought, the new s. 28 of the 1992 *Federal Court Act* now assigns exclusive judicial review jurisdiction to the Federal Court of Appeal with respect to enumerated federal administrative bodies, including the Agency.[71]

61. In 1992, Parliament also enacted a unified s. 18.1, replacing the "decisions or orders" limitation in the former s. 28(1) with "matter" in the new s. 18.1(1).[72] Parliament also retired the exclusion of "decisions or orders" of an administrative nature from judicial review under the former s. 28(1). The three limited grounds for judicial review have been expanded to include an all-encompassing ground where the public body "acted in any other way that was contrary to law."[73]

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[68] *Canada (Human Rights Comm.) v. Canadian Liberty Net*, [1998] 1 SCR 626 at paras. 33-36 [Vol. 2, Tab 11, pp. 326-327].

[69] 1971 *Federal Court Act*, ss. 18 and 28 [Appendix A, pp. 139-140].

[70] *Martineau v. Matsqui Institution Disciplinary Board*, [1980] S.C.R. 602 at paras. 17 and 27 [Vol. 2, Tab 30, pp. 752 and 754].

[71] *Federal Courts Act*, s. 28 [Appendix A, p. 133].

[72] *Federal Courts Act*, s. 18.1 [Appendix A, p. 130]; *Krause v. Canada*, [1999] 2 FC 476 at paras. 22-24 [Vol. 2, Tab 25, pp. 652-653]; *Markevich v. Canada*, [1999] 3 FC 28 at paras. 9-13 [Vol. 2, Tab 29, p. 731]; *Larny Holdings Ltd. v. Canada (Minister of Health)*, 2002 FCT 750 at paras. 14-22 [Vol. 2, Tab 26, pp. 660-666]; and *Morneault v. Canada*, [2001] 1 FC 30 at paras. 42-44 [Vol. 2, Tab 32, p. 811].

[73] *Irving Shipbuilding Inc. v. Canada (A.G.)*, 2009 FCA 116 at paras. 29-31 [Vol. 2, Tab 21, pp. 539-540] ; and *Federal Courts Act*, s. 18.1(4)(f) [Appendix A, p. 130] – see *Morneault v. Canada*, [2001] 1 FC 30 at para. 44 [Vol. 2, Tab 32, p. 811].

62. Section 18.1 of the *Federal Courts Act* reaffirms the plenary scope of judicial review of federal administrative acts in the federal courts, which is coextensive with the constitutionally guaranteed common law right of judicial review before the provincial superior courts.[74] Today, the federal courts enjoy the same extensive and constitutionally guaranteed judicial review jurisdiction with respect to federal administrative bodies as provincial superior courts do with respect to provincial administrative bodies. Section 18.1 of the *Federal Courts Act* does not constrain the federal courts' constitutional role and jurisdiction to conduct judicial review, but rather breathes life into it.

63. Therefore, the panels of this Honourable Court in *Oceanex* and *Guérin* correctly concluded that availability of judicial review of acts of federal administrative bodies is to be determined based on the *Wall*-test.[75]

ii. Judicial review is available pursuant to the *Wall*-test

64. The Applicant submits that under the *Wall*-test, it is fairly arguable that judicial review is available with respect to the Misinformation Ground, because the act of making and widely disseminating the Publications is arguably the Agency's purported exercise of statutory authority of a sufficiently public character.

The Agency's purported exercise of statutory authority as regulator

65. Mactavish, J.A. found on an interlocutory basis that the Agency's mandate includes providing "the transportation industry and the travelling public with non-binding guidance with respect to the rights and obligations of transportation service providers and consumers."[76] Mactavish, J.A. made this interlocutory finding based on the Agency's representations that providing non-binding guidance to the travelling public is an exercise of the Agency's mandate and authority, that the Agency's impugned

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[74] *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at paras. 33-34 and 48 [Vol. 2, Tab 8, pp. 234 and 239].

[75] *Oceanex Inc. v. Canada (Transport)*, 2019 FCA 250 at para. 30 [Vol. 2, Tab 33, p. 824]; and *Guérin c. Canada (Procureur général)*, 2019 CAF 272 at para. 65 [Vol. 2, Tab 19, p. 518].

[76] FCA Reasons at para. 34 [Tab 5, p. 85].

acts were in furtherance of that mandate, and that the Publications are "a statement of the Agency as regulator."[77]

66. The Agency also claims that the purpose of its Publications was to offer the public a "fair and sensible balance between passenger protection and airlines' operational realities" in order to protect the airlines' "economic viability."[78] In other words, the Agency claims it was its role as the regulator to step in and take steps to "stablize" the financial situation for the airlines by giving "guidance" on what the travelling public's rights to a refund "could be."

67. The Transport Minister also acknowledged that the Agency has, in its capacity as the regulator, stepped in to seal the vouchers debate.[79]

68. It therefore does not lie in the Agency's mouth to argue that it was not exercising or purporting to exercise statutory authority in making and widely disseminating the Publications to "guide" the travelling public.

The purported exercise of statutory authority is of sufficient public character

69. The *Wall*-test delineates exercises of statutory authority along the private *versus* public dichotomy. Each act of an administrative body is either of a private or a public character. In other words, if an administrative body's action is not of a private character, then it must necessarily be of a public one.

70. It follows that in order to succeed on this motion, the Agency must demonstrate that it is "plain and obvious" that the act of making and widely disseminating the Publications on the Agency's government website and other governmental channels for consumption by the travelling public is of a private character.

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[77] Agency's Memorandum of Fact and Law, dated April 29, 2020, at paras. 75, 80, and 101 (emphasis added).
[78] FCA Reasons at paras. 5-6 [Tab 5, pp. 76-77].
[79] COVI Committee, Evidence, 43rd Parl., 1st Sess., No. 013, p. 14 – Lukács Affidavit, Exhibit "A" [Tab 1A, p. 3].

71. The Agency has failed to present any arguments or evidence capable of meeting this burden, and in light of the Agency's claim that the Publications are "a statement of the Agency as regulator,"[80] the Agency is incapable of meeting this threshold.

72. Therefore, based on the *Wall*-test, it is fairly arguable that judicial review is available on the Misinformation Ground, and the Agency's motion must fail.

iii. Alternatively, it is fairly arguable that judicial review is available on the Misinformation Ground even under the restrictive, pre-*Wall* test

73. Even assuming this Honourable Court determines that the restrictive test is the correct and applicable test, the Applicant submits that the Agency still could not discharge their burden of demonstrating that it is "plain and obvious" that judicial review is unavailable in respect of the Publications. It will be open to the panel of this Honourable Court, on a full evidentiary record, to find that the Publications caused direct or indirect prejudice to the travelling public.

74. Notably, the Agency's position is that the "guidance" expressed in its Publications would benefit airlines suffering from a drastic decline in cash flow, because the airlines would get to keep the travelling public's money while deferring the delivery of services until an undetermined date.[81] It is a zero-sum game. The flip side of that "benefit" for the airlines is that the travelling public would be deprived of access to their hard-earned cash at a time when millions of Canadians are experiencing financial hardship due to the pandemic.

75. The Agency cannot realistically assert that the travelling public would suffer no prejudice from an official government statement providing "guidance" to airlines that "an appropriate approach" to resolving the airlines' cash woes is that passengers receive neither the services nor a refund of the monies paid. It does not lie in the Agency's mouth to argue that it would not expect airlines to adopt or rely on its guidance.

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[80] Agency's Memorandum of Fact and Law, dated April 29, 2020, at paras. 80 and 101 (emphasis added).

[81] Agency's Memorandum of Fact and Law, dated April 29, 2020, at para. 32.

76. On this motion, the Agency is inviting this Honourable Court to conflate and simply equate the "non-binding" nature of statements or guidance with a broad proposition that the Publications do not "affect rights, impose legal obligations, or cause prejudicial effects." The Agency's novel and technical proposition would effectively return this Court's judicial review jurisdiction back to the pre-1992 era where judicial review was limited to binding "decisions or orders," effectively immunizing non-binding policies, guidelines, statements, recommendations, reports, etc. from judicial scrutiny.

77. The absurdity of the Agency's proposition can be demonstrated with an example. Suppose that, to ensure the economic viability and survival of the tobacco industry, Health Canada were to publish a non-binding public statement on its website informing Canadians that:

> Health Canada believes it could be an appropriate approach to prevent COVID-19 if individuals fill their lungs every two hours with cigarette smoke, in order to inhibit COVID-19 droplets from entering the respiratory system.

The statement omits the side effects of inhaling tobacco, including the high risk of contracting cancer.

78. Under the Agency's theory, the "non-binding" nature of this supposed guidance or statement would foreclose against Canadians from seeking any public law remedy to protect fellow Canadians who would be misled by this misinformation and omission (i.e., the unproven allegation that filling lungs with smoke could prevent COVID-19 and the failure to mention the risks of smoking).

79. Applying the Agency's logic, it can equally be said that each Canadian is "not prejudiced" because the audiences are not deprived of the ability to attend their physician's office for a consultation to inquire about the benefits and side effects of smoking. However, the *sine qua non* may be that the audience would first need to have doubts over this "guidance" before they would consider inquiring further, which may never occur because this guidance came from the very government authority tasked with the mandate of protecting public health. The audiences that never come to realization may

quietly suffer from a seemingly ineffective COVID-19 prevention measure or other illnesses caused by smoking without ever knowing why.

80. Parliament and the framers of the Constitution surely did not intend to deprive superior courts from supervisory jurisdiction to grant public law remedies against a government authority that, by disseminating misinformation, has failed to fulfill its mandate to protect Canadians.[82]

E. Request for an Oral Hearing

81. On a motion, there is no general right to an oral hearing, and it remains within the Court's discretion to determine whether such a motion can be decided fairly based on the written representations.[83] Accordingly, a single judge of this Honourable Court may dismiss the Agency's motion to strike without an oral hearing. The Applicant submits that no oral hearing is required in order to **dismiss** the Agency's motion as it clearly cannot meet the "plain and obvious" threshold as discussed above.[84]

82. On the other hand, this Honourable Court recently confirmed that section 16 of the *Federal Courts Act*[85] provides for a right to an oral hearing for final disposition of applications for judicial review.[86] Thus, if the Court sees it fit to address the availability of judicial review as a preliminary matter, then given the division within the court about the correct legal test, the Applicant asks for an oral hearing before a 5-judge panel.

83. The Applicant submits, in any event, that it would be most efficient and consistent with this Court's usual practice to address the availability of judicial review issue as part of the hearing on the merits of the application, rather than as a preliminary matter.

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[82] *Martineau v. Matsqui Institution Disciplinary Board*, [1980] S.C.R. 602 at para. 50 [Vol. 2, Tab 30, p. 761].
[83] *Benitez v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 279 at paras. 12-14 [Vol. 2, Tab 4, p. 193].
[84] *Lukács v. Canadian Transportation Agency*, 2014 FCA 205 at para. 15 [Vol. 2, Tab 28, p. 727].
[85] *Federal Courts Act*, s. 16 [Appendix A, p. 129].
[86] *Bernard v. Canada (A.G.)*, 2019 FCA 144 at para. 13 [Vol. 2, Tab 5, p. 199].

F. Costs

84. The Applicant requests costs on this motion in writing, pursuant to Rule 401(1) of the *Federal Courts Rules*, in the fixed amount of $1,000 payable forthwith.

85. For this written motion, the Applicant submits that the Agency should have never brought it or otherwise continued pursuing it.[87] Firstly, this Honourable Court has already reminded the Agency in a previous instance of the very high threshold required for such motions to strike and the inefficient use of judicial resources arising from such preliminary motions. The Agency has not heeded any of those reminders.

86. Secondly, on August 3, 2020, the Agency was served with the Applicant's leave to appeal to the Supreme Court of Canada to review the decision of Mactavish, J.A.[88] The Applicant's application to the Supreme Court of Canada leaves little doubt that the availability of judicial review is subject to a serious legal debate that must be settled by this Honourable Court, or the Supreme Court.[89] That is, the issue is far from settled and cannot remotely be "plain and obvious" and the Agency has been on notice of that since August 3, 2020. However, the Agency elected to continue pursuing this motion despite being on notice of the frailties of its position. Indeed, the Agency even unreasonably withheld consent when the Applicant requested a mere five-day extension to properly respond to this motion due to the unavailability of the Applicant's counsel.

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87 *Federal Courts Rules*, Rule 401(2) [Appendix A, p. 145].
88 Lukács Affidavit, para. 4 [Tab 1, p. 2].
89 Memorandum of Arguments – Lukács Affidavit, Exhibit "C" [Tab 1C, 11].

PART IV – ORDER SOUGHT

87. The Responding Party, Air Passenger Rights, is seeking an Order:

(a) dismissing the Canadian Transportation Agency's motion to strike, with costs fixed in the amount of $1,000, payable forthwith by the Canadian Transportation Agency;

(b) alternatively, referring the present motion to an oral hearing before a panel of this Honourable Court; and

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

August 18, 2020

SIMON LIN
Counsel for the Applicant,
Air Passenger Rights

PART V – LIST OF AUTHORITIES

Statutes and Regulations

Canada Transportation Act, S.C. 1996, c. 10,
ss. 7(2), 13, and 19

Federal Courts Act, R.S.C., 1985, c. F-7,
ss. 16, 18.1, 18.4, and 28

1971 *Federal Court Act*,
ss. 18 and 28

Federal Courts Rules, S.O.R./98-106,
Rules 317-318 and 401

Case Law

876947 Ontario Limited (RPR Environmental) v. Canada (Attorney General), 2013 FCA 156

Air Canada v. Toronto Port Authority, 2011 FCA 347

Apotex Inc. v. Canada (Health), 2017 FCA 160

Benitez v. Canada (Minister of Citizenship & Immigration), 2006 FCA 279

Bernard v. Canada (Attorney General), 2019 FCA 144

Boudreau v. Minister of National Revenue, 2005 FCA 304

Canada (Attorney General) v. Democracy Watch, 2020 FCA 69

Canada (Minister of Citizenship and Immigration) v. Khosa, 2009 SCC 12

Canada (Attorney General) v. Public Service Alliance of Canada, 2019 FCA 41

Canada (Citizenship and Immigration) v. Tennant, 2019 FCA 206

Canada (Human Rights Commission) v. Canadian Liberty Net, [1998] 1 S.C.R. 626

Canadian Council For Refugees v. Canada (Immigration, Refugees and Citizenship), 2017 FC 1131

David Bull Laboratories (Canada) Inc. v. Pharmacia Inc., [1995] 1 F.C. 588

P.S.A.C. v. R., 2000 CanLII 15458 (FC), 2000 CarswellNat 1094

Sport Maska Inc. v. Bauer Hockey Corp., 2016 FCA 44

Wenham v. Canada (Attorney General), 2018 FCA 199

Zündel v. Citron, 2000 CanLII 17137 (FCA), [2000] 4 FC 225

Appendix A

Statutes and Regulations

CANADA

CONSOLIDATION

CODIFICATION

Canada Transportation Act

Loi sur les transports au Canada

S.C. 1996, c. 10

L.C. 1996, ch. 10

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PART I

Administration

Canadian Transportation Agency

Continuation and Organization

Agency continued

7 (1) The agency known as the National Transportation Agency is continued as the Canadian Transportation Agency.

Composition of Agency

(2) The Agency shall consist of not more than five members appointed by the Governor in Council, and such temporary members as are appointed under subsection 9(1), each of whom must, on appointment or reappointment and while serving as a member, be a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*.

Chairperson and Vice-Chairperson

(3) The Governor in Council shall designate one of the members appointed under subsection (2) to be the Chairperson of the Agency and one of the other members appointed under that subsection to be the Vice-Chairperson of the Agency.

1996, c. 10, s. 7; 2001, c. 27, s. 221; 2007, c. 19, s. 3; 2015, c. 3, s. 30(E).

Term of members

8 (1) Each member appointed under subsection 7(2) shall hold office during good behaviour for a term of not more than five years and may be removed for cause by the Governor in Council.

Reappointment

(2) A member appointed under subsection 7(2) is eligible to be reappointed on the expiration of a first or subsequent term of office.

Continuation in office

(3) If a member appointed under subsection 7(2) ceases to hold office, the Chairperson may authorize the member to continue to hear any matter that was before the member on the expiry of the member's term of office and that member is deemed to be a member of the Agency, but that person's status as a member does not preclude the appointment of up to five members under subsection 7(2) or up to three temporary members under subsection 9(1).

1996, c. 10, s. 8; 2007, c. 19, s. 4; 2015, c. 3, s. 31(E).

PARTIE I

Administration

Office des transports du Canada

Maintien et composition

Maintien de l'Office

7 (1) L'Office national des transports est maintenu sous le nom d'Office des transports du Canada.

Composition

(2) L'Office est composé, d'une part, d'au plus cinq membres nommés par le gouverneur en conseil et, d'autre part, des membres temporaires nommés en vertu du paragraphe 9(1). Tout membre doit, du moment de sa nomination, être et demeurer un citoyen canadien ou un résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés*.

Président et vice-président

(3) Le gouverneur en conseil choisit le président et le vice-président de l'Office parmi les membres nommés en vertu du paragraphe (2).

1996, ch. 10, art. 7; 2001, ch. 27, art. 221; 2007, ch. 19, art. 3; 2015, ch. 3, art. 30(A).

Durée du mandat

8 (1) Les membres nommés en vertu du paragraphe 7(2) le sont à titre inamovible pour un mandat d'au plus cinq ans, sous réserve de révocation motivée par le gouverneur en conseil.

Renouvellement du mandat

(2) Les mandats sont renouvelables.

Continuation de mandat

(3) Le président peut autoriser un membre nommé en vertu du paragraphe 7(2) qui cesse d'exercer ses fonctions à continuer, après la date d'expiration de son mandat, à entendre toute question dont il se trouve saisi à cette date. À cette fin, le membre est réputé être membre de l'Office mais son statut n'empêche pas la nomination de cinq membres en vertu du paragraphe 7(2) ou de trois membres temporaires en vertu du paragraphe 9(1).

1996, ch. 10, art. 8; 2007, ch. 19, art. 4; 2015, ch. 3, art. 31(A).

within three months after the vesting, absolutely dispose of the interest.

1996, c. 10, s. 10; 2015, c. 3, s. 32(E).

Remuneration

Remuneration

11 (1) A member shall be paid such remuneration and allowances as may be fixed by the Governor in Council.

Expenses

(2) Each member is entitled to be paid reasonable travel and living expenses incurred by the member in carrying out duties under this Act or any other Act of Parliament while absent from the member's ordinary place of work.

Members — retirement pensions

12 (1) A member appointed under subsection 7(2) is deemed to be employed in the public service for the purposes of the *Public Service Superannuation Act*.

Temporary members not included

(2) A temporary member is deemed not to be employed in the public service for the purposes of the *Public Service Superannuation Act* unless the Governor in Council, by order, deems the member to be so employed for those purposes.

Accident compensation

(3) For the purposes of the *Government Employees Compensation Act* and any regulation made pursuant to section 9 of the *Aeronautics Act*, a member is deemed to be an employee in the federal public administration.

1996, c. 10, s. 12; 2003, c. 22, ss. 224(E), 225(E); 2015, c. 3, s. 33(E).

Chairperson

Duties of Chairperson

13 The Chairperson is the chief executive officer of the Agency and has the supervision over and direction of the work of the members and its staff, including the apportionment of work among the members and the assignment of members to deal with any matter before the Agency.

Absence of Chairperson

14 In the event of the absence or incapacity of the Chairperson or if the office of Chairperson is vacant, the Vice-Chairperson has all the powers and shall perform all the duties and functions of the Chairperson.

Rémunération

Rémunération et indemnités

11 (1) Les membres reçoivent la rémunération et touchent les indemnités que peut fixer le gouverneur en conseil.

Frais de déplacement

(2) Les membres ont droit aux frais de déplacement et de séjour entraînés par l'exercice, hors de leur lieu de travail habituel, des fonctions qui leur sont confiées en application de la présente loi ou de toute autre loi fédérale.

Pensions de retraite des membres

12 (1) Les membres nommés en vertu du paragraphe 7(2) sont réputés appartenir à la fonction publique pour l'application de la *Loi sur la pension de la fonction publique*.

Membres temporaires

(2) Sauf décret prévoyant le contraire, les membres temporaires sont réputés ne pas appartenir à la fonction publique pour l'application de la *Loi sur la pension de la fonction publique*.

Indemnisation

(3) Pour l'application de la *Loi sur l'indemnisation des agents de l'État* et des règlements pris en vertu de l'article 9 de la *Loi sur l'aéronautique*, les membres sont réputés appartenir à l'administration publique fédérale.

1996, ch. 10, art. 12; 2003, ch. 22, art. 224(A) et 225(A); 2015, ch. 3, art. 33(A).

Président

Pouvoirs et fonctions

13 Le président est le premier dirigeant de l'Office; à ce titre, il assure la direction et le contrôle de ses travaux et la gestion de son personnel et procède notamment à la répartition des tâches entre les membres et à la désignation de ceux qui traitent des questions dont est saisi l'Office.

Intérim du président

14 En cas d'absence ou d'empêchement du président ou de vacance de son poste, la présidence est assumée par le vice-président.

Head Office

Head office

18 (1) The head office of the Agency shall be in the National Capital Region described in the schedule to the *National Capital Act*.

Residence of members

(2) The members appointed under subsection 7(2) shall reside in the National Capital Region described in the schedule to the *National Capital Act* or within any distance of it that the Governor in Council determines.

1996, c. 10, s. 18; 2007, c. 19, s. 5; 2008, c. 21, s. 61.

Staff

Secretary, officers and employees

19 The Secretary of the Agency and the other officers and employees that are necessary for the proper conduct of the business of the Agency shall be appointed in accordance with the *Public Service Employment Act*.

Technical experts

20 The Agency may appoint and, subject to any applicable Treasury Board directive, fix the remuneration of experts or persons who have technical or special knowledge to assist the Agency in an advisory capacity in respect of any matter before the Agency.

Records

Duties of Secretary

21 (1) The Secretary of the Agency shall

(a) maintain a record in which shall be entered a true copy of every rule, order, decision and regulation of the Agency and any other documents that the Agency requires to be entered in it; and

(b) keep at the Agency's office a copy of all rules, orders, decisions and regulations of the Agency and the records of proceedings of the Agency.

Entries in record

(2) The entry of a document in the record referred to in paragraph (1)(a) shall constitute the original record of the document.

Copies of documents obtainable

22 On the application of any person, and on payment of a fee fixed by the Agency, the Secretary of the Agency or, in the absence of the Secretary, the person assigned by

Siège de l'Office

Siège

18 (1) Le siège de l'Office est fixé dans la région de la capitale nationale délimitée à l'annexe de la *Loi sur la capitale nationale*.

Lieu de résidence des membres

(2) Les membres nommés au titre du paragraphe 7(2) résident dans la région de la capitale nationale délimitée à l'annexe de la *Loi sur la capitale nationale* ou dans la périphérie de cette région définie par le gouverneur en conseil.

1996, ch. 10, art. 18; 2007, ch. 19, art. 5; 2008, ch. 21, art. 61.

Personnel

Secrétaire et personnel

19 Le secrétaire de l'Office et le personnel nécessaire à l'exécution des travaux de celui-ci sont nommés conformément à la *Loi sur l'emploi dans la fonction publique*.

Experts

20 L'Office peut nommer des experts ou autres spécialistes compétents pour le conseiller sur des questions dont il est saisi, et, sous réserve des instructions du Conseil du Trésor, fixer leur rémunération.

Registre

Attributions du secrétaire

21 (1) Le secrétaire est chargé :

a) de la tenue du registre du texte authentique des règles, arrêtés, règlements et décisions de l'Office et des autres documents dont celui-ci exige l'enregistrement;

b) de la conservation, dans les bureaux de l'Office, d'un exemplaire des règles, arrêtés, règlements, décisions et procès-verbaux de celui-ci.

Original

(2) Le document enregistré en application de l'alinéa (1)a) en constitue l'original.

Copies conformes

22 Le secrétaire de l'Office, ou la personne chargée par le président d'assurer son intérim, délivre sous le sceau de l'Office, sur demande et contre paiement des droits

CANADA

CONSOLIDATION

CODIFICATION

Federal Courts Act

Loi sur les Cours fédérales

R.S.C., 1985, c. F-7

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Sittings of the Federal Court of Appeal

16 (1) Except as otherwise provided in this Act or any other Act of Parliament, every appeal and every application for leave to appeal to the Federal Court of Appeal, and every application for judicial review or reference to that court, shall be heard in that court before not fewer than three judges sitting together and always before an uneven number of judges. Otherwise, the business of the Federal Court of Appeal shall be dealt with by such judge or judges as the Chief Justice of that court may arrange.

Arrangements to be made by Chief Justice of the Federal Court of Appeal

(2) The Chief Justice of the Federal Court of Appeal shall designate the judges to sit from time to time and the appeals or matters to be heard by them.

Place of sittings

(3) The place of each sitting of the Federal Court of Appeal shall be arranged by the Chief Justice of that court to suit, as nearly as may be, the convenience of the parties.

No judge to hear appeal from own judgment

(4) A judge shall not sit on the hearing of an appeal from a judgment he or she has pronounced.

Chief Justice of Federal Court of Appeal to preside

(5) The Chief Justice of the Federal Court of Appeal, when present at any sittings of that court, shall preside and, in the absence of the Chief Justice, the senior judge of that court who is present shall preside.

R.S., 1985, c. F-7, s. 16; 1990, c. 8, s. 2; 2002, c. 8, s. 23.

Séances de la Cour d'appel fédérale

16 (1) Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, les appels et demandes d'autorisation d'appel à la Cour d'appel fédérale ainsi que les demandes de contrôle judiciaire ou renvois faits à celle-ci sont entendus par au moins trois juges de cette cour, siégeant ensemble en nombre impair; les autres travaux de la Cour d'appel fédérale sont assignés à un ou plusieurs juges par le juge en chef de celle-ci.

Dispositions du ressort du juge en chef de la Cour d'appel fédérale

(2) Le juge en chef de la Cour d'appel fédérale répartit en tant que de besoin les appels et autres affaires entre les juges.

Lieu des séances

(3) Dans la mesure du possible, le juge en chef fixe le lieu des séances de la Cour d'appel fédérale à la convenance des parties.

Inhabilité à siéger en appel

(4) Un juge ne peut entendre en appel une affaire qu'il a déjà jugée.

Présidence

(5) Les séances de la Cour d'appel fédérale sont présidées par le juge en chef de celle-ci ou, en son absence, par celui de ses juges présents qui est le plus ancien en poste.

L.R. (1985), ch. F-7, art. 16; 1990, ch. 8, art. 2; 2002, ch. 8, art. 23.

Jurisdiction of Federal Court

Relief against the Crown

17 (1) Except as otherwise provided in this Act or any other Act of Parliament, the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown.

Cases

(2) Without restricting the generality of subsection (1), the Federal Court has concurrent original jurisdiction, except as otherwise provided, in all cases in which

(a) the land, goods or money of any person is in the possession of the Crown;

(b) the claim arises out of a contract entered into by or on behalf of the Crown;

Compétence de la Cour fédérale

Réparation contre la Couronne

17 (1) Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, la Cour fédérale a compétence concurrente, en première instance, dans les cas de demande de réparation contre la Couronne.

Motifs

(2) Elle a notamment compétence concurrente en première instance, sauf disposition contraire, dans les cas de demande motivés par :

a) la possession par la Couronne de terres, biens ou sommes d'argent appartenant à autrui;

b) un contrat conclu par ou pour la Couronne;

c) un trouble de jouissance dont la Couronne se rend coupable;

(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;

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.

Grounds of review

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

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

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

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

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

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

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

Motifs

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

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

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

c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

f) a agi de toute autre façon contraire à la loi.

Defect in form or technical irregularity

(5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may

(a) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and

(b) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.

1990, c. 8, s. 5; 2002, c. 8, s. 27.

Vice de forme

(5) La Cour fédérale peut rejeter toute demande de contrôle judiciaire fondée uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l'ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.

1990, ch. 8, art. 5; 2002, ch. 8, art. 27.

Interim orders

18.2 On an application for judicial review, the Federal Court may make any interim orders that it considers appropriate pending the final disposition of the application.

1990, c. 8, s. 5; 2002, c. 8, s. 28.

Mesures provisoires

18.2 La Cour fédérale peut, lorsqu'elle est saisie d'une demande de contrôle judiciaire, prendre les mesures provisoires qu'elle estime indiquées avant de rendre sa décision définitive.

1990, ch. 8, art. 5; 2002, ch. 8, art. 28.

Reference by federal tribunal

18.3 (1) A federal board, commission or other tribunal may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Federal Court for hearing and determination.

Reference by Attorney General of Canada

(2) The Attorney General of Canada may, at any stage of the proceedings of a federal board, commission or other tribunal, other than a service tribunal within the meaning of the *National Defence Act*, refer any question or issue of the constitutional validity, applicability or operability of an Act of Parliament or of regulations made under an Act of Parliament to the Federal Court for hearing and determination.

1990, c. 8, s. 5; 2002, c. 8, s. 28.

Hearings in summary way

18.4 (1) Subject to subsection (2), an application or reference to the Federal Court under any of sections 18.1 to 18.3 shall be heard and determined without delay and in a summary way.

Exception

(2) The Federal Court may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action.

1990, c. 8, s. 5; 2002, c. 8, s. 28.

Exception to sections 18 and 18.1

18.5 Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.

1990, c. 8, s. 5; 2002, c. 8, s. 28.

Intergovernmental disputes

19 If the legislature of a province has passed an Act agreeing that the Federal Court, the Federal Court of Canada or the Exchequer Court of Canada has jurisdiction in cases of controversies between Canada and that province, or between that province and any other province or provinces that have passed a like Act, the Federal Court has jurisdiction to determine the controversies.

R.S., 1985, c. F-7, s. 19; 2002, c. 8, s. 28.

Renvoi d'un office fédéral

18.3 (1) Les offices fédéraux peuvent, à tout stade de leurs procédures, renvoyer devant la Cour fédérale pour audition et jugement toute question de droit, de compétence ou de pratique et procédure.

Renvoi du procureur général

(2) Le procureur général du Canada peut, à tout stade des procédures d'un office fédéral, sauf s'il s'agit d'un tribunal militaire au sens de la *Loi sur la défense nationale*, renvoyer devant la Cour fédérale pour audition et jugement toute question portant sur la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, d'une loi fédérale ou de ses textes d'application.

1990, ch. 8, art. 5; 2002, ch. 8, art. 28.

Procédure sommaire d'audition

18.4 (1) Sous réserve du paragraphe (2), la Cour fédérale statue à bref délai et selon une procédure sommaire sur les demandes et les renvois qui lui sont présentés dans le cadre des articles 18.1 à 18.3.

Exception

(2) Elle peut, si elle l'estime indiqué, ordonner qu'une demande de contrôle judiciaire soit instruite comme s'il s'agissait d'une action.

1990, ch. 8, art. 5; 2002, ch. 8, art. 28.

Dérogation aux art. 18 et 18.1

18.5 Par dérogation aux articles 18 et 18.1, lorsqu'une loi fédérale prévoit expressément qu'il peut être interjeté appel, devant la Cour fédérale, la Cour d'appel fédérale, la Cour suprême du Canada, la Cour d'appel de la cour martiale, la Cour canadienne de l'impôt, le gouverneur en conseil ou le Conseil du Trésor, d'une décision ou d'une ordonnance d'un office fédéral, rendue à tout stade des procédures, cette décision ou cette ordonnance ne peut, dans la mesure où elle est susceptible d'un tel appel, faire l'objet de contrôle, de restriction, de prohibition, d'évocation, d'annulation ni d'aucune autre intervention, sauf en conformité avec cette loi.

1990, ch. 8, art. 5; 2002, ch. 8, art. 28.

Différends entre gouvernements

19 Lorsqu'une loi d'une province reconnaît sa compétence en l'espèce, — qu'elle y soit désignée sous le nom de Cour fédérale, Cour fédérale du Canada ou Cour de l'Échiquier du Canada — la Cour fédérale est compétente pour juger les cas de litige entre le Canada et cette province ou entre cette province et une ou plusieurs autres provinces ayant adopté une loi semblable.

L.R. (1985), ch. F-7, art. 19; 2002, ch. 8, art. 28.

(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.

e) elle a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

f) elle a agi de toute autre façon contraire à la loi.

Hearing in summary way

(1.4) An appeal under subsection (1.2) shall be heard and determined without delay and in a summary way.

Procédure sommaire

(1.4) L'appel interjeté en vertu du paragraphe (1.2) est entendu et tranché immédiatement et selon une procédure sommaire.

Notice of appeal

(2) An appeal under this section shall be brought by filing a notice of appeal in the Registry of the Federal Court of Appeal

(a) in the case of an interlocutory judgment, within 10 days after the pronouncement of the judgment or within any further time that a judge of the Federal Court of Appeal may fix or allow before or after the end of those 10 days; and

(b) in any other case, within 30 days, not including any days in July and August, after the pronouncement of the judgment or determination appealed from or within any further time that a judge of the Federal Court of Appeal may fix or allow before or after the end of those 30 days.

Avis d'appel

(2) L'appel interjeté dans le cadre du présent article est formé par le dépôt d'un avis au greffe de la Cour d'appel fédérale, dans le délai imparti à compter du prononcé du jugement en cause ou dans le délai supplémentaire qu'un juge de la Cour d'appel fédérale peut, soit avant soit après l'expiration de celui-ci, accorder. Le délai imparti est de :

a) dix jours, dans le cas d'un jugement interlocutoire;

b) trente jours, compte non tenu de juillet et août, dans le cas des autres jugements.

Service

(3) All parties directly affected by an appeal under this section shall be served without delay with a true copy of the notice of appeal, and evidence of the service shall be filed in the Registry of the Federal Court of Appeal.

Signification

(3) L'appel est signifié sans délai à toutes les parties directement concernées par une copie certifiée conforme de l'avis. La preuve de la signification doit être déposée au greffe de la Cour d'appel fédérale.

Final judgment

(4) For the purposes of this section, a final judgment includes a judgment that determines a substantive right except as to any question to be determined by a referee pursuant to the judgment.

R.S., 1985, c. F-7, s. 27; R.S., 1985, c. 51 (4th Supp.), s. 11; 1990, c. 8, ss. 7, 78(E); 1993, c. 27, s. 214; 2002, c. 8, s. 34.

Jugement définitif

(4) Pour l'application du présent article, est assimilé au jugement définitif le jugement qui statue au fond sur un droit, à l'exception des questions renvoyées à l'arbitrage par le jugement.

L.R. (1985), ch. F-7, art. 27; L.R. (1985), ch. 51 (4e suppl.), art. 11; 1990, ch. 8, art. 7 et 78(A); 1993, ch. 27, art. 214; 2002, ch. 8, art. 34.

Judicial review

28 (1) The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals:

(a) [Repealed, 2012, c. 24, s. 86]

(b) the Review Tribunal continued by subsection 27(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*;

Contrôle judiciaire

28 (1) La Cour d'appel fédérale a compétence pour connaître des demandes de contrôle judiciaire visant les offices fédéraux suivants :

a) [Abrogé, 2012, ch. 24, art. 86]

b) la commission de révision prorogée par le paragraphe 27(1) de la *Loi sur les sanctions administratives pécuniaires en matière d'agriculture et d'agroalimentaire*;

(b.1) the Conflict of Interest and Ethics Commissioner appointed under section 81 of the *Parliament of Canada Act*;

(c) the Canadian Radio-television and Telecommunications Commission established by the *Canadian Radio-television and Telecommunications Commission Act*;

(d) [Repealed, 2012, c. 19, s. 272]

(e) the Canadian International Trade Tribunal established by the *Canadian International Trade Tribunal Act*;

(f) the Canadian Energy Regulator established by the *Canadian Energy Regulator Act*;

(g) the Governor in Council, when the Governor in Council makes an order under subsection 186(1) of the *Canadian Energy Regulator Act*;

(g) the Appeal Division of the Social Security Tribunal established under section 44 of the *Department of Employment and Social Development Act*, unless the decision is made under subsection 57(2) or section 58 of that Act or relates to an appeal brought under subsection 53(3) of that Act or an appeal respecting a decision relating to further time to make a request under subsection 52(2) of that Act, section 81 of the *Canada Pension Plan*, section 27.1 of the *Old Age Security Act* or section 112 of the *Employment Insurance Act*;

(h) the Canada Industrial Relations Board established by the *Canada Labour Code*;

(i) the Federal Public Sector Labour Relations and Employment Board referred to in subsection 4(1) of the *Federal Public Sector Labour Relations and Employment Board Act*;

(i.1) adjudicators as defined in subsection 2(1) of the *Federal Public Sector Labour Relations Act*;

(j) the Copyright Board established by the *Copyright Act*;

(k) the Canadian Transportation Agency established by the *Canada Transportation Act*;

(l) [Repealed, 2002, c. 8, s. 35]

(m) [Repealed, 2012, c. 19, s. 272]

(n) the Competition Tribunal established by the *Competition Tribunal Act*;

b.1) le commissaire aux conflits d'intérêts et à l'éthique nommé en vertu de l'article 81 de la *Loi sur le Parlement du Canada*;

c) le Conseil de la radiodiffusion et des télécommunications canadiennes constitué par la *Loi sur le Conseil de la radiodiffusion et des télécommunications canadiennes*;

d) [Abrogé, 2012, ch. 19, art. 272]

e) le Tribunal canadien du commerce extérieur constitué par la *Loi sur le Tribunal canadien du commerce extérieur*;

f) la Régie canadienne de l'énergie constituée par la *Loi sur la Régie canadienne de l'énergie*;

g) le gouverneur en conseil, quand il prend un décret en vertu du paragraphe 186(1) de la *Loi sur la Régie canadienne de l'énergie*;

g) la division d'appel du Tribunal de la sécurité sociale, constitué par l'article 44 de la *Loi sur le ministère de l'Emploi et du Développement social*, sauf dans le cas d'une décision qui est rendue au titre du paragraphe 57(2) ou de l'article 58 de cette loi ou qui vise soit un appel interjeté au titre du paragraphe 53(3) de cette loi, soit un appel concernant une décision relative au délai supplémentaire visée au paragraphe 52(2) de cette loi, à l'article 81 du *Régime de pensions du Canada*, à l'article 27.1 de la *Loi sur la sécurité de la vieillesse* ou à l'article 112 de la *Loi sur l'assurance-emploi*;

h) le Conseil canadien des relations industrielles au sens du *Code canadien du travail*;

i) la Commission des relations de travail et de l'emploi dans le secteur public fédéral visée par le paragraphe 4(1) de la *Loi sur la Commission des relations de travail et de l'emploi dans le secteur public fédéral*;

i.1) les arbitres de grief, au sens du paragraphe 2(1) de la *Loi sur les relations de travail dans le secteur public fédéral*;

j) la Commission du droit d'auteur constituée par la *Loi sur le droit d'auteur*;

k) l'Office des transports du Canada constitué par la *Loi sur les transports au Canada*;

l) [Abrogé, 2002, ch. 8, art. 35]

m) [Abrogé, 2012, ch. 19, art. 272]

(o) assessors appointed under the *Canada Deposit Insurance Corporation Act*;

(p) [Repealed, 2012, c. 19, s. 572]

(q) the Public Servants Disclosure Protection Tribunal established by the *Public Servants Disclosure Protection Act*; and

(r) the Specific Claims Tribunal established by the *Specific Claims Tribunal Act*.

n) le Tribunal de la concurrence constitué par la *Loi sur le Tribunal de la concurrence*;

o) les évaluateurs nommés en application de la *Loi sur la Société d'assurance-dépôts du Canada*;

p) [Abrogé, 2012, ch. 19, art. 572]

q) le Tribunal de la protection des fonctionnaires divulgateurs d'actes répréhensibles constitué par la *Loi sur la protection des fonctionnaires divulgateurs d'actes répréhensibles*;

r) le Tribunal des revendications particulières constitué par la *Loi sur le Tribunal des revendications particulières*.

Sections apply

(2) Sections 18 to 18.5, except subsection 18.4(2), apply, with any modifications that the circumstances require, in respect of any matter within the jurisdiction of the Federal Court of Appeal under subsection (1) and, when they apply, a reference to the Federal Court shall be read as a reference to the Federal Court of Appeal.

Dispositions applicables

(2) Les articles 18 à 18.5 s'appliquent, exception faite du paragraphe 18.4(2) et compte tenu des adaptations de circonstance, à la Cour d'appel fédérale comme si elle y était mentionnée lorsqu'elle est saisie en vertu du paragraphe (1) d'une demande de contrôle judiciaire.

Federal Court deprived of jurisdiction

(3) If the Federal Court of Appeal has jurisdiction to hear and determine a matter, the Federal Court has no jurisdiction to entertain any proceeding in respect of that matter.

R.S., 1985, c. F-7, s. 28; R.S., 1985, c. 30 (2nd Supp.), s. 61; 1990, c. 8, s. 8; 1992, c. 26, s. 17, c. 33, s. 69, c. 49, s. 128; 1993, c. 34, s. 70; 1996, c. 10, s. 229, c. 23, s. 187; 1998, c. 26, s. 73; 1999, c. 31, s. 92(E); 2002, c. 8, s. 35; 2003, c. 22, ss. 167(E), 262; 2005, c. 46, s. 56.1; 2006, c. 9, ss. 6, 222; 2008, c. 22, s. 46; 2012, c. 19, ss. 110, 272, 572, c. 24, s. 86; 2013, c. 40, ss. 236, 439; 2014, c. 20, s. 236; 2017, c. 9, ss. 43, 55; 2019, c. 28, s. 102.

Incompétence de la Cour fédérale

(3) La Cour fédérale ne peut être saisie des questions qui relèvent de la Cour d'appel fédérale.

L.R. (1985), ch. F-7, art. 28; L.R. (1985), ch. 30 (2e suppl.), art. 61; 1990, ch. 8, art. 8; 1992, ch. 26, art. 17, ch. 33, art. 69, ch. 49, art. 128; 1993, ch. 34, art. 70; 1996, ch. 10, art. 229, ch. 23, art. 187; 1998, ch. 26, art. 73; 1999, ch. 31, art. 92(A); 2002, ch. 8, art. 35; 2003, ch. 22, art. 167(A) et 262; 2005, ch. 46, art. 56.1; 2006, ch. 9, art. 6 et 222; 2008, ch. 22, art. 46; 2012, ch. 19, art. 110, 272 et 572, ch. 24, art. 86; 2013, ch. 40, art. 236 et 439; 2014, ch. 20, art. 236; 2017, ch. 9, art. 43 et 55; 2019, ch. 28, art. 102.

29 to 35 [Repealed, 1990, c. 8, s. 8]

29 à 35 [Abrogés, 1990, ch. 8, art. 8]

Substantive Provisions

Prejudgment interest — cause of action within province

36 (1) Except as otherwise provided in any other Act of Parliament, and subject to subsection (2), the laws relating to prejudgment interest in proceedings between subject and subject that are in force in a province apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.

Prejudgment interest — cause of action outside province

(2) A person who is entitled to an order for the payment of money in respect of a cause of action arising outside a province or in respect of causes of action arising in more than one province is entitled to claim and have included

Dispositions de fond

Intérêt avant jugement — Fait survenu dans une province

36 (1) Sauf disposition contraire de toute autre loi fédérale, et sous réserve du paragraphe (2), les règles de droit en matière d'intérêt avant jugement qui, dans une province, régissent les rapports entre particuliers s'appliquent à toute instance devant la Cour d'appel fédérale ou la Cour fédérale et dont le fait générateur est survenu dans cette province.

Intérêt avant jugement — Fait non survenu dans une seule province

(2) Dans toute instance devant la Cour d'appel fédérale ou la Cour fédérale et dont le fait générateur n'est pas survenu dans une province ou dont les faits générateurs sont survenus dans plusieurs provinces, les intérêts avant

CHAPTER 1†

An Act respecting the Federal Court of Canada

[*Assented to 3rd December, 1970*]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

SHORT TITLE

Short title

1. This Act may be cited as the *Federal Court Act*.

INTERPRETATION

Definitions

2. In this Act,

"Associate Chief Justice"

(*a*) "Associate Chief Justice" means the Associate Chief Justice of the Court;

"Canadian maritime law"

(*b*) "Canadian maritime law" means the law that was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the *Admiralty Act* or any other statute, or that would have been so administered if that Court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, as that law has been altered by this or any other Act of the Parliament of Canada;

"Chief Justice"

(*c*) "Chief Justice" means the Chief Justice of the Court;

"Court" or "Federal Court"

(*d*) "Court" or "Federal Court" means the Federal Court of Canada;

"Court of Appeal" or "Federal Court of Appeal"

(*e*) "Court of Appeal" or "Federal Court of Appeal" means that division of the Court referred to as the Court of Appeal or Federal Court of Appeal by this Act;

† *See* R.S.C., 1970 (2nd Supp.), c. 10.

CHAPITRE 1†

Loi concernant la Cour fédérale du Canada

[*Sanctionnée le 3 décembre 1970*]

Sa Majesté, sur l'avis et du consentement du Sénat et de la Chambre des communes du Canada, décrète:

TITRE ABRÉGÉ

Titre abrégé

1. La présente loi peut être citée sous le titre: *Loi sur la Cour fédérale.*

INTERPRÉTATION

Définitions

2. Dans la présente loi,

«juge en chef adjoint»

a) «juge en chef adjoint» désigne le juge en chef adjoint de la Cour;

«droit maritime canadien»

b) «droit maritime canadien» désigne le droit dont l'application relevait de la Cour de l'Échiquier du Canada, en sa juridiction d'amirauté, en vertu de la *Loi sur l'Amirauté* ou de quelque autre loi, ou qui en aurait relevé si cette Cour avait eu, en sa juridiction d'amirauté, compétence illimitée en matière maritime et d'amirauté, compte tenu des modifications apportées à ce droit par la présente loi ou par toute autre loi du Parlement du Canada;

«juge en chef»

c) «juge en chef» désigne le juge en chef de la Cour;

«Cour» ou «Cour fédérale»

d) «Cour» ou «Cour fédérale» désigne la Cour fédérale du Canada;

«Cour d'appel» ou «Cour d'appel fédérale»

e) «Cour d'appel» ou «Cour d'appel fédérale» désigne la division de la Cour appelée Cour d'appel ou Cour d'appel fédérale;

† *Voir* S.R.C. de 1970 (2e Supp.), c. 10.

"Crown" (*f*) "Crown" means Her Majesty in right of Canada;

"Federal board, commission or other tribunal" (*g*) "federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of *The British North America Act, 1867*;

"Final judgment" (*h*) "final judgment" means any judgment or other decision that determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding;

"Judge" (*i*) "judge" means a judge of the Court and includes the Chief Justice and Associate Chief Justice;

"Laws of Canada" (*j*) "laws of Canada" has the same meaning as those words have in section 101 of *The British North America Act, 1867*;

"Practice and procedure" (*k*) "practice and procedure" includes evidence relating to matters of practice and procedure;

"Property" (*l*) "property" means property of any kind whether real or personal, movable or immovable or corporeal or incorporeal and, without restricting the generality of the foregoing, includes a right of any kind, a share or a chose in action;

"Relief" (*m*) "relief" includes every species of relief whether by way of damages, payment of money, injunction, declaration, restitution of an incorporeal right, return of land or chattels or otherwise;

"Rules" (*n*) "Rules" means provisions of law and rules and orders made under section 46 or continued in force by subsection (6) of section 62;

"Ship" (*o*) "ship" includes any description of vessel or boat used or designed for use in navigation without regard to method or lack of propulsion;

f) «Couronne» désigne Sa Majesté du chef du Canada; «Couronne»

g) «office, commission ou autre tribunal fédéral» désigne un organisme ou une ou plusieurs personnes ayant, exerçant ou prétendant exercer une compétence ou des pouvoirs conférés par une loi du Parlement du Canada ou sous le régime d'une telle loi, à l'exclusion des organismes de ce genre constitués ou établis par une loi d'une province ou sous le régime d'une telle loi ainsi que des personnes nommées en vertu ou en conformité du droit d'une province ou en vertu de l'article 96 de l'*Acte de l'Amérique du Nord britannique, 1867*; «office, commission ou autre tribunal fédéral»

h) «jugement final» désigne tout jugement ou toute autre décision qui statue en totalité ou en partie sur le fond au sujet d'un droit d'une ou plusieurs des parties à une procédure judiciaire; «jugement final»

i) «juge» désigne un juge de la Cour, y compris le juge en chef et le juge en chef adjoint; «juge»

j) «droit du Canada» a le sens donné, à l'article 101 de l'*Acte de l'Amérique du Nord britannique, 1867*, à l'expression «Laws of Canada» traduite par l'expression «lois du Canada» dans les versions françaises de cet Acte; «droit du Canada»

k) «pratique et procédure» s'entend également de la preuve relative aux questions de pratique et de procédure; «pratique et procédure»

l) «bien» désigne n'importe quelle sorte de bien, mobilier ou immobilier, corporel ou incorporel, et notamment, sans restreindre la portée générale de ce qui précède, un droit de n'importe quelle nature, une part ou un droit d'action; «bien»

m) «redressement» comprend toute espèce de redressement judiciaire, qu'il soit sous forme de dommages-intérêts, de paiement d'argent, d'injonction, de déclaration, de restitution d'un droit incorporel, de restitution d'un bien mobilier ou immobilier, ou sous une autre forme; «redressement»

n) «Règles» désigne les règles et ordonnances établies en vertu de l'article 46 ou qui demeurent en vigueur aux termes du paragraphe (6) de l'article 62, ainsi «Règles»

"Supreme Court"

(*p*) "Supreme Court" means the Supreme Court of Canada; and

"Trial Division"

(*q*) "Trial Division" means that division of the Court called the Federal Court—Trial Division.

que toute autre disposition du droit en la matière;

«navire»

o) «navire» comprend toute espèce de bâtiment ou bateau utilisé ou conçu pour la navigation, indépendamment de son mode de propulsion ou même s'il n'en a pas;

«Cour suprême»

p) «Cour suprême» désigne la Cour suprême du Canada; et

«Division de première instance»

q) «Division de première instance» désigne la division de la Cour appelée Division de première instance de la Cour fédérale.

THE COURT

LA COUR

Original Court continued

3. The court of law, equity and admiralty in and for Canada now existing under the name of the Exchequer Court of Canada is hereby continued under the name of the Federal Court of Canada as an additional court for the better administration of the laws of Canada and shall continue to be a superior court of record having civil and criminal jurisdiction.

Maintien du tribunal existant

3. Le tribunal de *common law*, d'*equity* et d'amirauté du Canada existant actuellement sous le nom de Cour de l'Échiquier du Canada est maintenu sous le nom de Cour fédérale du Canada, en tant que tribunal supplémentaire pour la bonne application du droit du Canada, et demeure une cour supérieure d'archives ayant compétence en matière civile et pénale.

Court to consist of two divisions

4. The Federal Court of Canada shall hereafter consist of two divisions, called the Federal Court—Appeal Division (which may be referred to as the Court of Appeal or Federal Court of Appeal) and the Federal Court—Trial Division.

La Cour est formée de deux divisions

4. La Cour fédérale du Canada est désormais formée de deux divisions appelées Division d'appel de la Cour fédérale qui peut être appelée Cour d'appel ou Cour d'appel fédérale et Division de première instance de la Cour fédérale.

THE JUDGES

LES JUGES

Constitution of Court

5. (1) The Federal Court of Canada shall consist of the following judges:

(*a*) a chief justice called the Chief Justice of the Federal Court of Canada, who shall be the president of the Court, shall be the president of and a member of the Court of Appeal and shall be *ex officio* a member of the Trial Division;

(*b*) an associate chief justice called the Associate Chief Justice of the Federal Court of Canada, who shall be the president of and a member of the Trial Division and shall be *ex officio* a member of the Court of Appeal; and

Composition de la Cour

5. (1) La Cour fédérale du Canada est composée des juges suivants:

a) un juge en chef, appelé juge en chef de la Cour fédérale du Canada, qui est président de la Cour, président et membre de la Cour d'appel et membre de droit de la Division de première instance;

b) un juge en chef adjoint, appelé juge en chef adjoint de la Cour fédérale du Canada, qui est président et membre de la Division de première instance et qui est membre de droit de la Cour d'appel; et

Extra-ordinary remedies

18. The Trial Division has exclusive original jurisdiction

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

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

Recours extraordinaires

18. La Division de première instance a compétence exclusive en première instance

a) pour émettre une injonction, un bref de *certiorari,* un bref de *mandamus,* un bref de prohibition ou un bref de *quo warranto,* ou pour rendre un jugement déclaratoire, contre tout office, toute commission ou tout autre tribunal fédéral; et

b) pour entendre et juger toute demande de redressement de la nature de celui qu'envisage l'alinéa *a*), et notamment toute procédure engagée contre le procureur général du Canada aux fins d'obtenir le redressement contre un office, une commission ou à un autre tribunal fédéral.

Inter-governmental disputes

19. Where the legislature of a province has passed an Act agreeing that the Court, whether referred to in that Act by its new name or by its former name, has jurisdiction in cases of controversies,

(*a*) between Canada and such province, or

(*b*) between such province and any other province or provinces that have passed a like Act,

the Court has jurisdiction to determine such controversies and the Trial Division shall deal with any such matter in the first instance.

Différends entre gouvernements

19. Lorsque l'assemblée législative d'une province a adopté une loi reconnaissant que la Cour, qu'elle y soit désignée sous son nouveau ou son ancien nom, a compétence dans les cas de litige

a) entre le Canada et cette province, ou

b) entre cette province et une ou plusieurs autres provinces ayant adopté une loi au même effet,

la Cour a compétence pour juger ces litiges et la Division de première instance connaît de ces questions en première instance.

Industrial property

20. The Trial Division has exclusive original jurisdiction as well between subject and subject as otherwise,

(*a*) in all cases of conflicting applications for any patent of invention, or for the registration of any copyright, trade mark or industrial design, and

(*b*) in all cases in which it is sought to impeach or annul any patent of invention, or to have any entry in any register of copyrights, trade marks or industrial designs made, expunged, varied or rectified,

and has concurrent jurisdiction in all other cases in which a remedy is sought under the authority of any Act of the Parliament of Canada or at law or in equity, respecting

Propriété industrielle

20. La Division de première instance a compétence exclusive en première instance, tant entre sujets qu'autrement,

a) dans tous les cas où des demandes de brevet d'invention ou d'enregistrement d'un droit d'auteur, d'une marque de commerce ou d'un dessin industriel sont incompatibles, et

b) dans tous les cas où l'on cherche à faire invalider ou annuler un brevet d'invention ou insérer, rayer, modifier ou rectifier une inscription dans un registre des droits d'auteur, des marques de commerce ou des dessins industriels,

et elle a compétence concurrente dans tous les autres cas où l'on cherche à obtenir un redressement en vertu d'une

(*b*) in the case of any other judgment within thirty days (in the calculation of which July and August shall be excluded),

from the pronouncement of the judgment appealed from or within such further time as the Trial Division may, either before or after the expiry of those ten or thirty days, as the case may be, fix or allow.

b) dans le cas de tout autre jugement, dans les trente jours (les mois de juillet et août devant être exclus pour le calcul de ce délai),

à compter du prononcé du jugement dont il est fait appel ou dans le délai supplémentaire que la Division de première instance peut, soit avant, soit après l'expiration de ces dix ou trente jours, selon le cas, fixer ou accorder.

Service

(3) All parties directly affected by the appeal shall be served forthwith with a true copy of the notice of appeal and evidence of service thereof shall be filed in the Registry of the Court.

Signification

(3) Une copie certifiée conforme de l'avis d'appel doit être immédiatement signifiée à toutes les parties directement intéressées dans l'appel et la preuve de cette signification doit être déposée au greffe de la Cour.

Final judgment

(4) For the purposes of this section a final judgment includes a judgment that determines a substantive right except as to some question to be determined by a referee pursuant to the judgment.

Jugement final

(4) Aux fins du présent article, un jugement final comprend notamment un jugement qui statue sur le fond au sujet d'un droit, à l'exception d'un point litigieux laissé à la décision ultérieure d'un arbitre qui doit statuer en conformité du jugement.

Review of decisions of federal board, commission or other tribunal

28. (1) Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, upon the ground that the board, commission or tribunal

(*a*) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

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

(*c*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

Examen des décisions d'un office, d'une commission ou d'un autre tribunal *fédéral*

28. (1) Nonobstant l'article 18 ou les dispositions de toute autre loi, la Cour d'appel a compétence pour entendre et juger une demande d'examen et d'annulation d'une décision ou ordonnance, autre qu'une décision ou ordonnance de nature administrative qui n'est pas légalement soumise à un processus judiciaire ou quasi judiciaire, rendue par un office, une commission ou un autre tribunal fédéral ou à l'occasion de procédures devant un office, une commission ou un autre tribunal fédéral, au motif que l'office, la commission ou le tribunal

a) n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;

b) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier; ou

c) a fondé sa décision ou son ordonnance sur une conclusion de fait erronée, tirée de façon absurde ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.

When application may be made

(2) Any such application may be made by the Attorney General of Canada or any party directly affected by the decision or order by filing a notice of the application in the Court within ten days of the time the decision or order was first communicated to the office of the Deputy Attorney General of Canada or to that party by the board, commission or other tribunal, or within such further time as the Court of Appeal or a judge thereof may, either before or after the expiry of those ten days, fix or allow.

Délai de présentation de la demande

(2) Une demande de ce genre peut être faite par le procureur général du Canada ou toute partie directement affectée par la décision ou l'ordonnance, par dépôt à la Cour d'un avis de la demande dans les dix jours qui suivent la première communication de cette décision ou ordonnance au bureau du sous-procureur général du Canada ou à cette partie par l'office, la commission ou autre tribunal, ou dans le délai supplémentaire que la Cour d'appel ou un de ses juges peut, soit avant soit après l'expiration de ces dix jours, fixer ou accorder.

Trial Division deprived of jurisdiction

(3) Where the Court of Appeal has jurisdiction under this section to hear and determine an application to review and set aside a decision or order, the Trial Division has no jurisdiction to entertain any proceeding in respect of that decision or order.

Cas où la Division de première instance n'a pas compétence

(3) Lorsque, en vertu du présent article, la Cour d'appel a compétence pour entendre et juger une demande d'examen et d'annulation d'une décision ou ordonnance, la Division de première instance est sans compétence pour connaître de toute procédure relative à cette décision ou ordonnance.

Reference to Court of Appeal

(4) A federal board, commission or other tribunal to which subsection (1) applies may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Court of Appeal for hearing and determination.

Renvoi à la Cour d'appel

(4) Un office, une commission ou un autre tribunal fédéral auxquels s'applique le paragraphe (1) peut, à tout stade de ses procédures, renvoyer devant la Cour d'appel pour audition et jugement, toute question de droit, de compétence ou de pratique et procédure.

Hearing in summary way

(5) An application or reference to the Court of Appeal made under this section shall be heard and determined without delay and in a summary way.

Procédure sommaire d'audition

(5) Les demandes ou renvois à la Cour d'appel faits en vertu du présent article doivent être entendus et jugés sans délai et d'une manière sommaire.

Limitation on proceedings against certain decisions or orders

(6) Notwithstanding subsection (1), no proceeding shall be taken thereunder in respect of a decision or order of the Governor in Council, the Treasury Board, a superior court or the Pension Appeals Board or in respect of a proceeding for a service offence under the *National Defence Act*.

Restriction relative aux procédures d'opposition à certaines décisions ou ordonnances

(6) Nonobstant le paragraphe (1), aucune procédure ne doit être instituée sous son régime relativement à une décision ou ordonnance du gouverneur en conseil, du conseil du Trésor, d'une cour supérieure ou de la Commission d'appel des pensions ou relativement à une procédure pour une infraction militaire en vertu de la *Loi sur la défense nationale*.

Where decision not to be restrained

29. Notwithstanding sections 18 and 28, where provision is expressly made by an Act of the Parliament of Canada for an appeal as such to the Court, to the Supreme Court, to the Governor in Council or to the Treasury Board from a decision or order

Cas où il ne doit pas être mis obstacle à la décision

29. Nonobstant les articles 18 et 28, lorsqu'une loi du Parlement du Canada prévoit expressément qu'il peut être interjeté appel, devant la Cour, la Cour suprême, le gouverneur en conseil ou le conseil du Trésor, d'une décision ou ordonnance d'un

CANADA

CONSOLIDATION

CODIFICATION

Federal Courts Rules

Règles des Cours fédérales

SOR/98-106

DORS/98-106

Current to July 28, 2020

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À jour au 28 juillet 2020

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Exceptions to General Procedure

Ex parte proceedings

316.1 Despite rules 304, 306, 309 and 314, for a proceeding referred to in paragraph 300(b) that is brought *ex parte*,

(a) the notice of application, the applicant's record, affidavits and documentary exhibits and the requisition for hearing are not required to be served; and

(b) the applicant's record and the requisition for hearing must be filed at the time the notice of application is filed.

SOR/2013-18, s. 10.

Summary application under *Income Tax Act*

316.2 (1) Except for rule 359, the procedures set out in Part 7 apply, with any modifications that are required, to a summary application brought under section 231.7 of the *Income Tax Act*.

Commencing the application

(2) The application shall be commenced by a notice of summary application in Form 316.2.

SOR/2013-18, s. 10.

Material in the Possession of a Tribunal

Material from tribunal

317 (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.

Request in notice of application

(2) An applicant may include a request under subsection (1) in its notice of application.

Service of request

(3) If an applicant does not include a request under subsection (1) in its notice of application, the applicant shall serve the request on the other parties.

SOR/2002-417, s. 19; SOR/2006-219, s. 11(F).

Exceptions aux règles générales de procédure

Instances présentées *ex parte*

316.1 Malgré les règles 304, 306, 309 et 314, s'agissant d'instances visées à l'alinéa 300b) qui sont présentées *ex parte* :

a) l'avis de demande, le dossier du demandeur, les affidavits et pièces documentaires du demandeur et la demande d'audience n'ont pas à être signifiés;

b) le dossier du demandeur et la demande d'audience doivent être déposés au moment du dépôt de l'avis de demande.

DORS/2013-18, art. 10.

Demande sommaire en vertu de la *Loi de l'impôt sur le revenu*

316.2 (1) À l'exception de la règle 359, la procédure établie à la partie 7 s'applique, avec les modifications nécessaires, à la demande sommaire présentée en vertu de l'article 231.7 de la *Loi de l'impôt sur le revenu*.

Introduction de la demande

(2) La demande est introduite par un avis de demande sommaire établi selon la formule 316.2.

DORS/2013-18, art. 10.

Obtention de documents en la possession d'un office fédéral

Matériel en la possession de l'office fédéral

317 (1) Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande, en signifiant à l'office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés.

Demande inclue dans l'avis de demande

(2) Un demandeur peut inclure sa demande de transmission de documents dans son avis de demande.

Signification de la demande de transmission

(3) Si le demandeur n'inclut pas sa demande de transmission de documents dans son avis de demande, il est tenu de signifier cette demande aux autres parties.

DORS/2002-417, art. 19; DORS/2006-219, art. 11(F).

Material to be transmitted

318 (1) Within 20 days after service of a request under rule 317, the tribunal shall transmit

(a) a certified copy of the requested material to the Registry and to the party making the request; or

(b) where the material cannot be reproduced, the original material to the Registry.

Objection by tribunal

(2) Where a tribunal or party objects to a request under rule 317, the tribunal or the party shall inform all parties and the Administrator, in writing, of the reasons for the objection.

Directions as to procedure

(3) The Court may give directions to the parties and to a tribunal as to the procedure for making submissions with respect to an objection under subsection (2).

Order

(4) The Court may, after hearing submissions with respect to an objection under subsection (2), order that a certified copy, or the original, of all or part of the material requested be forwarded to the Registry.

Return of material

319 Unless the Court directs otherwise, after an application has been heard, the Administrator shall return to a tribunal any original material received from it under rule 318.

References from a Tribunal

Definition of *reference*

320 (1) In rules 321 to 323, ***reference*** means a reference to the Court made by a tribunal or by the Attorney General of Canada under section 18.3 of the Act.

Procedures on applications apply

(2) Subject to rules 321 to 323, rules 309 to 311 apply to references.

Notice of application on reference

321 A notice of application in respect of a reference shall set out

(a) the name of the court to which the application is addressed;

Documents à transmettre

318 (1) Dans les 20 jours suivant la signification de la demande de transmission visée à la règle 317, l'office fédéral transmet :

a) au greffe et à la partie qui en a fait la demande une copie certifiée conforme des documents en cause;

b) au greffe les documents qui ne se prêtent pas à la reproduction et les éléments matériels en cause.

Opposition de l'office fédéral

(2) Si l'office fédéral ou une partie s'opposent à la demande de transmission, ils informent par écrit toutes les parties et l'administrateur des motifs de leur opposition.

Directives de la Cour

(3) La Cour peut donner aux parties et à l'office fédéral des directives sur la façon de procéder pour présenter des observations au sujet d'une opposition à la demande de transmission.

Ordonnance

(4) La Cour peut, après avoir entendu les observations sur l'opposition, ordonner qu'une copie certifiée conforme ou l'original des documents ou que les éléments matériels soient transmis, en totalité ou en partie, au greffe.

Documents retournés

319 Sauf directives contraires de la Cour, après l'audition de la demande, l'administrateur retourne à l'office fédéral les originaux reçus aux termes de la règle 318.

Renvois d'un office fédéral

Définition

320 (1) Dans les règles 321 à 323, ***renvoi*** s'entend d'un renvoi fait à la Cour par un office fédéral ou le procureur général du Canada en vertu de l'article 18.3 de la Loi.

Application d'autres dispositions

(2) Sous réserve des règles 321 à 323, les règles 309 à 311 s'appliquent aux renvois.

Contenu de l'avis de demande

321 L'avis de demande concernant un renvoi contient les renseignements suivants :

a) le nom de la cour à laquelle la demande est adressée;

Directions re assessment

(5) Where the Court orders that costs be assessed in accordance with Tariff B, the Court may direct that the assessment be performed under a specific column or combination of columns of the table to that Tariff.

Directives de la Cour

(5) Dans le cas où la Cour ordonne que les dépens soient taxés conformément au tarif B, elle peut donner des directives prescrivant que la taxation soit faite selon une colonne déterminée ou une combinaison de colonnes du tableau de ce tarif.

Further discretion of Court

(6) Notwithstanding any other provision of these Rules, the Court may

(a) award or refuse costs in respect of a particular issue or step in a proceeding;

(b) award assessed costs or a percentage of assessed costs up to and including a specified step in a proceeding;

(c) award all or part of costs on a solicitor-and-client basis; or

(d) award costs against a successful party.

Autres pouvoirs discrétionnaires de la Cour

(6) Malgré toute autre disposition des présentes règles, la Cour peut :

a) adjuger ou refuser d'adjuger les dépens à l'égard d'une question litigieuse ou d'une procédure particulières;

b) adjuger l'ensemble ou un pourcentage des dépens taxés, jusqu'à une étape précise de l'instance;

c) adjuger tout ou partie des dépens sur une base avocat-client;

d) condamner aux dépens la partie qui obtient gain de cause.

Award and payment of costs

(7) Costs shall be awarded to the party who is entitled to receive the costs and not to the party's solicitor, but they may be paid to the party's solicitor in trust.

SOR/2002-417, s. 25(F); SOR/2010-176, s. 11.

Adjudication et paiement des dépens

(7) Les dépens sont adjugés à la partie qui y a droit et non à son avocat, mais ils peuvent être payés en fiducie à celui-ci.

DORS/2002-417, art. 25(F); DORS/2010-176, art. 11.

Costs of motion

401 (1) The Court may award costs of a motion in an amount fixed by the Court.

Dépens de la requête

401 (1) La Cour peut adjuger les dépens afférents à une requête selon le montant qu'elle fixe.

Costs payable forthwith

(2) Where the Court is satisfied that a motion should not have been brought or opposed, the Court shall order that the costs of the motion be payable forthwith.

Paiement sans délai

(2) Si la Cour est convaincue qu'une requête n'aurait pas dû être présentée ou contestée, elle ordonne que les dépens afférents à la requête soient payés sans délai.

Costs of discontinuance or abandonment

402 Unless otherwise ordered by the Court or agreed by the parties, a party against whom an action, application or appeal has been discontinued or against whom a motion has been abandoned is entitled to costs forthwith, which may be assessed and the payment of which may be enforced as if judgment for the amount of the costs had been given in favour of that party.

Dépens lors d'un désistement ou abandon

402 Sauf ordonnance contraire de la Cour ou entente entre les parties, lorsqu'une action, une demande ou un appel fait l'objet d'un désistement ou qu'une requête est abandonnée, la partie contre laquelle l'action, la demande ou l'appel a été engagé ou la requête présentée a droit aux dépens sans délai. Les dépens peuvent être taxés et le paiement peut en être poursuivi par exécution forcée comme s'ils avaient été adjugés par jugement rendu en faveur de la partie.

Motion for directions

403 (1) A party may request that directions be given to the assessment officer respecting any matter referred to in rule 400,

Requête pour directives

403 (1) Une partie peut demander que des directives soient données à l'officier taxateur au sujet des questions visées à la règle 400 :

Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

MOTION RECORD OF THE RESPONDING PARTY, AIR PASSENGER RIGHTS

Respondent's Motion to Strike

VOLUME 2 of 2

Appendix "B" – Book of Authorities

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TO: **CANADIAN TRANSPORTATION AGENCY**

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Case Law

Case Name:

876947 Ontario Ltd. (c.o.b. RPR Environmental) v. Canada (Attorney General)

Between
876947 Ontario Limited o/a RPR Environmental and Patrick Whitty, Appellants, and
The Attorney General of Canada, Respondent

[2013] F.C.J. No. 753

[2013] A.C.F. no 753

2013 FCA 156

446 N.R. 314

77 C.E.L.R. (3d) 188

2013 CarswellNat 2185

229 A.C.W.S. (3d) 677

Docket A-524-12

Federal Court of Appeal
Toronto, Ontario

Sharlow, Dawson and Gauthier JJ.A.

Heard: May 7, 2013.
Judgment: June 14, 2013.

(32 paras.)

Counsel:

Vilko Zbogar and Kim Stanton, for the Appellants.

Michael J. Sims and Andrew Laws, for the Respondent.

The judgment of the Court was delivered by

1 DAWSON J.A.:-- The issue raised on this appeal is whether a judge of the Federal Court erred by upholding an order made by a prothonotary that struck out portions of the appellants' fresh as amended notice of application. As I understand the Judge's reasons, the Judge proceeded to exercise his discretion *de novo* and dismissed the appeal on three grounds which are discussed in more detail later in these reasons (2012 FC 1356, unreported reasons issued in Court File T-2176-10 on November 23, 2012). In my view, the Judge committed a number of errors in his analysis such that the appeal should be allowed.

Factual Background

2 The Federal Court proceeding arises out of an investigation allegedly conducted on behalf of the Minister of the Environment by the Environmental Enforcement Directorate of Environment Canada (EED) as a result of an application made to it pursuant to section 17 of the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33 (Act). The appellants, applicants in the Federal Court, assert that there was no valid basis on which to commence and continue the investigation, the EED failed to discontinue the investigation, or alternatively, the EED failed to produce reports required by sections 19 and 21 of the Act. Amongst other things, the appellants seek the following relief in the Federal Court:

(a) A declaration that the purported section 17 application is null and void and ineffective because it was not made by a qualified individual, that is, a person who is resident in Canada and at least 18 years of age, and because the section 17 application did not include a solemn affirmation or declaration containing certain information as required by subsection 17(2) of the Act;

(b) A writ of *certiorari* quashing the Minister's decision to investigate the matters set out in the purported section 17 application;

(c) A writ of *mandamus* requiring the Minister and his agents to discontinue their section 17 investigation, or in the alternative, a writ of *prohibition* against the Minister and his agents continuing the section 17 investigation; and

(d) If the section 17 investigation has already been discontinued, a writ of *mandamus* requiring the Minister to send to the appellants a copy of the written report describing the information obtained during the investigation and stating the reasons for its discontinuation, as required by subsection 21(2) of the Act.

3 The respondent's motion to strike portions of the fresh as amended notice of application was based on two grounds. First, the respondent argued that the officers of the EED are peace officers who exercise broad law enforcement powers. Thus, an investigation undertaken pursuant to section 18 of the Act is a criminal investigation. As such, the Federal Court lacked jurisdiction to review the decision of the EED. Moreover, the impugned portions of the amended application were said to amount to a collateral attack on the criminal process and, as a result, were an abuse of process. Second, the respondent asserted that a decision by an officer of the EED to undertake an investigation is not a "decision" within the meaning of section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 because the decision does not affect the rights or interests of the subject of the investigation.

4 The Prothonotary and the Judge struck the allegations relating to the improper commencement and continuation of the investigation, as well as the allegation that the EED failed to discontinue the investigation. The claims for relief contained in paragraphs (a), (b) and (c), set out above, were also struck out, as well as a request for the appointment of an *amicus curiae.* The claim for relief contained in paragraph (d) was not struck, nor were the paragraphs of the pleading which relate to this ground of relief.

The scheme of the Act

5 In order to consider the merits of the motion to strike, it is necessary to understand the scheme of the Act.

6 Part 2 of the Act is entitled "Public Participation". For the purpose of this appeal, relevant provisions found in Part 2 are:

i. An individual, resident in Canada and 18 years of age and older, may apply to the Minister of the Environment for the investigation of any offence under the Act that the individual alleges has occurred (subsection 17(1)).
ii. The application shall include a solemn affirmation or declaration that sets out certain specified information (subsection 17(2)).
iii. The Minister is required to acknowledge receipt of the application within 20 days of receipt and "shall investigate all matters that the Minister considers necessary to determine the facts relating to the alleged offence" (section 18).
iv. After acknowledging receipt of the application, the Minister shall report to the applicant every 90 days on the progress of the investigation and the action, if any, that the Minister has taken or proposes to take. Generally, but not always, the Minister shall include in the report an estimate of the time required to complete the investigation or to implement the action (section 19).
v. At any stage of the investigation, the Minister may send documents or

other evidence to the Attorney General of Canada for consideration of whether an offence under the Act has been, or is about to be, committed and for any action the Attorney General may wish to take (section 20).

vi. The Minister may discontinue the investigation if of the view that the alleged offence does not require further investigation or that the investigation does not substantiate the alleged offence (subsection 21(1)).

vii. If the investigation is discontinued, the Minister shall prepare a report in writing that describes the information obtained during the investigation and states the reasons for the discontinuance of the investigation. A copy of this report is to be provided to the applicant and to any person whose conduct was investigated (subsection 21(2)).

viii. An individual who applied for an investigation may bring an environmental protection action against an alleged offender if the Minister failed to conduct an investigation and report within a reasonable time, or if the Minister's response to the investigation was unreasonable (subsection 22(1)).

ix. In the environmental protection action the individual may seek relief including a declaratory order and interlocutory or final injunctive relief. The individual may not claim damages (subsection 22(3)).

x. An environmental protection action may not be brought against a person if, in response to the alleged conduct on which the action is based, the person was convicted under the Act, or environmental protection alternative measures within the meaning of Part 10 of the Act were used to deal with the person (section 25).

xi. The alleged offence in an environmental protection action is to be proven on a balance of probabilities (section 29).

7 Part 10 of the Act is entitled "Enforcement". Relevant provisions contained in Part 10 are:

i. The Minister may designate enforcement officers for the purposes of the Act or any provision of the Act (subsection 217(1)).

ii. Such officers have all of the powers of a peace officer, except that the Minister may specify limits on those powers (subsection 217(3)).

8 Sections 17 to 22, 25 and 217 of the Act are set out in the appendix to these reasons.

The test on a motion to strike a notice of application

9 It is well settled law that notices of application for judicial review are struck only in exceptional circumstances. The test to be applied is whether the application is so clearly improper as to be bereft of any possibility of success. Unless this stringent test can be met, the proper way to contest an application is to appear and argue at the hearing of the application (*David Bull Laboratories*

(Canada) Inc. v. Pharmacia Inc., [1995] 1 F.C. 588 (C.A.)).

10 In my view, particular caution is required on a motion to strike when only a portion of a notice of application is impugned, and that portion is integrally related to the remaining portion of the application. As noted in *David Bull*, objections to the application can be dealt with promptly and efficiently in the context of consideration of the merits of the case, particularly where a portion of the application is to proceed to hearing in any event. As well, the Judge hearing the application may be constrained if integrally related portions of the application have been struck out.

The decision of the Prothonotary

11 The Prothonotary struck the impugned provisions of the application on the basis that there was no reviewable decision. The Minister's decision to refer an application for further investigation initiates a process that may or may not result in a decision to lay charges. In the Prothonotary's view, this is a preliminary step that in and of itself does not constitute a decision that is subject to judicial review.

The decision of the Judge

12 After setting out the factual background, the Judge accepted the joint submission of the parties that the appeal should proceed as a *de novo* hearing. He then appended relevant provisions of the Act to his reasons and quoted sections 18 and 18.1 of the *Federal Courts Act*.

13 The Judge then directed himself to whether in the circumstances before the Court a "peace officer" acts as a federal board, commission or other tribunal. The Judge found that the officer's decision to initiate an investigation was made by a federal board so that the Federal Court could judicially review the decision. To reach this conclusion the Judge correctly set out the two-step test to be applied, as articulated in *Anisman v. Canada (Border Services Agency)*, 2010 FCA 52, 400 N.R. 137, at paragraph 29 (reasons, paragraph 16). However, the Judge did not apply this test to the facts before him. Instead, he appears to have concluded at paragraph 17 of his reasons (the language of which is not entirely clear) that the Minister or a delegate of the Minister acts as a "federal board, commission or other tribunal" as defined in section 2 of the *Federal Courts Act* when exercising or purporting to exercise the Minister's authority under section 18 of the Act.

14 The Judge then gave three reasons for upholding the decision of the Prothonotary.

15 First, the Judge found that the Minister's decision was not susceptible to review because it did not amount to a decision affecting the legal rights of the appellants, nor did it impose any legal obligations or cause prejudicial effects. No reasons were given for this conclusion (reasons, paragraph 19).

16 Second, the Judge noted that only in exceptional circumstances should interlocutory decisions be judicially reviewed. No analysis was conducted into whether the circumstances before the Court

were exceptional (reasons, paragraph 20).

17 Finally, the Judge noted that there were related proceedings pending in the Ontario Superior Court of Justice. This allowed the Federal Court, in its discretion, to decline to exercise its jurisdiction to judicially review a decision where an applicant has an adequate alternative remedy. In the Judge's view, the Ontario proceeding provided such a remedy, although no reasons were given for this conclusion (reasons, paragraph 21).

Analysis

18 In my view, the Judge did not err in his conclusion that he was required to review the Prothonotary's decision on a *de novo* basis.

19 I also agree that a person acting under section 18 of the Act, that is, a person who is investigating "all matters that the Minister considers necessary to determine the facts relating to the alleged offence" is a person who exercises, or purports to exercise, powers conferred by an Act of Parliament. Such a person therefore fall within the definition of "federal board, commission or other tribunal" found in section 2 of the *Federal Courts Act*.

20 I now consider the three grounds the Judge relied upon to find that the impugned portions of the application should be struck out.

21 To begin, as noted above at paragraph 3, the motion to strike was brought on two grounds. During the oral argument of this appeal, counsel confirmed that no one argued before the Federal Court that either the interlocutory nature of the decision or the existence of an adequate alternate remedy would justify an order striking portions of the application. The respondent did not seek to uphold the decision of the Federal Court on either of these grounds.

22 As this Court recently noted in *Wells Fargo Equipment Finance Co. v. MLT-3 (The)*, 2013 FCA 96, [2013] F.C.J. No. 380, at paragraph 21 (citing *Rodaro v. Royal Bank of Canada*, (2002), 59 O.R. (3d) 74 (C.A.)) when a judge decides to take the unusual step of deciding a case on a basis not argued by counsel, fairness generally requires that the parties be advised and be afforded the opportunity to make submissions on the new issue or issues. In my view, in the present case the Judge ought to have afforded that opportunity to the parties.

23 I now turn to the first reason given by the Judge for striking the impugned portions of the application: the decision to initiate an investigation does not affect the legal rights of the appellants, nor does it impose legal obligations or cause prejudicial effects.

24 I disagree that the appellants' submissions that their legal rights were affected is an argument bereft of any possibility of success. As the review of the legislative regime shows, it is at least arguable that legal consequences flow from the commencement of an investigation under section 18 of the Act. The subject of the investigation is exposed to the risk that the matter may be referred to

the Attorney General (section 20), exposed to the risk of that an environmental protection action will be commenced (section 22) and entitled to a report if the investigation is discontinued (section 21). Moreover, the evidentiary record before the Federal Court did not provide a sufficient evidentiary basis for the Judge's conclusion that the decision did not cause the appellants to suffer prejudicial effects.

25 The Judge's second reason was that only in exceptional circumstances should interlocutory decisions be judicially reviewed. Assuming, without deciding, that the decision at issue is interlocutory in nature, this is not a basis in law for striking portions of a notice of application. Rather, it is a ground on which the Federal Court may decline to exercise its discretion to grant a remedy when it determines the merits of the application for judicial review.

26 The Judge's final reason was the existence of an adequate alternate remedy: a pending tort claim in the Ontario Superior Court of Justice. Again, the existence of an adequate alternate remedy is a ground on which the Federal Court may decline to grant a remedy when it determines the merits of the application for judicial review. It is not a basis in law for striking a notice of application, or portions thereof. This is particularly the case when the appellants were not afforded the opportunity to adduce evidence or make submissions on the adequacy of the remedy.

27 In light of these errors it is necessary for this Court to consider the Prothonotary's decision *de novo*.

28 The grounds on which the motion to strike was based are set out at paragraph 3 above. I have already dealt with the second ground that no decision was made that affected the appellants' rights. The first ground is premised on the thesis that a decision made under section 18 of the Act is made by a peace officer as part of a criminal process.

29 It is not plain and obvious to me that this is so. During oral argument we were informed that the legislation at issue has not been judicially considered. In my view, it is at least arguable that a section 18 investigation is completely separate from the exercise of peace officer powers under Part 10 of the Act. Support for this position may be found in sections 20 and 29 of the Act. Section 20, read in context, could support the conclusion that there is no criminal investigation until the matter is referred to the Attorney General for consideration. Section 29 shows that in one of the possible outcomes from an investigation, an environmental protection action, the offence alleged is to be established on the civil, not criminal standard of proof. A lower standard of proof from that applied in the criminal process could again support the argument that the section 18 process is not criminal in nature.

30 As I would allow the appeal, so that the application for judicial review will proceed on the merits in its entirety, it is inappropriate to express a final conclusion on these arguments. It is sufficient to find, as I have, that the argument that a person exercising authority under section 18 of the Act is not acting as a peace officer in a criminal process is not bereft of any possibility of success.

Conclusion

31 For these reasons, I would allow the appeal and set aside the order of the Federal Court with costs both here and below in any event of the cause. Making the order the Federal Court should have made, I would dismiss the motion to strike portions of the notice of application.

Postscript

32 During the oral argument of this appeal a factual dispute emerged about whether the investigation has been concluded against the individual appellant. Counsel for the respondent indicated it was concluded. The record on this point is, in my view, ambiguous. It would be open to the parties, and helpful to the Federal Court, if the parties were to clarify the record on this point.

DAWSON J.A.
SHARLOW J.A.:-- I agree.
GAUTHIER J.A.:-- I agree.

* * * * *

APPENDIX

Sections 17 to 22, as well as sections 25 and 217 of the *Canadian Environmental Protection Act, 1999* read as follows:

> 17. (1) An individual who is resident in Canada and at least 18 years of age may apply to the Minister for an investigation of any offence under this Act that the individual alleges has occurred.
> (2) The application shall include a solemn affirmation or declaration
>
> (*a*) stating the name and address of the applicant;
>
> (*b*) stating that the applicant is at least 18 years old and a resident of Canada;
>
> (*c*) stating the nature of the alleged offence and the name of each person alleged to have contravened, or to have done something in contravention of, this Act or the regulations; and
>
> (*d*) containing a concise statement of the evidence supporting the allegations of the applicant.

(3) The Minister may prescribe the form in which an application under this section is required to be made.

18. The Minister shall acknowledge receipt of the application within 20 days of the receipt and shall investigate all matters that the Minister considers necessary to determine the facts relating to the alleged offence.

19. After acknowledging receipt of the application, the Minister shall report to the applicant every 90 days on the progress of the investigation and the action, if any, that the Minister has taken or proposes to take, and the Minister shall include in the report an estimate of the time required to complete the investigation or to implement the action, but a report is not required if the investigation is discontinued before the end of the 90 days.

20. At any stage of an investigation, the Minister may send any documents or other evidence to the Attorney General of Canada for consideration of whether an offence has been or is about to be committed under this Act and for any action that the Attorney General may wish to take.

21. (1) The Minister may discontinue the investigation if the Minister is of the opinion that

(*a*) the alleged offence does not require further investigation; or

(*b*) the investigation does not substantiate the alleged offence.

(2) If the investigation is discontinued, the Minister shall

(*a*) prepare a report in writing describing the information obtained during the investigation and stating the reasons for its discontinuation; and

(*b*) send a copy of the report to the applicant and to any person whose conduct was investigated.

22. (1) An individual who has applied for an investigation may bring an environmental protection action if

(*a*) the Minister failed to conduct an investigation and report within a

reasonable time; or

(*b*) the Minister's response to the investigation was unreasonable.

(2) The action may be brought in any court of competent jurisdiction against a person who committed an offence under this Act that

(*a*) was alleged in the application for the investigation; and

(*b*) caused significant harm to the environment.

(3) In the action, the individual may claim any or all of the following:

(*a*) a declaratory order;

(*b*) an order, including an interlocutory order, requiring the defendant to refrain from doing anything that, in the opinion of the court, may constitute an offence under this Act;

(*c*) an order, including an interlocutory order, requiring the defendant to do anything that, in the opinion of the court, may prevent the continuation of an offence under this Act;

(*d*) an order to the parties to negotiate a plan to correct or mitigate the harm to the environment or to human, animal or plant life or health, and to report to the court on the negotiations within a time set by the court; and

(*e*) any other appropriate relief, including the costs of the action, but not including damages.

[...]

25. An environmental protection action may not be brought against a person if the person was convicted of an offence under this Act, or environmental protection alternative measures within the meaning of Part 10 were used to deal with the person, in respect of the alleged conduct on which the action is based.

[...]

217. (1) The Minister may designate as enforcement officers or analysts for the purposes of this Act, or any provision of this Act,

(*a*) persons or classes of persons who, in the Minister's opinion, are qualified to be so designated; and

(*b*) with the approval of a government, persons or classes of persons employed by the government in the administration of a law respecting the protection of the environment.

(2) Every enforcement officer or analyst shall be furnished with a certificate of designation as an enforcement officer or analyst, as the case may be, and on entering any place under section 218 or 220, as the case may be, shall, if so requested, produce the certificate to the person in charge of the place.

(3) For the purposes of this Act and the regulations, enforcement officers have all the powers of a peace officer, but the Minister may specify limits on those powers when designating any person or class of persons.

(4) Every power -- including arrest, entry, search and seizure -- that may be exercised in Canada in respect of an offence under this Act or the Criminal Code may, in respect of an offence arising out of a contravention of Division 3 of Part 7 or of any regulation made under that Division, or in respect of an offence under the Criminal Code that is committed in the course of enforcement of this Act, be exercised in an area of the sea referred to in paragraph 122(2)(*c*) if the offence was committed in that area of the sea.

(5) The powers referred to in subsection (4) may be exercised in an area of the sea referred to in paragraph 122(2)(*g*) if hot pursuit has been commenced in Canada or in an area of the sea referred to in any of paragraphs 122(2)(*a*) to (*e*) and (*g*).

(6) The powers referred to in subsection (4) may not be exercised under that subsection or subsection (5) in relation to a ship that is not a Canadian ship, or to a foreign national who is on board such a ship, without the consent of the

Attorney General of Canada.

* * *

17. (1) Tout particulier âgé d'au moins dix-huit ans et résidant au Canada peut demander au ministre l'ouverture d'une enquête relative à une infraction prévue par la présente loi qui, selon lui, a été commise.

(2) La demande est accompagnée d'une affirmation ou déclaration solennelle qui énonce :

a) les nom et adresse de son auteur;

b) le fait que le demandeur a au moins dix-huit ans et réside au Canada;

c) la nature de l'infraction reprochée et le nom des personnes qui auraient contrevenu à la présente loi ou à ses règlements ou auraient accompli un acte contraire à la présente loi ou à ses règlements;

d) un bref exposé des éléments de preuve à l'appui de la demande.

(3) Le ministre peut fixer, par règlement, la forme de la demande.

18. Le ministre accuse réception de la demande dans les vingt jours de sa réception et fait enquête sur tous les points qu'il juge indispensables pour établir les faits afférents à l'infraction reprochée.

19. A intervalles de quatre-vingt-dix jours à partir du moment où il accuse réception de la demande jusqu'à l'interruption de l'enquête, le ministre informe l'auteur de la demande du déroulement de l'enquête et des mesures qu'il a prises ou entend prendre. Il indique le temps qu'il faudra, à son avis, pour compléter l'enquête ou prendre les mesures en cause selon le cas.

20. Il peut, à toute étape de l'enquête, transmettre des documents ou autres éléments de preuve au procureur général du Canada pour lui permettre de déterminer si une infraction prévue à la présente loi a été commise ou est sur le point de l'être et de prendre les mesures de son choix.

21. (1) Le ministre peut interrompre l'enquête s'il estime que l'infraction reprochée ne justifie plus sa poursuite ou que ses résultats ne permettent pas de conclure à la perpétration de l'infraction.

(2) En cas d'interruption de l'enquête, il établit un rapport exposant l'information recueillie et les motifs de l'interruption et en envoie un exemplaire à l'auteur de la

demande et aux personnes dont le comportement fait l'objet de l'enquête. La copie du rapport envoyée à ces dernières ne doit comporter ni les nom et adresse de l'auteur de la demande ni aucun autre renseignement personnel à son sujet.

22. (1) Le particulier qui a demandé une enquête peut intenter une action en protection de l'environnement dans les cas suivants :

a) le ministre n'a pas procédé à l'enquête ni établi son rapport dans un délai raisonnable;

b) les mesures que le ministre entend prendre à la suite de l'enquête ne sont pas raisonnables.

(2) L'action en protection de l'environnement peut être intentée devant tout tribunal compétent contre la personne qui, selon la demande, aurait commis une infraction prévue à la présente loi, si cette infraction a causé une atteinte importante à l'environnement.

(3) Dans le cadre de son action, le particulier peut demander :

a) un jugement déclaratoire;

b) une ordonnance -- y compris une ordonnance provisoire -- enjoignant au défendeur de ne pas faire un acte qui, selon le tribunal, pourrait constituer une infraction prévue à la présente loi;

c) une ordonnance -- y compris une ordonnance provisoire -- enjoignant au défendeur de faire un acte qui, selon le tribunal, pourrait empêcher la continuation de l'infraction;

d) une ordonnance enjoignant aux parties de négocier un plan de mesures correctives visant à remédier à l'atteinte à l'environnement, à la vie humaine, animale ou végétale ou à la santé, ou à atténuer l'atteinte, et de faire rapport au tribunal sur l'état des négociations dans le délai fixé par celui-ci;

e) toute autre mesure de redressement indiquée -- notamment le paiement

des frais de justice -- autre que l'attribution de dommages-intérêts.

...

25. Elle ne peut non plus être intentée si la personne en cause a déjà, pour le comportement reproché, soit été déclarée coupable d'une infraction prévue à la présente loi, soit fait l'objet de mesures de rechange au sens de la partie 10.

...

217. (1) Le ministre peut désigner, à titre d'agent de l'autorité ou d'analyste pour l'application de tout ou partie de la présente loi :

a) les personnes -- ou catégories de personnes -- qu'il estime compétentes pour occuper ces fonctions;

b) avec l'approbation d'un gouvernement, les personnes affectées -- à titre individuel ou au titre de leur appartenance à une catégorie -- par celui-ci à l'exécution d'une loi concernant la protection de l'environnement.

(2) L'agent de l'autorité ou l'analyste reçoit un certificat attestant sa qualité, qu'il présente, sur demande, au responsable du lieu qu'il visite en vertu des articles 218 ou 220, selon le cas.

(3) Pour l'application de la présente loi et de ses règlements, l'agent de l'autorité a tous les pouvoirs d'un agent de la paix; le ministre peut toutefois restreindre ceux-ci lors de la désignation.

(4) Les pouvoirs -- notamment en matière d'arrestation, de visite, de perquisition ou de saisie -- pouvant être exercés au Canada à l'égard d'une infraction sous le régime de la présente loi ou du Code criminel peuvent l'être, à l'égard d'une infraction à la section 3 de la partie 7 ou à tout règlement pris en vertu de cette section ou d'une infraction au Code criminel commise dans le cadre de l'application de la présente loi, dans tout espace visé à l'alinéa 122(2)*c*) si l'infraction y est commise.

(5) Les pouvoirs visés au paragraphe (4) peuvent être exercés dans tout espace visé à l'alinéa 122(2)*g*) en cas de poursuite immédiate entamée au Canada ou dans un espace visé à l'un des alinéas 122(2)*a*) à *e*) et *g*).

(6) Les pouvoirs visés au paragraphe (4) ne peuvent être exercés en vertu de ce paragraphe ou du paragraphe (5) à l'égard d'un navire autre qu'un navire canadien ou à l'égard d'un étranger se trouvant à bord d'un navire autre qu'un navire canadien sans le consentement du procureur général du Canada.

2011 CAF 347, 2011 FCA 347
Federal Court of Appeal

Air Canada v. Toronto Port Authority

2011 CarswellNat 5259, 2011 CarswellNat 6021, 2011 CAF 347, 2011 FCA 347, [2011] F.C.J. No. 1725, 211 A.C.W.S. (3d) 254, 426 N.R. 131

Air Canada, Appellant and Toronto Port Authority and Porter Airlines Inc., Respondents

David Stratas J.A., Eleanor R. Dawson J.A., Gilles Létourneau J.A.

Heard: June 6, 2011
Judgment: December 12, 2011
Docket: A-355-10

Proceedings: affirming *Air Canada v. Toronto Port Authority* (2010), 2010 CF 774, 2010 CarswellNat 4044, 2010 FC 774, 2010 CarswellNat 2422, 371 F.T.R. 247 (F.C.); additional reasons at *Air Canada v. Toronto Port Authority* (2011), 2011 CarswellNat 4, 2010 FC 1335 (F.C.)

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Robert L. Armstrong, Orestes Pasparakis, Greg Sheahan, Nicholas Daube, for Respondent, Porter Airlines

***David Stratas J.A.*:**

1 This is an appeal from the judgment of the Federal Court (*per* Justice Hughes): 2010 FC 774 (F.C.). 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 *Mavi v. Canada (Attorney General)*, 2011 SCC 30, [2011] 2 S.C.R. 504 (S.C.C.). 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 (Fed. 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 (F.C.A.); *Democracy Watch v. Canada (Conflict of Interest & Ethics Commissioner)*, 2009 FCA 15, 86 Admin. L.R. (4th) 149 (F.C.A.).

30 The decided cases offer many illustrations of this situation: *e.g.*, *1099065 Ontario Inc. v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2008 FCA 47, 375 N.R. 368 (F.C.A.) (an official's letter proposing dates for a meeting); *Philipps c. Canada (Bibliothécaire & archiviste)*, 2006 FC 1378, [2007] 4 F.C.R. 11 (F.C.) (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 (Fed. 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.

170 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 preexisting 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,
>
> "federal board, commission or other tribunal"
>
> « *office fédéral* »
>
> "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...
>
> **2.** (1) Les définitions qui suivent s'appliquent à la présente loi. « office fédéral »
>
> "*federal board, commission or other tribunal*"

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> « 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 (Border Services Agency)*, 2010 FCA 52, 400 N.R. 137 (F.C.A.).

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 (F.C.); *Halterm Ltd. v. Halifax Port Authority* (2000), 184 F.T.R. 16 (Fed. 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: *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.). 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 (No. 2)* (1979), [1980] 1 S.C.R. 602 (S.C.C.); see also *R. v. Criminal Injuries Compensation Board*, [1967] 2 Q.B. 864 (Eng. Q.B.).

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.* (1991), [1992] 2 F.C. 115 (Fed. T.D.); *Jackson v. Canada (Attorney General)* (1997), 141 F.T.R. 1 (Fed. T.D.). There are a number of relevant factors relevant to the

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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 Vacations Ltd. v. Halifax Port Authority*, *supra*; *Peace Hills Trust Co. v. Moccasin*, 2005 FC 1364 (F.C.) at paragraph 61, (2005), 281 F.T.R. 201 (Eng.) (F.C.) ("[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 (Ont. Div. Ct.); *Aeric Inc. v. Canada Post Corp.*, [1985] 1 F.C. 127 (Fed. C.A.). 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 Farmers Markets Ltd.* (2003), [2004] 1 W.L.R. 233 (Eng. C.A.) at page 240, cited with approval in *McDonald v. Anishinabek Police Service* (2006), 83 O.R. (3d) 132 (Ont. 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 Cottagers (1982) Ltd. v. Rat Portage Band No. 38B*, 2008 FC 812 (F.C.) at paragraphs 45-46, (2008), [2009] 2 F.C.R. 267 (F.C.).

• *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: *Onuschak v. Canadian Society of Immigration Consultants*, 2009 FC 1135 (F.C.) at paragraph 23, (2009), 357 F.T.R. 22 (Eng.) (F.C.); *Certified General Accountants Assn. (Canada) v. Canadian Public Accountability Board* (2008), 233 O.A.C. 129 (Ont. Div. Ct.); *R. v. Panel on Take-overs & Mergers*, [1987] Q.B. 815 (Eng. 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 (N.W.T. 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 Farmers Markets Ltd.*, *supra* at page 240. 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 (N.S. T.D.).

• *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 (Ont. 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 (Ont. 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 (Sask. Q.B.); *Volker Stevin N.W.T. ('92) Ltd.*, *supra*; *R. v. Panel*, *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:
>
> . . . . .
>
> (*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 the Western Gap of the Toronto harbour to provide access to the Toronto City Centre Airport.
>
> **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*) 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 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:
>
> (*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 Regulations pursuant to subsection 63(2) of the Act;
>
> . . . . .
>
> (*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:
>
> (i) those activities described in sections 7.1 and 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;
>
> (iii) the following uses to the extent such uses are not described as activities in section 7.1, 7.2 or 7.3:
>
> (A) uses related to shipping, navigation, transportation of passengers and goods, handling of goods and storage of goods;
>
> (B) provision of municipal services or facilities in connection with such federal real property;
>
> (C) uses not otherwise within subparagraph 7.1(*c*)(iii)(A), (B) or (D) that are described in supplementary letters patent;

(D) government sponsored economic development initiatives approved by Treasury Board;

provided such uses are carried on by third parties, other than Subsidiaries, pursuant to leasing or licensing arrangements;

. . . . .

(*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;

. . . . .

(*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;

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.

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

[...]

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) les activités décrites aux paragraphes 7.1 et 7.2;

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

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

(C) utilisations qui ne sont pas prévues aux divisions 7.1*c*)(iii)(A), (B) ou (D) mais qui sont décrites dans des lettres patentes supplémentaires;

(D) projets de développement économique émanant du gouvernement et approuvés par le Conseil du Trésor;

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) 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) 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;

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.

180

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: *R. v. McGregor*, [1989] F.C.J. No. 266, 57 D.L.R. (4th) 317 (Fed. 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 subjectmatters 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.

***Létourneau, Dawson JJ.A.*:**

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

Appeal dismissed.

2017 CAF 160, 2017 FCA 160
Federal Court of Appeal

Apotex Inc. v. Canada (Health)

2017 CarswellNat 3442, 2017 CarswellNat 9830, 2017 CAF 160,
2017 FCA 160, 281 A.C.W.S. (3d) 192, 36 Admin. L.R. (6th) 110

APOTEX INC. (Appellant) and MINISTER OF HEALTH and ATTORNEY GENERAL OF CANADA and THE COMMISSIONER OF INFORMATION OF CANADA (Respondents)

David G. Near, Donald J. Rennie, Mary J.L. Gleason JJ.A.

Heard: March 27, 2017
Judgment: July 20, 2017
Docket: A-259-16, A-260-16, A-261-16

Proceedings: affirming *Apotex Inc. v. Canada (Minister of Health)* (2016), 2016 CarswellNat 3257, 2016 FC 776, Catherine M. Kane J. (F.C.)

Counsel: Jerry Topolski, Jaro Mazzola, for Appellant
Louisa Garib, Aditya Ramachandran, for Respondent, Commissioner of Information of Canada

***David G. Near J.A.*:**

I. Introduction

1 At issue are three consolidated appeals of an order of the Federal Court, dated July 8, 2016 (2016 FC 776 (F.C.)). Justice Kane (the Judge) dismissed Apotex Inc.'s (Apotex) motion to set aside Prothonotary Milczynski's (the Prothonotary) order, dated April 4, 2016, granting the Information Commissioner of Canada (the Commissioner) leave to be added as a respondent to Apotex's underlying application for judicial review.

II. Background

2 In response to three requests made under the *Access to Information Act*, R.S.C. 1985, c. A-1 (the Act), the Minister of Health (the Minister) decided to disclose records Apotex had previously submitted when seeking approval for a pharmaceutical product. On September 8, 2015 and October 22, 2015, pursuant to subsection 44(1) of the Act, Apotex applied for judicial review of the Minister's three decisions. Apotex alleged that the records were exempt from disclosure

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pursuant to subsection 20(1) of the Act, as the records contained: trade secrets; confidential financial, commercial, scientific, or technical information; and information that, if disclosed, could reasonably be expected to prejudice Apotex's competitive position or interfere with its contractual negotiations.

3 On February 29, 2016, the Commissioner brought a motion in writing seeking leave to be added as a respondent to Apotex's application for judicial review pursuant to paragraph 42(1)(*c*) of the Act:

> 42 (1) The Information Commissioner may
>
> (c) with leave of the Court, appear as a party to any review applied for under section 41 or 44.
>
> 42 (1) Le Commissaire à l'information a qualité pour:
>
> c) comparaître, avec l'autorisation de la Cour, comme partie à une instance engagée en vertu des articles 41 ou 44.

4 Apotex opposed the motion on the basis that the Commissioner had not demonstrated that her appearance was necessary in the application for judicial review as is required under Rule 104 of the *Federal Courts Rules*, SOR/98-106 (the Rules):

> 104 (1) At any time, the Court may
>
> (b) order that a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined be added as a party, but no person shall be added as a plaintiff or applicant without his or her consent, signified in writing or in such other manner as the Court may order.
>
> 104 (1) La Cour peut, à tout moment, ordonner:
>
> (b) order that a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined be added as a party, but no person shall be added as a plaintiff or applicant without his or her consent, signified in writing or in such other manner as the Court may order.

5 The Prothonotary ordered, pursuant to paragraph 42(1)(*c*) of the Act, that the Commissioner be granted leave to be added as a party, specifically a respondent, in Apotex's application for judicial review. The Prothonotary did not provide detailed reasons for her order (*Apotex Inc. v. Canada (Minister of Health)* (April 4, 2016), Doc. Ottawa T-1511-15; T-1782-15; T-1783-15 (F.C.)).

6 Apotex brought a motion before the Judge to set aside the Prothonotary's order.

III. Decision of the Federal Court Judge

7 The Judge applied the *Aqua-Gem* standard of review to the Prothonotary's order (*R. v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425, 149 N.R. 273 (Fed. C.A.)). The parties had accepted that the decision to add the Commissioner as a respondent was not vital to the outcome of Apotex's judicial review application (reasons at para. 11). Therefore, the Judge determined that the Prothonotary's discretionary order was owed deference and would not be disturbed unless "based upon a wrong principle or upon a misapprehension of facts" (reasons at paras. 9-15, 75-80).

8 Before the Judge, Apotex submitted that the Prothonotary had legally erred by failing to properly apply Rule 104 to the Commissioner's request for leave to be added as a party. Apotex argued that, according to the decision of a single judge of this Court in *Air Canada c. Thibodeau*, 2012 FCA 14, 438 N.R. 321 (F.C.A.) [*Thibodeau*], Rule 104 imposes a strict test of necessity such that a respondent should only be added where it would be bound by the result in the underlying proceeding.

9 The Judge determined that *Thibodeau* "should not be relied on for the proposition that necessity is the only test" (reasons at para. 64). The Judge found that the appellate judge in *Thibodeau* had not addressed the interplay between the Rules and the particular statutory provision at issue there, paragraph 78(1)(*c*) of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), which matches the language in paragraph 42(1)(*c*) of the Act. The Judge also found that *Thibodeau* was distinguishable on the facts because, in that case, the Commissioner of Official Languages had chosen to be and participated as an intervener in the Federal Court and then sought party status, too late, on appeal (reasons at para. 65).

10 The Judge found that if Rule 104 was strictly applied, the Commissioner would rarely meet the necessity test and, as a result, Parliament's intention that the Commissioner may be granted leave to be a party under paragraph 42(1)(*c*) of the Act would be undermined. The Judge, therefore, determined that Rule 104 had to be "adapted accordingly" in light of the provisions in the Act (reasons at paras. 52-54). The Judge noted that this Court relied on the same principle when considering the predecessor to Rule 104 in *Canada (Attorney General) v. Bernard*, [1994] 2 F.C. 447, 164 N.R. 361 (Fed. C.A.) [*Canada (HRC)*] (reasons at para 55). Justice Décary, writing on behalf of a panel of this Court, noted in *Canada (HRC)*:

> The Rules are subject, of course, to provisions in Acts of Parliament that may grant certain tribunals a distinct possibility of participating in judicial proceedings, either as a party or intervenor as of right, or as a party or intervenor with leave of the Court. Where such provisions exists, the Rules shall be adapted accordingly [...] For examples of statutory provisions giving a tribunal the possibility of participating in judicial proceedings, see: the *Official Languages Act*, R.S.C., 1985 (4th Supp), c. 31, s. 78(1)(a), (b) and (c) and 78(3); the *Access to Information Act*, R.S.C. 1985, c. A-1, ss. 42(1)(a), (b) and (c)[...]

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(*Canada (HRC)* at 461, footnote 25)

11 The Judge went on to consider the criteria, beyond necessity, that have guided the court in granting leave to the Commissioner to appear as a party under paragraph 42(1)(*c*) of the Act. The Judge cited, with approval, Prothonotary Tabib's approach in *Canon Canada Inc. v. Infrastructure Canada* (February 28, 2014), Doc. Ottawa T-1987-13 (F.C.) [*Canon*]. There, Prothonotary Tabib noted that the criteria should be "akin to that on a motion for leave to intervene pursuant to Rule 109. The Court should be satisfied that the participation of the [Commissioner] would assist the Court to determine a factual or legal issue in the proceedings" (reasons at para. 71, citing *Canon* at 2-3). The Judge found that "this approach reflects the need to reconcile Rule 104 with the Act to respect both the intention of the Act and the requirement that leave be sought to be added as a party" (reasons at para. 72). The Judge noted that the Commissioner will not automatically be added as a party but that the court should consider on a case by case basis "whether and how the addition of the Commissioner would assist the Court" (reasons at para.73).

12 The Judge determined that even though the Commissioner had not demonstrated that her participation was necessary, the Prothonotary had found sufficient grounds to allow the Commissioner to appear as a party in accordance with paragraph 42(1)(*c*). The Judge concluded that there was no basis to interfere with this finding and, therefore, dismissed Apotex's motion to set aside the Prothonotary's order (reasons at para. 85).

IV. Issue

13 I would characterize the issue on appeal as follows: Did the Judge err in refusing to interfere with the Prothonotary's order granting leave to the Commissioner to appear as a respondent to Apotex's application for judicial review?

V. Analysis

A. Standard of Review

14 Following the Judge's decision, this Court revisited the standard of review to be applied to discretionary decisions of prothonotaries and decisions made by judges on appeals of prothonotaries' decisions in *Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology*, 2016 FCA 215, 402 D.L.R. (4th) 497 (F.C.A.) [*Hospira*]. In *Hospira*, a five-member panel of this Court replaced the *Aqua-Gem* standard of review with that articulated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.) [*Housen*]. As such, on appeal of a prothonotary's order to the Federal Court, a judge must review whether the prothonotary made an error of law or a palpable and overriding error in determining a question of fact or a question of mixed fact and law (*Hospira* at para. 79). Further, it was held that this Court must apply the *Housen* standard on appeal of a Federal Court judge's review of a prothonotary's order. Therefore, in the case at bar,

this Court must determine whether the Judge erred in law or made a palpable and overriding error in refusing to interfere with the Prothonotary's order granting leave to the Commissioner to appear as a party (*Hospira* at paras. 83-84; see also *Sikes v. EnCana Corp.*, 2017 FCA 37 (F.C.A.) at para. 12, (2017), 144 C.P.R. (4th) 472 (F.C.A.).

B. Did the Judge err in refusing to interfere with the Prothonotary's order?

15 Apotex submits that the Judge erred in law in finding that Rule 104 did not apply to the Commissioner's request for leave to be added as a party. Apotex argues that *Thibodeau* was binding on the Judge and there was no basis to distinguish it from the matter before her. Further, Apotex argues that the Judge's interpretation creates an inconsistency with the test for granting leave to intervene under Rule 109.

16 In my view, the Judge did not err in refusing to interfere with the Prothonotary's order even though the Commissioner had not demonstrated it was a *necessary* party to Apotex's application for judicial review. The Judge was not bound to strictly apply Rule 104 to the Commissioner's request. I agree with the Judge that *Thibodeau* is distinguishable and, in any event, a decision of a single judge of this Court sitting as a motions judge does not bind a three-member panel of this Court (*Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44 (F.C.A.) at paras. 37-38, (2016), 480 N.R. 387 (F.C.A.)). I find *Canada (HRC)*, a decision of a three-member panel of this Court, to be the more persuasive authority.

17 Even in light of Rule 104, Parliament's intention to have an agent of Parliament appear in judicial proceedings as a party, with leave of the court, must be given effect. In my view, the necessity test provided for in Rule 104 would undermine the intent of paragraph 42(1)(*c*) of the Act, which grants the Commissioner the clear possibility of appearing as a party, with leave of the court, in judicial review proceedings before the Federal Court. I accept that, when exercising its discretion to grant leave under paragraph 42(1)(*c*), the court should be satisfied that the Commissioner would be of assistance to the court in the judicial review proceeding (see *Canon* at 2-3). While I recognize that this guiding criteria borrows language from Rule 109, I do not accept that the court is obligated to apply the factors relevant to a motion for leave to intervene under Rule 109 (see *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)* (1989), [1990] 1 F.C. 90, 103 N.R. 391 (Fed. C.A.), where this Court affirmed the correctness of the factors set out by the Federal Court in (1989), [1990] 1 F.C. 74 (Fed. T.D.) at 79-80, (1989), 29 F.T.R. 267 (Fed. T.D.)). I agree with Prothonotary Tabib in *Canon* where she determined that an assistance test furthers the Commissioner's participation, in accordance with Parliamentary intent, while still recognizing that paragraph 42(1)(*c*) does not give the Commissioner party status as of right.

18 Whether the Commissioner will be of assistance must be assessed by the court on a case-by-case basis. For example, the Federal Court has previously granted the Commissioner leave to appear as a party where it was found that she would provide a distinct point of view on a

motion for a confidentiality order (*Canon*) or where she had completed an investigation into the relevant complaint and it was found that she would provide knowledge and expertise relating to the Act, its jurisprudence, and the relevant legal issue (*Porter Airlines Inc. v. Canada (Attorney General)* (March 23, 2016), Doc. Ottawa T-1491-15 (F.C.) at paras. 4-5; see also *Canadian Tobacco Manufacturers' Council v. Minister of National Revenue* [2000 CarswellNat 3585 (Fed. T.D.)], (18 August 2000) Ottawa T-877-00 at paras. 7-8).

19 On a contested motion, where the parties raised different interpretations of the applicable legal test, it would have been helpful had the Prothonotary provided more detailed reasons for why she granted leave to the Commissioner to appear as a party. While the Judge's reasons included an analysis of what test the Commissioner must meet to be added as a respondent, the Judge did not clearly *apply* this test to assess whether and how the addition of the Commissioner would assist the Court in Apotex's particular application for judicial review. Rather, the Judge determined that the Commissioner provided sufficient grounds for the Prothonotary to grant leave in accordance with paragraph 42(1)(*c*) of the Act and that it was unnecessary to consider Apotex's opposition to these grounds because she was not considering the Prothonotary's order *de novo* (reasons at para. 85).

20 When reviewed on the *Housen* standard, I find that the Judge did not err in refusing to interfere with the Prothonotary's finding of sufficient grounds to grant leave to the Commissioner to appear as a party. Before the Prothonotary, the Commissioner submitted that her participation in Apotex's application for judicial review would be of assistance to the court. Apotex had expressed an intention to reverse the order of evidence in its judicial review which, the Commissioner alleged, could reverse the burden of proof. The Commissioner argued that this reversal was contrary to the jurisprudence under section 20 of the Act and would impact the access to information regime. The Commissioner highlighted her expertise and experience in the interpretation and administration of the Act, including the application of the section 20 exemption. The Commissioner also noted that none of the requesters of the records were parties to the application for judicial review and, as such, her participation would further the Court's consideration of requesters' rights. I recognize that there was limited evidence before the Prothonotary, however, in my view, there was a sufficient basis on which the Judge could have concluded that the Prothonotary did not commit a reviewable error in granting the Commissioner's motion.

VI. Conclusion

21 For the foregoing reasons, I would dismiss the appeal, with costs.

***Donald J. Rennie J.A.*:**

I agree.

***Mary J.L. Gleason J.A.*:**

I agree.

Appeal dismissed.

2006 CAF 279, 2006 FCA 279
Federal Court of Appeal

Benitez v. Canada (Minister of Citizenship & Immigration)

2006 CarswellNat 2587, 2006 CarswellNat 5104, 2006 CAF 279, 2006 FCA 279, 272 D.L.R. (4th) 274, 353 N.R. 93, 49 Admin. L.R. (4th) 102, 58 Imm. L.R. (3d) 3

Shurlyn Cathy Ann Jones, Shurnikay Jones (Appellants) and the Minister of Citizenship and Immigration (Respondents)

J. Richard C.J., J.M. Evans, J.D.D. Pelletier JJ.A.

Judgment: August 17, 2006
Docket: A-173-06

Proceedings: affirmed *Benitez v. Canada (Minister of Citizenship & Immigration)* (2006), 2006 CarswellNat 1048, 2006 CarswellNat 2203 ((F.C.))

Counsel: Rocco Galati (written) for Appellants
John Provart (written) for Respondent

***J.M. Evans J.A.*:**

1 This is a motion in writing under Rule 369 of the *Federal Courts Rules* brought by the Minister of Citizenship and Immigration. The Minister requests the Court to dismiss for mootness the appellants' appeal from an order of Justice Mosley of the Federal Court, dated April 10, 2006. Justice Mosley's order states that their application for judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board is dismissed in respect of certain issues which he had decided.

2 In that decision, dated May 5, 2005, the Board had dismissed the claim of Shurlyn Cathy Jones, the principal claimant, and her daughter, Shurnikay, to be recognized in Canada as refugees.

3 Prior to Justice Mosley's decision, there were a number of applications for judicial review in the Federal Court raising an important question of law affecting many cases before the Board, namely, the validity of a procedural guideline ("Guideline 7") issued by the Chair of the Board under the power conferred by paragraph 159(1)(*h*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

4 Guideline 7 provides for "reverse order questioning" of a refugee claimant: that is, the Refugee Claims Officer questions the claimant before the claimant's lawyer. In the Federal Court, the applicants argued that the Guideline was invalid on various Charter and administrative law grounds, including procedural unfairness, the deprivation of Board members' adjudicative independence, and the fettering of their discretion.

5 Nineteen of these applications, including the appellants', were consolidated and heard together by Justice Mosley on March 7-8, 2006. On April 10, 2006, he rendered his decision finding that Guideline 7 was valid and certified that each application involved the same seven serious questions of general importance pursuant to paragraph 74(*d*) of the Act. The order dismissed the application for judicial review "with respect to the issues heard by the Court" at the hearing held on March 7-8, 2006. Justice Mosley's decision is reported as *Benitez v. Canada (Minister of Citizenship & Immigration)*, 2006 FC 461 (F.C.).

6 Like several of the nineteen applicants, the appellants also challenged the validity of the Board's rejection of their claim on other grounds, which were set down to be heard in separate hearings before different Judges of the Federal Court. The "non-Guideline 7" aspects of the appellants' application for judicial review were heard by Justice Snider on March 21, 2006.

7 In a decision bearing the same date as *Benitez*, April 10, 2006, Justice Snider found that the Board had committed a number of reviewable errors unconnected with Guideline 7, allowed the appellants' application for judicial review, quashed the Board's decision and remitted the matter for re-determination by a differently constituted panel of the Board.

8 In her order, Justice Snider directed the Board to defer the hearing of the appellants' claim "until any appeal of the decision regarding other aspects of this application for judicial review is disposed of in the Federal Court of Appeal or the time in which a party may file a Notice of Appeal to that Court has expired, whichever last occurs." Justice Snider's decision is reported as *Jones v. Canada (Minister of Citizenship & Immigration)*, 2006 FC 405 (F.C.).

9 On April 21, 2006, the appellants filed their notice of appeal in this Court from the decision of Justice Mosley. The Minister filed the present notice of motion on July 18, 2006.

10 In support of the motion to dismiss, the Minister says that the appellants' appeal from the order of Justice Mosley is moot, on the ground that Justice Snider granted the very relief which the appellants would obtain if their Guideline 7 appeal succeeded, namely, a quashing of the Board's refusal of their refugee claims and a remittal to the Board for re-determination. The appellants raise three issues in response to the motion to dismiss their appeals.

11 First, they argue that the Crown's motion should be dealt with on the basis of an oral hearing, not the written submissions from the parties under Rules 369. They submit that if the Minister's

motion were granted, they would be deprived of an important right, namely the right to appeal against the decision of Justice Mosley. Further, they allege, the issues raised by the motion are sufficiently complex that they can only be properly explored at an oral hearing.

12 I do not agree. Rule 369 imposes no express limits on the exercise of the Court's discretion to dispose of a motion under Rule 369 in writing or after an oral hearing. Neither the text of the Rule nor the jurisprudence supports the position that motions to dismiss an appeal may not be determined on the basis of written submissions. Rather, the Court exercises its discretion by asking whether, in all the circumstances of the given case, it can fairly dispose of the motion without the delay and additional expense of an oral hearing.

13 The questions in dispute on this motion are purely legal and, in my opinion, not unduly complex. None of the factors listed by Prothonotary Hargrave in *Karlsson v. Minister of National Revenue* (1995), 97 F.T.R. 75 (Fed. T.D.) at para. 10, as warranting an oral hearing is present here.

14 I am satisfied that, assisted by the full and able written submissions of counsel for the parties, I am in a position to dispose fairly of the motion without an oral hearing, whether held at the beginning of the hearing of the appeals, or at any other time.

15 Second, the appellants argue that, when Justice Mosley dismissed their application for judicial review on the Guideline 7 issues, and certified questions for appeal, they had an unqualified right to appeal his decision. This right could not be removed by the order of Justice Snider allowing the application for judicial review and quashing the Board's decision. They had, they argue, only one application for judicial review before the Federal Court, a fact that was not altered when the Court bifurcated the application by separating the Guideline 7 issues from the other grounds on which they sought to have the Board's decision quashed.

16 I agree that the appellants had only one application for judicial review before the Federal Court, which the Court bifurcated in order to enable it to deal efficiently and fairly with the pressing problem caused by the large number of cases raising the same general legal issue about the propriety of an important and pervasive aspect of the Board's process.

17 When Justice Mosley rejected the attack made by the applicants, including the present appellants, on the validity of Guideline 7, and certified questions for appeal, it is clear from his order that he was not disposing finally of the application for judicial review, but only dismissing it on the Guideline 7 issues. Justice Snider's order finally disposed of the application by granting it.

18 The basic problem with the appellants' position is that, having been granted the relief by Justice Snider that they sought in their application, they, in effect, want to appeal against Justice Mosley's reasons. While the parties do not dispute that Justice Mosley's order dismissing the application on certain issues is an order from which the appellants may appeal, that appeal is rendered moot by the order of Justice Snider.

19 The appellants cannot have it both ways. They cannot both claim the benefit of Justice Snider's order for the purpose of having their case re-heard by the Board, and, at the same time, assert that they have the right to challenge Justice Mosley's order denying them the relief which Justice Snider granted.

20 I am satisfied that the procedure creatively adopted by the Federal Court for dealing with multiple applications raising, among others, a single issue, does not result in any unfairness to the appellants. I find it inconceivable that the Board would proceed with the hearing of the appellants' claim before this Court disposes of the appeals from Justice Mosley's order which go forward. It is immaterial that Justice Snider's direction to the Board to defer the hearing of the appellants' claim may appear to assume that the appellants' appeal will proceed, when, as result of the Court's order disposing of this motion, it will not.

21 Since other appeals from Justice Mosley's order will be heard by this Court, dismissing the appellants' appeal does not preclude the Court from determining the validity of Guideline 7. Indeed, I understand that the Court is likely to receive submissions from the appellants' counsel who is representing other appellants in the Guideline 7 appeals. If these appeals are successful, the Board will re-determine the present appellants' refugee claim in the light of this Court's decision.

22 True, the appellants may be adversely affected by a decision of this Court upholding the validity of Guideline 7, a question on which they will not have been heard by this Court. However, it is in the nature of adjudication, and the doctrine of precedent, that a decision of one court may effectively determine the rights of third parties in other proceedings. Moreover, since their counsel is representing other appellants, the present appellants will indirectly have the benefit of his submissions.

23 In brief, the appellants' position is not materially different from what it would have been if all the issues in their application for judicial review had been heard and decided by one judge, who found against them on the Guideline 7 issue, but allowed their application on other grounds.

24 Accordingly, the appellants' appeal is moot and no useful purpose would be served if, in the exercise of the Court's discretion, I allowed it to proceed.

25 Third, the appellants ask for costs, whether or not the Minister's motion is granted, on the ground that the Minister did not file this motion until July 18, 2006, more than three months after the appellants had filed their notice of appeal. The Minister must have been aware that, by mid-July, counsel would have done a lot of work preparing for the appeal. Counsel filed the appellants' appeal book on July 24, 2006, after obtaining from counsel for the Minister a short extension of time, on condition that the appellants' counsel filed his memorandum of fact and law no later than August 12, 2006. In these circumstances, counsel argues, the appellants should be awarded costs on a solicitor-client basis in respect of this motion.

26 Costs are not awarded in proceedings arising under the *Immigration and Refugee Protection Act*, unless "for special reasons" the Court so orders: *Federal Court Immigration and Refugee Protection Rules*, SOR/93-22, section 22.

27 Despite counsel's submissions, I am not persuaded that the circumstances of this case constitute "special circumstances". In my opinion, the appeal was fundamentally misguided and, having decided to pursue it, the appellants must be taken to have assumed the risk that the normal costs consequences would follow. The benefit of section 22 was available to the appellants if their appeal failed on its merits; that benefit does not become a burden when their appeal is dismissed summarily.

28 For these reasons, I would grant the motion and dismiss the appeal for mootness.

***J. Richard C.J.*:**

I agree.

***J.D.D. Pelletier J.A.*:**

I agree.

Application granted; appeal dismissed as moot.

2019 FCA 144
Federal Court of Appeal

Bernard v. Canada (Attorney General)

2019 CarswellNat 1740, 2019 FCA 144, 305 A.C.W.S. (3d) 757

ELIZABETH BERNARD (Applicant) and BONNIE GALE BAUN, ATTORNEY GENERAL OF CANADA and PUBLIC SERVICE ALLIANCE OF CANADA (Respondents)

Marc Noël C.J., David Stratas J.A., George R. Locke J.A.

Judgment: May 14, 2019
Docket: A-264-18

Counsel: Elizabeth Bernard (written), for herself
Caroline Engmann (written), for Respondent, Attorney General of Canada
Andrew Raven (written), Morgan Rowe (written), for Respondent, Public Service Alliance of Canada

***David Stratas J.A.*:**

1 The respondent, Public Service Alliance of Canada, moves for an order that the applicant is a vexatious litigant under section 40 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. It also moves for an order dismissing the application for judicial review on a summary basis on the ground that the applicant lacks standing.

2 For the following reasons, I would grant both orders.

Court composition for these motions

3 Vexatious litigant applications or vexatious litigant motions under section 40 of the *Federal Courts Act* can be heard and determined by one judge: *Federal Courts Act*, section 16; *Canada v. Olumide*, 2017 FCA 42, [2018] 2 F.C.R. 328 (F.C.A.) at para. 5 (*Olumide No. 2*); *Simon v. Canada (Attorney General)*, 2019 FCA 28 (F.C.A.) at para. 3; *Keremelevski v. Ukrainian Orthodox Church of St. Mary*, 2019 FCA 218 (F.C.A.) at para. 6.

4 A single judge can also order, as part of the vexatious litigant application or motion, that "a proceeding previously instituted by the person in [the Court] not be continued" unless leave is later sought and granted: *Federal Courts Act*, subsection 40(1). An order that a proceeding not be

continued is not a dismissal: see *Philipos v. Canada (Attorney General)*, 2017 FCA 117 (F.C.A.) on the difference between discontinuance and dismissal.

5 But a single judge cannot determine a motion to dismiss an appeal: *Federal Courts Act*, section 16; *Rock-St Laurent v. Canada (Minister of Citizenship & Immigration)*, 2012 FCA 192, 434 N.R. 144 (F.C.A.) at para. 30; *Keremelevski* at para. 5.

6 In this case, we have a motion for a vexatious litigant order that can be heard by one judge and a motion to dismiss the application that must be heard by three judges. One option is for the Court to divide the motions and have the vexatious litigant motion heard by one judge and the motion to dismiss the application for judicial review heard by three judges. This option was pursued in *Keremelevski*, above. The other option is to place both motions in front of three judges. This option has been pursued here.

Preliminary issues

7 The applicant submits that a vexatious litigant order can only be obtained by way of application, not a motion, as has been done here. She notes that the text of section 40 is quite explicit — it says "application."

8 Many cases in this Court have granted relief under section 40 by way of motion. Some examples include *Olumide No. 2* and *Nelson v. Canada (Customs & Revenue Agency)*, 2003 FCA 127, 301 N.R. 359 (Fed. C.A.). This Court has recently approved of parties proceeding by way of motion instead of application: *Lawyers' Professional Indemnity Co. v. Coote*, 2014 FCA 98 (F.C.A.) at para. 12. The two have been seen as identical and interchangeable: *Olumide v. Canada*, 2016 FCA 287 (F.C.A.) at paras. 34 and 42.

9 The applicant specifically argues that *Nelson* is wrongly decided. She points to what she says are the severe consequences of making a vexatious litigant order against someone.

10 I am not persuaded that these authorities are manifestly wrong within the meaning of *Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149 (Fed. C.A.). In terms of procedure, both motions and applications for a vexatious litigant order allow the party against whom a vexatious litigant order is sought to adduce all admissible evidence and make full submissions. Both motions and applications for a vexatious litigant order can be decided by a single judge. In both, the applicant may apply for more time to adduce evidence and make submissions if that is required. Thus, in all meaningful procedural aspects, motions for vexatious litigant orders are at least as fair as applications.

11 Further, the Public Service Alliance of Canada's decision to seek a vexatious litigant order by way of motion within an existing proceeding rather than a separate application has not prejudiced the applicant in any way. She has had a full opportunity to know the case against her and to respond

to it. Indeed, although the Public Service Alliance of Canada proceeded by way of motion, the applicant ended up having five months to respond, a much longer time than that usually given to those responding to applications.

12 The applicant also submits that the Public Service Alliance of Canada's decision to proceed by way of motion rather than application took away her right to have an oral hearing. She suggests that this Court must hear all applications orally. I reject the submission.

13 Section 16 of the *Federal Courts Act* provides, among other things, that appeals, "applications" ("demandes") for judicial review, and references are to be "heard" ("entendus"); for these, there is a right to an oral hearing. Applications under section 40 of the *Federal Courts Act* are not covered by section 16 of the Act and, thus, the oral hearing requirement in that section does not apply. Indeed, the equally authoritative French language version of section 40 speaks not of "demandes" ("applications") but of "requêtes" ("motions") which, incidentally also confirms the view, above, that section 40 matters can be brought by way of motion. As is well-known, there is no right to an oral hearing of motions ("requêtes"): *SNC-Lavalin Group Inc. v. Canada (Public Prosecution Service)*, 2019 FCA 108 (F.C.A.), citing this Court's order dated April 29, 2019 in *Lessard-Gauvin v. Canada (Attorney General)*, file A-312-18; see also *Nelson*, above at para. 23 and *Benitez v. Canada (Minister of Citizenship & Immigration)*, 2006 FCA 279, 272 D.L.R. (4th) 274 (F.C.A.) at paras. 12-14. Thus, the Public Service Alliance of Canada's decision to proceed by way of motion rather than application has not deprived the applicant to an oral hearing: she was never entitled to one even if an application had been brought.

14 In the alternative, the applicant also requests an oral hearing of this motion. The Court has discretion not to order one: *Fotinov v. Royal Bank of Canada*, 2014 FCA 70 (F.C.A.). Here, the applicant's request for an oral hearing is denied. She has offered no specific reason why an oral hearing should be ordered other than the fact that the motion is important to her. Upon reviewing the material filed in this motion, no questions occurred to the Court. The material is straight-forward and clear and, like many of the motions we hear, can be dealt with efficiently and expeditiously in writing. This exercise of discretion is consistent with the mandate in Rule 3 that we exercise our discretion to further "the just, most expeditious and least expensive determination of every proceeding on its merits."

The vexatious litigant motion

15 The law governing vexatious litigant motions is set out in *Olumide No. 2*, as recently explained and elaborated upon in *Simon*.

16 The test is whether the extra layer of regulation afforded by a vexatious litigant order is necessary and consistent with the purposes underlying the vexatious litigant provision, section 40 of the *Federal Courts Act*: *Olumide No. 2* at para. 31. In discussing this test in *Simon* at para. 26, this Court reduced the test to a concrete question: "does the litigant's ungovernability or harmfulness to

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the court system and its participants justify a leave-granting process for any new proceedings?" On the record before us, this question must be answered in the affirmative. Lengthy reasons explaining this result are neither necessary nor desirable: *Olumide No. 2* at paras. 39-40.

17 Since July 2015, the applicant has filed nine applications for judicial review involving ten different responding parties, including three bargaining agents, three individual respondents and four branches of the federal government. All of the applications that have been determined have been dismissed.

18 A pattern has emerged: the applicant often starts proceedings in which she has no standing. She does so despite advice she has received from this Court and from the Federal Public Sector Labour Relations and Employment Board. This has happened twice in the last two years: *Bernard v. Close*, 2017 FCA 52 (F.C.A.); *Bernard v. Public Service Alliance of Canada*, 2017 FCA 142. The application presently before this Court represents the third time. This does not include proceedings where the applicant has sought to intervene in others' proceedings, proceedings in which she does not have a legally cognizable interest: Tyner Affidavit at para. 10; Order in A-394-16.

19 This pattern is enhanced by the applicant's substantially similar conduct before the Federal Public Sector Labour Relations and Employment Board. This conduct tends to corroborate the view that the applicant is the sort of litigant requiring a leave-granting process for any new proceedings she brings.

20 The applicant has repeatedly asked the Board to reconsider decisions to which she was not a party despite being repeatedly advised that she does not have standing: *Bernard v. Professional Institute of the Public Service of Canada*, 2018 FPSLREB 47 (Can. F.P.S.L.R.E.B.) at paras. 18-21.

21 In another matter, the Board has imposed restrictions on the applicant to prevent conduct, including relitigation, that it described as "vexatious": *Bernard v. Canada Revenue Agency*, 2017 PSLREB 46 (Can. P.S.L.R.E.B.).

22 This pattern of conduct in the face of administrative and judicial decisions confirms that the applicant will not refrain in the future from trying to start or enter litigation in which she has no interest. On the record before me, if the vexatious litigant motion is not granted, she will doubtlessly continue her conduct. She presently proceeds in defiance of attempts to regulate her. In this aspect, she is ungovernable.

23 It is not necessary for a party seeking to have a litigant declared vexatious to establish that no other means are available to regulate the litigant. Vexatious litigant orders are made when they are necessary. This being said, nonetheless I am satisfied that the only regulatory tool available to the Court to protect itself and the litigants before it is a vexatious litigant order against the applicant. This is a clear case.

24 The applicant's conduct is harmful. By starting or trying to enter proceedings in which she has no interest, she drags third parties into litigation or steps in litigation that never would have had to be undertaken but for her conduct. Innocent parties are forced to incur unnecessary litigation costs or see their litigation delayed. All the concerns about "mere busybodies" entering into litigation, aired in the jurisprudence of the Supreme Court on standing, are here, magnified many times by the applicant's repetition of her behaviour: see *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45, [2012] 2 S.C.R. 524 (S.C.C.) at paras. 26-27*; Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 (S.C.C.); *Hy & Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675 (S.C.C.); *Canadian Council of Churches v. R.*, [1992] 1 S.C.R. 236 (S.C.C.).

25 The applicant submits that a vexatious litigant order should not be made against her because it is "an extraordinary remedy that alters a person's right to the presumptive access to the courts." I disagree. In *Olumide No. 2* at para. 29, this Court explained that vexatious litigant orders are not as drastic as the applicant contends. They do not bar access to the courts: instead, they regulate it. They are designed to protect the Court, its scarce resources, and the parties before it while maintaining the litigant's right to legitimate and necessary access to the Court: *Olumide No. 2* at paras. 17-22.

26 To be sure, a litigant declared vexatious can still access the courts by bringing a proceeding but only if the Court grants leave. Faced with a request for leave, the Court must act judicially and promptly, considering the applicable legal standards, the evidence filed in support of the granting of leave, and the purposes of the vexatious litigant provision. The Court could well grant leave to a vexatious litigant who has a *bona fide* reason to assert a claim that is not frivolous and vexatious within the meaning of the case law on pleadings. Seen in this way, vexatious litigant orders are far from drastic.

27 The applicant also submits that motions to declare a person vexatious should not be used as a litigation tactic. As a general proposition, that is true. But that proposition does not apply here. This motion has been brought in good faith and has been prosecuted professionally and with very good cause.

28 Finally, the applicant complains that vexatious litigant orders are only made against self-represented parties like her. She complains that persistence and robust advocacy are praised in the legal profession but are labelled as "vexatious" when practised by self-represented parties.

29 This Court addressed this concern in *Simon*, above, using words fully apposite to the applicant's case (at paras. 13-16):

> We must be careful not to confuse unrepresented litigants who need extra attention and assistance with those who are vexatious; vexatious litigants are just a sliver of the

> unrepresented litigants we see. Helping the unrepresented is part of the core mission of the Court: to make justice available to our whole populace, including all those with lesser capabilities and greater challenges. We accomplish that mission primarily through a dedicated, professional registry and timely Court orders and directions. Almost all unrepresented litigants who need extra attention and assistance are open to receiving it, receive it, and advance their cases to a determination on the merits. They do not need the extra layer of regulation supplied by a vexatious litigant declaration. But undeniably some do.
>
> Some litigants are simply ungovernable. They ignore all the rules, do not respond constructively to the considerable attention and assistance courts give to them, flout court orders, and persist in litigation doomed to fail — sometimes resurrecting it after it is struck, and then resurrecting it again and again.
>
> Other litigants are simply harmful. They force opposing parties to defend unmeritorious or duplicative litigation and drain the scarce and finite resources of the court by the quantity of pointless litigation, the style or manner of their litigation, their motivations, intentions, attitudes and capabilities while litigating, or any combination of these things.
>
> At a certain point, enough is enough and practicality must prevail: the extra layer of regulation supplied by a vexatious litigant declaration is necessary, just and responsible. See generally *Olumide* [*No. 2*] at paras. 20-22 and 32-34.

30 As I have mentioned, the applicant's conduct warrants a vexatious litigant order. Her status as a self-represented litigant has nothing to do with this conclusion. I would add that the applicant is different from some self-represented litigants we encounter: she has a facility with our procedures and has litigation capability. But the serious concerns about the applicant's governability and the causing of harm, described above, remain. In fact, her facility and capability can increase the prospect of harm to others and the Court and, thus, can increase the need for the regulation supplied by a vexatious litigant order. She is not like some others who, through lack of facility and capacity incidentally and haphazardly cause harm as they thrash about in the litigation process.

31 There is a mandatory prerequisite to the making of a vexatious litigant order under section 40. Under subsection 40(2) of the Act, the Attorney General must consent to the bringing of the motion to declare the applicant vexatious. This prerequisite has been satisfied here: the Attorney General has given his consent.

32 I conclude that the applicant's ungovernability and harmfulness to the court system and its participants justify a leave-granting process for any new proceedings. I would grant the motion for a vexatious litigant order against the applicant.

Motion to dismiss the application

33 Interlocutory motions to dismiss proceedings before the Court may be made: *JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue*, 2013 FCA 250, [2014] 2 F.C.R. 557 (F.C.A.); *Lee v. Canada (Correctional Service)*, 2017 FCA 228 (F.C.A.); *Canwest MediaWorks Inc. v. Canada (Minister of Health)*, 2008 FCA 207 (F.C.A.) at para. 10; *Forner v. PIPSC*, 2016 FCA 35 (F.C.A.); *Fabrikant v. Canada*, 2018 FCA 171 (F.C.A.). In such motions, the Court looks for a fatal flaw striking at the root of the proceeding — a "show-stopper" — or some other circumstance that suggests that the proceeding is doomed to fail.

34 This approach reflects this Court's view that "unnecessary and unmeritorious cases should be rooted out and quashed as early as possible": *Fabrikant v. Canada*, 2018 FCA 224 (F.C.A.) at para. 26. To this end, many tools have recently been developed, repurposed or given new vitality: *Ibid*. at para. 26.

35 In her application for judicial review, the applicant alleges that a decision of the Federal Public Sector Labour Relations and Employment Board was made by a panel that was not constituted in accordance with law. The administrative decision had nothing to do with the applicant. The applicant was not a party before the Board. The decision dismissed complaints made by the respondent, Ms. Baun. Ms. Baun has started her own application for judicial review against the decision.

36 The applicant has filed her affidavit in support of her application. She offers no evidence suggesting that the Board's decision affected her legal rights, imposed legal obligations upon her or prejudicially affected her in some way. She falls well short of the test for direct standing in applications for judicial review: *League for Human Rights of B'Nai Brith Canada v. R.*, 2010 FCA 307, [2012] 2 F.C.R. 312 (F.C.A.).

37 The applicant also lacks public interest standing under the test in *Downtown Eastside*, above. The evidence does not establish that the applicant has a real stake or genuine interest in the matter. Nor does the evidence show that her application is a reasonable and effective way to bring the issue of the validity of the administrative decision before the Court; indeed, the application of the directly affected person, Ms. Baun, places the issue before the Court and ensures that the administrative decision is not immune from review.

38 *Close*, above, is directly on point and binding. In *Close*, this Court dismissed the applicant's attempt to litigate another party's case for want of public interest standing or any type of standing whatsoever. In *Close*, this Court observed (at para. 9) that "[t]here are potentially tens of thousands similarly situated to the applicant who would also have standing if we were to grant standing to this applicant." Nothing in the applicant's affidavit suggests that the same is not true here.

39 Therefore, in my view, the application for judicial review suffers from a fatal flaw — it is doomed to fail. The applicant does not have the standing necessary to maintain the application.

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Proposed disposition

40 I would declare the applicant a vexatious litigant, with costs to the respondent, Public Service Alliance of Canada. I would also order that the applicant shall not institute new proceedings or attempt to intervene in others' proceedings, whether acting for herself or having her interests represented by another individual in this Court, except by leave of this Court. I would also dismiss the application for judicial review with costs.

***Marc Noël C.J.*:**

I agree

***George R. Locke J.A.*:**

I agree

Motion granted.

2005 CAF 304, 2005 FCA 304
Federal Court of Appeal

Boudreau v. Minister of National Revenue

2005 CarswellNat 2894, 2005 CarswellNat 5089, 2005 CAF 304, 2005 FCA 304, [2005] 5 C.T.C. 38, [2005] F.C.J. No. 1551, 142 A.C.W.S. (3d) 1053, 2005 D.T.C. 5580 (Eng.), 340 N.R. 268, 47 C.C.P.B. 165

Suzanne Boudreau (Applicant) and Minister of National Revenue, Attorney General of Canada (Respondents)

Sharlow, Rothstein, Nadon JJ.A.

Heard: August 22, 2005
Judgment: September 20, 2005
Docket: A-248-05

Counsel: Mr. Lubomyr Chabursky for Applicant
Mr. Roger Leclaire, Ms Justine Malone for Respondent

***Sharlow J.A.*:**

1 The applicant Suzanne Boudreau has commenced an application for judicial review of the decision of the Minister of National Revenue to issue a notice of intention to revoke, as of January 1, 1996, the registration of a pension plan established by Cryptic Web Information Technology Security Inc. Ms. Boudreau is seeking an order quashing the Minister's decision or, alternatively, an order prohibiting the Minister from revoking the plan retroactively to a date earlier than October 16, 2003 (the date of the notice of intention to revoke). Soon after commencing her application for judicial review, Ms. Boudreau filed a notice of motion seeking certain interlocutory orders.

2 In response to Ms. Boudreau's motions, the Crown filed a motion record that contests those motions and also contains a notice of motion seeking an order quashing Ms. Boudreau's application for judicial review on the basis that this Court lacks the jurisdiction to hear it. Ms. Boudreau contests the Crown's motion.

3 A hearing was convened to hear oral argument on the question of jurisdiction. If that question is resolved in the Crown's favour, this application for judicial review will be quashed. Because that could result in the final disposition of this application for judicial review, argument on the preliminary question of jurisdiction was heard by three judges: *Federal Courts Act*, R.S.C. 1985, c. F-7, section 16.

Facts

4 To understand the context of this case, it is necessary to be aware of certain of the tax characteristics of pension plans, the tax consequences of the registration of a pension plan under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), and the tax consequences of the revocation of the registration of a pension plan.

5 Generally, any payment made by any pension plan, registered or unregistered, is taxable if it is made to or for the benefit of a member. That is so whether the payment is made in the form of a periodic pension payment, or in a lump sum (paragraph 56(1)(*a*) of the *Income Tax Act*).

6 A number of income tax advantages are obtained by the registration of a pension plan under the *Income Tax Act*. First, any contribution made to a registered pension plan by a member of the plan is deductible, subject to certain limitations, in computing the member's income for income tax purposes. Second, income earned on investments held in a registered pension plan is exempt from income tax as long as the investment is held in the plan (provided certain conditions are met). Third, in a number of situations, money can be transferred from one registered pension plan to another registered pension plan (or certain other recognized tax deferred plans) for the benefit of a member, without the member incurring a tax liability in respect of the transfer.

7 The revocation of the registration of a pension plan does not cause the pension plan to cease to exist. It remains in existence, but the special tax advantages of registration would be lost. It would no longer be possible for a member to make deductible contributions to the plan. Income earned on investments held in the plan would be taxable. It would no longer be possible to make a tax-free transfer of money from the pension plan to another plan. Such a transfer of funds probably would be taxed in the hands of the member, either as a pension benefit under paragraph 56(1)(*a*) of the *Income Tax Act* or as a distribution from a trust under paragraph 12(1)(*m*) of the *Income Tax Act*, depending upon the circumstances. If funds are transferred from an unregistered pension plan to a registered plan, the member could be at risk of double taxation because the transfer itself would be taxable, and any payments subsequently made out of the transferee plan to the member could also be taxable.

8 The revocation of the registration of a pension plan occurs as the last step in a statutory process (the process is discussed in more detail below). The Minister takes the position that it is possible in certain circumstances for the effective date of the revocation of the registration of a pension plan to predate the completion, or even the commencement, of the revocation process. The Minister apparently also takes the position that where the effective date of the revocation of a pension plan predates the revocation process, the tax advantages of registration may be lost to the members of the plan retroactively.

9 It is not necessary at this stage to determine whether the Minister's position on the retroactive effect of the revocation of the registration of a pension plan is correct. It is sufficient to note that if the Minister is correct, then the members of a registered pension plan could bear a significant unexpected tax burden if the registration of the plan is revoked, and an even greater burden if the registration is revoked retroactively. The problem of the potential retroactive effect of the revocation of the registration of a pension plan is at the core of Ms. Boudreau's application for judicial review.

10 Ms. Boudreau was at one time an employee of the federal government, and was also a contributor to the public service superannuation plan maintained for federal government employees under the *Public Service Superannuation Act*, R.S. 1985, c. P-36. Ms. Boudreau says that for a period of time in 1999 and 2000, when she was no longer a federal government employee, she was an employee of Cryptic Web and became a member of the Cryptic Web pension plan. During that period, the Cryptic Web pension plan was a registered pension plan.

11 It appears that the Cryptic Web pension plan was registered effective January 1, 1996. In 1999, arrangements then in place permitted a federal government employee who moved to employment in the private sector to apply to have money transferred from the public service superannuation plan to a registered pension plan maintained by or for the new employer. Ms. Boudreau took advantage of those arrangements when she left her employment with the federal government, and money was transferred to the Cryptic Web pension plan for Ms. Boudreau's benefit. There is a dispute between Ms. Boudreau and the Crown as to whether the correct amount of money was transferred, but that dispute is not before this Court.

12 Sometime after 2000, the money that had been transferred to the Cryptic Web pension plan for Ms. Boudreau's benefit was transferred again, apparently in a manner that complied with the relevant law, to another registered pension plan.

13 On October 16, 2003, the Minister sent to Cryptic Web a notice of intention to revoke the registration of its pension plan, effective January 1, 1996, pursuant to paragraphs 147.1(11)(*a*) and (*j*) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). The relevant portion of those provisions read as follows:

147.1 (11) Where, at any time after a pension plan has been registered by the Minister,	147.1 (11) Lorsque l'une des situations suivantes se produit après que le ministre a agréé un régime de pension:
(a) the plan does not comply with the prescribed conditions for registration [...] the Minister may give notice (in this subsection and subsection 147.1(12) referred to as a "notice of intent") by registered mail to the plan administrator that the Minister proposes to revoke the registration of the plan as of a date specified in the notice of intent,	a) le régime n'est pas conforme aux conditions d'agrément réglementaires [...] le ministre peut informer l'administrateur du régime par avis — appelé "avis d'intention" au présent paragraphe et au paragraphe (12) — , envoyé en recommandé, qu'il entend retirer l'agrément du régime à la date précisée dans

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which date shall not be earlier than the date as of which, (j) where paragraph 147.1(11)(*a*) applies, the plan failed to so comply [...].	l'avis d'intention, qui ne peut être antérieure aux dates suivantes: j) si l'alinéa *a*) s'applique, la date où le régime cesse d'être conforme [...].

14 The Minister's position, as set out in the notice of intention to revoke the registration of the Cryptic Web pension plan, is that one of the conditions of registration had never been met. That condition was that the primary purpose of the plan be the provision of retirement benefits to individuals in respect of their services as employees. The Minister alleges that the members of the Cryptic Web pension plan were never its employees.

15 Cryptic Web has appealed the notice of intention to revoke. That is its right under paragraph 172(3)(*f*) of the *Income Tax Act*, the relevant portions of which reads as follows:

172 (3) Where the Minister [...] (f) [...] gives notice under subsection 147.1(11) to the administrator of a registered pension plan that the Minister proposes to revoke its registration [...] [...] the administrator of the plan or an employer who participates in the plan, in a case described in paragraph 172(3)(f) [...], may appeal from the Minister's decision, or from the giving of the notice by the Minister, to the Federal Court of Appeal.	172 (3) Lorsque le ministre: [...] f) [...] envoie à l'administrateur d'un régime de pension agréé l'avis d'intention prévu au paragraphe 147.1(11), selon lequel il entend retirer l'agrément du régime; [...] [...] l'administrateur du régime ou l'employeur qui participe au régime, dans une situation visée aux alinéas f) ou f.1), peuvent interjeter appel à la Cour d'appel fédérale de cette décision ou de la signification de cet avis.

16 The facts of this case are superficially similar to the facts in *Loba Ltd. v. Minister of National Revenue* (2004), [2005] 1 C.T.C. 6, 2004 D.T.C. 6680 (F.C.A.), leave to appeal refused on April 7, 2005, (2005) (S.C.C.). The Loba appeal was dismissed on the basis that it was reasonable for the Minister, on the evidence before him, to conclude that the conditions for registration were not met as of the date of the intended revocation.

17 The Cryptic Web appeal has yet to be heard. At the request of the parties, it was held in abeyance pending the outcome of the *Loba* appeal. For reasons that are not relevant to the issue now before this Court, it is still in abeyance, and it is not now clear whether it will proceed.

18 In May of 2005, Ms. Boudreau sought leave to intervene in the Cryptic Web appeal. As I understand it, her interest in the Cryptic Web appeal is based on the suggestion, implied in certain statements in the notice of intention to revoke the registration of the Cryptic Web pension plan, that if the registration is revoked as of January 1, 1996 (as the notice of intent indicates), there may be retroactive tax consequences to individuals like Ms. Boudreau who became members of the plan while it was registered.

19 It is suggested, for example, that one of the consequences of the revocation of the registration of the Cryptic Web pension plan as of January 1, 1996, would be that money transferred for Ms. Boudreau's benefit to the Cryptic Web pension plan from the public service superannuation plan after January 1, 1996, would be taxable in her hands as of the date of the transfer (assuming her tax return for the relevant year is not statute barred). It is also suggested that all income earned on investments held in the plan in 1996 and subsequent years would become taxable. If that is the case, it seems likely that the tax would be borne indirectly by Ms. Boudreau and the other members of the pension plan, in the sense that the tax would be paid out of money held in the plan. It is not clear whether the Minister would take the position that additional tax consequences would result from the subsequent transfer of money from the Cryptic Web pension plan for the benefit of Ms. Boudreau to another pension plan.

20 Ms. Boudreau's motion to intervene was dismissed on July 7, 2005 "for prematurity". As her motion was not dismissed on the merits, it remains open to Ms. Boudreau to re-apply for leave to intervene in the Cryptic Web appeal, if it proceeds.

21 On June 1, 2005, Ms. Boudreau filed the notice of application for judicial review that commenced these proceedings, citing subsection 147.1(13) of the *Income Tax Act*. The issue now raised by the Crown is whether this Court has the jurisdiction to hear her application.

Discussion

22 The Federal Court of Appeal is a statutory court. It has no jurisdiction except the jurisdiction given to it by an Act of Parliament. Section 27 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, gives this Court the jurisdiction to hear appeals from the Federal Court and appeals from the Tax Court of Canada. Section 28 of the *Federal Courts Act*, gives this Court the jurisdiction to hear and determine applications for judicial review of specified decisions of the federal boards, commissions and tribunals. No decision of the Minister of National Revenue is specified in section 28 of the *Federal Courts Act*. Therefore, there can be no direct recourse to this Court for decisions of the Minister, except as provided in subsection 172(3) or some other provision of the *Income Tax Act*.

23 The *Income Tax Act* is one of the federal statutes that gives this Court jurisdiction over matters that are not within the scope of section 27 or section 28 of the *Federal Courts Act*. Paragraph 172(3)(*f*) of the *Income Tax Act* provides for a right of appeal from a decision of the Minister to issue a notice of intention to revoke the registration of a pension plan. However, the right of appeal under paragraph 172(3)(*f*) of the *Income Tax Act* is given only to the administrator of the plan and the participating employers. It is not given to members of the plan.

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24 Ms. Boudreau submits that the jurisdiction to hear her application for judicial review is given to this Court by subsection 147.1(13) of the *Income Tax Act*. The Crown disagrees, and submits that subsection 147.1(13) should not be interpreted as broadly as Ms. Boudreau suggests.

25 The resolution of the debate about the scope of subsection 147.1(13) requires consideration of the statutory scheme for the revocation of the registration of pension plans. That scheme is found in subsections 147.1(11), (12) and (13) and in the appeal provision, subsection 172(3), quoted above. Subsections 147.1(11), (12) and (13), in their entirety, read as follows:

147.1 (11) Where, at any time after a pension plan has been registered by the Minister,	147.1 (11) Lorsque l'une des situations suivantes se produit après que le ministre a agréé un régime de pension:
(a) the plan does not comply with the prescribed conditions for registration,	a) le régime n'est pas conforme aux conditions d'agrément réglementaires;
(b) the plan is not administered in accordance with the terms of the plan as registered,	b) le régime n'est pas géré tel qu'il est agréé;
(c) the plan becomes a revocable plan,	c) l'agrément du régime peut être retiré;
(d) a condition imposed by the Minister in writing and applicable with respect to the plan (including a condition applicable generally to registered pension plans or a class of such plans and a condition first imposed before 1989) is not complied with,	d) une condition (y compris une condition applicable de façon générale aux régimes de pension agréés en général ou à une catégorie de régimes et une condition imposée pour la première fois avant 1989) que le ministre a imposée au régime par écrit n'est pas respectée;
(e) a requirement under subsection 147.1(6) or 147.1(7) is not complied with,	e) une des exigences énoncées aux paragraphes (6) ou (7) n'est pas respectée;
(f) a benefit is paid by the plan, or a contribution is made to the plan, contrary to subsection 147.1(10),	f) des prestations sont payées par le régime ou des cotisations y sont versées contrairement au paragraphe (10);
(g) the administrator of the plan fails to file an information return or actuarial report relating to the plan or to a member of the plan as and when required by regulation,	g) l'administrateur ne présente pas de déclaration de renseignements ou de rapport actuariel concernant le régime ou un participant à celui-ci selon les modalités réglementaires de temps ou autres;
(h) a participating employer fails to file an information return relating to the plan or to a member of the plan as and when required by regulation, or	h) un employeur participant ne présente pas de déclaration de renseignements concernant le régime ou un participant à celui-ci selon les modalités réglementaires de temps ou autres;
(i) registration of the plan under the Pension Benefits Standards Act, 1985 or a similar law of a province is refused or revoked,	i) l'agrément du régime aux termes de la Loi de 1985 sur les normes de prestation de pension ou d'une loi provinciale semblable est refusé ou retiré,
the Minister may give notice (in this subsection and subsection 147.1(12) referred to as a "notice of intent") by registered mail to the plan administrator that the Minister proposes to revoke the registration of the plan as of a date specified in the notice of intent, which date shall not be earlier than the date as of which,	le ministre peut informer l'administrateur du régime par avis — appelé "avis d'intention" au présent paragraphe et au paragraphe (12) — , envoyé en recommandé, qu'il entend retirer l'agrément du régime à la date précisée dans l'avis d'intention, qui ne peut être antérieure aux dates suivantes:
(j) where paragraph 147.1(11)(*a*) applies, the plan failed to so comply,	j) si l'alinéa *a*) s'applique, la date où le régime cesse d'être conforme,

(k) where paragraph 147.1(11)(*b*) applies, the plan was not administered in accordance with its terms as registered,

k) si l'alinéa *b*) s'applique, la date où le régime n'est plus géré tel qu'il est agréé;

(l) where paragraph 147.1(11)(*c*) applies, the plan became a revocable plan,

l) si l'alinéa *c*) s'applique, la date où l'agrément du régime peut être retiré;

(m) where paragraph 147.1(11)(*d*) or 147.1(11)(*e*) applies, the condition or requirement was not complied with,

m) si l'alinéa *d*) ou *e*) s'applique, la date où la condition ou l'exigence n'est plus respectée;

(n) where paragraph 147.1(11)(*f*) applies, the benefit was paid or the contribution was made,

n) si l'alinéa *f*) s'applique, la date où les paiements ou versements ont été effectués;

(o) where paragraph 147.1(11)(*g*) or 147.1(11)(*h*) applies, the information return or actuarial report was required to be filed, and

o) si l'alinéa *g*) ou *h*) s'applique, la date fixée pour la présentation;

(p) where paragraph 147.1(11)(*i*) applies, the registration referred to in that paragraph was refused or revoked.

p) si l'alinéa *i*) s'applique, la date du refus ou du retrait.

147.1 (12) Where the Minister gives a notice of intent to the administrator of a registered pension plan, or the plan administrator applies to the Minister in writing for the revocation of the plan's registration, the Minister may,

147.1 (12) Le ministre peut, s'il envoie un avis d'intention à l'administrateur d'un régime de pension agréé ou si celui-ci lui demande par écrit de retirer l'agrément, informer l'administrateur par avis — appelé "avis de retrait" au présent paragraphe et au paragraphe (13) — , envoyé en recommandé, du retrait de l'agrément du régime à compter de la date précisée dans l'avis de retrait, qui ne peut être antérieure à celle précisée dans l'avis d'intention ou dans la demande de l'administrateur. L'avis de retrait est envoyé aux dates suivantes:

(a) where the plan administrator has applied to the Minister in writing for the revocation of the plan's registration, at any time after receiving the administrator's application, and

a) si l'administrateur demande au ministre par écrit de retirer l'agrément du régime, une date donnée postérieure à la réception de la demande de l'administrateur;

(b) in any other case, after 30 days after the day of mailing of the notice of intent,

b) dans les autres cas, 30 jours après la mise à la poste de l'avis d'intention.

give notice (in this subsection and subsection 147.1(13) referred to as a "notice of revocation") by registered mail to the plan administrator that the registration of the plan is revoked as of the date specified in the notice of revocation, which date may not be earlier than the date specified in the notice of intent or the administrator's application, as the case may be.

147.1 (13) Where the Minister gives a notice of revocation to the administrator of a registered pension plan, the registration of the plan is revoked as of the date specified in the notice of revocation, unless the Federal Court of Appeal or a judge thereof, on application made at any time before the determination of an appeal pursuant to subsection 172(3), orders otherwise.

147.1 (13) L'agrément d'un régime de pension agréé est retiré à compter de la date précisée dans l'avis de retrait, sauf ordonnance contraire de la Cour d'appel fédérale ou de l'un de ses juges sur demande formulée avant qu'il ne soit statué sur tout appel interjeté selon le paragraphe 172(3).

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26 It seems to me that Ms. Boudreau's application can be heard by this Court only if this Court accepts three propositions relating to the scope of subsection 147.1(13). First, this Court must be authorized to make at least one of the orders Ms. Boudreau is seeking (an order quashing the decision of the Minister to issue the notice of intent, or an order that the effective date of the revocation to be no earlier than the date of the notice of intent). Second, Ms. Boudreau must have the status to make an application under subsection 147.1(13). Third, it must be possible to commence an application under subsection 147.1(13) before the Minister has issued a notice of revocation for the Cryptic Web pension plan.

27 The scheme for the revocation of the registration of a pension plan contemplates two kinds of notice to be given by the Minister to the administrator of the plan. The first notice, referred to in subsection 147.1(11), is a "notice of intention to revoke" or a "notice of intent".

28 A notice of intention to revoke the registration of a pension plan must specify a reason for the proposed revocation, which must be one of the reasons set out in paragraphs 147.1(11)(*a*) through (*i*). It must also specify a proposed effective date for the revocation. The proposed effective date cannot be earlier than the date specified in subsection 147.1(11)(*j*) through (*p*), which varies depending upon the reason for the proposed revocation. In this case, the stated reason for Minister's intent to revoke is based on paragraph 147.1(11)(*a*) (that is, that the plan does not comply with the prescribed conditions for revocation), which means that the earliest possible effective date, as specified by paragraph 147.1(11)(*j*), is "the date as of which the plan failed to so comply."

29 A notice of intention to revoke the registration of a pension plan triggers a statutory appeal right in paragraph 172(3)(*f*) of the *Income Tax Act*. The appeal lies directly to this Court. The right of appeal is given to the administrator of the plan to whom the notice of intent is given, and to each employer that participates in the pension plan. Strangely, subsection 147.1(11) requires the Minister to give the plan administrator, but not the participating employers, a notice of intention to revoke the registration of a pension plan.

30 The notice of intention to revoke the registration of a pension plan also marks the beginning of a 30 day period after which the Minister may issue the second kind of notice provided for in the revocation scheme, a "notice of revocation" under subsection 147.1(12). The notice of revocation is the instrument by which the registration of a pension plan is revoked.

31 The Minister may issue a notice of revocation either under paragraph 147.1(12)(*a*), in response to an application by the administrator of a plan to revoke its registration, or under paragraph 147.1(12)(*b*), 30 days or more after the mailing of a notice of intent.

32 A notice of revocation must specify an effective date for the revocation. However, there is a significant degree of discretion in the choice of effective date.

33 In the case of a notice of revocation issued in response to a request for revocation by the plan administrator (which I will refer to as a voluntary revocation), the effective date specified in the notice of revocation may be any date that is not earlier than the date specified in the administrator's application.

34 In the case of a notice of revocation issued after the Minister has issued a notice of intent (which I will refer to as an involuntary revocation), the effective date specified in the notice of revocation may be any date that is not earlier than the proposed effective date specified in the notice of intent.

35 The Minister may issue a notice of revocation 30 days after the mailing of the notice of intention to revoke, whether or not an appeal has been commenced under subsection 172(3) of the *Income Tax Act*. That means that the Minister has the right, but not the obligation, to defer the issuance of notice of revocation until after the disposition of any such appeal. It bears repeating that in the notice of revocation, whenever it is issued, the Minister may choose an effective date for the revocation that is later than the proposed effective date specified in the notice of intent.

36 According to subsection 147.1(13), the registration of a pension plan is revoked as of the effective date specified on the notice of revocation "unless this Court or a judge thereof, on application made at any time before the determination of an appeal pursuant to subsection 172(3), orders otherwise". The quoted phrase comprises the closing words of subsection 147.1(13). Its meaning is a matter of debate between Ms. Boudreau and the Crown because subsection 147.1(13) is not specific on a number of important points.

37 It is clear, for example, that subsection 147.1(13) gives this Court the jurisdiction to make an "order otherwise", upon an application that is made before the disposition of an appeal under subsection 172(3). If there is no such order, then the registration of the pension plan is revoked as of the effective date specified in the notice of revocation. However, much remains unclear about what kind of order is contemplated by subsection 147.1(13), who is entitled to make an application under subsection 147.1(13), and when the application may be made.

38 Before dealing with those points, I will make some general observations about the revocation of the registration of pension plans that, in my view, should guide the interpretation of subsection 147.1(13).

39 First, the statutory scheme for the revocation of the registration of a pension plan is intended to accommodate a revocation at the request of the plan administrator, or a revocation that results from a decision of the Minister.

40 Second, the only temporal restriction on an application under subsection 147.1(13) is that it must be made before the disposition of any appeal under subsection 172(3). That would

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suggest that, if subsection 147.1(13) has any application to voluntary revocations, there is no time limit. That may seem to be a strange result. However, it makes sense in the context of a statutory revocation scheme that provides for notice of the revocation to be given only to the plan administrator, one party among the many who might be affected by the revocation. Also, it seems to me that, since any relief that may be available under subsection 147.1(13) is discretionary, any unreasonable delay on the part of an applicant in the case of a voluntary revocation probably would reduce the likelihood of obtaining a remedy.

41 Third, although Parliament has said that only the administrator of a registered pension plan or a participating employer may exercise the right of appeal under subsection 172(3) when the Minister issues an intent to revoke the registration of the plan, it has not expressed a similar limitation in relation to applications under subsection 147.1(13) when the Minister issues a notice of revocation. Thus, the language of subsection 147.1(13) may suggest that it is intended to have broader application than subsection 172(3).

42 Fourth, the adverse tax consequences of the revocation of the registration of a pension plan fall mainly on the members. I would assume that in most cases, the members of a plan are not in a position to influence decisions about the administration of the plan. It is not unreasonable to suppose that Parliament may have wished to provide some judicial recourse to the members of a pension plan that is proposed to be revoked, even if that recourse falls short of a right of appeal under subsection 172(3).

43 I will now discuss the specific questions mentioned above. Subsection 147.1(13) is reproduced here for ease of reference:

147.1 (13) Where the Minister gives a notice of revocation to the administrator of a registered pension plan, the registration of the plan is revoked as of the date specified in the notice of revocation, unless the Federal Court of Appeal or a judge thereof, on application made at any time before the determination of an appeal pursuant to subsection 172(3), orders otherwise.	147.1 (13) L'agrément d'un régime de pension agréé est retiré à compter de la date précisée dans l'avis de retrait, sauf ordonnance contraire de la Cour d'appel fédérale ou de l'un de ses juges sur demande formulée avant qu'il ne soit statué sur tout appel interjeté selon le paragraphe 172(3).

What kind of order is contemplated by the words "order otherwise" in subsection 147.1(13)?

44 The principal function of subsection 147.1(13) is to give legal effect to a notice of revocation of the registration of a pension plan. That legal effect has two aspects. The first aspect is the revocation itself (the registration of the pension plan is revoked). The second aspect is the effective date of the revocation (the registration is revoked as of the date specified in the notice of revocation).

45 A secondary function of subsection 147.1(13) is to provide an exception to the stated legal effect of the notice of revocation. The exception is an "order otherwise" made by this Court, or a judge of this Court, on an application that meets the statutory conditions.

46 There is an issue as to whether the "order otherwise" may speak to both of the stipulated legal effects of subsection 147.1(13), or only the effective date. The question, it seems to me, is this: if an application is made that meets the statutory conditions, does subsection 147.1(13) give the Court the jurisdiction (a) to invalidate the revocation entirely, or (b) to alter the effective date of the revocation, or (c) to suspend or stay the revocation pending the disposition of a subsection 172(3) appeal?

47 The first and second possibilities reflect the two alternative orders sought by Ms. Boudreau in this application for judicial review. The third reflects, as I understand it, the view of the Crown as to the limited scope of subsection 147.1(13).

48 For the purposes of this appeal, I propose to consider only the second and third possibilities. That is because, in Ms. Boudreau's case, she has only a limited interest in the revocation of the registration of the Cryptic Web pension plan. Any risk to her of a tax disadvantage from the revocation would be eliminated by an order that alters the effective date of the revocation to a date that is later than the date on which money was transferred from the Cryptic Web pension plan to the other plan, which apparently occurred at some point, perhaps in 2002, but in any event before the Minister issued the notice of intent.

49 The Crown proposes an interpretation of subsection 147.1(13) that would limit this Court's jurisdiction to the right to suspend or stay the revocation pending the disposition of a subsection 172(3) appeal, not to change permanently the effective date of the revocation. There are a number of reasons why I would be reluctant to adopt such a limited interpretation.

50 Interpreting subsection 147.1(13) to permit only a suspension or stay of a revocation would preclude the possibility, even in a case where there is an appeal under subsection 172(3), that subsection 147.1(13) may be used to seek an order imposing a different effective date for the revocation than the date set out in the notice of revocation. Suppose, for example, the Minister issues a notice of intention to revoke the registration of a pension plan, and specifies a particular effective date for the revocation. Then suppose the plan administrator appeals. And then, while the appeal is pending, the Minister issues a notice of revocation naming a different effective date, as he is apparently entitled to do. It seems to me unreasonable to preclude the appellant in such a case from having recourse to subsection 147.1(13) to argue against the change of effective date.

51 Another difficulty with the Crown's proposed interpretation is that it is based on the premise that no application may be made under subsection 147.1(13) unless there is an appeal pending

under subsection 172(3). In other words, it is based on the premise that Parliament intended to preclude access to subsection 147.1(13) in the case of a voluntary revocation.

52 It is not difficult to envisage how subsection 147.1(13) could be employed in a voluntary revocation. It is conceivable that the Minister and the administrator may have different views as to the appropriateness of a particular revocation, or the choice of effective date. If the appropriateness of the revocation itself is in issue, then either the administrator will not request it, or the Minister will not accede to the request. Either way, the revocation of the registration will not occur. But if the administrator requests a revocation and the Minister agrees that revocation is appropriate, they still may have different views as to the choice of effective date. The Minister's view will necessarily prevail unless the administrator is entitled to use subsection 147.1(13) to seek an order for a different effective date. I see no sound policy reason why Parliament would be inclined to preclude recourse to subsection 147.1(13) in such a case. Nor do I see anything in the statutory scheme to suggest that Parliament intended to do so.

53 For these reasons, I am inclined to the view that subsection 147.1(13) should be interpreted to give this Court the jurisdiction, in the case of a voluntary or involuntary revocation, to make an order altering the effective date stated in the notice of revocation, and also the jurisdiction, if a subsection 172(3) appeal is pending, suspending or staying the revocation pending the determination of the appeal.

54 Assuming that view is correct, the exercise of the Court's jurisdiction would require an application that meets the conditions in subsection 147.1(13). It remains to consider what is required for an application to meet those conditions.

Who has the status to make an application under subsection 147.1(13)?

55 The Crown's position is that an application under subsection 147.1(13) may be made only by the administrator or a participating employer of a pension plan that is proposed to be revoked, and not a member. The most straightforward answer to that proposition is that Parliament has not said that recourse to subsection 147.1(13) is limited to those who have a right of appeal under subsection 172(3), although it could easily have done so.

56 It also seems to me that the Crown's reasoning on this point suffers from the same flaw as the previous point, which is that it is based on the premise that an application under subsection 147.1(13) must necessarily be connected with an appeal under subsection 172(3), and therefore cannot be applied in a situation involving a voluntary revocation. The premise is just as unsound in the context of this point as it was in context of the previous point.

57 It may well happen that the Minister and other parties with an interest in a registered pension plan have different views about what the effective date of the revocation of its registration should be. In fact, of all possible interested parties, it is probably the members who have the

most at stake in the resolution of any dispute about the choice of effective date. Given that the subject matter of subsection 147.1(13) is the resolution of a dispute about the effective date of a revocation, and given that it does not expressly limit potential applicants to plan administrators and participating employees, I would not be inclined to add such a limitation by interpreting the provision as narrowly as the Crown would propose.

58 It also seems to me relevant that, as a practical matter, there can be no assurance that the decision of a plan administrator to request the revocation of its registration, or the decision of the administrator or a participating employer not to appeal an involuntary revocation, or to settle or abandon such an appeal, will necessarily take into account the interests of the members. While the members may have the right to pursue civil remedies against the plan administrator or the participating employer if their interests are impaired, those remedies may prove empty if the administrator and employer have no assets. In addition, such remedies would have to be pursued in the provincial courts which may not have the jurisdiction to reverse a revocation. The Crown argues that the income tax consequences of a revocation could, to the extent they result in tax assessments, be appealed to the Tax Court of Canada, but it is far from clear to me that it would be open to the Tax Court, in an income tax appeal, to disregard the effective date of the revocation of a pension plan as stipulated in a notice of revocation.

59 If subsection 147.1(13) does not entitle members of a pension plan to challenge the effective date of the revocation of the registration of a pension plan, then the decision of the Minister to issue a notice of revocation may be within the exclusive original jurisdiction of the Federal Court by virtue of section 18 of the *Federal Courts Act* (assuming section 18.5 of the *Federal Courts Act* would not bar the application: see *T.W.U. v. Canada (Radio-Television & Telecommunications Commission)* (1992), [1993] 1 F.C. 231 (Fed. C.A.)); a point on which I express no opinion.) Assuming the Federal Court has jurisdiction in this matter, it would mean that two different courts could be required to adjudicate the same point, with potentially inconsistent results.

60 On balance, I am inclined to the view that anyone has the status to bring an application under subsection 147.1(13) who can demonstrate a real and substantial interest in the revocation of the registration of a pension plan. Ms. Boudreau clearly has such an interest.

The timing of an application under subsection 147.1(13)

61 Can an application be made under subsection 147.1(13) before the Minister issues a notice of revocation? The Minister argues that it cannot, and relies on the opening words ("where the Minister gives a notice of revocation to the administrator of a registered pension plan").

62 In my view the opening words are sufficiently clear to support the conclusion that an order cannot be made under subsection 147.1(13) until after a notice of revocation is issued. However, they do not preclude the commencement of an application under subsection 147.1(13) in respect

of a pension plan for which the Minister has not yet issued a notice of revocation, but has issued a notice of intent that is under appeal, as in this case.

63 It seems to me that, if Ms. Boudreau has the status to make an application under subsection 147.1(13), and this Court has the jurisdiction to grant her one of the remedies she is seeking, the fact that a notice of revocation has not yet been issued may be a reason to delay the hearing of this application, but it is not a reason to find that it should not have been commenced when it was. This Court cannot make an order under subsection 147.1(13) unless an application is made under subsection 147.1(13) "at any time before the determination of an appeal pursuant to subsection 172(3)". If an order is to be made before the appeal is determined, it must be possible to apply for the order while the appeal is pending.

Summary and proposed disposition of the Crown's motion on jurisdiction

64 As indicated above, my inclination is to conclude that Ms. Boudreau has the status to bring the application for judicial review, and that this Court has the jurisdiction to grant one of the remedies she seeks (an order changing the effective date of the revocation of the registration of the Cryptic Web pension plan), but that her application cannot be determined unless and until a notice of revocation is issued.

65 I have expressed my conclusions tentatively because it seems to me unnecessary at this stage to reach a definitive conclusion. That is because the Cryptic Web appeal remains outstanding, and Ms. Boudreau retains the right to reapply to intervene in that appeal, if it proceeds. If it proceeds, it may result in a judgment that would render this application moot (whether or not Ms. Boudreau is permitted to intervene).

66 I would make an order staying this application, and all motions filed to date, until the final disposition of the Cryptic Web appeal.

***Rothstein J.A.*:**

I agree

***Nadon J.A.*:**

I agree

Motion and application stayed.

2020 FCA 69
Federal Court of Appeal

Canada (Attorney General) v. Democracy Watch

2020 CarswellNat 1268, 2020 FCA 69, [2020] F.C.J. No. 498, 317 A.C.W.S. (3d) 244, 445 D.L.R. (4th) 336

ATTORNEY GENERAL OF CANADA (Appellant) and DEMOCRACY WATCH (Respondent)

Wyman W. Webb, Donald J. Rennie, Anne L. Mactavish JJ.A.

Heard: December 12, 2019
Judgment: April 1, 2020
Docket: A-159-19

Proceedings: reversing *Democracy Watch v. Canada (Attorney General)* (2019), 2019 CF 388, 2019 CarswellNat 3075, 2019 CarswellNat 1110, 2019 FC 388, Patrick Gleeson J. (F.C.)

Counsel: Alexander Gay, for Appellant
Sebastian Spano, for Respondent

***Donald J. Rennie J.A.*:**

I. Introduction

1 The Attorney General of Canada appeals from a judgment of the Federal Court (2019 FC 388 (F.C.), *per* Gleeson J.), in which the Court granted the respondent's judicial review application and set aside a decision of the Commissioner of Lobbying not to conduct an investigation under subsection 10.4(1) of the *Lobbying Act*, R.S.C. 1985, c. 44 (4th Supp.). The Federal Court held that the Commissioner's decision that an investigation was not necessary to ensure compliance with the *Lobbying Act* or the Lobbyists' Code of Conduct was both subject to judicial review and unreasonable.

2 For the reasons that follow, I would allow the appeal.

3 The circumstances that gave rise to the application may be briefly stated. In January of 2017, the media reported that the Prime Minister of Canada, Justin Trudeau, and his family celebrated the New Year on a Caribbean island at the invitation of Prince Shah Karim Al Hussaini (the Aga Khan IV). The vacation was a gift.

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4 Following the media report, a private citizen filed a complaint with the Office of the Commissioner of Lobbying, asserting that the Aga Khan's gift had violated the *Lobbying Act* and the Lobbyists' Code. An acknowledgement letter was mailed to the complainant.

5 The Office of the Lobbying Commissioner began an internal review to assess whether it should conduct an investigation. In a memorandum of September 13, 2017, the Director of Investigations recommended to the Commissioner that the file be closed without further investigation. In a short and somewhat cryptic memorandum, the Director found:

> [...] no evidence to indicate that Prince Shah Karim Al Hussaini, Aga Khan IV, is remunerated for his work with the [Aga Khan Foundation Canada] and, therefore, that he was engaged in registrable lobbying activity during the Prime Minister's Christmas vacation.
>
> Consequently, the *Lobbyists' Code of Conduct* does not apply to the Aga Khan's interactions with the Prime Minister.

6 The Commissioner agreed. The reasons for the decision were not announced to the public, but the Commissioner informed the complainant of the decision not to investigate. I note, parenthetically, that the Aga Khan Foundation itself is a registered lobbyist under the *Lobbying Act*. The Aga Khan sits on the Board of the Aga Khan Foundation, but his position is unpaid. He is a volunteer.

7 Democracy Watch commenced a judicial review application to set aside the decision not to pursue an investigation in respect of the complaint.

8 After a review of the Commissioner's investigative powers and duties, the Federal Court concluded that the scheme set out by the *Lobbying Act* and the Lobbyists' Code imposed an obligation on the Commissioner to receive, consider and investigate complaints originating from the public. In reaching this conclusion, the Court relied in part on the introduction to the Lobbyists' Code, which states that "[a]nyone suspecting non-compliance with the Code should forward information to the Commissioner".

9 The purpose of the *Lobbying Act* also played a role in the Federal Court's analysis. The judge concluded that the exhortation in the Code that the public provide information, combined with a "duty" on the part of the Lobbying Commissioner to review, consider and render a decision on information brought forward by the public furthered the important public purposes of the Act: to enhance public trust and confidence in the integrity of government decision-making. These factors led to a conclusion that legal rights were affected by a decision not to investigate under subsection 10.4(1) of the *Lobbying Act*. The Commissioner's decision not to investigate further was therefore amenable to judicial review.

II. The Arguments before this Court

10 The appellant makes two principle arguments.

11 The first is that because the *Lobbying Act*, like the *Conflict of Interest Act*, S.C. 2006, c. 9, s. 2, fails to create a statutory right for a member of the public to have their complaint investigated, the Federal Court was bound by this Court's previous decision in *Democracy Watch v. Canada (Conflict of Interest & Ethics Commissioner)*, 2009 FCA 15 (F.C.A.) (*Democracy Watch 2009*) and that it was an error of law for the Federal Court not to follow a binding authority.

12 At issue in that appeal was whether the Conflict of Interest and Ethics Commissioner's decision not to begin an investigation under subsection 45(1) of the *Conflict of Interest Act*, when a member of the public had requested an investigation, was amenable to judicial review.

13 This Court concluded that there was no statutory right under the *Conflict of Interest Act* for a member of the public to have their complaint investigated. The Ethics Commissioner, in turn, had no statutory duty to act upon that complaint (*Democracy Watch 2009* at para. 11). Because the *Conflict of Interest Act* did not create a right for a member of the public to have their complaint investigated, the Ethics Commissioner's decision not to investigate was not an order or decision amenable to judicial review. The Court also noted that the Ethics Commissioner had not made any statements in her letter that could have binding legal effect (at para. 12).

14 In this case, the Federal Court judge was not bound by *Democracy Watch 2009*. I agree with the respondent that while the scheme is analogous, there are differences between the two Acts. The language governing investigations in subsection 10.4(1) of the *Lobbying Act* is mandatory, while the language in subsection 45(1) of the *Conflict of Interest Act* is permissive. While this would seem, as a matter of first impression, to favour the respondent, this Court pointed out in *Democracy Watch v. Canada (Attorney General)*, 2018 FCA 194 (F.C.A.) at paragraph 29 that mandatory language does not necessarily translate into a reviewable order or decision amenable to judicial review.

15 While *Democracy Watch 2009* is certainly instructive and contains guidance as to the criteria that the judge should consider in assessing whether the decision not to investigate gave rise to judicial review, it is not dispositive of the result in this case. The question whether the *Lobbying Act* creates rights or obligations, or causes prejudicial effects, can only be determined through consideration of the *Lobbying Act* itself, not another statute. It was not an error of law on the part of the judge to consider the argument whether a right of judicial review arose under the *Lobbying Act* on its own merits.

16 I turn to the appellant's second argument.

17 The appellant highlights the fact that the Lobbyists' Code, though it encourages the public to bring forward information, is not a statutory instrument that compels the investigation

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of complaints or creates legal rights. The appellant encourages this Court to distinguish between the process of gathering information provided for by the *Lobbying Act* and the Lobbyists' Code, and a statutory complaints process sufficiently robust to create rights. To this end, the appellant juxtaposes the lobbying regime with other statutes in which Parliament uses express language to create a statutory mechanism for the investigation of complaints by agents of Parliament.

18 The respondent, in turn, highlights the legislative history of the *Lobbying Act*, emphasising the manner in which Parliament has, through a series of legislative reforms commencing in 1988, expanded the mandate and investigative powers of the Commissioner and lowered the threshold to commence an investigation. The respondent also emphasizes that the Lobbyists' Code encourages "anyone" to bring information to the attention of the Commissioner. Finally, the respondent argues that the loss of public trust that flows from the Commissioner's decision that the Aga Khan is not subject to the *Lobbying Act* or the Lobbyists' Code is a consequence sufficient to trigger a right of judicial review. According to the respondent, consequences need not be legal to trigger a right of review.

19 As in all judicial review applications, the Court must first decide whether the decision sought to be set aside is subject to judicial review. Not all administrative action gives rise to a right of review. There are many circumstances where an administrative body's conduct will not trigger a right to judicial review. Some decisions are simply not justiciable, crossing the boundary from the legal to the political. Others may be justiciable but there may be an adequate alternative remedy. No right of review arises where the conduct attacked fails to affect rights, impose legal obligations, or cause prejudicial effects (*Sganos v. Canada (Attorney General)*, 2018 FCA 84 (F.C.A.) at para. 6; *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605 (F.C.A.) at para. 29; *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, [2010] 2 F.C.R. 488 (F.C.A.); and *Democracy Watch 2009*, referred to above).

20 It is this latter criterion that is the focus of this appeal. The answer to the question whether the *Lobbying Act* affects rights, imposes obligations or causes prejudicial effects requires a careful examination of the legislation in question. As the issue is one of statutory interpretation, the standard of review is correctness (*TELUS Communications Inc. v. Wellman*, 2019 SCC 19 (S.C.C.) at para. 30).

III. The Legislative Regime

21 The over-arching purpose of the *Lobbying Act* is to ensure transparency and accountability in the lobbying of public office holders and consequentially increase public confidence in the integrity of government decision-making. To that end, it establishes the Office of the Commissioner of Lobbying. The Commissioner reports directly to Parliament through the Speaker of the House of Commons and the Speaker of the Senate. The Commissioner's mandate includes the maintenance of a publically accessible system for the registration of paid lobbyists. The Act authorizes the

2009 SCC 12, 2009 CSC 12
Supreme Court of Canada

Canada (Minister of Citizenship and Immigration) v. Khosa

2009 CarswellNat 434, 2009 CarswellNat 435, 2009 SCC 12, 2009 CSC 12, [2009] 1 S.C.R. 339, [2009] S.C.J. No. 12, 175 A.C.W.S. (3d) 7, 304 D.L.R. (4th) 1, 385 N.R. 206, 77 Imm. L.R. (3d) 1, 82 Admin. L.R. (4th) 1, J.E. 2009-481

Minister of Citizenship and Immigration, Appellant and Sukhvir Singh Khosa, Respondent and Immigration and Refugee Board, Intervener

McLachlin C.J.C., Bastarache, Binnie, LeBel,
Deschamps, Fish, Abella, Charron, Rothstein JJ. *

Heard: March 20, 2008
Judgment: March 6, 2009 **
Docket: 31952

Proceedings: reversing *Khosa v. Canada (Minister of Citizenship & Immigration)* (2007), [2007] 4 F.C.R. 332, [2007] F.C.J. No. 139, 2007 CAF 24, 276 D.L.R. (4th) 369, 2007 CarswellNat 1418, 59 Imm. L.R. (3d) 122, 2007 FCA 24, 2007 CarswellNat 212, 360 N.R. 183, A. Desjardins J.A., B. Malone J.A., R. Décary J.A. (F.C.A.); reversing *Khosa v. Canada (Minister of Citizenship & Immigration)* (2005), [2005] F.C.J. No. 1465, 266 F.T.R. 138 (Eng.), 2005 CF 1218, 2005 CarswellNat 5249, 48 Imm. L.R. (3d) 253, 2005 CarswellNat 2651, 2005 FC 1218, Lutfy C.J. (F.C.)

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Garth Barriere, Daniel B. Geller, for Respondent
Joseph J. Arvay, Q.C., Joel M. Rubinoff, for Intervener

***Binnie J.*:**

1 At issue in this appeal is the extent to which, if at all, the exercise by judges of statutory powers of judicial review (such as those established by ss. 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7) is governed by the common law principles lately analysed by our Court in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.).

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2 The respondent, Khosa, applied unsuccessfully to the Immigration Appeal Division ("IAD") of the Immigration and Refugee Board to remain in Canada, notwithstanding his conviction for criminal negligence causing death in an automobile street race. A valid removal order had been issued to return him to India. The majority of the IAD did not accept that there were "sufficient humanitarian and compassionate considerations [to] warrant special relief [against the removal order] in light of all the circumstances of the case" within the meaning of s. 67(1)(c) of the *Immigration and Refugee Protection Act* ("*IRPA*"), S.C. 2001, c. 27. Applying the "patent unreasonableness" standard of review, the judicial review judge at first instance dismissed Khosa's challenge to the IAD decision. However, applying a "reasonableness" *simpliciter* standard of review, a majority of the Federal Court of Appeal set aside the IAD decision. *Dunsmuir* (decided subsequently to both lower court decisions) did away with the distinction between "patent unreasonableness" and "reasonableness *simpliciter*" and substituted a more context-driven view of "reasonableness" that nevertheless "does not pave the way for a more intrusive review by courts" (para. 48).

3 The appellant Minister sought leave to appeal to this Court to argue that in any event s. 18.1 of the *Federal Courts Act* establishes a *legislated* standard of review that displaces the common law altogether. On this view, *Dunsmuir* is largely irrelevant to the current appeal. However, it is apparent that while the courts below differed on the choice of the appropriate common law standard of review, neither the judge at first instance nor any of the judges of the appellate court considered the common law of judicial review to be displaced by s. 18.1 of the *Federal Courts Act*. The trial court took the view that s. 18.1 of the *Federal Courts Act* deals essentially with *grounds* of review of administrative action, not *standards* of review, and the Federal Court of Appeal proceeded in the same way. I think this approach is correct although, as will be discussed, s. 18.1(4)(*d*) does provide legislative guidance as to "the degree of deference" owed to the IAD's findings of fact.

4 *Dunsmuir* teaches that judicial review should be less concerned with the formulation of different standards of review and more focussed on substance, particularly on the nature of the issue that was before the administrative tribunal under review. Here, the decision of the IAD required the application of broad policy considerations to the facts as found to be relevant, and weighed for importance, by the IAD itself. The question whether Khosa had shown "sufficient humanitarian and compassionate considerations" to warrant relief from his removal order, which all parties acknowledged to be valid, was a decision which Parliament confided to the IAD, not to the courts. I conclude that on general principles of administrative law, including our Court's recent decision in *Dunsmuir*, the applications judge was right to give a higher degree of deference to the IAD decision than seemed appropriate to the Federal Court of Appeal majority. In my view, the majority decision of the IAD was within a range of reasonable outcomes and the majority of the Federal Court of Appeal erred in intervening in this case to quash it. The appeal is therefore allowed and the decision of the Immigration Appeal Division is restored.

I. Facts

5 The respondent, Sukhvir Singh Khosa, is a citizen of India. He immigrated to Canada with his family in 1996, at the age of 14. He has landed immigrant status. During the evening of November 13, 2000, he and an individual named Bahadur Singh Bhalru, drove their respective cars at over 100 kilometres per hour along Marine Drive through a residential and commercial area of Vancouver. At their criminal trial, the court concluded that they were "street racing". Khosa was prepared to plead guilty to a charge of dangerous driving, but not to the more serious charge of criminal negligence causing death, of which he was eventually convicted. The respondent continued to deny street racing, although he admitted that he was speeding and that his driving behaviour was exceptionally dangerous. On appeal from sentencing, the British Columbia Court of Appeal commented:

> ... it is significant that the respondents were racing. They were driving at excessive speeds in competition with each other on a major street lined with both commercial and residential properties. They did this at a time when other vehicles and pedestrians reasonably could be expected to be on the roads.
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> . . . . .
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> The "spontaneous" nature of the race ... mitigates the severity with which it should be assessed. The race was not planned, did not involve vehicles specifically modified for the purpose of racing, and was of relatively short duration. As unacceptable as the conduct of the respondents was, it represented a reckless error in judgment more than a deliberate endangerment of the public.
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> 2003 BCCA 645, 190 B.C.A.C. 42 (B.C. C.A.), at paras. 33 and 36)

As to the "moral culpability" of the respondent and his co-accused, the Court of Appeal continued:

> The Crown concedes that there are several factors which mitigate the moral culpability of the respondents in this case. Mr. Khosa and Mr. Bhalru are both young, have no prior criminal record or driving offences, have expressed remorse for the consequences of their conduct, and have favourable prospects for rehabilitation....
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> [para. 38]

6 The respondent received a conditional sentence of two years less a day. The conditions included house arrest, a driving ban, and community service, all of which were complied with prior to the IAD hearing.

II. Judicial History

A. Immigration Appeal Division, [2004] I.A.D.D. No. 1268 (Imm. & Ref. Bd. (App. Div.))

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(1) The Majority

7 The majority of the IAD recognized (at para. 12) that its discretionary jurisdiction to grant "special relief on humanitarian and compassionate grounds under s. 67(1)(*c*) of the *IRPA* should be exercised in light of the factors adopted in *Ribic v. Canada (Minister of Employment & Immigration)* (1986), [1985] I.A.B.D. No. 4 (Imm. App. Bd.), and endorsed by this Court in *Chieu v. Canada (Minister of Citizenship & Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84 (S.C.C.), at paras. 40, 41 and 90, namely:

> (1) the seriousness of the offence leading to the removal order;
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> (2) the possibility of rehabilitation;
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> (3) the length of time spent, and the degree to which the individual facing removal is established, in Canada;
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> (4) the family and community support available to the individual facing removal;
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> (5) the family in Canada and the dislocation to the family that removal would cause; and
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> (6) the degree of hardship that would be caused to the individual facing removal to his country of nationality.

8 The majority considered that the last four *Ribic* factors were not particularly compelling for or against relief. As to the first two factors, the offence in question was "extremely serious" (para. 14) and the majority expressed particular concern over Khosa's refusal to accept without reservation the finding that he had been street racing. The IAD majority considered that this refusal "reflects a lack of insight into his conduct" (para. 15). As to Khosa's prospects for rehabilitation, the majority decided that there was insufficient evidence upon which to make a finding one way or the other (paras. 15 and 23). However, even if Khosa had good prospects for rehabilitation, "balancing all the relevant factors, ... the scale does not tip in [Khosa's] favour" (para. 23). Accordingly, "special relief was denied.

(2) The Dissent

9 The dissenting member of the IAD would also have denied the appeal, but she would have stayed the execution of the deportation order pending a further review in three years. She acknowledged the seriousness of the offence for which Khosa was convicted but found that it was mitigated by matters not considered important by the majority. Evidence of remorse and rehabilitation favoured relief. Having regard to the criminal proceedings, she noted that no penitentiary term was considered appropriate. The crime of which Khosa was convicted is not one of intent. There was no evidence of criminal propensity. The race was spontaneous and short.

All sentencing conditions had been complied with. In the circumstances, she concluded that relief ought to be granted on humanitarian and compassionate grounds.

B. Federal Court, 2005 FC 1218, 266 F.T.R. 138 (Eng.) (F.C.)

10 Lutfy C.J. dismissed Khosa's application for judicial review. He found that considerable deference was required, given the broad nature of the discretion vested in the IAD and its expertise in applying *Ribic* factors in appeals under s. 67(1)(c) of the *IRPA*. The appropriate standard of review is patent unreasonableness. Whether or not the IAD majority erred in its appreciation of the evidence in light of the *Ribic* factors is "substantially, if not completely, factual" (para. 29).

11 Lutfy C.J. said that the crux of Khosa's argument was that the majority of the IAD erred by placing inordinate emphasis on his denial that his admittedly dangerous driving took place in the context of a street race, but the judge declined to reweigh the evidence, saying (at para. 36):

> In assessing Mr. Khosa's expression of remorse, they [the majority] chose to place greater weight on his denial that he participated in a "race" than others might have. The IAD conclusion on the issue of remorse appears to differ from that of the criminal courts. The IAD, however, unlike the criminal courts, had the opportunity to assess Mr. Khosa's testimony.

12 In the result, Lutfy C.J. held that there was no basis for concluding that "the majority opinion is patently unreasonable or, in the words of paragraph 18.1(4)(d) of the *Federal Courts Act*, one which was based on an erroneous finding of fact 'made in a perverse or capricious manner or without regard for the material'" (para. 39).

C. Federal Court of Appeal, 2007 FCA 24, [2007] 4 F.C.R. 332 (F.C.A.)

(1) The Majority

13 Décary J.A. (Malone J.A. concurring) disagreed with Lutfy C.J. on the appropriate standard of review. In his view, the applicable standard was "reasonableness". Accordingly, "[s]ince the applications Judge applied the wrong standard of review, it is my duty, on appeal, to review the Board's decision on the correct standard of review, that is, on the standard of reasonableness" (para. 14).

14 With respect to the second *Ribic* factor, Décary J.A. said that the "possibility of rehabilitation" is a criminal law concept with which the IAD does not have particular expertise. It should be wary of questioning findings of the criminal courts on matters falling squarely within their expertise. The majority "merely acknowledges the findings of the British Columbia courts in that regard, which are favourable to [Khosa], and does not explain why it comes to the contrary conclusion .... The whole of the evidence with respect to the conduct of [Khosa] after his sentencing undisputedly

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strengthens the findings of the criminal courts. Yet, the Board ignores that evidence and those findings" (para. 17). As to the "street racing" issue, Décary J.A. said:

> It clearly appears from the transcripts of the hearing that the presiding member — who wrote the majority decision — and counsel for the Crown, had some kind of fixation with the fact that the offence was related to street racing, to such a point that the hearing, time and time again, was transformed into a quasi-criminal trial, if not into a new criminal trial. [para. 18]

For these reasons, Décary J.A. concluded that the majority had acted unreasonably.

(2) The Dissent

15 Desjardins J.A. concluded that the applications judge was right to apply the "patent unreasonableness" standard. She emphasized that the IAD has expertise in applying the *Ribic* factors in decisions under s. 67(1)(c) of the *IRPA* and that this exercise is "highly fact-based and contextual" (para. 36). Desjardins J.A. also emphasized the broad discretion conferred upon the IAD by s. 67(1)(c) of the *IRPA*. In her view, Lutfy C.J. had made no reviewable error. She would have dismissed the appeal.

III. Relevant Statutory Provisions

16 *Immigration and Refugee Protection Act*, S.C. 2001, c. 27

> **3.** (1) The objectives of this Act with respect to immigration are
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> . . . . .
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> (*h*) to protect the health and safety of Canadians and to maintain the security of Canadian society;
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> . . . . .
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> **36.** (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for
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> > (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;
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> **67.** (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,
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> . . . . .
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> (*c*) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.
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> . . . . .

Federal Courts Act, R.S.C. 1985, c. F-7

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 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.

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

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

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

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

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

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

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

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

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

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

(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.

IV. Analysis

17 This appeal provides a good illustration of why the adjustment made by *Dunsmuir* was timely. By switching the standard of review from patent unreasonableness to reasonableness *simpliciter*, the Federal Court of Appeal majority felt empowered to retry the case in important respects, even though the issues to be resolved had to do with immigration policy, not law. Clearly, the majority felt that the IAD disposition was unjust to Khosa. However, Parliament saw fit to confide that particular decision to the IAD, not to the judges.

18 In cases where the legislature has enacted judicial review legislation, an analysis of that legislation is the first order of business. Our Court had earlier affirmed that, within constitutional limits, Parliament may by legislation specify a particular standard of review: see *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779 (S.C.C.). Nevertheless, the intended scope of judicial review legislation is to be interpreted in accordance with the usual rule that the terms of a statute are to be read purposefully in light of its text, context and objectives.

19 Generally speaking, most if not all judicial review statutes are drafted against the background of the common law of judicial review. Even the more comprehensive among them, such as the British Columbia *Administrative Tribunals Act*, S.B.C. 2004, c. 45, can only sensibly be interpreted in the common law context because, for example, it provides in s. 58(2)(*a*) that "a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with *unless it is patently unreasonable*". The expression "patently unreasonable" did not spring unassisted from the mind of the legislator. It was obviously intended to be understood in the context of the common law jurisprudence, although a number of *indicia* of patent unreasonableness are given in s. 58(3). Despite *Dunsmuir*, "patent unreasonableness" will live on in British Columbia, but the *content* of the expression, and the precise degree of deference it commands in the diverse circumstances of a large provincial administration, will necessarily continue to be calibrated according to general principles of administrative law. That said, of course, the legislature in s. 58 was and is directing the B.C. courts to afford administrators a high degree of deference on issues of fact, and effect must be given to this clearly expressed legislative intention.

A. A Difference of Perspective

20 As Rand J. commented in *Roncarelli v. Duplessis*, [1959] S.C.R. 121 (S.C.C.), at p. 140, "there is always a perspective within which a statute is intended to operate". This applies to s. 18.1 of the *Federal Courts Act* as much as it does to any other enactment.

21 My colleague Justice Rothstein adopts the perspective that in the absence of a privative clause or statutory direction to the contrary, express or implied, judicial review under s. 18.1 is to proceed "as it does in the regular appellate context" (para. 117). Rothstein J. writes:

> On my reading, where Parliament intended a deferential standard of review in s. 18.1(4), it used clear and unambiguous language. The necessary implication is that where Parliament did not provide for deferential review, it intended the reviewing court to apply a correctness standard as it does in the regular appellate context.
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> [Emphasis added.]

I do not agree that such an implication is either necessary or desirable. My colleague states that "where a legal question can be extricated from a factual or policy inquiry, it is inappropriate to presume deference where Parliament has not indicated this via a privative clause" (para. 90), citing *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at paras. 8 and 13. *Housen*, of course, was a regular appeal in a civil negligence case.

22 On this view, the reviewing court applies a standard of review of correctness unless otherwise directed to proceed (expressly or by necessary implication) by the legislature.

23 Rothstein J. writes that the Court's "depart[ed] from the conceptual origin of standard of review" in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.). *Pezim* was a unanimous decision of the Court which deferred to the expertise of a specialized tribunal in the interpretation of provisions of the *Securities Act*, S.B.C. 1985, c. 83, despite the presence of a right of appeal and the absence of a privative clause.

24 The conceptual underpinning of the law of judicial review was "further blurred", my colleague writes, by *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.), which treated the privative clause "simply as one of several factors in the calibration of deference (standard of review)" (para. 92). In my colleague's view, "[i]t is not for the court to impute tribunal expertise on legal questions, absent a privative clause and, in doing so, assume the role of the legislature to determine when deference is or is not owed" (para. 91).

25 I do not share Rothstein J.'s view that absent statutory direction, explicit or by necessary implication, no deference is owed to administrative decision makers in matters that relate to their special role, function and expertise. *Dunsmuir* recognized that with or without a privative clause, a measure of deference has come to be accepted as appropriate where a particular decision had been allocated to an administrative decision maker rather than to the courts. This deference

extended not only to facts and policy but to a tribunal's interpretation of its constitutive statute and related enactments because "there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported" (*Dunsmuir*, at para. 41). A policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" (*Dunsmuir*, at para. 49, quoting Professor David J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93). Moreover, "[d]eference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context" (*Dunsmuir*, at para. 54).

26 *Dunsmuir* stands against the idea that in the absence of express statutory language or necessary implication, a reviewing court is "to apply a correctness standard as it does in the regular appellate context" (Rothstein J., at para. 117). *Pezim* has been cited and applied in numerous cases over the last 15 years. Its teaching is reflected in *Dunsmuir*. With respect, I would reject my colleague's effort to roll back the *Dunsmuir* clock to an era where some courts asserted a level of skill and knowledge in administrative matters which further experience showed they did not possess.

B. Section 18.1 of the Federal Courts Act

27 Given the differing perspectives that Rothstein J. and I bring to judicial review, it is not surprising that we differ on the role and function of s. 18.1 of the *Federal Courts Act*.

28 In my view, the interpretation of s. 18.1 of the *Federal Courts Act* must be sufficiently elastic to apply to the decisions of hundreds of different "types" of administrators, from Cabinet members to entry-level *fonctionnaires*, who operate in different decision-making environments under different statutes with distinct grants of decision-making powers. Some of these statutory grants have privative clauses; others do not. Some provide for a statutory right of appeal to the courts; others do not. It cannot have been Parliament's intent to create by s. 18.1 of the *Federal Courts Act* a single, rigid Procrustean standard of decontextualized review for all "federal board[s], commission[s] or other tribunal[s]", an expression which is defined (in s. 2) to include generally all federal administrative decision makers. A flexible and contextual approach to s. 18.1 obviates the need for Parliament to set customized standards of review for each and every federal decision maker.

29 The Minister's reliance on *Owen* is misplaced. At issue in that case was the standard applicable to the highly specific task of judicial review of decisions of Review Boards set up under s. 672.38 of the *Criminal Code* to deal with individuals found not criminally responsible ("NCR") on account of a mental disorder. The mandate of these Boards is to determine the "least onerous and least

restrictive" limits on the liberty of NCR individuals who remain a "significant threat to the safety of the public" (s. 672.54). On a statutory appeal (s. 672.78), the Court of Appeal is authorized to set aside a Review Board order on a number of grounds, namely

> (a) the decision is unreasonable or cannot be supported by the evidence; or,
>
> (b) the decision is based on a wrong decision on a question of law (unless no substantial wrong or miscarriage of justice has occurred); or
>
> (c) there was a miscarriage of justice.

30 The *Owen* court held that where Parliament has shown a clear intent then, absent any constitutional challenge, that is the standard of review that is to be applied (para. 32). This approach was affirmed in *Dunsmuir* where the majority said that "determining the applicable standard of review is accomplished by establishing legislative intent" (para. 30).

31 However, in *Owen* itself, even in the context of a precisely targeted proceeding related to a named adjudicative board, the standard of review was evaluated by reference to the common law of judicial review, as was made clear in the following paragraph:

> The first branch of the test corresponds with what the courts call the standard of review of reasonableness *simpliciter*, i.e., the Court of Appeal should ask itself whether the Board's risk assessment and disposition order was unreasonable in the sense of not being supported by reasons that can bear even a somewhat probing examination....
>
> [para. 33]

And in the next paragraph:

> Resort must therefore be taken to the jurisprudence governing judicial review on a standard of reasonableness *simpliciter* .... [para. 34]

See also *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, 2004 SCC 20, [2004] 1 S.C.R. 498 (S.C.C.).

32 In *Pinet v. St. Thomas Psychiatric Hospital*, 2004 SCC 21, [2004] 1 S.C.R. 528 (S.C.C.), the Court dealt with the second branch of s. 672.78(1)(*b*) ("error of law") on ordinary administrative law principles (clearly applying a correctness standard, at para. 25). As to the saving proviso (i.e., the decision may be set aside for an error of law "unless no substantial wrong or miscarriage of justice has occurred"), the *Pinet* court held that the party seeking to uphold the Review Board decision despite the error of law must "satisfy the appellate court that a Review Board, acting reasonably, and properly informed of the law, would necessarily have reached the same conclusion absent the legal error" (para. 28). None of this is explicit in the statute, but the common law was

necessarily called in aid to fill in interstices in the legislation. See also *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, 2006 SCC 7, [2006] 1 S.C.R. 326 (S.C.C.).

33 Resort to the general law of judicial review is all the more essential in the case of a provision like s. 18.1 of the *Federal Courts Act* which, unlike s. 672 of the *Criminal Code*, is not limited to particular issues before a particular adjudicative tribunal but covers the full galaxy of federal decision makers. Section 18.1 must retain the flexibility to deal with an immense variety of circumstances.

C. Matter of Statutory Interpretation

34 The genesis of the *Federal Courts Act* lies in Parliament's decision in 1971 to remove from the superior courts of the provinces the jurisdiction over prerogative writs, declarations, and injunctions against federal boards, commissions and other tribunals and to place that jurisdiction (slightly modified) in a new federal court. As Donald S. Maxwell, Q.C., the then Deputy Minister of Justice, explained to the House of Commons Standing Committee on Justice and Legal Affairs:

> Clause 18 is based on the philosophy that we want to remove the jurisdiction and prerogative matters from the Superior Courts of the provinces and place them in our own federal Superior Court.
>
> . . . . .
>
> Having got them there, we think they are not entirely satisfactory. We feel that there should be improvements made on these remedies of *certiorari* and prohibition. This is what we are endeavouring to do in Clause 28.
>
> (See *Minutes of Proceedings and Evidence* of the Committee, No 26, 2nd Sess., 28th Parl., May 7, 1970, at pp. 25-26.)

This transfer of jurisdiction was recognized and accepted in *Pringle v. Fraser*, [1972] S.C.R. 821 (S.C.C.), *Howarth v. Canada (National Parole Board)* (1974), [1976] 1 S.C.R. 453 (S.C.C.), at pp. 470-72, and *Martineau v. Matsqui Institution (No. 2)* (1979), [1980] 1 S.C.R. 602 (S.C.C.), at p. 637, with the proviso that such transfer does not deprive the provincial superior courts of their jurisdiction to determine the constitutional validity and applicability of legislation: *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.). Subsequent amendments to the Act in 1990 (when s. 18.1 was added) clarified and simplified its expression and implementation, but did not have the effect of excluding the common law. R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), notes that "courts readily assume that reform legislation is meant to be assimilated into the existing body of common law" (p. 432; see also pp. 261-62).

35 My colleague Rothstein J. writes that "to say (or imply) that a *Dunsmuir* standard of review analysis applies even where the legislature has articulated the applicable standard of review

directly contradicts *Owen*" (para. 100). This assumes the point in issue, namely whether as a matter of interpretation, Parliament has or has not articulated the applicable standard of review in s. 18.1.

36 In my view, the language of s. 18.1 generally sets out threshold grounds which permit but do not require the court to grant relief. Whether or not the court should exercise its discretion in favour of the application will depend on the court's appreciation of the respective roles of the courts and the administration as well as the "circumstances of each case": see *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 (S.C.C.), at p. 575. Further, "[i]n one sense, whenever the court exercises its discretion to deny relief, balance of convenience considerations are involved" (D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at p. 3-99). Of course, the discretion must be exercised judicially, but the general principles of judicial review dealt with in *Dunsmuir* provide elements of the appropriate judicial basis for its exercise.

37 On this point, as well, my colleague Rothstein J. expresses disagreement. He cites a number of decisions dealing with different applications of the Court's discretion. He draws from these cases the negative inference that other applications of the discretion are excluded from s. 18.1(4). In my view, with respect, such a negative inference is not warranted. Decisions that address unrelated problems are no substitute for a proper statutory analysis of s. 18.1(4) itself which in the English text provides that

> **18.1** . . .
>
> (4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal....

38 A different concern emerges from the equally authoritative French text of s. 18.1(4) which reads:

> **18.1** . . .
>
> (4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas:...

Generally speaking, the use of the present indicative tense (*sont prises*) is not to be read as conferring a discretion: see s. 11 of the French version of the *Interpretation Act*, R.S.C. 1985, c. I-21, and P. A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), p. 72, fn 123 (in the French edition, the point is canvassed by Professor Côté, at p. 91, fn 123). It has been truly remarked in the context of bilingual legislation that "Canadians read only one version of the law at their peril": M. Bastarache et al., *The Law of Bilingual Interpretation* (2008), at p. 32. However, the text of s. 18.1(4) must be interpreted not only in accordance with the rules governing bilingual statutes but within the larger framework of the modern rule 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.

39 The English version of s. 18.1(4) is permissive; the court is clearly given discretion. In the French version, the words "*sont prises*" translate literally as "are taken" which do not, on the face of it, confer a discretion. A shared meaning on this point is difficult to discern. Nevertheless, the linguistic difference must be reconciled as judges cannot be seen to be applying s. 18.1(4) differently across the country depending on which language version of s. 18.1(4) they happen to be reading. In *R. c. Bois*, 2004 SCC 6, [2004] 1 S.C.R. 217 (S.C.C.), at para. 26, the Court cited with approval the following approach:

> Unless otherwise provided, differences between two official versions of the same enactment are reconciled by educing the meaning common to both. Should this prove to be impossible, or if the common meaning seems incompatible with the intention of the legislature as indicated by the ordinary rules of interpretation, the meaning arrived at by the ordinary rules should be retained.
>
> (Quoting Côté, at p. 324.)

(See also Bastarache et al., at p. 32.) Linguistic analysis of the text is the servant, not the master, in the task of ascertaining Parliamentary intention: see *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.), at pp. 1071-72 (Lamer J. dissenting in part, but not on this point.) A blinkered focus on the textual variations might lead to an interpretation at odds with the modern rule because, standing alone, linguistic considerations ought not to elevate an argument about text above the relevant context, purpose and objectives of the legislative scheme: see Sullivan, at p. 116.

40 Here the English version cannot be read so as to compel the court to grant relief: the word "may" is unquestionably permissive. In Bastarache et al., it is said that "the clearer version provides the common meaning" (p. 67), but it cannot be said that the French text here is ambiguous. Accordingly, the linguistic issue must be placed in the framework of the modern rules of statutory interpretation that give effect not only to the text but to context and purpose. There is nothing in the context or purpose of the enactment to suggest a Parliamentary intent to eliminate the long-standing existence of a discretion in judicial review remedies. As mentioned earlier, the principal legislative objective was simply to capture the judicial review of federal decision makers for the Federal Court. Under the general public law of Canada (then as now), the granting of declarations and the original prerogative and extraordinary remedies, and subsequent statutory variations thereof, have generally been considered to be discretionary, as discussed by Beetz J. in *Harelkin*. The Federal Court's discretion in matters of judicial review has repeatedly been affirmed by this Court: see *Solosky v. Canada* (1979), [1980] 1 S.C.R. 821 (S.C.C.), at pp. 830-31; *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49 (S.C.C.), at p. 92-93, and *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 (S.C.C.), at pp. 77-80. The Federal Courts themselves have repeatedly asserted, notwithstanding

the problem posed by the French text of s. 18.1(4), the existence of a discretion in the exercise of their judicial review jurisdiction (and quite properly so in my opinion) both in decisions rendered in French (see e.g. *Grenier c. Canada (Procureur général)*, 2005 FCA 348, [2006] 2 F.C.R. 287 (F.C.A.), *per* Létourneau J.A., at para. 40, and *Devinat v. Canada (Immigration & Refugee Board)* (1999), [2000] 2 F.C. 212 (Fed. C.A.), *per* The Court, at para. 73) and in English (see e.g. *Thanabalasingham v. Canada (Minister of Citizenship & Immigration)*, 2006 FCA 14, 263 D.L.R. (4th) 51 (F.C.A.), *per* Evans J.A., at para. 9; *Charette v. Canada (Commissioner of Competition)*, 2003 FCA 426, 29 C.P.R. (4th) 1 (F.C.A.), *per* Sexton J.A., at para. 70 and *Pal v. Canada (Minister of Employment & Immigration)* (1993), 70 F.T.R. 289 (Fed. T.D.), *per* Reed J., at para. 9). I conclude that notwithstanding the bilingual issue in the text, s. 18.1(4) should be interpreted so as to preserve to the Federal Court a discretion to grant or withhold relief, a discretion which, of course, must be exercised judicially and in accordance with proper principles. In my view, those principles include those set out in *Dunsmuir*.

41 With these general observations I turn to the particular paragraphs of s. 18.1(4) of the *Federal Courts Act* that, in my view, enable but do not require judicial intervention.

42 Section 18.1(4)(*a*) provides for relief where a federal board, commission or other tribunal

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

No standard of review is specified. *Dunsmuir* says that jurisdictional issues command a correctness standard (majority, at para. 59). The *Federal Courts Act* does not indicate in what circumstances, despite jurisdictional error having been demonstrated, relief may properly be withheld. For that and other issues, resort will have to be had to the common law. See *Harelkin*, at pp. 575-76.

43 Judicial intervention is also authorized where a federal board, commission or other tribunal

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

No standard of review is specified. On the other hand, *Dunsmuir* says that procedural issues (subject to competent legislative override) are to be determined by a court on the basis of a correctness standard of review. Relief in such cases is governed by common law principles, including the withholding of relief when the procedural error is purely technical and occasions no substantial wrong or miscarriage of justice (*Pal*, at para. 9). This is confirmed by s. 18.1(5). It may have been thought that the Federal Court, being a statutory court, required a specific grant of power to "make an order validating the decision" (s. 18.1(5)) where appropriate.

44 Judicial intervention is authorized where a federal board, commission or other tribunal

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

Errors of law are generally governed by a correctness standard. *Mugesera c. Canada (Ministre de la Citoyenneté & de l'Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100 (S.C.C.), at para. 37, for example, held that the general questions of international law and criminal law at issue in that case had to be decided on a standard of correctness. *Dunsmuir* (at para. 54), says that if the interpretation of the home statute or a closely related statute by an expert decision maker is reasonable, there is no error of law justifying intervention. Accordingly, para. (*c*) provides a *ground* of intervention, but the common law will stay the hand of the judge(s) in certain cases if the interpretation is by an expert adjudicator interpreting his or her home statute or a closely related statute. This nuance does not appear on the face of para. (*c*), but it is the common law principle on which the discretion provided in s. 18.1(4) is to be exercised. Once again, the open textured language of the *Federal Courts Act* is supplemented by the common law.

45 Judicial intervention is further authorized where a federal board, commission or other tribunal

> (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;

The legislator would have been aware of the great importance attached by some judicial decisions to so-called "jurisdictional fact finding"; see e.g., *Bell v. Ontario (Human Rights Commission)*, [1971] S.C.R. 756 (S.C.C.), and *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 (S.C.C.). Parliament clearly wished to put an end to the tendency of some courts to seize on a "preliminary fact" on which the administrative agency's decision was said to be based to quash a decision. In *Bell*, the "jurisdictional fact" was whether the residential accommodation in respect of which a prospective tenant claimed rental discrimination was a "self-contained dwelling unit". The Court disagreed with the Human Rights Commission, which had "based" its decision on this threshold fact. Viewed in this light, s. 18.1(4)(*d*) was intended to confirm by legislation what Dickson J. had said in *New Brunswick Liquor Corp.*, namely that judges should "not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233).

46 More generally, it is clear from s. 18.1(4)(d) that Parliament intended administrative fact finding to command a high degree of deference. This is quite consistent with *Dunsmuir*. It provides legislative precision to the reasonableness standard of review of factual issues in cases falling under the *Federal Courts Act*.

47 Paragraph (*e*) contemplates a question of mixed fact and law namely that the federal board, commission or other tribunal

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

The common law would not allow a statutory decision maker to rely on fraudulent or perjured testimony. The court would be expected to exercise its discretion in favour of the applicant under para. (*e*) as well.

48 Section 18.1(4)(*f*) permits judicial intervention if the federal board, commission or other tribunal

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

A reference to "contrary to law" necessarily includes "law" outside the *Federal Courts Act* including general principles of administrative law. Paragraph (*f*) shows, if further demonstration were necessary, that s. 18.1(4) is not intended to operate as a self-contained code, but is intended by Parliament to be interpreted and applied against the backdrop of the common law, including those elements most recently expounded in *Dunsmuir*.

49 In *Federal Courts Practice 2009* (2008), B. J. Saunders et al. state, at pp. 112-13:

***Grounds* for Review**

Section 18.1(4) sets out the grounds which an applicant must establish to succeed on an application for judicial review. The grounds are broadly stated and reflect, generally, the grounds upon which judicial review could be obtained under the prerogative and extraordinary remedies listed in section 18(1).

Section 18.1(4)(f) ensures that the Court will not be hindered in developing *new grounds* for review.

[Emphasis added.]

50 I readily accept, of course, that the legislature can by clear and explicit language oust the common law in this as in other matters. Many provinces and territories have enacted judicial review legislation which not only provide guidance to the courts but have the added benefit of making the law more understandable and accessible to interested members of the public. The diversity of such laws makes generalization difficult. In some jurisdictions (as in British Columbia), the legislature has moved closer to a form of codification than has Parliament in the *Federal Courts Act*. Most jurisdictions in Canada seem to favour a legislative approach that explicitly identifies the *grounds* for review but not the *standard* of review [1] . In other provinces, some laws specify "patent unreasonableness" [2] . In few of these statutes, however, is the *content* of the specified standard of review defined, leading to the inference that the legislatures left the content to be supplied by the common law.

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51 As stated at the outset, a legislature has the power to specify a standard of review, as held in *Owen*, if it manifests a clear intention to do so. However, where the legislative language permits, the courts (a) will *not* interpret grounds of review as standards of review, (b) will apply *Dunsmuir* principles to determine the appropriate approach to judicial review in a particular situation, and (c) will presume the existence of a discretion to grant or withhold relief based on the *Dunsmuir* teaching of restraint in judicial intervention in administrative matters (as well as other factors such as an applicant's delay, failure to exhaust adequate alternate remedies, mootness, prematurity, bad faith and so forth).

D. Standard of Review Analysis

52 *Dunsmuir* states that "courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures" (para. 27).

53 The process of judicial review involves two steps. First, *Dunsmuir* says that "[a]n exhaustive review is not required in every case to determine the proper standard of review" (para. 57). As between correctness and reasonableness, the "existing jurisprudence may be helpful" (para. 57). And so it is in this case. *Dunsmuir* renders moot the dispute in the lower courts between patent unreasonableness and reasonableness. No authority was cited to us that suggests a "correctness" standard of review is appropriate for IAD decisions under s. 67(1)(c) of the *IRPA*. Accordingly, "existing jurisprudence" points to adoption of a "reasonableness" standard.

54 This conclusion is reinforced by the second step of the analysis when jurisprudential categories are not conclusive. Factors then to be considered include: (1) the presence or absence of a privative clause; (2) the purpose of the IAD as determined by its enabling legislation; (3) the nature of the question at issue before the IAD; and (4) the expertise of the IAD in dealing with immigration policy (*Dunsmuir*, at para. 64). Those factors have to be considered as a whole, bearing in mind that not all factors will necessarily be relevant for every single case. A contextualized approach is required. Factors should not be taken as items on a check list of criteria that need to be individually analysed, categorized and balanced in each case to determine whether deference is appropriate or not. What is required is an overall evaluation. Nevertheless, having regard to the argument made before us, I propose to comment on the different factors identified in *Dunsmuir*, all of which in my view point to a reasonableness standard.

55 As to the presence of a privative clause, s. 162(1) of the *IRPA* provides that "[e]ach Division of the Board has, in respect of proceedings brought before it under this Act, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction". A privative clause is an important indicator of legislative intent. While privative clauses deter

judicial intervention, a statutory right of appeal may be at ease with it, depending on its terms. Here, there is no statutory right of appeal.

56 As to the purpose of the IAD as determined by its enabling legislation, the IAD determines a wide range of appeals under the *IRPA*, including appeals from permanent residents or protected persons of their deportation orders, appeals from persons seeking to sponsor members of the family class, and appeals by permanent residents against decisions made outside of Canada on their residency obligations, as well as appeals by the Minister against decisions of the Immigration Division taken at admissibility hearings (s. 63). A decision of the IAD is reviewable only if the Federal Court grants leave to commence judicial review (s. 72).

57 In recognition that hardship may come from removal, Parliament has provided in s. 67(1)(c) a power to grant exceptional relief. The nature of the question posed by s. 67(1)(c) requires the *IAD* to be "satisfied that, at the time that the appeal is disposed of ... sufficient humanitarian and compassionate considerations warrant special relief". Not only is it left to the IAD to determine what constitute "humanitarian and compassionate considerations", but the "sufficiency" of such considerations in a particular case as well. Section 67(1)(c) calls for a fact-dependent and policy-driven assessment by the IAD itself. As noted in *Prata v. Canada (Minister of Manpower & Immigration)* (1975), [1976] 1 S.C.R. 376 (S.C.C.), at p. 380, a removal order

> establishes that, in the absence of some special privilege existing, [an individual subject to a lawful removal order] has no right whatever to remain in Canada. [An individual appealing a lawful removal order] does not, therefore, attempt to assert a right, but, rather, attempts to obtain a discretionary privilege.
>
> [Emphasis added.]

58 The respondent raised no issue of practice or procedure. He accepted that the removal order had been validly made against him pursuant to s. 36(1) of the *IRPA*. His attack was simply a frontal challenge to the IAD's refusal to grant him a "discretionary privilege". The IAD decision to withhold relief was based on an assessment of the facts of the file. The IAD had the advantage of conducting the hearings and assessing the evidence presented, including the evidence of the respondent himself. IAD members have considerable expertise in determining appeals under the *IRPA*. Those factors, considered altogether, clearly point to the application of a reasonableness standard of review. There are no considerations that might lead to a different result. Nor is there anything in s. 18.1(4) that would conflict with the adoption of a "reasonableness" standard of review in s. 67(1)(c) cases. I conclude, accordingly, that "reasonableness" is the appropriate standard of review.

E. Applying the "Reasonableness" Standard

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59 Reasonableness is a single standard that takes its colour from the context. One of the objectives of *Dunsmuir* was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

60 In my view, having in mind the considerable deference owed to the IAD and the broad scope of discretion conferred by the *IRPA*, there was no basis for the Federal Court of Appeal to interfere with the IAD decision to refuse special relief in this case.

61 My colleague Fish J. agrees that the standard of review is reasonableness, but he would allow the appeal. He writes:

> While Mr. Khosa's denial of street racing may well evidence some "lack of insight" into his own conduct, it cannot reasonably be said to contradict — still less to outweigh, on a balance of probabilities — all of the evidence in his favour on the issues of remorse, rehabilitation and likelihood of reoffence. [para. 149]

I do not believe that it is the function of the reviewing court to reweigh the evidence.

62 It is apparent that Fish J. takes a different view than I do of the range of outcomes reasonably open to the IAD in the circumstances of this case. My view is predicated on what I have already said about the role and function of the IAD as well as the fact that Khosa does not contest the validity of the removal order made against him. He seeks exceptional and discretionary relief that is available only if the IAD itself is satisfied that "sufficient humanitarian and compassionate considerations warrant special relief. The IAD majority was not so satisfied. Whether we agree with a particular IAD decision or not is beside the point. The decision was entrusted by Parliament to the IAD, not to the judges.

63 The *Dunsmuir* majority held:

> 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. [para. 47]

Dunsmuir thus reinforces in the context of adjudicative tribunals the importance of reasons, which constitute the primary form of accountability of the decision maker to the applicant, to the public and to a reviewing court. Although the *Dunsmuir* majority refers with approval to the proposition that an appropriate degree of deference "requires of the courts "not submission but a respectful attention to the reasons offered *or which could be offered* in support of a decision"" (para. 48 (emphasis added)), I do not think the reference to reasons which "could be offered" (but were not) should be taken as diluting the importance of giving proper reasons for an administrative decision, as stated in *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), at para. 43. *Baker* itself was concerned with an application on "humanitarian and compassionate grounds" for relief from a removal order.

64 In this case, both the majority and dissenting reasons of the IAD disclose with clarity the considerations in support of both points of view, and the reasons for the disagreement as to outcome. At the factual level, the IAD divided in large part over differing interpretations of Khosa's expression of remorse, as was pointed out by Lutfy C.J. According to the IAD majority:

> It is troublesome to the panel that [Khosa] continues to deny that his participation in a "street-race" led to the disastrous consequences At the same time, I am mindful of [Khosa's] show of relative remorse at this hearing for his excessive speed in a public roadway and note the trial judge's finding of this remorse This show of remorse is a positive factor going to the exercise of special relief. However, I do not see it as a compelling feature of the case in light of the limited nature of [Khosa's] admissions at this hearing.
>
> [Emphasis added; para. 15.]

According to the IAD dissent on the other hand:

> ... from early on he [Khosa] has accepted responsibility for his actions. He was prepared to plead guilty to dangerous driving causing death ....
>
> I find that [Khosa] is contrite and remorseful. [Khosa] at hearing was regretful, his voice tremulous and filled with emotion....
>
> . . . . .
>
> The majority of this panel have placed great significance on [Khosa's] dispute that he was racing, when the criminal court found he was. And while they concluded this was "not fatal" to his appeal, they also determined that his continued denial that he was racing "reflects a lack of insight." The panel concluded that this "is not to his credit." The panel found that [Khosa] was remorseful, but concluded it was not a "compelling feature in light of the limited nature of [Khosa's] admissions".

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> However I find [Khosa's] remorse, even in light of his denial he was racing, is genuine and is evidence that [Khosa] will in future be more thoughtful and will avoid such recklessness. [paras. 50-51 and 53-54]

It seems evident that this is the sort of factual dispute which should be resolved by the IAD in the application of immigration policy, and not reweighed in the courts.

65 In terms of transparent and intelligible reasons, the majority considered each of the *Ribic* factors. It rightly observed that the factors are not exhaustive and that the weight to be attributed to them will vary from case to case (para. 12). The majority reviewed the evidence and decided that, in the circumstances of this case, most of the factors did not militate strongly for or against relief. Acknowledging the findings of the criminal courts on the seriousness of the offence and possibility of rehabilitation (the first and second of the *Ribic* factors), it found that the offence of which the respondent was convicted was serious and that the prospects of rehabilitation were difficult to assess (para. 23).

66 The weight to be given to the respondent's evidence of remorse and his prospects for rehabilitation depended on an assessment of his evidence in light of all the circumstances of the case. The IAD has a mandate different from that of the criminal courts. Khosa did not testify at his criminal trial, but he did before the IAD. The issue before the IAD was not the potential for rehabilitation for purposes of sentencing, but rather whether the prospects for rehabilitation were such that, alone or in combination with other factors, they warranted special relief from a valid removal order. The IAD was required to reach its own conclusions based on its own appreciation of the evidence. It did so.

67 As mentioned, the courts below recognized some merit in Khosa's complaint. Lutfy C.J. recognized that the majority "chose to place greater weight on his denial that he participated in a "race" than others might have" (para. 36). Décary J.A. described the majority's preoccupation with street racing as "some kind of fixation" (para. 18). My colleague Fish J. also decries the weight put on this factor by the majority (para. 141). However, as emphasized in *Dunsmuir*, "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" (para. 47). In light of the deference properly owed to the IAD under s. 67(1)(*c*) of the *IRPA*, I cannot, with respect, agree with my colleague Fish J. that the decision reached by the majority in this case to deny special discretionary relief against a valid removal order fell outside the range of reasonable outcomes.

V. Disposition

68 The appeal is allowed and the decision of the IAD is restored.

***Rothstein J.*:**

69 I have had the benefit of reading the reasons of my colleague Justice Binnie allowing this appeal. While I concur with this outcome, I respectfully disagree with the majority's approach to the application of the *Dunsmuir* standard of review analysis under s. 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 ("*F.C.A.*").

I. Introduction

70 The central issue in this case is whether the *F.C.A.* expressly, or by necessary implication, provides the standards of review to be applied on judicial review, and if so, whether this displaces the common law standard of review analysis recently articulated in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.). The majority is of the view that the *Dunsmuir* standard of review analysis is to be read into s. 18.1(4) of the *F.C.A.* In my view, courts must give effect to the legislature's words and cannot superimpose on them a duplicative common law analysis. Where the legislature has expressly or impliedly provided for standards of review, courts must follow that legislative intent, subject to any constitutional challenge.

71 Section 18.1(4) of the *F.C.A.* states:

> [Grounds of Review]
>
> (4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal
>
> > (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
> >
> > (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
> >
> > (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
> >
> > (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
> >
> > (e) acted, or failed to act, by reason of fraud or perjured evidence; or
> >
> > (f) acted in any other way that was contrary to law.

72 The language of s. 18.1(4)(*d*) makes clear that findings of fact are to be reviewed on a highly deferential standard. Courts are only to interfere with a decision based on erroneous findings of fact where the federal board, commission or other tribunal's factual finding was "made in a perverse or

capricious manner or without regard for the material before it". By contrast with para. (*d*), there is no suggestion that courts should defer in reviewing a question that raises any of the other criteria in s. 18.1(4). Where Parliament intended a deferential standard of review in s. 18.1(4), it used clear and unambiguous language. The necessary implication is that where Parliament did not provide for a deferential standard, its intent was that no deference be shown. As I will explain, the language and context of s. 18.1(4), and in particular the absence of deferential wording, demonstrates that a correctness standard is to be applied to questions of jurisdiction, natural justice, law and fraud. The language of s. 18.1(4)(*d*) indicates that deference is only to be applied to questions of fact.

73 *Dunsmuir* reaffirmed that "determining the applicable standard of review is accomplished by establishing legislative intent" (para. 30). The present majority's insistence that *Dunsmuir* applies even where Parliament specifies a standard of review is inconsistent with that search for legislative intent, in my respectful view.

74 Standard of review developed as a means to reconcile the tension that privative clauses create between the rule of law and legislative supremacy: see *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298*, [1988] 2 S.C.R. 1048 (S.C.C.) [hereinafter Bibault]. "Full" or "strong" privative clauses that purport to preclude the judicial review of a question brought before a reviewing court give rise to this judicial-legislative tension, which deference and standard of review were developed to resolve: see *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890 (S.C.C.), at para. 17, for a discussion of the nature of privative clauses. In my opinion, the application of *Dunsmuir* outside the strong privative clause context marks a departure from the conceptual and jurisprudential origins of the standard of review analysis.

75 In my view, the question of whether the *Dunsmuir* standard of review analysis applies to judicial review under s. 18.1 of the *F.C.A.* becomes clear when one examines the conceptual basis for the common law standard of review analysis. As explained in part II, standard of review emerged as a means to reconcile the judicial-legislative tension to which privative clauses gave rise. The legislature's desire to immunize certain administrative decisions from judicial scrutiny conflicted with the constitutional supervisory role of the courts and, as such, required a juridical response that could reconcile these competing requirements. Deference and standard of review was the result. It was the departure from this conceptual origin that blurred the role of the privative clause as the legislature's communicative signal of relative expertise, and in doing so, the Court moved away from the search for legislative intent that governs this area. In part III, I refer to this Court's jurisprudence on the judicial recognition of legislated standards of review. That jurisprudence is clear that courts must give effect to legislated standards of review, subject to any constitutional challenges. In part IV, I explain that having regard to the conceptual origin of standard of review and the jurisprudence on legislated standards of review, s. 18.1(4) of the *F.C.A.* occupies the field of standard of review and therefore ousts the common law on that question, excepting in cases of a strong privative clause. In part V, I conclude by briefly considering the

Immigration Appeal Division ("IAD") decision in this case. Like the majority, I would allow the appeal.

II. The Place of Standard of Review: Reconciling the Judicial-Legislative Tension of the Privative Clause

A. The Judicial-Legislative Tension

76 Absent a privative clause, courts have always retained a supervisory judicial review role. In the provinces, provincial superior courts have inherent jurisdiction and in most, if not all, cases statutory judicial review jurisdiction. In the federal context, the *F.C.A.* transferred this inherent jurisdiction from the provincial superior courts to the Federal Courts. Where applicable, statutory rights of appeal also grant affected parties the right to appeal an administrative decision to court. This residual judicial review jurisdiction means that courts retained authority to ensure the rule of law even as delegated administrative decision making emerged. La Forest and Iacobucci JJ. acknowledged this in *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 (S.C.C.), when La Forest J. wrote that:

> In the absence of other provisions indicating a disposition to limit judicial review, the normal supervisory role of the courts remains. The administrative tribunal, of course, is authorized to make determinations on these questions, but they are not to be insulated from the general supervisory role of the courts. [p. 584]

The legislature was well aware that parties who perceived an administrative injustice would still have recourse to the courts.

77 The question is, however, whether the creation of expert tribunals automatically meant that there was to be some limitation on the judicial review role of the courts, in particular on questions of law. Where the legislature enacted strong privative clauses precluding review for legal error, there is no doubt that this was the legislative intent. In my opinion, the same limit on judicial review cannot be inferred merely from the establishment of a tribunal when the legislature did not seek to immunize the tribunal's decisions from judicial review. In those cases, the creation of an administrative decision maker did not by itself give rise to a tension with the supervisory role of the courts.

78 In contrast, the majority appears to understand the judicial review of administrative decisions as automatically engaging a judicial-legislative tension, which the standard of review analysis seeks to resolve. In *Dunsmuir*, Bastarache and LeBel JJ., writing for the majority, described this as follows:

> Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament

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> and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.
>
> [Emphasis added; para. 27.]

As I understand this reasoning, the legislature displaced (or attempted to displace) judicial decision making in some areas by creating administrative bodies. From this viewpoint, the standard of review functions as a necessary balancing exercise between the courts' constitutional exercise of judicial review and the legislative desire to delegate certain powers to administrative bodies.

79 In my opinion, in the absence of a strong privative clause such as existed in *Dunsmuir*, there are important reasons to question whether this view is applicable. Broadly speaking, it is true of course that the creation of expert administrative decision makers evidenced a legislative intent to displace or bypass the courts as primary adjudicators in a number of areas. As Professor W. A. Bogart notes, "[t]he core idea was that the legislature wanted to regulate some area but wished someone else, an administrative actor, to carry out the regulation for reasons of expertise, expediency, access, independence from the political process, and so forth" ("The Tools of the Administrative State and the Regulatory Mix", in C. M. Flood and L. Sossin, eds., *Administrative Law in Context* (2008), 25, at p. 31). It was only with the enactment of privative clauses, however, that the legislature evidenced an intent to oust, or at the very least restrict, the court's review role.

80 The most obvious case was labour relations. Labour relations boards were created during the First and Second World Wars, in part to stave off labour unrest: see R. J. Charney and T. E. F. Brady, *Judicial Review in Labour Law* (loose-leaf), at pp. 2-1 to 2-17. In order to protect the boards from judicial intervention, the legislature enacted strong privative clauses. Professor Audrey Macklin notes that "[f]rustrated with judicial hostility toward the objectives of labour relations legislation, the government not only established a parallel administrative regime of labour relations boards, but also enacted statutory provisions that purported to preclude entirely judicial review of the legality of administrative action": "Standard of Review: The Pragmatic and Functional Test", in *Administrative Law in Context*, 197, at p. 199. While there are different types of privative clauses, the labour relations context gave rise to strong privative clauses that typically purported to preclude review not only of factual findings, but also legal and jurisdictional decisions of the tribunal: see *Pasiechnyk*, at para. 17 (discussing what constitutes a "full" or "true" privative clause).

81 In attempting to preclude judicial review, privative clauses gave rise to a tension between the two core pillars of the public law system: legislative supremacy and the judicial enforcement of law: see D. Dyzenhaus, "Disobeying Parliament? Privative Clauses and the Rule of Law", in R. W. Bauman and T. Kahana, eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (2006), 499, at p. 500. Strong privative clauses reflected the legislature's intent

to make administrative decisions final and thereby beyond the purview of judicial scrutiny. This conflicts with the rule of law principle of accountability, for which access to courts is necessary. As Professor Mary Liston notes

> The risk to the accountability function of the rule of law was that these officials could behave as a law unto themselves because they would be the sole judges of the substantive validity of their own acts. The institutional result of privative clauses was a system of competing and irreconcilable supremacies between the legislative and judicial branches of government.
>
> ("Governments in Miniature: The Rule of Law in the Administrative State", in *Administrative Law in Context*, 77, at p. 104)

Faced with these competing "supremacies", courts were forced to develop a juridical approach that would reconcile, or at least alleviate, this tension. In Canada, courts opted for the deference approach.

B. The Origins of the Standard of Review Analysis: Resolving the Privative Clause Tension

82 The deference approach emerged as a means of reconciling Parliament's intent to immunize certain administrative decisions from review with the supervisory role of courts in a rule of law system. This approach originated with *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 (S.C.C.) ("*C.U.P.E*"). In reviewing a labour tribunal decision, Dickson J., as he then was, wrote that the privative clause "constitutes a clear statutory direction on the part of the Legislature that public sector labour matters be promptly and finally decided by the [Public Service Labour Relations] Board" (p. 235). The decision of the Board was protected so long as it was not "so patently unreasonable that the Board ... did 'something which takes the exercise of its powers outside the protection of the privative or preclusive clause'" (p. 237).

83 The deference approach sought to give effect to the legislature's recognition that the administrative decision maker had relative expertise on some or all questions. The privative clause indicated the area of tribunal expertise that the legislature was satisfied warranted deference. As Professor Dyzenhaus explains:

> ... *CUPE* involves more than concession. Right at the outset of the development of the idea of deference, it was clear that there was a judicial cession of interpretative authority to the tribunal, within the scope of its expertise — the area of jurisdiction protected by the privative clause. The cession was not total — the tribunal could not be patently unreasonable. But it was significant because it required that judges defer to the administration's interpretations of the law, except on jurisdictional, constitutional, or constitutionlike issues.
>
> [Emphasis added; p. 512.]

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84 It is clear in *C.U.P.E.* that the deferential approach was contingent upon and shaped by the relevant privative clause. Interpretive authority was only ceded to tribunals in the area "within the scope of its expertise — the area of jurisdiction protected by the privative clause". A strong privative clause that protected legal as well as factual and discretionary decisions meant that the legislature recognized the tribunal as having relative expertise with respect to all these questions. Dickson J. emphasized that the legislature's frequent use of privative clauses in the labour relations context was intimately connected to tribunal expertise. He wrote that "[t]he rationale for protection of a labour board's decisions within jurisdiction is straightforward and compelling. The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations" (p. 235). In other words, tribunal expertise was a compelling rationale for imposing a privative clause. It was not, however, a free-standing basis for deference.

85 A further step in the development of the deference approach was *Bibeault*, when this Court introduced the pragmatic and functional approach for determining the appropriate standard of review. The pragmatic and functional approach, now known simply as the standard of review analysis, was intended to focus "the Court's inquiry directly on the intent of the legislator rather than on interpretation of an isolated provision" (p. 1089). In reviewing a decision maker protected by a strong privative clause, this more expansive analysis examined "not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal" (p. 1088). Beetz J. emphasized the overarching objective of giving effect to legislative intent while upholding courts' supervisory role in a rule of law system (see p. 1090).

86 The reasoning of Gonthier J. in *Bell Canada v. Canadian Radio-Television & Telecommunications Commission*, [1989] 1 S.C.R. 1722 (S.C.C.), further reflected this understanding that it is the privative clause that signals when deference is owed and that demarcates the area of relative expertise. Gonthier J. made clear that:

> Where the legislator has clearly stated that the decision of an administrative tribunal is final and binding, courts of original jurisdiction cannot interfere with such decisions unless the tribunal has committed an error which goes to its jurisdiction. ... Decisions which are so protected are, in that sense, entitled to a non-discretionary form of deference because the legislator intended them to be final and conclusive and, in turn, this intention arises out of the desire to leave the resolution of some issues in the hands of a specialized tribunal.
>
> [Emphasis added; p. 1744.]

Gonthier J.'s statement captured the essential role of the privative clause. Privative clauses indicate the legislature's intent that administrative decisions made within "the hands of a specialized tribunal" be deemed final and conclusive. It is in these cases that courts must balance their

constitutional role to preserve the rule of law with the legislature's intent to oust the courts' jurisdiction. Gonthier J.'s reasoning understood expertise as the underlying rationale for enacting the privative clause. Expertise alone was not interpreted as indicating a legislative intent for finality. If the legislature intended to protect expert decision makers from review, it did so through a privative clause.

C. Departure from the Origins of Standard of Review: Expertise as a Stand-Alone Basis for Deference

87 However, with *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.), there was a departure from the conceptual origin of standard of review I have described. That case involved the judicial review of a tribunal decision that was not protected by a privative clause and in fact was subject to a statutory right of appeal. Relying on the language of "specialization of duties" from *Bell Canada*, the Court in *Pezim* imputed relative expertise to the tribunal, including on questions of law, based on its statutory mandates. In *Pezim*, the Court reviewed the constating statute of the British Columbia Securities Commission and found that "[t]he breadth of the Commission's expertise and specialisation is reflected in the provisions of the [B.C. Securities] Act" (p. 593). This approach of judicially imputing expertise, even on questions of law, was a departure from earlier jurisprudence that relied on privative clauses as the manifest signal of the legislature's recognition of relative tribunal expertise.

88 My colleague Binnie J. writes at para. 26 of his reasons that "*Pezim* has been cited and applied in numerous cases over the last 15 years." In light of this, he rejects what he sees as my effort "to roll back the *Dunsmuir* clock". With respect, I do not believe that the longevity of *Pezim* should stand in the way of this Court's recent attempts to return conceptual clarity to the application of standard of review. The fact that *Pezim* has been cited in other cases does not preclude this Court from revisiting its reasoning where there are compelling reasons to do so: *R. v. Robinson*, [1996] 1 S.C.R. 683 (S.C.C.), at para. 46. In my view, *Pezim*'s departure from the conceptual basis for standard of review constitutes such a compelling reason. In *Dunsmuir*, this Court recognized that the time had "arrived for a reassessment" of "the troubling question of the approach to be taken in judicial review of decisions of administrative tribunals" (para. 1). Such reassessment should include a return to the conceptual basis for standard of review.

89 I do not dispute that reviewing courts, whether in the appellate or judicial review contexts, should show deference to lower courts and administrative decision makers on questions of fact: see Deschamps J. in concurrence in *Dunsmuir* at para. 161. The principled bases articulated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at para. 13, for deference to judicial triers of fact are also relevant in the administrative review context. Just as judicial triers of fact are better situated to make findings of fact at first instance, so too are tribunals, especially in the area of policy making. In cases involving mixed fact and law, where the legal question cannot be extricated from a factual or policy finding, deference should be shown.

90 However, where a legal question can be extricated from a factual or policy inquiry, it is inappropriate to presume deference where Parliament has not indicated this via a privative clause. The basic rule in the appellate context is that questions of law are to be reviewed on a correctness standard: *Housen*, at para. 8. The reasons for this are twofold. First, "the principle of universality requires appellate courts to ensure that the same legal rules are applied in similar situations": *Housen*, at para. 9. Divergent applications of legal rules undermine the integrity of the rule of law. Dating back to the time of Dicey's theory of British constitutionalism, almost all rule of law theories include a requirement that each person in the political community be subject to or guided by the same general law: see A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed. 1959), at p. 193; L. L. Fuller, *The Morality of Law* (Rev. ed. 1969), at pp. 81-91 (advocating the principle of congruence between official action and declared rule); J. Raz, *The Authority of Law: Essays on Law and Morality* (1979), at pp. 215-17 ("[s]ince the court's judgment establishes conclusively what is the law in the case before it, the litigants can be guided by law only if the judges apply the law correctly"). A correctness standard on questions of law is meant, in part, to ensure this universality. Second, appellate and reviewing courts have greater law-making expertise relative to trial judges and administrative decision makers. As this Court emphasized in *Housen*:

> [W]hile the primary role of trial courts is to resolve individual disputes based on the facts before them and settled law, the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application. In order to fulfill the above functions, appellate courts require a broad scope of review with respect to matters of law. [para. 9]

91 In the administrative context, unlike the appellate context, the legislature may decide that an administrative decision maker has superior expertise relative to a reviewing court, including on legal questions. It signals this recognition by enacting a strong privative clause. It is in these cases that the court must undertake a standard of review analysis to determine the appropriate level of deference that is owed to the tribunal. It is not for the court to impute tribunal expertise on legal questions, absent a privative clause and, in doing so, assume the role of the legislature to determine when deference is or is not owed.

92 The distinction between the judicial and legislative roles was further blurred when the privative clause was incorporated into the pragmatic and functional approach in *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.). *Pushpanathan* set out the four relevant factors for the standard of review analysis: privative clause, expertise, purpose of the act as a whole and of the provision in particular, and the nature of the problem. Rather than being viewed as the express manifestation of legislative intent regarding deference, the privative clause was now treated simply as one of several factors in the calibration of deference (standard of review). As Professor Macklin notes, "[i]f the privative clause was an exercise in communicating legislative intent about the role of the courts, suffice to say that the message was, if not lost, then at least reformulated in translation" (p. 225).

D. Legislative Intent

93 In my opinion, recognizing expertise as a free-standing basis for deference on questions that reviewing courts are normally considered to be expert on (law, jurisdiction, fraud, natural justice, etc.) departs from the search for legislative intent that governs this area. As *Dunsmuir* reaffirmed, the rationale behind the common law standard of review analysis is to give effect to legislative intent (Bastarache and LeBel JJ., at para. 30): see also *Pushpanathan*, at para. 26 ("[t]he central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal whose decision is being reviewed"); *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 (S.C.C.), at para. 149 (standard of review as "seeking the polar star of legislative intent").

94 Where the recognition of relative expertise was grounded in the privative clause, the legislature's intent was clear. Departures from that conceptual basis have led courts to undertake what are often artificial judicial determinations of relative expertise. It seems quite arbitrary, for example, that courts may look at the nature of a tribunal as defined by its enabling statute, but not always conduct a full review of its actual expertise. Should a reviewing court be required to consider the qualifications of administrative decision makers on questions that courts are normally considered to have superior expertise? For example, should it matter whether or not decision makers have legal training? In the specific context of statutory interpretation, should the reviewing court scrutinize whether or not the tribunal regularly reviews and interprets particular provisions in its home statute such that it possesses relative expertise with respect to such provisions? See L. Sossin, "Empty Ritual, Mechanical Exercise or the Discipline of Deference? Revisiting the Standard of Review in Administrative Law" (2003), 27 *Advocates' Q.* 478, at p. 491 (for a discussion of the judicial determination of expertise).

95 Far from subscribing to the view that courts should be reviewing the actual expertise of administrative decision makers, it is my position that this is the function of the legislature. In my view, the discordance between imputed versus actual expertise is simply one manifestation of the larger conceptual unhinging of tribunal expertise from the privative clause. The legislatures that create administrative decision makers are better able to consider the relative qualifications, specialization and day-to-day workings of tribunals, boards and other decision makers which they themselves have constituted. Where the legislature believes that an administrative decision maker possesses superior expertise on questions that are normally within the traditional bailiwick of courts (law, jurisdiction, fraud, natural justice, etc.), it can express this by enacting a privative clause.

96 In my respectful view, the majority's common law standard of review approach seeks two polar stars — express legislative intent and judicially determined expertise — that may or may not align. While there was some attempt by the majority in *Dunsmuir* to reconnect these inquiries, the

move has been incomplete. Professor David Mullan notes that "expertise is no longer described as the single most important factor" in *Dunsmuir* and the privative clause is seen as a "strong indication" of a requirement of deference: "*New Brunswick (Board of Management) v. Dunsmuir*, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!" (2008), 21 *C.J.A.L.P.* 117, at pp. 125-26. In my view, it is time for the courts to acknowledge that privative clauses and tribunal expertise are two sides of the same coin.

E. Recognizing the Limitation of Common Law Standard of Review Analysis

97 Standard of review has dominated so much of administrative law jurisprudence and academic writing to date that one might hope it would, by now, provide a cogent and predictable analysis of when courts should adopt a deferential approach to an administrative decision. *Dunsmuir* demonstrates that this is still not the case. In *Dunsmuir*, six judges of this Court said that the standard of review applicable to the adjudicator's legal determination was reasonableness. Three judges found that the standard was correctness. Each group focused on different aspects of the adjudicator's decision-making process. The majority gave weight to the presence of a strong privative clause, that the adjudicator was imputed to have expertise in interpreting his home statute, that the purpose of the legislation was the timely and binding settlement of disputes, and that the legal question was not outside the specialized expertise of the adjudicator. The minority focused on the relationship between the common law rules relating to dismissal and those under the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25. Because their starting point was the common law, over which the adjudicator was not imputed to have expertise, the minority was of the view that the correctness standard applied.

98 What this demonstrates is that the common law standard of review analysis continues to provide little certainty about which standard will apply in a particular case. How a court will weigh and balance the four standard of review factors remains difficult to predict and therefore more costly to litigate. In my view, it must be recognized that the common law standard of review analysis does not provide for a panacea of rigorous and objective decision making regarding the intensity with which courts should review tribunal decisions. In attempting to reconcile the court's constitutional role in the face of a strong privative clause, it may be the best that we have at this point. But its application outside the privative clause context is, in my view, of highly questionable efficacy.

III. Judicial Recognition of Legislated Standards of Review

A. Giving Effect to Legislative Intent

99 This Court has considered legislative language similar to that in s. 18.1(4) in previous cases and has held that a common law standard of review analysis is not necessary where the legislature has provided for standards of review. This Court held in *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R.

779 (S.C.C.), that legislative rules specifying standards of review must be given effect by courts, subject to constitutional limits.

100 The majority now attempts to qualify that holding in *Owen*. In my respectful view, that is ignoring the obvious. The majority insists that although not stated, the "common law of judicial review" was still in play in *Owen*. Binnie J. writes that "even in the context of a precisely targeted proceeding related to a named adjudicative board, the standard of review was evaluated by reference to the common law of judicial review" (para. 31). In my respectful opinion, to say (or imply) that a *Dunsmuir* standard of review analysis applies even where the legislature has articulated the applicable standard of review directly contradicts *Owen*.

101 The majority nevertheless implies that even if the *Dunsmuir* standard of review analysis did not apply in *Owen*, this was only because of the specificity of s. 672.38 of the *Criminal Code*, R.S.C. 1985, c. C-46 (see para. 29). That section sets out the standard of review to be applied on judicial review of decisions from Review Boards regarding the liberty of persons found not criminally responsible. The majority contrasts this with s. 18.1 of the *F.C.A.*, stating that "[r]esort to the general law of judicial review is all the more essential in the case of a provision like s. 18.1 of the [*F.C.A.*] which, unlike s. 672 of the *Criminal Code*, is not limited to particular issues before a particular adjudicative tribunal" (para. 33). Thus, even if one rejects the view that a common law standard of review analysis was present in *Owen*, the majority still says that the generality of s. 18.1 of the *F.C.A.* makes it applicable in the present case.

102 The problem with this reasoning is that such qualification would seriously undermine the legislature's ability to introduce greater certainty and predictability into the standard of review process. Drawn to its logical conclusion, in order to displace the *Dunsmuir* standard of review analysis, the majority's approach would require legislatures to enact standard of review legislation with respect to every single administrative tribunal or decision maker and perhaps in relation to every type of decision they make. With respect, this amounts to a serious overreaching of this Court's role. It fails to respect the legislature's prerogative to articulate, within constitutional limits, what standard of review should apply to decision makers that are wholly the products of legislation.

103 In discussing British Columbia's *Administrative Tribunals Act*, S.B.C. 2004, c. 45 ("B.C. *A.T.A.*"). Binnie J. notes that "most if not all judicial review statutes are drafted against the background of the common law of judicial review" (para. 19). While I agree with this observation, I disagree with him as to the conclusions that should flow from it. The majority views the common law background as providing an opening for the continued relevance of a common law standard of review analysis. In reference to s. 58(2)(a) of the B.C. *A.T.A.*, Binnie J. writes:

> Despite *Dunsmuir*, "patent unreasonableness" will live on in British Columbia, but the content of the expression, and the precise degree of deference it commands in the diverse

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> circumstances of a large provincial administration, will necessarily continue to be calibrated according to general principles of administrative law.
>
> [Emphasis added; para. 19.]

104 The majority would allow for recourse to the common law on several fronts. First, Binnie J. states that the common law jurisprudence on the "content" of "patently unreasonable" will be relevant. I agree that the common law will be a necessary interpretive tool where common law expressions are employed by the legislator and are not adequately defined: see R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 434-36; *R. v. Holmes*, [1988] 1 S.C.R. 914 (S.C.C.); *Waldick v. Malcolm*, [1991] 2 S.C.R. 456 (S.C.C.).

105 However, the majority would also allow for recourse on a second front. Binnie J. says that "the precise degree of deference [patently unreasonable] commands in the diverse circumstances of a large provincial administration, will necessarily continue to be calibrated according to general principles of administrative law" (para. 19). It is unclear exactly which principles of administrative law are being referred to. If the reference to general principles of administrative law means there is some sort of spectrum along which patent unreasonableness is to be calibrated, that would be at odds with the B.C. legislature's codification of discrete standards of review.

106 With the *A.T.A.*, the B.C. legislature expressly codified the standards of review. However, in order for legislation to be exhaustive on a particular question, legislatures are not required to expressly oust the common law by statute. In *Gendron v. Supply & Services Union of the P.S.A.C., Local 50057*, [1990] 1 S.C.R. 1298 (S.C.C.), this Court considered whether recourse to the common law duty of fair representation was appropriate where the legislature had created a statutory duty. L'Heureux-Dubé J., writing for a unanimous Court, emphasized that because the content of the statutory remedy was "identical to the duty at common law ... [t]he common law duty is therefore not in any sense additive; it is merely duplicative" (p. 1316). The Court went on to hold that:

> ... the common law duty of fair representation is neither "necessary or appropriate" in circumstances where the statutory duty applies. Parliament has codified the common law duty and provided a new and superior method of remedying a breach. It is therefore reasonable to conclude that while the legislation does not *expressly* oust the common law duty of fair representation, it does however effect this end by necessary implication
>
> [Emphasis in original; p. 1319.]

Thus, while recourse to the common law is appropriate where Parliament has employed common law terms or principles without sufficiently defining them, it is not appropriate where the legislative scheme or provisions expressly or implicitly ousts the relevant common law analysis as is the case with s. 18.1(4) of the *F.C.A.*

B. The Majority's Concern with the Rigidity of Legislated Standards is Misplaced

107 The majority expresses concern with the rigidity of general legislative schemes in the judicial review context. With respect to the B.C. *A.T.A.*, Binnie J. writes of the need for a common law analysis that would account for the "diverse circumstances of a large provincial administration" (para. 19). In the federal context, he writes: "It cannot have been Parliament's intent to create ... a single, rigid Procrustean standard of decontextualized review ..." (para. 28). By focussing on the diversity of decision makers covered by the *F. C.A.* and the B.C. *A.T.A.*, the majority's reasons make prescribed standards appear overly rigid, even arbitrary.

108 With respect, the image of the Procrustean bed is misplaced in the judicial review context. The invocation of the Procrustean image with respect to legislated rules creates the impression that the contrasting common law standard of review is operating in a fluid, fully contextualized paradigm. This is not the case. This is not an area where Parliament is imposing rigid conformity against the backdrop of a panoply of common law standards. The potential flexibility of a contextual common law analysis is already limited in the post-*Dunsmuir* world of two standards. Regardless of what type of decision maker is involved, whether a Cabinet minister or an entry-level *fonctionnaire* (para. 28), the *Dunsmuir* analysis can only lead to one of two possible outcomes: reasonableness or correctness. And, as the present majority makes clear, these are single standards, not moving points along a spectrum (para. 59).

109 Moreover, the majority's concerns regarding legislative rigidity are only realized if one accepts that the focus of the analysis should or *must* be on the type of administrative decision maker. The majority's argument is that it cannot have been intended for a range of decision makers to be subject to the same standards of review. A review of the *F.C.A.* and the B.C. *A.T.A.* makes clear, however, that the respective legislatures believed the focus should be on the nature of the question under review (e.g. fact, law, etc.), rather than the nature of the decision maker. So there is a diversity in these schemes. It just operates according to the type of question being reviewed.

110 Even given this legislative focus on the type of question under review, it is still not the case that all administrative decision makers are subject to the same standards of review. Where a decision maker's enabling statute purports to preclude judicial review on some or all questions through a privative clause, deference will apply and a *Dunsmuir* standard of review analysis will be conducted. This is precisely how Parliament has legislated in the *F.C.A.* context when it intends for greater deference to be shown to certain decision makers.

111 The *Canada Labour Code*, R.S.C. 1985, c. L-2, for example, includes a strong privative clause protecting the Canadian Industrial Relations Board from judicial review under the *F. C.A.* on questions of law and fact. Section 22(1) states:

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> **22.** (1) Subject to this Part, every order or decision of the Board is final and shall not be questioned or reviewed in any court, except in accordance with the *Federal Courts Act* on the grounds referred to in paragraph 18.1(4)(*a*), (*b*) or (*e*) of that Act.

Section 22(1) expressly provides for review on questions of jurisdiction, procedural fairness, fraud or perjured evidence, but excludes review for errors of law or fact through express reference to s. 18.1(4) of the *F. C.A*. Where the privative clause applies, i.e. with respect to s. 18.1(4)(*c*),(*d*), or (*f*), the court is faced with a tension between its constitutional review role and legislative supremacy. In such cases, the *Dunsmuir* analysis applies. There is no role for the *Dunsmuir* standard of review analysis where s. 22(1) expressly provides for review on questions of jurisdiction, natural justice and fraud. Correctness review applies in these cases.

112 In contrast, the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 — the underlying legislation in the present case — does not contain this type of privative clause. Section 162(1) only provides that "[e]ach Division of the Board has, in respect of proceedings brought before it under this Act, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction." Contrary to the implication of the majority reasons, I think it is plain that this privative clause is intended only to differentiate between different levels and tribunals within the immigration regime and provide each with exclusive jurisdiction to hear legal and factual questions. It is not a privative clause that seeks to restrict or preclude judicial review.

113 These examples indicate that Parliament has not been unmindful of the issue of standard of review in s. 18.1(4). Where it intends that a tribunal decision reviewed under s.18.1 be shown deference, Parliament expressly indicates this either in s. 18.1(4) itself, as it has in para. (*d*) with respect to facts, or in the underlying legislation such as the *Canada Labour Code*. Where it does not, the courts should undertake their review according to the standards of correctness.

114 I would note that the B.C. legislature has also turned its mind to these concerns. The B.C. *A.T.A*. provides for more deferential standards of review where the underlying statute contains a privative clause. By imposing different standards of review depending on whether or not the administrative decision is protected by a privative clause, the legislature differentiates between those expert decisions it wished to protect and those it did not (ss. 58 and 59). The Hon. Geoff Plant indicated this when introducing the B.C. *A.T.A*. on second reading:

> For tribunals with specialized expertise, like the Farm Industry Review Board and the Employment Standards Tribunal, this bill generally provides that a court must defer to a tribunal's decision unless the decision is patently unreasonable or the tribunal has acted unfairly. For other tribunals — including, for example, the mental health review panels — the bill provides that with limited exceptions, a court must adopt a standard of correctness in reviewing the tribunal's decisions.

(*Debates of the Legislative Assembly*, 5th Sess., 37th Parl., May 18, 2004, p. 11193)

115 The record of the proceedings of the B.C. legislature also makes clear the legislature's intent to codify standards of review that would oust a duplicative common law standard of review analysis. The policy rationale for this move was clear. The legislation was aimed at refocussing judicial review litigation on the merits of the case, rather than on the convoluted process of determining and applying the standard of review.

> The question of what the standard of review should be on a case-by-case basis is often interpreted by the courts as a search for legislative intent. ... Accordingly, searching for that intent tends to be a time-consuming, expensive and sometimes disruptive exercise.
>
> . . . . .
>
> The provisions in this bill that codify the standards of review will shift the focus from what has been largely a scholarly debate about fine points of law to matters of greater immediate concern to the parties in tribunal proceedings.
>
> [Emphasis added.]
>
> (*Debates of the Legislative Assembly*, p. 11193)

116 It would be troubling, I believe, to the B.C. legislature to think that, despite its effort to codify standard of review and shift the focus of judicial review to the merits of the case, this Court would re-impose a duplicative *Dunsmuir* -type analysis in cases arising under the B.C. *A.T.A.*

IV. Statutory Interpretation of the *Federal Courts Act*

A. Section 18.1(4)

117 Section 18.1(4) appears at para. 71 above. On my reading, where Parliament intended a deferential standard of review in s. 18.1(4), it used clear and unambiguous language. The necessary implication is that where Parliament did not provide for deferential review, it intended the reviewing court to apply a correctness standard as it does in the regular appellate context.

118 In my opinion, it is useful to analyse s. 18.1(4) by first examining para. (*d*), which provides for judicial review where the federal board, commission or other tribunal

> (*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;

In this paragraph, Parliament has expressly instructed courts to show significant deference to the original decision maker. The words "in a perverse or capricious manner or without regard for the material before it" are clear and unambiguous. They indicate that on questions of fact, courts are only to interfere in the most egregious cases of erroneous fact finding.

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119 Binnie J. also finds that "it is clear from s. 18.1(4)(*d*) that Parliament intended administrative fact finding to command a high degree of deference" (para. 46). It would seem that in recognizing that the legislature intended a high degree of deference, one would conclude that this provision speaks for itself and ousts a common law standard of review analysis. Yet, Binnie J. still suggests that the provision is merely complementary of the common law, rather than dispositive of the standard of review issue. He writes that s. 18.1(4)(*d*) "provides legislative precision to the reasonableness standard of review of factual issues" and is "quite consistent with *Dunmsuir*" (para. 46). By superimposing *Dunsmuir*, the majority signals that factual decisions are to be reviewed on a reasonableness standard. The question then is whether reasonableness implies the same level of deference as "capricious" and "perverse". Arguably, a reasonableness review might be less deferential than that intended by the words Parliament used. Regardless of whether that is true or not, there is no justification for imposing a duplicative common law analysis where the statute expressly provides for the standard of review: See *Gendron*.

120 By contrast with para. (*d*), there is no suggestion that courts should defer in reviewing a question that raises any of the other criteria in s. 18.1(4). Parliament recognized that with respect to factual determinations, a federal board, commission or other tribunal is better situated than a reviewing court. With respect to questions of law, jurisdiction, natural justice, fraud or perjured evidence, the legislation deems courts to have greater expertise than administrative decision makers.

121 There is no suggestion in the *F.C.A.* that reviewing courts should defer on questions of law. Section 18.1(4)(*c*) provides for review where the federal board, commission or other tribunal

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

I can see no meaningful difference between the terms "the decision is based on a wrong decision on a question of law" which, in *Owen*, was considered to be sufficient by this Court to determine that a correctness standard of review applied, and "erred in law in making a decision or an order, whether or not the error appears on the face of record" in para. 18.1(4)(*c*). Indeed, in *Mugesera c. Canada (Ministre de la Citoyenneté & de l'Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100 (S.C.C.), a unanimous Court thought that the words of s. 18.1(4) were sufficiently clear that "[u]nder these provisions, questions of law are reviewable on a standard of correctness" (para. 37). *Mugesera*, like this case, was a judicial review of a decision of the IAD.

122 The majority now attempts to qualify *Mugesera* by writing that "[e]rrors of law are *generally* governed by a correctness standard" (para. 44 (emphasis added)). With respect, *Mugesera* did not qualify its application of the correctness standard of review in interpreting s. 18.1(4)(*c*). Paragraph 37 of *Mugesera* states:

> Applications for judicial review of administrative decisions rendered pursuant to the *Immigration Act* are subject to s. 18.1 of the *Federal Court Act*. Paragraphs (*c*) and (*d*) of s. 18.1(4), in particular, allow the Court to grant relief if the federal commission erred in law or based its decision on an erroneous finding of fact. Under these provisions, questions of law are reviewable on a standard of correctness.

Moreover, contrary to what the present majority implies, the Court in *Mugesera* did not limit the application of the correctness standard to "the general questions of international law and criminal law at issue in that case" (para. 44 of majority). It is clear that as a matter of statutory interpretation, the Court understood s. 18.1(4)(*c*) as requiring a correctness review on questions of law. The Court saw no need to impose the common law over what the statute itself dictated.

123 The majority nevertheless insists that "para. (*c*) provides a *ground* of intervention, but the common law will stay the hand of the judge(s) in certain cases if the interpretation is by an expert adjudicator interpreting his or her home statute or a closely related statute" (para. 44) (Emphasis in original). With respect, there is no authority for this in the legislation. The majority finds their opening in the *remedial* discretion of s. 18.1(4). Binnie J. writes: "This nuance does not appear on the face of para. (c), but is the common law principle on which the discretion provided in s. 18.1(4) is to be exercised" (para. 44). As I will explain, the remedial discretion in s. 18.1(4) goes to the question of withholding relief, not the review itself. The bases upon which the remedial discretion is to be exercised are wholly distinct from the common law of standard of review analysis.

124 Paragraphs (*a*), (*b*) and (*e*) of s. 18.1(4) provide for relief where a federal board, commission or other tribunal

> (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
>
> (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
>
> . . . . .
>
> (e) acted, or failed to act, by reason of fraud or perjured evidence; ...

There is no indication in any of these provisions that the legislature intended for the reviewing court to show any deference to administrative decision makers in determining questions of jurisdiction, natural justice, procedural fairness and fraud or perjured evidence.

125 Section 18.1(4)(*f*) contemplates judicial intervention where the federal board, commission or other tribunal

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

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The majority writes that s. 18.1(4)(*f*) "necessarily includes 'law' outside the *[F. C.A.]* (para. 48) and therefore demonstrates that "s. 18.1(4) is not intended to operate as a self-contained code, but is intended by Parliament to be interpreted and applied against the backdrop of the common law, including those elements most recently expounded in *Dunsmuir*" (para. 48). The majority relies on the statement by the authors of *Federal Courts Practice 2009* (2008), Saunders et al., that "[s]ection 18.1(4)(f) ensures that the Court will not be hindered in developing *new grounds* for review" (emphasis added by Binnie J., at para. 49).

126 It is not in dispute that s. 18.1(4) is not intended to operate as a self-contained code. In judicial review of any administrative decision where a legal error is alleged, the court is required to consider whether the decision maker was in breach of any statutory provision or common law rule that might be relevant. In this regard, I agree that s. 18.1(4)(*f*) provides for potentially expanded *grounds* of review. However, that is not the issue in this case. The issue in this case is whether Parliament has legislated exhaustively on the standard of review, so as to oust the *Dunsmuir* standard of review analysis. Binnie J.'s reliance on Saunders et al.'s discussion of the "grounds of review" under s. 18.1(4) does not address whether the section also provides for standards of review. This is troubling, given that those same commentators find that s. 18.1(4) does provide for *standards of review* on questions of fact and law. At p. 145 of their text under the title "Grounds for Review Standards of Review — Generally" in commenting on *Mugesera*, they write:

> Under section 18.1(4)(c) and (d) of the *Federal Courts Act*, questions of law are reviewable on a standard of correctness. On questions of fact, the reviewing court can intervene under section 18.1(4)(d) only if it considers that the tribunal "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".
>
> [Emphasis added; p. 145.]

127 All that s. 18.1(4)(*f*) provides for is review of legal errors committed by a federal board, commission or other tribunal other than those "in making a decision or an order", which are already captured under s. 18.1(4)(*c*): see *Morneault v. Canada (Attorney General)* (2000), [2001] 1 F.C. 30 (Fed. C.A.), at para. 44 ("the intent of the paragraph appears to have been to afford a ground that was not otherwise specifically mentioned in subsection 18.1(4)"). A tribunal's refusal to make a decision or an order, for example, would not come under para. (*c*). The reference to "acted in any other way that was contrary to law" refers, then, to legal errors that are not captured by s. 18.1(4)(*c*). It does not provide an opening for a *Dunsmuir* standard of review analysis. With respect, the majority's view of s. 18.1(4) ignores the obvious interpretation in search of something that is not there.

B. Section 18 and the Origins of the Federal Courts Act

128 The majority is of the view that when s. 18.1 was added to the *F.C.A.*, it "did not have the effect of excluding the common law" (para. 34). It appears that this proposition is intended to act as a platform for the applicability of the common law standard of review analysis. With respect, it is overly broad to suggest that *all* elements of the common law continued to apply to s. 18.1(4) simply because there were *some* gaps — for example, criteria in exercising the discretion to withhold relief — which the common law continued to fill. For the reasons I have explained, the *F.C.A*. occupies the area of standard of review and therefore ousts the application of the common law on this question.

129 The genesis of the *Federal Courts Act* and its amendments is not in dispute. Section 18 was enacted to transfer jurisdiction from the provincial superior courts to the federal courts for judicial review of federal tribunals, subject to provincial courts retaining a residual jurisdiction to determine the constitutionality and applicability of legislation. Section 18, which refers to the prerogative writs, survives, but no application for judicial review can be made under it. Subsection (3) provides:

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

Section 18.1 contains the statutory process under which judicial review may be applied for and under which the court exercises its jurisdiction.

130 The 1990 amendments were intended to clarify pre-existing procedural confusion about whether the trial or appeal divisions had jurisdiction with regard to particular applications for judicial review. The amendments also aimed to simplify the procedure for obtaining a remedy by requiring that it be sought by way of application for judicial review, rather than by way of statement of claim or originating notice of motion as had been the prior practice: D. Sgayias et al., *Federal Court Practice 1998* (1997), at pp. 69-70. As reform legislation, the amendments did not concern the standard of review.

C. The Implications of Section 18.1(4) Remedial Discretion

131 I agree with Binnie J.'s bilingual analysis and conclusion that, "notwithstanding the bilingual issue in the text, s. 18.1(4) should be interpreted so as to preserve to the Federal Court a discretion to grant or withhold relief (para. 40). The pertinent question is what should form the basis for the exercise of that judicial discretion. Relief on judicial review is equitable. The discretion in s. 18.1(4) recognizes that it may be inappropriate to grant equitable relief in some cases. This *remedial* discretion allows a reviewing judge to withhold relief in certain cases. It does not concern the *review* itself, however.

132 The majority says that the *F.C.A.* does not "indicate in what circumstances ... relief may properly be withheld" (para. 42). It is true that the legislation does not provide for criteria according to which reviewing courts should exercise their discretion to withhold relief. In the context of this specific gap, I agree with the majority that "resort will have to be had to the common law" (para. 42). The pertinent question is which *part* of the common law is relevant to the withholding of relief by the court on judicial review.

133 Binnie J. attempts to ground the court's remedial discretion to withhold relief in general judicial review principles. He states at para. 36 that the court's exercise of the s. 18.1(4) discretion "will depend on the court's appreciation of the respective roles of the courts and the administration as well as the 'circumstances of each case': see *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 (S.C.C.), at p. 575." He cites Brown and Evans' observation that "whenever the court exercises its discretion to deny relief, balance of convenience considerations are involved" (para. 36); D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at p. 3-99. While "the discretion must be exercised judicially", Binnie J. finds that "the general principles of judicial review dealt with in *Dunsmuir* provide elements of the appropriate judicial basis for its exercise" (para. 36).

134 By linking remedial discretion to Dusnmuir "general principles of judicial review," Binnie J. conflates standard of review (deference) with the granting of relief. In doing so, he effectively reads in an opening for recourse to the common law standard of review analysis. He relies on the specific gap regarding the discretion to grant relief to impute a wider gap regarding standard of review.

135 With respect, this is not the nature of the discretion under s. 18.1(4). The traditional common law discretion to refuse relief on judicial review concerns the parties' conduct, any undue delay and the existence of alternative remedies: *Immeubles Port Louis Ltée c. Lafontaine (Village)*, [1991] 1 S.C.R. 326 (S.C.C.), at p. 364. As *Harelkin* affirmed, at p. 575, courts may exercise their discretion to refuse relief to applicants "if they have been guilty of unreasonable delay or misconduct or if an adequate alternative remedy exists, notwithstanding that they have proved a usurpation of jurisdiction by the inferior tribunal or an omission to perform a public duty". As in the case of interlocutory injunctions, courts exercising discretion to grant relief on judicial review will take into account the public interest, any disproportionate impact on the parties and the interests of third parties. This is the type of "balance of convenience" analysis to which Brown and Evans were referring.

136 Thus, the discretion contained in s. 18.1(4) speaks to the withholding of relief in appropriate cases; it does not engage the question of standard of review. Reliance upon it by the majority to support the view that it opens the door to the *Dunsmuir* standard of review analysis is, with respect,

misplaced. In my view, the *Dunsmuir* standard of review should be confined to cases in which there is a strong privative clause. Excepting such cases, it does not apply to s. 18.1(4) of the *F.C.A.*

V. Decision in this Case

137 In determining whether the respondent was eligible for the special relief available under s. 67(1)(*c*) of the *Immigration and Refugee Protection Act*, the IAD acknowledged that its discretion should be exercised with consideration for the criteria set out in *Ribic v. Canada (Minister of Employment & Immigration)* (1986), [1985] I.A.B.D. No. 4 (Imm. App. Bd.) (endorsed by this Court in *Chieu v. Canada (Minister of Citizenship & Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84 (S.C.C.)). The majority of the IAD expressly referred to the *Ribic* factors and, in my view, had regard to those it considered relevant in exercising its discretion. The actual application of the *Ribic* factors to the case before it and its exercise of discretion is fact-based. I do not find that the factual findings of the IAD were perverse or capricious or were made without regard to the evidence. I would allow the appeal.

***Deschamps J.*:**

138 I agree with Rothstein J. that since s. 18.1(4) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, sets legislated standards of review, those standards oust the common law. Consequently, I agree with Parts III, IV and V of his reasons and would also allow the appeal.

***Fish J.* (dissenting):**

I

139 This appeal raises two issues. The first concerns the standard of review with respect to decisions of the Immigration Appeal Division ("IAD"). In that regard, I agree with Justice Binnie that the standard of review is "reasonableness".

140 The second issue is whether the majority decision of the IAD in this case survives judicial scrutiny under that standard. Unlike Justice Binnie, and with the greatest of respect, I have concluded that it does not.

141 Essentially, I find that the decision of the IAD rests on what the Court of Appeal has aptly described as a "fixation" that collides with the overwhelming weight of the uncontradicted evidence in the record before it. I agree with the majority below that the decision, for this reason, cannot stand.

142 Accordingly, I would dismiss the appeal.

II

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143 In 2000, when he was 18 years old, Sukhvir Singh Khosa caused the death of Irene Thorpe by driving recklessly at more than twice the speed limit, losing control of his automobile and running it off the roadway. He had by then been living in Canada for four years. When his appeal to the IAD was decided in 2004, he was 22 and married. Four more years have elapsed since then.

144 To order Mr. Khosa's removal would separate him from his wife and immediate family. It would return him to a country he has visited only once since emigrating at the age of 14 and where he appears to have few relatives.

145 The IAD's task in this case is to look to "all the circumstances of the case" in order to determine whether "sufficient humanitarian and compassionate considerations" existed to warrant relief from a removal order: *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 67(1)(*c*). The IAD is bound in performing that function to consider the various factors set out in *Ribic v. Canada (Minister of Employment & Immigration)* (1986), [1985] I.A.B.D. No. 4 (Imm. App. Bd.), and endorsed by this Court in *Chieu v. Canada (Minister of Citizenship & Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84 (S.C.C.), at para. 90. The IAD in this case placed the greatest emphasis on the factors of remorse, rehabilitation, and likelihood of reoffence.

146 With respect to these factors, the record before the IAD consisted essentially of the following uncontested and uncontradicted evidence:

- The sentencing judge found that "by his actions immediately after learning of Ms. Thorpe's death and since the accident ... he has expressed remorse" (*R. v. Khosa*, 2003 BCSC 221, [2003] B.C.J. No. 280 (B.C. S.C.), at para. 56).

- Mr. Khosa took responsibility for his crime early, expressing a desire to attend the funeral of the woman he had killed and offering — before any arraignment or preliminary inquiry — to plead guilty to dangerous driving causing death.

- The sentencing judge found that "[i]n the more than two years that have passed since the accident, Mr. Khosa has not left the house except to go to work, to school, or the Sikh temple. He normally does not drink. He does not take drugs. He has no criminal record. He has no driving record. He has complied with all of his bail conditions and *is not likely to re-offend*." (para. 55 (emphasis added)).

- Mr. Khosa had not driven a car since the accident, even though he was permitted to do so for some months thereafter.

- Mr. Khosa's probation officer concluded from close and extensive contact with Mr. Khosa that he "appears to be making a sincere effort to maintain a stable and responsible life style in which he is a contributing member of the community". The probation officer also reported that he has "demonstrated a very positive attitude towards community supervision [and] willingly

conforms to the expectations, requirements, and restrictions of the Conditional Sentence". With respect to his character, the probation officer was of the view that Mr. Khosa "presents as a pro-social young man who values work, family, community and religion" (A.R., at p. 355).

- Mr. Khosa had no previous criminal or driving convictions whatever.
- Mr. Khosa had complied with all provisions of his conditional sentence.
- Several employers wrote letters describing Mr. Khosa as conscientious and reliable.

147 Despite all of this evidence indicating that Mr. Khosa was extremely unlikely to reoffend and had taken responsibility for his actions, the majority at the IAD seized upon one consideration: Mr. Khosa's denial that he was "street-racing" at the time the accident occurred. Apart from a brief mention of Mr. Khosa's "show of relative remorse at [the] hearing" ([2004] I.A.D.D. No. 1268 (Imm. & Ref. Bd. (App. Div.))), at para. 15), and a passing allusion to the judgments of the criminal courts to his culpability (para. 14), Mr. Khosa's denial was the *only* consideration that the IAD majority considered with respect to these issues. Manifestly, this solitary fact was the decisive element — if not the sole basis — upon which the majority of the IAD denied Mr. Khosa's basis for all humanitarian and compassionate relief.

148 So much cannot reasonably be made out of so little.

III

149 While Mr. Khosa's denial of street racing may well evidence some "lack of insight" into his own conduct, it cannot reasonably be said to contradict — still less to outweigh, on a balance of probabilities — all of the evidence in his favour on the issues of remorse, rehabilitation and likelihood of reoffence.

150 The IAD's cursory treatment of the sentencing judge's findings on remorse and the risk of recidivism are particularly troubling. While findings of the criminal courts are not necessarily binding upon an administrative tribunal with a distinct statutory purpose and a different evidentiary record, it was incumbent upon the IAD to consider those findings and to explain the basis of its disagreement with the decision of the sentencing judge. The majority decision at the IAD mentions only in passing the favourable findings of the criminal courts and does not explain *at all* its disagreement with them.

151 Moreover, Mr. Khosa's denial of street racing is, at best, of little probative significance in determining his remorse, rehabilitation and likelihood of reoffence. In light, particularly, of the extensive, uncontradicted and unexplained evidence to the contrary, Mr. Khosa's denial of street racing cannot reasonably support the inference drawn from it by the majority in the IAD.

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152 It is also important to note that street racing was not a necessary element of Mr. Khosa's crime of criminal negligence causing death (*R. v. Khosa*, 2003 BCCA 644, 190 B.C.A.C. 23 (B.C. C.A.), at para. 85). It appears that Mr. Khosa's refusal to accept his guilty verdict on this charge — in contrast with his willingness to plead guilty to the less serious charge of dangerous driving causing death — is due solely to his mistaken impression that the former requires a finding that he was racing (A.R., at p. 145). This is therefore not a case where a person in deportation proceedings maintains his innocence, as suggested by the majority of the IAD (at para. 14), but rather a case where the immigrant simply disputes an ancillary finding of the criminal court.

153 Whatever the correct interpretation of Mr. Khosa's denial that he was street-racing, it is clear that the majority at the IAD had "some kind of fixation" — to again borrow the phrase of the majority below — with this piece of evidence, and based its refusal to grant humanitarian and compassionate relief largely on this single fact.

154 The majority at the IAD made repeated reference to the denial. Toward the end of its decision, it stated that in light of Mr. Khosa's "failure ... to acknowledge his conduct and accept responsibility for ... street-racing ..., there is *insufficient evidence u*pon which I can make a determination that [Mr. Khosa] does not represent a present risk to the public" (para. 23 (emphasis added)). I find that this conclusion is not only incorrect, but unreasonable. There was ample evidence suggesting that he posed no risk. The majority decision of the IAD simply disregarded virtually all of that evidence.

155 Later, in justifying its decision to deny all relief rather than order a stay of removal, the majority wrote that Mr. Khosa's "failure to acknowledge or take responsibility for his specific reckless conduct does not suggest that any purpose would be served by staying the present removal order" (para. 24). Here, again, the decision of the IAD majority transforms a limited, specific and ancillary denial into a general failure to take responsibility.

156 The majority's inordinate focus on racing and its failure to consider contrary evidence do not "fit comfortably with the principles of justification, transparency and intelligibility" that are required in order to withstand reasonableness review (reasons of Binnie J., at para. 59).

157 With respect, I thus feel bound to conclude that the IAD was unreasonable in its evaluation of Mr. Khosa's rehabilitation, remorse and likelihood of reoffence.

IV

158 Because the IAD's finding on these specific factors was central to its ultimate decision to deny any and all humanitarian and compassionate relief, the IAD's determination cannot be sustained.

159 To be sure, the majority at the IAD stated that even if it were to have found that Mr. Khosa did not present a risk to the public "in balancing all the relevant factors, I determine the scale does not tip in [Mr. Khosa's] favour and decline to exercise favourable discretion" (para. 23). This sort of conclusory statement, however, cannot insulate the IAD's decision from review when the rest of its reasons demonstrate that its decision rests on an unreasonable determination of central importance, as in this case.

160 I agree that decisions of the IAD are entitled to deference. In my respectful view, however, deference ends where unreasonableness begins.

V

161 For all these reasons, as stated at the outset, I would dismiss the appeal and affirm the judgment of the Court of Appeal returning this matter to the IAD for reconsideration before a differently-constituted panel.

Appeal allowed.

Pourvoi accueilli.

Footnotes

* Bastarache J. took no part in the judgment.

** A corrigendum issued by the Court on April 20, 2009 has been incorporated herein.

1 See. e.g., federally, the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, s. 147(1); *Canada Agricultural Products Act*, R.S.C. 1985, c. 20 (4th Supp.), s. 10(1.1); *Employment Insurance Act*, S.C. 1996, c. 23, s. 115(2); in Newfoundland and Labrador, *Urban and Rural Planning Act, 2000*, S.N.L. 2000, c. U-8, s. 46(1); in New Brunswick, *Occupational Health and Safety Act*, S.N.B. 1983, c. O-0.2, s. 26(5); *The Residential Tenancies Act*, S.N.B. 1975, c. R-10.2, s. 27(1); in P.E.I., *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, s. 4(1); in Quebec, *Code of Civil Procedure*, R.S.Q., c. C-25, s. 846; *Youth Protection Act*, R.S.Q., c. P-34.1, s. 74.2; in Ontario, *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 2; in Manitoba, *The Certified General Accountants Act*, C.C.S.M., c. C46, s. 22(2); *The Gaming Control Act*, C.C.S.M., c. G5, s. 45(2); *The Human Rights Code*, C.C.S.M., c. H175, s. 50(1), and in the Yukon Territory, *Education Labour Relations Act*, R.S.Y. 2002, c. 62, s. 95(1); *Liquor Act*, R.S.Y. 2002, c. 140, s. 118(1); *Rehabilitation Services Act*, R.S.Y. 2002, c. 196, s. 7.

2 See e.g. *Traffic Safety Act*, R.S.A. 2000, c. T-6, s. 47.1(3); *Administrative Tribunals Act*, S.B.C. 2004, c. 45, s. 58; *Health Professions Act*, S.Y. 2003, c. 24, s. 29, or "correctness", e.g., *Back to School Act, 1998*, S.O. 1998, c. 13, s. 18(3).

2019 FCA 41
Federal Court of Appeal

Canada (Attorney General) v. Public Service Alliance of Canada

2019 CarswellNat 513, 2019 FCA 41, 2019 C.L.L.C. 220-032, 302 A.C.W.S. (3d) 540, 432 D.L.R. (4th) 170

ATTORNEY GENERAL OF CANADA (Applicant) and PUBLIC SERVICE ALLIANCE OF CANADA (Respondent) and FEDERAL PUBLIC SECTOR LABOUR RELATIONS AND EMPLOYMENT BOARD (Intervener)

ATTORNEY GENERAL OF CANADA (Applicant) and PUBLIC SERVICE ALLIANCE OF CANADA (Respondent) and FEDERAL PUBLIC SECTOR LABOUR RELATIONS AND EMPLOYMENT BOARD (Intervener)

M. Nadon, Johanne Gauthier, Mary J.L. Gleason JJ.A.

Heard: November 22, 2018
Judgment: March 1, 2019
Docket: A-235-17, A-236-17

Proceedings: affirming *Public Service Alliance of Canada v. Treasury Board (Correctional Service of Canada)* (2017), 2017 CarswellNat 4006, 2017 CarswellNat 4005, 2017 CRTESPF 11, 2017 FPSLREB 11, Catherine Ebbs Member (Can. F.P.S.L.R.E.B.); and affirming *Public Service Alliance of Canada v. Canada Revenue Agency* (2017), 2017 CarswellNat 3956, 2017 CarswellNat 3955, 2017 CRTESPF 16, 2017 FPSLREB 16, Michael F. McNamara Member (Can. F.P.S.L.R.E.B.)

Counsel: Richard Fader, for Applicant
Amanda Montague-Reihnoldt, for Respondent
Asha Kurian, Nicholas Czyzewski, for Intervener

***Mary J.L. Gleason J.A.*:**

1 The applicant seeks to set aside two decisions of the Federal Public Sector Labour Relations and Employment Board (the Board) in *Public Service Alliance of Canada v. Treasury Board (Correctional Service of Canada)*, 2017 FPSLREB 11 (Can. F.P.S.L.R.E.B.) (CSC Reasons) and *Public Service Alliance of Canada v. Canada Revenue Agency*, 2017 FPSLREB 16 (Can. F.P.S.L.R.E.B.) (CRA Reasons). In the two decisions, the Board allowed the unfair labour practice

complaints brought by the respondent union, finding that the employer in each case had violated the statutory freeze enshrined in section 107 of the *Federal Public Sector Labour Relations Act*, enacted by the *Public Service Modernization Act*, S.C. 2003, c. 22, s. 2 (the *FPSLRA*). In reaching these decisions, the Board determined that the complaints had been made in a timely fashion within the meaning of subsection 190(2) of the *FPSLRA*, which requires that complaints be filed within 90 days of the date on which the complainant knew or ought, in the Board's opinion, to have known of the action or circumstances giving rise to the complaint.

2 The applicant does not challenge the Board's determinations on the merits of the unfair labour practice complaints but, rather, only its determinations that the complaints were timely under subsection 190(2) of the *FPSLRA*.

3 By orders of this Court dated January 10, 2018, the Board was granted permission to intervene in these applications. The Board has advanced the argument that its decisions in the instant case are not reviewable in light of the privative clause in subsection 34(1) of the *Federal Public Sector Labour and Employment Board Act*, enacted by the *Economic Action Plan 2013 Act, No. 2*, S.C. 2013, c. 40, s. 365 (the *FPSLREBA*).

4 These applications were joined for hearing. The original of these Reasons will be placed in Court file A-235-17 and a copy of them in Court file A-236-17.

5 For the reasons set out below, I conclude that the Board's arguments with respect to subsection 34(1) of the *FPSLREBA* are without merit and that the impugned portions of the Board's decisions are amenable to judicial review. However, I also conclude that the reasonableness standard of review applies and that the Board's determinations in respect of subsection 190(2) of the *FPSLRA* are reasonable. I would accordingly dismiss these applications, with costs payable by the applicant to the respondent on the basis set out below. I would not award costs against the Board or in respect of the issues raised by it.

I. Background and the Decisions of the Board on Timeliness

6 It is useful to commence by setting out the facts relevant to the timeliness issue and to summarize the Board's rulings on the issue.

7 In both cases, at the times relevant to the complaints, the employer and the respondent union were engaged in collective bargaining and the statutory freeze enshrined in section 107 of the *FPSLRA* was in effect. That section provides in relevant part that, after notice to bargain collectively has been given and the collective agreement is still being negotiated, unless the parties agree otherwise, the terms and conditions of employment in force in the bargaining unit on the day notice to bargain was given continue in force and must be respected by the employer and the bargaining agent until either: a) the right to strike or lock-out accrues, where the resolution process includes the right to strike or lock-out, or b) until an arbitral award is rendered, where the

resolution process includes arbitration. Thus, at the relevant times, the employers in these cases were prevented from unilaterally altering the terms and conditions of employment of employees in the bargaining units.

8 In both cases, the employers determined they needed to make changes to employees' hours of work, by reducing them in the case of the Correctional Service of Canada, and by removing certain flexibilities, in the case of the Canada Revenue Agency. Neither obtained the consent of the respondent, the employees' bargaining agent. Both organizations gave advance notice of the changes they intended to make to the affected employees and to the respondent. The respondent filed unfair labour practice complaints with the Board, alleging a violation of section 107 of the *FPSLRA*. The complaints in both cases were filed more than 90 days after the date the advance notices were given by the employers, but within 90 days of the date the changes were implemented.

9 In both cases, the Board found the complaints to be timely under subsection 190(2) of the *FPSLRA*. The Board reasoned that the relevant 90-day period commenced on the date the impugned changes were made because the action or circumstance giving rise to the complaint, or to use the Board's words, the "triggering event" that started the running of the 90-day clock, was the change to employees' terms and conditions of employment and not the prior notice of the employers' intent to implement those changes: CRA Reasons at para. 10; CSC Reasons at para. 38. In reaching this conclusion, the Board relied on its previous case law to similar effect, citing *PASC v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 46 (Can. P.S.L.R.B.) and *UCCO-SACC-CSN v. Treasury Board*, 2016 PSLREB 47 (Can. P.S.L.R.E.B.).

II. Are the Board's Decisions Reviewable?

10 With this background in mind, I turn now to the Board's contention that its decisions in the present cases are unreviewable. As noted, the Board alleges that this conclusion flows from subsection 34(1) of the *FPSLREBA*. That provision provides that:

> Every order or decision of the Board is final and is not to be questioned or reviewed in any court, except in accordance with the *Federal Courts Act* on the grounds referred to in paragraph 18.1(4)(*a*), (*b*) or (*e*) of that Act.
>
> Les décisions et ordonnances de la Commission sont définitives et ne sont susceptibles de contestation ou de révision par voie judiciaire que pour les motifs visés aux alinéas 18.1(4)*a*), *b*) ou *e*) de la *Loi sur les Cours fédérales* et dans le cadre de cette loi.

11 Paragraphs 18.1(4)(*a*), (*b*) and (*e*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 provide:

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

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

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

[...]

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

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

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

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

[...]

e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

12 The Board submits that the portions of its decisions under review dealing with subsection 190(2) of the *FPSLRA* do not involve its jurisdiction, an alleged violation of procedural fairness or a claim of fraud or perjured evidence. Rather, in accordance with the decisions of this Court in *McConnell v. P.I.P.S.C.*, 2007 FCA 142, 362 N.R. 30 (F.C.A.) (*McConnell*) and *Boshra v. C.A.P.E.*, 2011 FCA 98, 415 N.R. 77 (F.C.A.) (*Boshra*), the Board says that its decisions on the timeliness issue involve questions of fact or of mixed fact and law. It asserts that such questions are reviewable under paragraphs 18.1(4)(*c*) and (*d*) of the *Federal Courts Act*, which refer to errors of law and findings of fact made in a perverse or capricious manner or without regard for the material before the tribunal as grounds of review. Because these grounds are excluded from the purview of subsection 34(1) of the *FPSLREBA*, the Board submits that the impugned portions of its decisions are unreviewable.

13 Faced with the reality that decisions of this nature made by the Board or by the Canada Industrial Relations Board (the CIRB) are routinely reviewed by this Court despite the presence of subsection 34(1) in the *FPSLREBA* (or of a similar provision in subsection 22(1) of the *Canada Labour Code*, R.S.C. 1985, c. L-2), the Board contends that its arguments are nonetheless ones it is entitled to make as it says the issue has not been definitively settled by this Court.

14 In support of its position, the Board relies on the decisions of the Supreme Court of Canada in *Société d'énergie de la Baie James c. No*, 2001 SCC 39, [2001] 2 S.C.R. 207 (S.C.C.) and *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220, 38 N.R. 541 (S.C.C.), submitting that the Supreme Court there recognized that it was open to a legislature to limit the grounds of review

so long as review for jurisdictional issues is available. The Board also points to statements made by this Court in *Piedmont Airlines Inc. v. U.S.W.A., Local 1976*, 2003 FCA 154 (Fed. C.A.) at para. 6, (2003), 303 N.R. 40 (Fed. C.A.); *Kowallsky v. P.S.A.C.*, 2008 FCA 183 (F.C.A.) at paras. 5, 7, (2008), 379 N.R. 196 (F.C.A.) 6; *Société des Arrimeurs de Québec c. S.C.F.P., locale 3810*, 2008 FCA 237 (F.C.A.) at para. 18, (2008), 381 N.R. 312 (F.C.A.); *Democracy Watch v. Canada (Attorney General)*, 2018 FCA 194 (F.C.A.) at para. 24; *Democracy Watch v. Canada (Attorney General)*, 2018 FCA 195 (F.C.A.) at para. 5, which it says support its contention that the Board's errors of law, fact or of mixed fact and law are not reviewable.

15 The Board further submits that its reading of subsection 34(1) of the *FPSLREBA* accords with the subsection's text, context and purpose, particularly in light of the need for expedition and finality in labour relations and the Board's avowed expertise in issues like the application of subsection 190(2) of the *FPSLRA*.

16 Both the applicant, who represents the employers subject to the *FPSLRA*, and the respondent, the bargaining agent representing the majority of unionized employees subject to the Act, roundly reject the Board's arguments. They say that issues like those that arise in the instant cases are — and should be — subject to review under the deferential reasonableness standard.

17 They point to *McConnell* and *Boshra* as examples of cases where this Court reviewed decisions identical to those involved in this application under the reasonableness standard. They also note that the case law of this Court recognizes that, for purposes of fitting within the grounds for review listed in subsection 18.1(4) of the *Federal Courts Act*, errors of law or fact that warrant intervention can be characterized as jurisdictional errors within the meaning of paragraph 18.1(4)(*a*) of the *Federal Courts Act*. In support of these arguments, they point to the decisions of this Court in *C.U.P.W. v. Healy*, 2003 FCA 380, 311 N.R. 96 (F.C.A.) (*C.U.P.W. v. Healy*) and *Canadian Federal Pilots Assn. v. Canada (Treasury Board)*, 2009 FCA 223, [2010] 3 F.C.R. 219 (F.C.A.) (*P.S.A.C. v. C.F.P.A.*).

18 In *C.U.P.W. v. Healy* at para. 22, Evans J.A., who wrote for the Court, noted that:

> [...] the grounds of review set out in subsection 18.1(4) overlap to a degree. Thus, a decision based on a finding of fact that is supported by no evidence is liable to be set aside on the ground that it was made either without jurisdiction (*Re Keeprite Workers' Independent Union et al. v. Keeprite Products Ltd.* (1980), 114 D.L.R. (3d) 162 (Ont. CA); *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476, 494-95) or, possibly, in breach of the rules of natural justice (*R. v. Deputy Industrial Injuries Commissioner, Ex parte Moore*, [1965] 1 Q.B. 456, 488 (Eng. CA); *Minister for Immigration and Ethnic Affairs v. Pochi* (1980), 31 A.L.R. 666, 689 (Aust. Fed. Ct.)).

19 To similar effect, in *Canadian Federal Pilots Assn. v. Canada (Treasury Board)* at paras. 32-33, 35, Evans J.A., again writing for the Court, explained that:

> 32. First, a tribunal will have "acted beyond its jurisdiction" [within the meaning of paragraph 18.1(4)(*a*) of the *Federal Courts Act*] if it had decided incorrectly a legal question for which correctness is the applicable standard of review. Such questions have been labelled "jurisdictional questions" or, to adopt the terminology of Justice Binnie referred to above, "jurisdictional issues". They may include provisions of a tribunal's enabling statute.
>
> 33. Second, even if the question decided by a tribunal is not "jurisdictional" in this sense, but is a "mere" question of law, the Court may nonetheless intervene on an application for judicial review if the tribunal's decision is unreasonable.
>
> [...]
>
> 35. Even if its interpretation of section 58 is not subject to review for correctness, the Board will nonetheless have "acted beyond its jurisdiction" if its interpretation is unreasonable. Like other administrative tribunals, the Board is not authorized by Parliament to make a decision that is based on an unreasonable interpretation of its enabling legislation. Fidelity to the rule of law requires that individuals be afforded this minimum protection from the arbitrary exercise of public power by administrative decision makers, whether or not they are protected by a preclusive clause: *Khosa*, at paragraph 42.

20 The applicant and respondent further submit that the decisions of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.) (*Dunsmuir*) and *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.) (*Khosa*) largely denude subsection 18.1(4) of the *Federal Courts Act* of content, with the result that decisions of all federal administrative tribunals, including the Board, are reviewable for reasonableness unless one of the exceptions to the application of the reasonableness standard discussed in *Dunsmuir* applies.

21 In response, the Board disagrees and says that *Dunsmuir* and *Khosa* deal only with the issue of the standard of review to be applied and not to the grounds of review which may be raised. However, the Board also argues that *Dunsmuir* and subsequent case law of the Supreme Court significantly limit the frequency with which jurisdictional issues may be found. The impact, according to the Board, is that many of its decision are unreviewable by virtue of the combined effect of subsections 34(1) of the *FPSLREBA* and 18.1(4) of the *Federal Courts Act*.

22 I cannot accept the Board's submissions for several reasons.

23 First, they fly in the face of the myriad decisions of this Court and of the Supreme Court of Canada in which decisions of the Board, the CIRB or their predecessors, involving alleged errors of law, fact or mixed fact and law, have been reviewed under the deferential reasonableness standard (or previously under the patent unreasonableness standard) despite the presence of the privative clauses in subsection 34(1) of the *FPSLREBA* and subsection 22(1) of the *Canada Labour Code*.

The 43 cases listed in the Appendix to these reasons have been decided on this basis in the last two years. For each prior year, several additional cases would be added to the list. Thus, contrary to what the Board asserts, this issue *has* been definitively settled by the jurisprudence.

24 Second, as this Court held in *Canadian National Railway v. Emerson Milling Inc.*, 2017 FCA 79, [2018] 2 F.C.R. 573 (F.C.A.) at para. 18, the term "jurisdiction", when used in a provision like paragraph 18.1(4)(*a*) of the *Federal Courts Act*, must be understood in its appropriate historical context. This is in accordance with the principles of statutory interpretation, which require a court to have regard to the appropriate context when interpreting legislation: *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para. 21, (1998), 221 N.R. 241 (S.C.C.); *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.) at para. 27.

25 In 1990, when Parliament adopted subsection 18.1 of the *Federal Courts Act*, errors of jurisdiction in Canadian administrative law were understood to include errors of law, in circumstances where the Board was required to offer a correct interpretation, and patently unreasonable legal interpretations, as was noted in *Canadian Federal Pilots Assn. v. Canada (Treasury Board)*; see also *C.A.I.M.A.W., Local 14 v. Canadian Kenworth Co.*, [1989] 2 S.C.R. 983 (S.C.C.) at pp. 1003-1004, (1989), 102 N.R. 1 (S.C.C.). Such errors were also understood to include findings of fact that would be caught by paragraph 18.1(4)(*d*) of the *Federal Courts Act*, as was noted in *C.U.P.W. v. Healy*. Thus, properly read in context, "jurisdictional errors" for purposes of setting forth a ground (as opposed to a standard) of review within the meaning of subsection 18.1(4) of the *Federal Courts Act* include situations where the Board makes an unreasonable legal interpretation or an error of fact within the ambit of paragraph 18.1(4)(*d*) of that Act.

26 Third, contrary to what the Board asserts, the decisions of the Supreme Court of Canada in *Dunsmuir* and *Khosa* cannot be understood to narrow the range of Board decisions that may be judicially reviewed. Rather, they hold that a common standard of review framework is to be applied to all federal administrative decision-makers and that, unless one of the exceptions discussed in *Dunsmuir* obtains, the applicable standard of review is reasonableness. This is evident both from the reasons of the majority in *Khosa*, at paragraphs 43 to 51 and from the reasons of Rothstein J. at paragraph 111 in the same case, where he discussed the import of the privative clause found in section 22 of the *Canada Labour Code*. He there wrote as follows:

> Section 22(1) expressly provides for review on questions of jurisdiction, procedural fairness, fraud or perjured evidence, but excludes review for errors of law or fact through express reference to s. 18.1(4) of the [*Federal Courts Act*]. Where the privative clause applies, i.e. with respect to s. 18.1(4)(*c*), (*d*), or (*f*), the court is faced with a tension between its constitutional review role and legislative supremacy. In such cases, the *Dunsmuir* analysis applies. There is no role for the *Dunsmuir* standard of review analysis where s. 22(1) expressly provides for review on questions of jurisdiction, natural justice and fraud. Correctness review applies in these cases.

27 While the majority in *Khosa* disagreed that the *Dunsmuir* analysis applied only to paragraphs 18.1(4)(*c*) to (*f*) of the *Federal Courts Act*, they did not disagree that issues falling within the purview of paragraphs 18.1(4)(*c*) to (*f*) are subject to the *Dunsmuir* analysis. Thus, when read in their appropriate context, subsection 34(1) of the *FPSLREBA* and subsection 18.1(4) of the *Federal Courts Act* do not preclude review in the instant cases.

28 Fourth, the cases on which the Board relies enumerated in paragraph 14 of these Reasons do not constitute a binding ruling on this issue. Rather, to the extent these cases may contain passages that might support the Board's interpretation, the Court's comments are made only in passing and do not settle the issue. The relevant authorities, which do settle the issue, are *Canadian Federal Pilots Assn. v. Canada (Treasury Board)* and *C.U.P.W. v. Healy*, which, as already noted, directly contradict the Board's arguments. Also relevant are the multitude of cases where this Court has reviewed under the reasonableness standard decisions like those challenged in this application. Thus, the case law relied upon by the Board is not determinative.

29 Fifth, contrary to what the Board asserts, its interpretation would not lead to greater expedition. Under the Board's approach, this Court would be required to decide as a preliminary issue what paragraph in subsection 18.1(4) of the *Federal Courts Act* applies to each argument advanced in an application for judicial review and to determine the Court's jurisdiction based on the characterization of issue. This sort of formalistic preliminary question-type analysis harkens back to the now abolished division in judicial review matters that limited review under the former section 28 (as opposed to section 18) of the *Federal Courts Act* to decisions made on a judicial or quasi-judicial basis: see *Singh v. Canada (Minister of Employment & Immigration)*, [1985] 1 S.C.R. 177 (S.C.C.) at p. 197, (1985), 58 N.R. 1 (S.C.C.) (*per* Wilson J.); *Syndicat des employés de production du Québec & de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879 (S.C.C.) at pp. 895-902, (1989), 100 N.R. 241 (S.C.C.). This requirement led to convoluted, costly and lengthy debates about the character of a decision under review that did little to advance the substance of litigation, and these requirements were consequently abolished in the 1990 amendments to the *Federal Courts Act*: see *An Act to amend the Federal Court Act, the Crown Liability Act, the Supreme Court Act and other Acts in consequence thereof*, S.C. 1990, c. 8, s. 8. To adopt the Board's approach would reintroduce similar debates and delays in the judicial review process, which are antithetical to the sound labour relations that the *FPSLRA* is designed to foster. Thus, the Board's interpretation would in fact end up undermining the purpose of the Act.

30 Finally, contrary to what the Board says, its interpretation runs afoul of the rule of law concerns that provide the constitutional underpinning for judicial review of administrative action by the independent judicial branch: see *Dunsmuir* at paras. 27-29; *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 (S.C.C.) at para. 13, (2018), 421 D.L.R. (4th) 381 (S.C.C.). Given recent pronouncements by the Supreme Court of Canada, the scope of jurisdictional issues that arise in administrative law cases is exceedingly limited,

if such issues may still even be said to exist at all. Although the category of true questions of jurisdiction was recognized in *Dunsmuir* at para. 59 as attracting correctness review, the Supreme Court has repeatedly emphasized its narrow and exceptional nature: see, for example, *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.) at para. 39; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293 (S.C.C.) at para. 26; *Québec (Procureure générale) c. Guérin*, 2017 SCC 42, [2017] 2 S.C.R. 3 (S.C.C.) at para. 32. In *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 (S.C.C.) at para. 41, (2018), 36 Admin. L.R. (6th) 1 (S.C.C.), the Supreme Court cast doubt on the category's future:

> 41. The reality is that true questions of jurisdiction have been on life support since *Alberta Teachers*. No majority of this Court has recognized a single example of a true question of *vires*, and the existence of this category has long been doubted. Absent full submissions by the parties on this issue and on the potential impact, if any, on the current standard of review framework, I will only reiterate this Court's prior statement that it will be for future litigants to establish either that the category remains necessary or that the time has come, in the words of Binnie J., to "euthanize the issue" once and for all (*Alberta Teachers*, at para. 88).

31 As the Board acknowledges, the recognition that there are few, if any, questions of jurisdiction could result in its decisions being largely unreviewable. This cannot be.

32 In *Dunsmuir*, the Supreme Court of Canada underscored that judicial review must be available as a constitutional imperative and cannot be ousted by a privative clause. At paragraph 31, Bastarache and LeBel JJ., writing for the majority, stated:

> 31. The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect (*Executors of the Woodward Estate v. Minister of Finance*, [1973] S.C.R. 120, at p. 127).

33 Thus, for all the foregoing reasons, contrary to what the Board asserts, its decisions in the instant cases are amenable to review by this Court.

34 This conclusion, however, does not mean that subsection 34(1) of the *FPSLREBA* is without impact. To the contrary, it has a vital impact, namely, to indicate that the applicable standard of review is reasonableness and to underscore the considerable deference to be accorded to the Board in respect of decisions of this nature: see *Dunsmuir* at para. 52. This Court and the Supreme Court of Canada have often commented that subsection 34(1) of the *FPSLREBA*'s predecessors have precisely this impact. For example, in *Canada (Attorney General) v. P.S.A.C.*, [1993] 1 S.C.R. 941 (S.C.C.) at p. 962, (1993), 150 N.R. 161 (S.C.C.), the Supreme Court underlined that the privative clause is a reason "why the decisions of the Board made within its jurisdiction should be treated

with deference by the court". Put into modern terms, the Board's decisions are to be reviewed on a reasonableness standard due in part to its being protected by this strict privative clause: *Exeter v. Canada (Deputy Head - Statistics Canada)*, 2014 FCA 251, 465 N.R. 346 (F.C.A.); *Boshra* at para. 44; *McConnell* at para. 14.

III. Are the Board's Decisions Reasonable?

35 Thus, the issue becomes whether the Board's decisions in these two cases on the timeliness issue are reasonable.

36 The applicant submits that the Board's decisions are not reasonable because the Board offered an unreasonable interpretation of subsection 190(2) of the *FPSLRA*. More specifically, the applicant argues that the Board ignored the wording of the subsection, that its interpretation was inconsistent with the purposes of the *FPSLRA* and the objective of the 90-day limitation period enshrined in the subsection and that its interpretation contradicts much of the Board's prior case law, which the applicant submits is to the effect that the 90-day time period starts to run when notice of an intended employer action is given and not from when the action is taken. In support of this last point, the applicant relies on several cases dealing with the commencement of the 90-day period in circumstances other than statutory freeze complaints (for example, *Castonguay v. P.S.A.C.*, 2007 PSLRB 78 (Can. P.S.L.R.B.); *Bunyan v. Canada (Treasury Board - Department of Human Resources & Skills Development)*, 2007 PSLRB 85 (Can. P.S.L.R.B.); *Cuming v. Butcher*, 2008 PSLRB 76 (Can. P.S.L.R.B.); *Éthier v. Canada (Correctional Service)*, 2010 PSLRB 7 (Can. P.S.L.R.B.); *Forward-Arias v. Union of Solicitor General Employees*, 2010 PSLRB 81 (Can. P.S.L.R.B.); *Baun v. P.S.A.C., Local 20140*, 2010 PSLRB 127 (Can. P.S.L.R.B.); *Crête v. Ouellet*, 2013 PSLRB 96 (Can. P.S.L.R.B.); *Coulter v. PSAC*, 2014 PSLRB 53 (Can. P.S.L.R.B.); *Esam v. PSAC*, 2014 PSLRB 90 (Can. P.S.L.R.B.); *Gibbins v. PIPSC*, 2015 PSLREB 36 (Can. P.S.L.R.E.B.)).

37 The applicant also relies on the Board's decisions in *Federal Government Dockyard Chargehands Association v. Treasury Board (Department of National Defence)*, 2016 PSLREB 26 (Can. P.S.L.R.E.B.) (*Chargehands Association)* and *International Brotherhood of Electrical Workers, Local 2228 v. Treasury Board (Department of National Defence)*, 2017 PSLREB 37 (Can. P.S.L.R.E.B.) (*IBEW*), where the Board heard statutory freeze complaints filed after notice of the impending change was given but before the change was made. The applicant says that the determinations made by the Board in its past decisions are irreconcilable with its timeliness finding in the instant cases.

38 I disagree with the applicant on all points.

39 Dealing first with the alleged inconsistency in the Board's case law, I see nothing inconsistent in the Board's determination in the two decisions under review as they are actually consistent with its prior case law and the case law of the CIRB, and of their predecessors, on the issue of

when time limits in a statutory freeze complaint start to run (see, for example, *PASC v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 46 (Can. P.S.L.R.B.); *UCCO-SACC-CSN v. Treasury Board*, 2016 PSLREB 47 (Can. P.S.L.R.E.B.); *Treasury Board v. PSAC*, 2017 PSLREB 11 (Can. P.S.L.R.E.B.); see also *C.A.L.P.A. v. Air Canada* (1977), 24 di 203 (Can. L.R.B.); *Vaillancourt and Canada (Treasury Board - Transport Canada), Re*, [1988] C.P.S.S.R.B. No. 366 (Can. P.S.S.R.B.); *C.U.P.E. (Airline Division), Local 4033 v. Air Alliance Inc.* (1991), 15 C.L.R.B.R. (2d) 288 (Can. L.R.B.)). These cases hold that the relevant time period starts when the impugned change to employees' terms and conditions of employment is made and not when advance notice of the impending change is given.

40 Treating the statutory freeze cases differently, for purposes of the time period in subsection 190(2) of the *FPSLRA*, from cases dealing with the time period for filing a grievance, is reasonable. As this Court held in *Boshra*, subsection 190(2) of the *FPSLRA* requires that the Board discern what constitutes the action or circumstance giving rise to the complaint and when the applicant knew or ought to have known of the same (at para. 40). There is nothing unreasonable in concluding that the action or circumstance giving rise to a statutory freeze complaint is the impugned change in terms and conditions of employment as section 107 of the *FPSLRA* prevents such changes from being made and paragraph 190(1)(*c*) of the *FPSLRA* provides that a complaint may be made alleging that the employer "has failed to comply with section 107" of the *FPSLRA*. This stands in contrast to grievances, which may challenge employer policies before they are applied; as the respondent notes, sections 208 and 209 of the *FPSLRA* allow for grievances to be filed challenging employer interpretations of the collective agreement. Thus, different results on timeliness issues in the two types of cases are entirely reasonable.

41 The other cases relied on by the applicant concerning time limits in duty of fair representation complaints or other types of unfair labour practice are fact-specific. Contrary to what the applicant asserts, these cases do not stand for the proposition that in all cases the relevant time period start to run from when the respondent informs the complainant of an intended course of action. Nor are the decisions in *Chargehands Association* and *IBEW* of assistance to the applicant as the Board did not address the issue of timeliness in them.

42 Thus, the Board's decisions in the instant cases do not contradict its prior case law but, rather, follow such case law and the case law of the CIRB. This strongly points to their being reasonable.

43 Nor is there anything in the wording of subsection 190(2) of the *FPSLRA* or in its overall policy that would mandate a different conclusion. There is nothing unreasonable in concluding that both the action and circumstance giving rise to a statutory freeze violation is the implementation of the impugned changes to employees' terms and conditions of employment. Moreover, as the respondent rightly notes, there are sound labour relations policy reasons in support of the Board's approach in these cases as allowing the parties additional time to discuss issues when they are bargaining is consistent with sound labour relations.

44 In any event, it is for the Board and not for this Court to assess how sound labour relations polices are advanced through the interpretation to be given to provisions in the *FPSLRA*. Given the wording of the relevant statutory provisions, the relevant prior case law and the significant deference to be afforded to the Board in cases of this nature, I conclude that its decisions are reasonable.

IV. Proposed Disposition

45 I would therefore dismiss these applications, with costs, payable by the applicant in favour of the respondent, with the exception of the costs associated with responding to the Board's intervention. I would award no costs for or against the Board or in respect of the issues raised in its intervention.

***M. Nadon J.A.*:**

I agree.

***Johanne Gauthier J.A.*:**

I agree.

Appeal dismissed.

Appendix

Federal Public Sector Labour and Employment Board and its predecessors

1. *Jane Doe v. Canada (Attorney General)*, 2018 FCA 183 (F.C.A.).
2. *Klos v. Canada (Attorney General)*, 2018 FCA 160 (F.C.A.).
3. *Canada (Attorney General) v. Fehr*, 2018 FCA 159 (F.C.A.).
4. *Dias v. Canada (Attorney General)*, 2018 FCA 126 (F.C.A.).
5. *Kalonji c. Canada (Procureur général)*, 2018 FCA 8 (F.C.A.).
6. *Canada (Attorney General) v. Public Service Alliance of Canada*, 2017 FCA 208 (F.C.A.).
7. *Chopra v. Canada (Attorney General)*, 2017 FCA 176 (F.C.A.).
8. *Canada (Attorney General) v. Heyser*, 2017 FCA 113, [2018] 1 F.C.R. 245 (F.C.A.).
9. *Canada (Treasury Board) v. PSAC*, 2017 FCA 111 (F.C.A.).
10. *Canada (Attorney General) v. CFPA*, 2017 FCA 100 (F.C.A.).

11. *Jean Pierre v. Canada (Immigration and Refugee Board)*, 2018 FCA 97 (F.C.A.).

12. *Allen v. National Research Council of Canada*, 2017 FCA 81 (F.C.A.).

13. *Canada (Procureur général) c. Féthière*, 2017 FCA 66 (F.C.A.).

14. *Bernard v. Canada Revenue Agency*, 2017 FCA 40 (F.C.A.).

15. *Bergey v. Canada (Attorney General)*, 2017 FCA 30 (F.C.A.).

16. *Jean Pierre c. Canada (Citoyenneté et Immigration)*, 2017 FCA 26 (F.C.A.).

17. *Canada (Attorney General) v. Grant*, 2017 FCA 10 (F.C.A.).

18. *Pierre c. Clément*, 2016 FCA 308 (F.C.A.).

19. *Canada (Procureur général) c. Rahmani*, 2016 FCA 249 (F.C.A.).

20. *PSAC v. Canada (Attorney General)*, 2016 FCA 184 (F.C.A.).

21. *Sather v. Canada (Deputy Head, Correctional Service)*, 2016 FCA 149, 32 C.C.E.L. (4th) 132 (F.C.A.).

22. *Forner v. Canada (Attorney General)*, 2016 FCA 136 (F.C.A.).

23. *Alexander v. Canada (Attorney General)*, 2016 FCA 132 (F.C.A.).

24. *Bahniuk v. Canada (Attorney General)*, 2016 FCA 127, 484 N.R. 10 (F.C.A.).

25. *Canada (Attorney General) v. Dyson*, 2016 FCA 125 (F.C.A.).

26. *Pierre c. Canada (Agence des services frontaliers)*, 2016 FCA 124, 488 N.R. 176 (F.C.A.).

27. *Lloyd v. Canada (Attorney General)*, 2016 FCA 115 (F.C.A.).

28. *Canada (Procureur général) c. IPFPC*, 2016 FCA 104 (F.C.A.).

29. *Canada (Procureur général) c. Assoc. des juristes de justice*, 2016 FCA 92, [2016] 4 F.C.R. 349 (F.C.A.), rev'd in part and aff'd in part 2017 SCC 55, [2017] 2 S.C.R. 456 (S.C.C.).

30. *Baragar v. Canada (Attorney General)*, 2016 FCA 75, 483 N.R. 52 (F.C.A.).

31. *Pouliot c. Canada (Administrateur général, Comité des griefs des Forces canadiennes)*, 2016 FCA 54 (F.C.A.).

32. *Cavanagh v. Canada Revenue Agency*, 2016 FCA 27 (F.C.A.).

33. *PSAC v. Canada Revenue Agency*, 2016 FCA 8 (F.C.A.).

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34. *Canada (Attorney General) v. Gatien*, 2016 FCA 3, 479 N.R. 382 (F.C.A.).

Canada Industrial Relations Board

1. *Conseil des Innus de Pessamit c. Michaud*, 2018 FCA 177 (F.C.A.).

2. *Garda Security Screening Inc. v. General Teamsters, Local Union 979*, 2018 FCA 71 (F.C.A.).

3. *Canadian Union of Postal Workers v. Lang*, 2017 FCA 233 (F.C.A.).

4. *Wsánec School Board v. British Columbia*, 2017 FCA 210 (F.C.A.).

5. *Fairhurst v. Unifor Local 114*, 2017 FCA 152 (F.C.A.).

6. *Rogers Communications Canada Inc. v. Maintenance and Service Employees' Association*, 2017 FCA 127 (F.C.A.).

7. *FedEx Freight Canada Corp. v. TC, Local 31*, 2017 FCA 78 (F.C.A.).

8. *Chin Quee v. TC, Local 938*, 2017 FCA 62 (F.C.A.).

9. *Madrigga v. Teamsters Canada Rail Conference*, 2016 FCA 151, 486 N.R. 248 (F.C.A.).

2019 CAF 206, 2019 FCA 206
Federal Court of Appeal

Canada (Citizenship and Immigration) v. Tennant

2019 CarswellNat 12976, 2019 CarswellNat 3390, 2019 CAF 206, 2019 FCA 206, 307 A.C.W.S. (3d) 468, 436 D.L.R. (4th) 155, 58 Admin. L.R. (6th) 167, 70 Imm. L.R. (4th) 1

THE MINISTER OF CITIZENSHIP AND IMMIGRATION (Appellant) and ANDREW JAMES FISHER-TENNANT BY HIS GUARDIAN AT LAW, JONATHAN TENNANT (Respondent) and CANADIAN ASSOCIATION OF REFUGEE LAWYERS (Intervener)

Wyman W. Webb, D.G. Near, J.B. Laskin JJ.A.

Heard: February 13, 2019
Judgment: July 16, 2019
Docket: A-104-18

Proceedings: quashing appeal *Fisher-Tennant v. Canada (Citizenship and Immigration)* (2018), 2018 CarswellNat 263, 2018 CF 151, 2018 CarswellNat 544, 2018 FC 151, Shirzad Ahmed J. (F.C.)

Counsel: Gregory G. George, David Joseph, Elinor Elstub, for Appellant
Martha A. Cook, for Respondent
Michael Bossin, Laïla Demirdache, for Intervener

***J.B. Laskin J.A.*:**

I. Overview

1 In granting an application for judicial review of a decision made under the *Citizenship Act*, R.S.C. 1985, c. C-29, a judge of the Federal Court declared that Andrew James Fisher-Tennant is a citizen of Canada: *Fisher-Tennant v. Canada (Citizenship and Immigration)*, 2018 FC 151 (F.C.) (Ahmed J.). The application judge declined to certify in his judgment a question of general importance. By paragraph 22.2(*d*) of the *Citizenship Act*, no appeal lies to this Court from a judgment of the Federal Court on judicial review with respect to any matter under the Act, absent a certified question.

2 Despite this preclusive clause, the Minister of Citizenship and Immigration appeals from the application judge's decision. He relies on the jurisprudence of this Court holding that paragraph 22.2(*d*) and other preclusive clauses in the *Citizenship Act* and the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*), will not, in certain circumstances, bar an appeal from a decision in respect of which no question has been certified. The Minister argues that the application judge committed two "jurisdictional" errors that permit the appeal to proceed. These errors, the Minister argues, were in impermissibly granting a declaration of fact and in "usurping" the decision-making role of the Minister under the *Citizenship Act*, and they resulted in the application judge awarding relief not available on judicial review under the *Federal Courts Act*, R.S.C. 1985, c. F-7.

3 The respondent, Andrew, is three years old. He is represented in this proceeding by his biological father, Jonathan Tennant, who submits that the application judge committed no error that would permit an appeal to this Court in the absence of a certified question.

4 For the reasons that follow, I agree with Mr. Tennant. I would therefore quash the Minister's appeal on the basis that it is barred by paragraph 22.2(*d*) of the *Citizenship Act*.

II. Background

A. Citizenship by descent

5 Part I of the *Citizenship Act* bears the heading "The Right to Citizenship." By paragraph 3(1)(*b*) of the Act, which is included in Part I under the subheading "Persons who are citizens," and subject to the Act's other provisions, a person "is" a citizen by descent if the person was born outside Canada after February 14, 1977, and if, at the time of the person's birth, one of the person's parents, other than an adoptive parent, was a Canadian citizen.

6 Since 2009, citizenship by descent under paragraph 3(1)(*b*) has been limited by paragraph 3(3)(*b*) to the first generation born outside Canada to a Canadian parent: *An Act to amend the Citizenship Act*, S.C. 2008, c. 14, s. 2(2).

7 However, the first generation limit in paragraph 3(3)(*b*) is subject to, among other things, the Crown servant exception set out in paragraph 3(5)(*b*). Under this exception, the first generation limit does not apply to a person "born to a parent one or both of whose parents, at the time of that parent's birth, were employed outside Canada in or with the Canadian Armed Forces, the federal public administration or the public service of a province, otherwise than as a locally engaged person."

8 In this case, Andrew was born in November 2015 in the United States. Mr. Tennant, a Canadian citizen, is his biological father, and Marc Fisher, an American citizen by birth, his adoptive father.

But Andrew was not the first generation to be born outside Canada: his biological father, Mr. Tennant, was born in 1971 in Malaysia, to Dr. Paul Tennant and Susan Carey, Canadian citizens by birth, while Dr. Tennant was working in that country. At birth, Mr. Tennant was a Canadian citizen under paragraph 5(1)(*b*) of the former *Canadian Citizenship Act*, R.S.C. 1970, c. C-19, which provided that a person born outside of Canada was a Canadian citizen if his or her father was a citizen.

9 It follows that unless the Crown servant exception applies — unless Andrew's grandfather, Dr. Tennant, was employed in Malaysia "in or with [...] the federal public administration or the public service of a province" at the time that Andrew's biological father, Mr. Tennant, was born — the first generation limit in paragraph 3(3)(*b*) applies to Andrew, who is then not a citizen by descent. Conversely, if the Crown servant exception applies, Andrew is a citizen by descent under paragraph 3(1)(*b*).

10 By contrast to section 3, under which certain persons have the status of citizen at birth, section 5 of the Act, under the subheading "Grant of citizenship," provides for the acquisition of citizenship by certain categories of persons through a grant of citizenship by the Minister, on application. Sections 5.1 and 11 also provide for citizenship on application and by grant. The Supreme Court recognized and discussed the distinction between citizenship at birth and citizenship by grant in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 (S.C.C.) at paras. 2-4, (1997), 143 D.L.R. (4th) 577 (S.C.C.). I will return to this distinction later in these reasons.

B. Application for certificate of citizenship

11 Mr. Tennant applied for a certificate of Canadian citizenship on Andrew's behalf under subsection 12(1) of the *Citizenship Act*. That provision states that the Minister must, on application, determine if a person is a citizen, and, if they are, must (subject to any applicable regulations) issue a certificate of citizenship or provide them with some other means to establish their citizenship.

12 Mr. Tennant set out in the application that he had been born in Malaysia in 1971, at a time when his father, Dr. Tennant, was employed there as a Crown servant. In the space provided in which to include "[d]etails on Crown service," Mr. Tennant indicated that his father had been a "University professor retained by the Government of Canada under a scheme established between Canada and Malaysia for technical co-operation."

13 Mr. Tennant included a copy of his father's passport, issued April 1, 1971, in support of Andrew's application. The passport contained a temporary employment visa, "[f]or employment as Lecturer with The University of Penang under Colombo Plan," as well as an inscription, reading

> THE BEARER IS PROCEEDING TO MALAYSIA AS A UNIVERSITY PROFESSOR RETAINED BY THE GOVERNMENT OF CANADA UNDER THE SCHEME

ESTABLISHED BETWEEN CANADA AND MALAYSIA FOR TECHNICAL CO-OPERATION.

14 Mr. Tennant also included a letter from the University of British Columbia, indicating that Dr. Tennant taught at the University of Penang from 1971 to 1973, and that the University of British Columbia paid his salary and benefits during this period, for which it was then reimbursed by the Canadian International Development Agency of the Government of Canada. Finally, he provided a copy of Dr. Tennant's application for registration of Mr. Tennant's birth abroad, which stated that Dr. Tennant was "SERVING ON A CIDA PROJECT" at the time of Mr. Tennant's birth.

15 The application was considered by a citizenship officer of Citizenship and Immigration Canada. She wrote to Citizenship and Passport Program Guidance, with the subject line "Verification of crown servant employment," asking whether the documentation provided by Mr. Tennant was "acceptable in order to apply [the] crown servant grandparent exception [...]." A senior program advisor responded several months later. He stated that "employment with the University of British Columbia [...] would not qualify for the grandparent Crown servant exception," because employment abroad with the University of British Columbia "[did] not fall under either the 'federal public administration' or 'public service of a province' categories of Crown service." He also stated that, if Mr. Tennant had documentation demonstrating that Dr. Tennant was employed abroad by the Canadian government during the relevant period, "we would take it into consideration."

16 The officer prepared a memorandum concerning Andrew's application, setting out her conclusion that the Crown servant exception was not applicable, "[a]s per information received and through verification with [Citizenship and Passport Program Guidance] [...]." The officer wrote to Mr. Tennant advising of her decision, stating that Andrew did not meet the legislative requirements for citizenship.

C. Application for judicial review

17 Mr. Tennant applied on Andrew's behalf for leave to judicially review the officer's decision under subsection 22.1(1) and section 22.2 of the *Citizenship Act*. In his application for leave and for judicial review, he sought a declaration that Andrew is "a Canadian citizen by virtue of meeting the requirements for Canadian citizenship pursuant to the [*Citizenship Act*]," and an order in the nature of *mandamus* "compelling the Minister, within 30 days of the date of the order, to issue [Andrew] a Certificate of Citizenship [...]." One of the grounds asserted for relief was that Andrew "[met] the statutory requirements for Canadian citizenship by virtue of ss. 3(1)(b) of the *Citizenship Act* and [was] entitled to a Certificate of Citizenship [...]."Mr. Tennant asked in the alternative that the officer's decision be set aside and the matter sent back for redetermination. Mr. Tennant submitted an affidavit in support of the application, as well as an affidavit sworn by Dr. Tennant.

18 The Minister opposed the granting of leave. Mr. Tennant then raised in his reply memorandum the argument that the officer had fettered her discretion by treating the view of Citizenship and

Passport Program Guidance as dispositive. Leave was granted, and the Minister then brought a motion in writing for judgment, conceding the issue of fettered discretion and seeking to have the officer's decision set aside and the matter remitted for reconsideration. Mr. Tennant opposed the motion on the basis that he wished to make oral submissions on Andrew's entitlement to declaratory relief.

19 The Minister's motion and the application for judicial review were heard together by the Federal Court. In his reasons, the application judge referred (at para. 14) to the parties' agreement that the officer had fettered her discretion, stating that "[t]he only dispute remaining between the parties is with respect to the issues of remedy and costs."

20 The application judge then addressed, under the heading "Availability of the Directed Verdict," Mr. Tennant's request for declaratory relief. He first found (at paras. 18-20) that this was not a case where "the decision-maker must be left to complete its work," as the "relevant factual finding was made" by the officer, "albeit not in the manner required by law," and that there was nothing further required to complete the record. As a result, he concluded, concerns over "wading into the decision-making process on the basis of an incomplete factual record" and "weigh[ing] evidence in place of the decision-maker" did not arise.

21 The application judge went on to consider the Minister's argument that the Federal Court is unable to make declarations pertaining solely to findings of fact. He agreed with that proposition, but disagreed that it applied, finding (at para. 21) that the declaration sought by Mr. Tennant — that Andrew is a Canadian citizen under section 3 of the *Citizenship Act* — was one not of fact but of law, and within the authority of the Federal Court to grant.

22 Under the heading "Appropriateness of a Directed Verdict," the application judge then outlined the evidence before the officer. He found (at para. 28) that "the only logical conclusion [was] that Dr. Tennant was in the employment of CIDA and thereby he was a Crown servant," and stated that it would be futile to return the matter to the officer in the face of such clear evidence. He also noted (at para. 31) that the officer's "approach demonstrate[d] a lack of diligence," and that this "militate[d] in favour of a remedy that [was] commensurate with the seriousness of the consequences flowing from the [o]fficer's conduct." Finally, he noted that the language of section 3 of the *Citizenship Act* is itself declaratory, stating (at para. 33) that "once the requirements under [section] 3 are met, the person *is a citizen*, irrespective of Ministerial action" (emphasis in original), and that a "directed verdict" would therefore not impinge on any exercise of the Minister's discretion.

23 For these reasons, the application judge concluded (at paras. 23, 34-36) that the case warranted what he described as "the exceptional remedy of a directed verdict." He expressly declined to return the matter for redetermination, writing that "any decision that fails to affirm or delay [sic] the recognition of [Andrew's] citizenship would be unjust." He reasoned that, because he had

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"affirmed that Dr. Tennant was serving abroad as a Crown servant" at the relevant time, Andrew was a Canadian citizen "as a matter of law."

24 The Minister asked that the application judge certify the following question:

> Does the Federal Court have the jurisdiction to issue a directed verdict or a declaration that an applicant is a Canadian citizen under the Citizenship Act, when a decision-maker has not made a factual determination that the applicant is a Canadian citizen as per the provisions of the Citizenship Act?

25 The application judge found (at para. 41) that this question did not merit certification. He stated that "the question as to whether the Federal Court has the jurisdiction to issue directed verdicts is already well established," both generally and in the citizenship context.

26 In disposing of the proceeding, the application judge issued the following judgment:

> THIS COURT'S JUDGMENT is that:
>
> 1. I hereby declare, Andrew James Fisher-Tennant is a citizen of Canada.
>
> 2. No costs are awarded.
>
> 3. There is no question for certification.

D. Appeal to this Court

27 The Minister presented a notice of appeal to the Registry of this Court for filing. The notice stated that the application judge's decision fell within the "narrow exception" to the certified question requirement, because the application judge had made two "jurisdictional" errors — issuing a declaration on a question of fact and arrogating to himself the Minister's power under subsection 12(1) of the *Citizenship Act* to determine whether Andrew is a citizen. In accordance with rule 72 of the *Federal Courts Rules*, SOR/98-106, the Registry forwarded the notice of appeal to a judge of this Court, who directed the Registry to file it.

28 Mr. Tennant then brought a motion under rule 74 of the *Federal Courts Rules*, which provides that the Court may "at any time, order that a document that is not filed in accordance with [the Rules] be removed from the Court file." He argued that the Minister had not established a "sufficiently arguable case" that the appeal fell within the exceptions to the certified question requirement. The Minister opposed the motion, in large part on the basis that the direction under rule 72 had determined that the appeal should proceed, and that the motion was an improper attempt to appeal from that decision. This Court dismissed the motion: *Canada (Citizenship and Immigration) v. Tennant*, 2018 FCA 132 (F.C.A.) (Stratas J.A., sitting alone). I will discuss the

reasons of my colleague Justice Stratas on the motion when I refer to the case law regarding the scope and limits of paragraph 22.2(*d*) and similar provisions.

29 Following the dismissal of Mr. Tennant's motion, the Canadian Association of Refugee Lawyers (CARL) was granted leave to intervene in the appeal with respect to the proper interpretation of preclusive clauses and the remedial powers of the Federal Court.

III. Issue and standard of review

30 The threshold issue is whether the Minister's appeal is barred by paragraph 22.2(*d*) of the *Citizenship Act*. In resolving this issue the Court may consider both whether the errors alleged by the Minister are of a kind that will justify hearing an appeal in the face of a preclusive clause, and whether the application judge actually committed the errors alleged.

31 To the extent that the Court determines whether the alleged errors on the part of the application judge are of a kind that can justify hearing the appeal despite the preclusive clause, the Court makes this determination at first instance. No standard of review therefore applies.

32 To the extent that the Court determines whether the application judge actually committed the alleged errors, the administrative law standard of review in *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 (S.C.C.) at paras. 45-47, [2013] 2 S.C.R. 559 (S.C.C.), applies to the application judge's review of the Minister's decision, while the appellate standard of review set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), applies to the application judge's determination of the appropriate remedy: *Sturgeon Lake Cree Nation v. Hamelin*, 2018 FCA 131 (F.C.A.) at para. 51, (2018), 424 D.L.R. (4th) 366 (F.C.A.).

IV. Hearing an appeal despite a preclusive clause

A. The preclusive clauses

33 By paragraphs 27(1)(*a*) and (*c*) of the *Federal Courts Act*, an appeal lies to this Court from a final or interlocutory judgment of the Federal Court. However, the appeal rights set out in the *Federal Courts Act* may be overridden by other statutes: *Tennina v. Minister of National Revenue*, 2010 FCA 25 (F.C.A.) at para. 11, (2010), 402 N.R. 1 (F.C.A.).

34 Both the *Citizenship Act* and the *IRPA* permit judicial review applications only with leave of the Federal Court, preclude appeals to this Court from interlocutory and leave decisions, and preclude appeals to this Court from judgments issued in applications for judicial review in the absence of a certified question. Section 22.4 of the *Citizenship Act* and subsection 75(2) of the *IRPA* state, respectively, that the provisions of those statutes prevail in the event of any inconsistency with those of the *Federal Courts Act*.

35 The relevant provision in this case is paragraph 22.2(*d*) of the *Citizenship Act*, which governs judicial review applications under the Act; it states that "an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question." Its counterpart in the *IRPA* is paragraph 74(*d*). This Court has described this provision as "a second filter" — the first, the requirement to obtain leave, applying to applications for judicial review to the Federal Court, and the second, the certified question requirement, applying to appeals to this Court from decisions of the Federal Court: *Mudrak v. Canada (Minister of Citizenship and Immigration)*, 2016 FCA 178 (F.C.A.) at para. 11, (2016), 485 N.R. 186 (F.C.A.). The Court has explained further that the second requirement is "intended to filter significant questions of law from questions of fact," and has also stated that "[a]s a certified question is a precondition to this Court's jurisdiction, it is a requirement that must not be taken lightly": *Mudrak* at paras. 12, 19. These observations apply equally to paragraph 22.2(*d*) of the *Citizenship Act*.

36 As set out above, the application judge did not certify a question when issuing his judgment. In bringing this appeal nonetheless, the Minister asserts that the application judge made errors of a kind that have been recognized as permitting this Court to hear an appeal despite paragraph 22.2(*d*) of the *Citizenship Act* and similar preclusive clauses.

B. Judicial treatment of the preclusive clauses

37 The case law establishes that certain types of errors will justify hearing an appeal in the face of a preclusive clause. These include, for example, bias or a reasonable apprehension of bias on the part of the judge at first instance, and refusal to exercise jurisdiction: *Canada (Minister of Citizenship & Immigration) v. Katriuk* (1999), 235 N.R. 305, 1999 CarswellNat 157 (Fed. C.A.) at para. 12; *Canada (Solicitor General) v. Subhaschandran*, 2005 FCA 27 (F.C.A.) at para. 15, [2005] 3 F.C.R. 255 (F.C.A.); *Es-Sayyid v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FCA 59 (F.C.A.) at para. 28, (2012), 432 N.R. 261 (F.C.A.), leave to appeal to S.C.C. refused, (2012), 440 N.R. 398 (note) (S.C.C.). A further category comprises errors in the course of a "separate, divisible judicial act" — a decision in the exercise of a power that arises not under the *Citizenship Act* (or the *IRPA*) but from some other source: *Canada (Minister of Citizenship & Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 (S.C.C.) at paras. 65-66, (1997), 151 D.L.R. (4th) 119 (S.C.C.).

38 This Court has also used the term "jurisdictional errors" to describe errors that will permit an appeal to be heard despite a preclusive clause: *Sellathurai v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2011 FCA 223 (F.C.A.) at paras. 15-16, (2011), [2012] 2 F.C.R. 243 (F.C.A.). But it has also expressed reluctance to use that language, given the uncertainties surrounding the term "jurisdiction" in other contexts, preferring instead to use the language of

"fundamental matters" striking "right at the rule of law": *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 144 (F.C.A.) at paras. 19-21.

39 I agree with the view expressed by my colleague Justice Stratas in his reasons dismissing the rule 74 motion in this proceeding (at para. 16) that the case law has not defined the exceptions to preclusive clauses particularly well. He saw the motion as an opportunity to provide a "better explanation" for the exceptions. He described (at para. 19) an exception centred on "jurisdictional" errors as unhelpful, because it would ultimately capture issues of statutory interpretation that were, at best, mere errors of law. He proposed (at para. 17) that, instead of focussing on "jurisdictional" errors, the Court should not give effect to a preclusive clause where the Federal Court's judgment gives rise to rule of law concerns. The appeal bar would then not apply where

> • it is alleged that there is a fundamental flaw going to the very root of the Federal Court's judgment or striking at the Federal Court's very ability to decide the case — examples include a blatant exceedance of authority obvious from the face of the judgment or an infringement of the rule against actual or apparent bias supported by substantial particularity in the notice of appeal; and
>
> • the flaw raises serious concerns about the Federal Court's compliance with the rule of law

40 Justice Stratas went on to state (at paras. 17-18) that the exception should not apply to "contentious debates over issues of statutory interpretation, errors of law, exercises of judicial discretion, and the weight that should be accorded to evidence and its assessment," but only to "fundamental" flaws that strike at "the very root" of the judgment or the Federal Court's "very ability" to hear the case, and in any event only where "serious concerns" regarding the rule of law are raised. "This high threshold," he stated, "allows Parliament's preference for an absolute bar to prevail in all cases except for those most rare cases where concerns based on the constitutional principle of the rule of law are the most pronounced."

41 Consistent with Justice Stratas's comments, the exceptions that have been identified to the preclusive clauses, no matter how they are expressed, do not include "mere errors of law": *Mahjoub* at para. 21. There are many statements to this effect. For example, in *Canada (Minister of Citizenship & Immigration) v. Huntley*, 2011 FCA 273 (F.C.A.) at para. 8, (2011), [2012] 3 F.C.R. 118 (F.C.A.), leave to appeal to S.C.C. refused, (2012), 435 N.R. 391 (note) (S.C.C.), this Court held that "failing to apply the appropriate standard of review is a run-of-the-mill error of law, and not a usurpation of jurisdiction [...]." In *Canada (Minister of Citizenship and Immigration) v. Katriuk*, 252 N.R. 68 at para. 8, 1999 CarswellNat 2531 (WL) (F.C.A.), leave to appeal refused, [2000] 1 S.C.R. xiii., this Court held that "an erroneous finding of fact based on a misapprehension of what is in evidence" did not result in a loss of jurisdiction, but at most amounted to an error of law in the exercise of jurisdiction.

42 In a similar vein, this Court has rejected the argument that the fact that an order was made "outside the statutory jurisdiction of the Federal Court" is sufficient to defeat the *IRPA*'s preclusive clause, holding that "[t]o accept that argument could deprive [the preclusive clause] of all meaning": *Canada (Minister of Citizenship & Immigration) v. Edwards*, 2005 FCA 176 (F.C.A.) at para. 12, (2005), 335 N.R. 181 (F.C.A.); see also *Lazareva v. Canada (Minister of Citizenship & Immigration)*, 2005 FCA 181 (F.C.A.) at paras. 8-9, (2005), 335 N.R. 21 (F.C.A.). In both of these cases, the appeals held subject to the statutory bar were based on the ground (similar to one of the grounds advanced in this case) that in granting relief the Federal Court had "usurped" authority granted to the Minister. The Minister's position here, based on counsel's response when the Court raised these decisions in oral argument, appears to be that these two decisions do not reflect the current law.

C. Position of the parties and intervener on the nature and scope of the exceptions

43 The Minister argues that, in enacting the preclusive clause, "Parliament cannot have intended to immunize alleged errors from appellate scrutiny which, if not subject to review, would undermine the rule of law and public confidence in the due administration of justice": Minister's memorandum at para. 33. He submits that a preclusive clause will not apply where the application judge committed a "jurisdictional error," whether by exceeding the judge's jurisdiction or failing to exercise it. The Minister also quotes with apparent approval Justice Stratas's description of the threshold as requiring a "fundamental flaw," and a decision "raising serious concerns about [...] compliance with the rule of law": Minister's memorandum at para. 35.

44 In his submissions, Mr. Tennant appears to invoke the administrative law concept of "true question of jurisdiction": Mr. Tennant's memorandum at paras. 13-14. He submits that to be entitled to proceed with his appeal, the Minister must "demonstrate that the issues raised are those of 'true jurisdiction' for which no [deference] ought to be shown." However, he also cites (at para. 15) Justice Stratas's articulation of the test. Mr. Tennant submits (at para. 16) that "[i]t is a rare case that an appellant can establish a lack or loss of jurisdiction of the court."

45 CARL submits that the preclusive clauses in the *IRPA* and the *Citizenship Act* should be construed applying the same principles applied to privative clauses restricting access to judicial review. It states that privative clauses have always been narrowly interpreted, citing *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220 (S.C.C.) at 237, (1981), 127 D.L.R. (3d) 1 (S.C.C.), and *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394 (S.C.C.) at 405, (1992), 92 D.L.R. (4th) 609 (S.C.C.).

46 CARL argues that this Court should not accept Justice Stratas's articulation of the test, which it sees as both departing from existing jurisprudence and raising the applicable threshold. CARL submits that in suggesting that errors must be "fundamental," "serious," and "substantial" to give rise to appeal, Justice Stratas used "qualitative" and "undefined" language that will promote too

broad a reading of the preclusive clauses. It argues that a broad interpretation should be rejected because it will unduly limit access to justice by vulnerable non-citizens.

47 CARL also disagrees with Justice Stratas's reluctance to describe the relevant test in "jurisdictional" terms. It draws a distinction between "simple" jurisdictional errors and "true" jurisdictional errors, as those terms are understood for the purposes of judicial review. It cites *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 (S.C.C.) at para. 31, [2018] 2 S.C.R. 230 (S.C.C.), in which the Supreme Court stated that "'true' questions of jurisdiction involve a far narrower meaning of 'jurisdiction' than the one ordinarily employed." CARL accordingly urges this Court to adopt a test turning on "simple" jurisdictional errors, arguing that "the debate on jurisdiction" that has plagued judicial review jurisprudence "does not need to spread into other areas of law": CARL's memorandum at para. 22.

48 In reply, the Minister disagrees that Justice Stratas's approach changed the "jurisdictional exception" test, or that he could have done so as a judge sitting alone. The Minister argues that Justice Stratas's description of the threshold is consistent with that adopted by panels of this Court in *Mahjoub* and *Huntley*. He says that the concern that applying Justice Stratas's description would lead to less access to this Court is unfounded.

D. No need in this case to revisit the nature and scope of the exceptions

49 I appreciate and respect the efforts of my colleague Justice Stratas to provide a "better explanation" of the circumstances in which it will be appropriate to entertain an appeal despite a preclusive clause. There is much in his reasons with which I agree.

50 At the same time, there may be some merit to CARL's concern about describing the exceptions in qualitative terms. Redefining the exception in language such as "fundamental flaw," "blatant exceedance of authority," striking "at the very root" of the judgment, and raising "serious concerns" about the rule of law could present its own set of interpretive difficulties. The rule of law is itself a concept that defies easy definition. In addition, the reasons why a "blatant" or "obvious" exceedance of authority should justify hearing an appeal despite the bar, when an insidious or subtle exceedance would not, may deserve further consideration. Another potential concern is with putting the scope of the appeal bar on a constitutional footing when there is no constitutional right to an appeal: *Charkaoui, Re*, 2007 SCC 9 (S.C.C.) at para. 136, [2007] 1 S.C.R. 350 (S.C.C.). Nor does the "rule of law" category appear to capture the "separate, divisible judicial act" cases, some of which turn on the specific statutory language of the preclusive clause in issue. We did not receive extensive (or in some cases any) submissions on these areas of potential concern.

51 The Minister is correct in his submission that unless and until adopted by a panel of this Court, the views expressed by a member of the Court sitting alone as a motions judge do not change the law as established by the decisions of a panel: *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44 (F.C.A.) at paras. 37-38, [2016] 4 F.C.R. 3 (F.C.A.). In the end, I do not find it necessary

296

to decide in this case whether to adopt my colleague's formulation or some variation of it. That is because I conclude, for reasons that I will now discuss, that the errors that the application judge is alleged to have made either were not errors at all or were ordinary errors, of a kind that does not displace the preclusive clause in paragraph 22.2(*d*) of the *Citizenship Act*, regardless of how the currently recognized exceptions to the preclusive clauses are expressed.

V. The errors alleged

52 The Minister submits that the application judge made two "jurisdictional" errors that resulted in his granting relief not available on judicial review under the *Federal Courts Act*, and that these errors permit this Court to hear and decide the Minister's appeal.

53 First, he argues that the application judge exceeded his jurisdiction by issuing what is in substance a declaration of fact — that Dr. Tennant was a Crown servant — when the Federal Court has no jurisdiction to make declarations on findings of fact. Second, he submits that the application judge exceeded his jurisdiction by "arrogating to himself a power that Parliament gave to the Minister" — the exclusive authority to determine applications for evidence of citizenship. I will address these two grounds in turn.

A. Did the application judge impermissibly grant a declaration of fact?

54 As set out above, the substantive relief granted by the application judge was a declaration that "Andrew James Fisher-Tennant is a citizen of Canada." The parties agree that the Federal Court has authority to issue declaratory relief in deciding an application for judicial review. Its power to do so is found in paragraph 18(1)(*a*) of the *Federal Courts Act*, by which it may grant declaratory relief against any federal board, commission or other tribunal:

> **Extraordinary remedies, federal tribunals**
>
> 18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction
>
> (a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and
>
> (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.
>
> **Recours extraordinaires: offices fédéraux**
>
> 18 (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour:

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

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

55 By subsection 18(3), the remedies in subsection 18(1) may be obtained only on an application for judicial review made under section 18.1. Subsection 18.1(3) then sets out the Federal Court's powers on an application for judicial review, which again include a power to grant declaratory relief:

Powers of Federal Court

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

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

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

Pouvoirs de la Cour fédérale

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

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

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

56 In addition, rule 64 of the *Federal Courts Rules* provides that the Federal Court may make "a binding declaration of right in a proceeding," whether or not any consequential relief is or can be claimed.

57 However, the Minister argues that the application judge exceeded his powers to grant declaratory relief under subsections 18(1) and 18.1(3) by issuing a declaration of fact. On this point, the Minister relies on this Court's statement in *Makara v. Canada (Attorney General)*, 2017 FCA 189 (F.C.A.) at para. 16, that the Federal Court "does not have jurisdiction to make declarations pertaining solely to findings of fact." The Minister submits that the application judge's declaration

is "at heart" a declaration of fact, because in order to make it, the judge first had to make a factual determination that Dr. Tennant was a Crown servant in 1971: Minister's memorandum at para. 57.

58 The prohibition against the Federal Court granting declarations of fact, to which the Minister refers, has its roots in *Gill v. Canada (Minister of Employment & Immigration)* (1991), 49 F.T.R. 285 (Fed. T.D.) at para. 13, 1991 CarswellNat 291 (Fed. T.D.). In that case the plaintiff — whose application for permanent residency had been denied on the basis that he had been untruthful about his marital status — sought a declaration that he had never been married and that he had answered questions truthfully on his permanent residency application. Relying on this Court's statement in *LeBar v. Canada* (1988), [1989] 1 F.C. 603 (Fed. C.A.) at 610, (1988), 90 N.R. 5 (Fed. C.A.), that declaratory relief "declares what the law is," the Federal Court concluded that the relief sought was a "declaration of fact" beyond its jurisdiction to grant, and struck out the statement of claim. The Nova Scotia Court of Appeal followed similar reasoning in *R. v. Shore Disposal Ltd.* (1976), 72 D.L.R. (3d) 219 (N.S. C.A.) at 222, (1976), 16 N.S.R. (2d) 538 (N.S. C.A.).

59 In my view, the analyses in *Gill* and similar cases merely give effect to the well-established principle that declaratory relief must resolve a real legal issue in which both parties have a genuine interest. The Supreme Court recently reiterated the requirements for granting declaratory relief in *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4 (S.C.C.) at para. 60:

> [d]eclaratory relief is granted by the courts on a discretionary basis, and may be appropriate where (a) the court has jurisdiction to hear the issue, (b) the dispute is real and not theoretical, (c) the party raising the issue has a genuine interest in its resolution, and (d) the responding party has an interest in opposing the declaration being sought [...].

60 These factors, all of which are present here, have long governed the granting of declaratory relief. It has also long been clear that granting declaratory relief may entail determining whether the facts give rise to a legal right. As stated by Paul Martin in "The Declaratory Judgment" (1931) 9:8 C.B.R. 540 at 547, cited with approval in *T.E.A.M. v. Manitoba Telecom Services Inc.*, 2007 MBCA 85 (Man. C.A.) at para. 62, (2007), 214 Man. R. (2d) 284 (Man. C.A.), "the essence of the declaratory judgment is the determination of rights."

61 The use of declarations to determine questions of status is also well known to Canadian law: see "The Declaratory Judgment" at 546.

62 For example, in *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99 (S.C.C.), the Supreme Court granted a declaration that non-status Indians and Métis are "Indians" under subsection 91(24) of the *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.). In doing so, it relied (at para. 4) on "a number of key factual findings" made by the trial judge. In *Glynos v. Canada*, [1992] 3 F.C. 691 (Fed. C.A.), 1992 CanLII 8572, a case on which Mr. Tennant particularly relies, this Court, having formed a clear view of Mr. Glynos's entitlement to citizenship under a provision that, unlike section 3 of the current *Citizenship Act*, required that

citizenship be granted, issued a declaration that he was "eligible for a grant of citizenship." The application judge's declaration in this case is also similar in effect to the declaration by the Court of Appeal for Ontario in *Gehl v. Canada (Attorney General)*, 2017 ONCA 319 (Ont. C.A.) at para. 89, (2017), 138 O.R. (3d) 52 (Ont. C.A.). While the Court's declaration in that case that the appellant was entitled to registration as an Indian was based on its view of the limited range of reasonable outcomes available on the record underlying the appellant's application for registration, this did not transform the declaration into one of fact.

63 In my view, status as a citizen of Canada by descent may be the subject of a declaration. As Mr. Tennant correctly observes, this Court has held that Canadian citizenship is "a creature of federal statute" with "no meaning apart from statute": *Taylor v. Canada (Minister of Citizenship & Immigration)*, 2007 FCA 349 (F.C.A.) at para. 50, (2007), 286 D.L.R. (4th) 385 (F.C.A.).

64 And as discussed above, it is the Act itself — in this case paragraph 3(1)(*b*) — that confers citizenship by descent. It is not granted by the Minister, but rather is acquired by birth: see *Assal c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2016 FC 505 (F.C.) at paras. 68-70. This is reflected in the procedure for obtaining evidence of citizenship, as now set out in section 14 of the *Citizenship Regulations, No. 2*, SOR/2015-124. That provision requires the filing of "evidence that establishes that the applicant *is* a citizen" (emphasis added). A certificate of citizenship issued under subsection 12(1) is therefore only evidence of citizenship, and does not itself confer that status. As stated in one tribunal decision, "[i]t is not the 'certificate of citizenship' that provides the citizenship, but rather it is being born as a citizen which entitles you to a piece of paper showing such citizenship": *Schlesinger v. Canada (Citizenship and Immigration)*, 2015 CanLII 92532 at para. 17, 2015 CarswellNat 8549 (Imm. & Ref. Bd. (App. Div.)). Or as put in *Assal* (at para. 68), "[f]or a citizen at birth, the certificate of citizenship only constitutes the recognition or evidence of this citizenship."

65 Contrary to the Minister's submission, a declaration of citizenship is thus, at a minimum, not "solely" a declaration of fact. The nature of the application judge's declaration is therefore not a basis to conclude that the preclusive clause does not apply.

B. Did the application judge usurp the role of the Minister?

66 The Minister argues that the application judge's declaratory judgment effectively renders a decision on the merits of the application under subsection 12(1) of the *Citizenship Act*, which he submits is beyond the Federal Court's statutory authority. The Minister submits that Parliament has given him the exclusive authority to determine applications made under subsection 12(1). He says that nothing in the *Federal Courts Act* empowers the Federal Court to render a decision on the merits or to substitute its decision for that of the Minister, and to determine itself whether the requirements of subsection 12(1) are met. The Minister invokes the distinction between the role

of the Court on appeal, in which substitution of the Court's views is permissible, and its role on judicial review, in which, he submits, it is not.

67 One of the principal authorities on which the Minister relies is this Court's decision in *Rafuse v. Canada (Pension Appeals Board)*, 2002 FCA 31 (Fed. C.A.) at paras. 8-9, (2002), 286 N.R. 385 (Fed. C.A.), in which this Court approved the Federal Court's statement in *Xie v. Canada (Minister of Employment & Immigration)* (1994), 75 F.T.R. 125 (Fed. T.D.) at para. 17, 1994 CarswellNat 484 (Fed. T.D.), that it does not, on judicial review, have the power to "substitute its opinion for that of the tribunal whose decision is under judicial review, and make the decision that the tribunal should have made." He also relies on the comment of Justice Stratas in his decision on the rule 74 motion (at para. 25) that "the clear language of the *Citizenship Act* gives [the] power [to grant citizenship] only to the Minister."

68 Contrary to the Minister's submission, the law of judicial review recognizes a power on the part of a reviewing court to substitute its view for that of the administrative decision-maker, provided that certain conditions are met. The application judge therefore did not err in holding that this remedy was available to him if these conditions were satisfied.

69 There are two relevant statements in *Rafuse*. One is the statement on which the Minister relies. The second, also citing *Xie*, is the following (at para. 14):

> While the directions that the Court may issue when setting aside a tribunal's decision include directions in the nature of a directed verdict, this is an exceptional power that should be exercised only in the clearest of circumstances [...].

70 The first proposition set out in *Rafuse* — that substitution of the decision of the Court for that of the administrative decision-maker is not permitted on judicial review under the *Federal Courts Act* — has been repeated by this Court in several other cases. In *Jada Fishing Co. v. Canada (Minister of Fisheries & Oceans)*, 2002 FCA 103 (Fed. C.A.) at para. 10, (2002), 288 N.R. 237 (Fed. C.A.), leave to appeal refused, [2002] 4 S.C.R. vi (note) (S.C.C.), this Court held that it was "without jurisdiction" to substitute its decision for that of a tribunal, because it could "only dismiss the appeal or give the judgment that the Trial Division should have given, and the Trial Division could not have substituted its decision for that of the [tribunal] in an application for judicial review." See also *Layden v. Canada (Minister of Human Resources & Social Development)*, 2009 FCA 14 (F.C.A.) at paras. 10-12; *Adamson v. Canadian Human Rights Commission*, 2015 FCA 153 (F.C.A.) at para. 62, (2015), 474 N.R. 136 (F.C.A.), leave to appeal refused, [2016] 1 S.C.R. v (note) (S.C.C.); *Canada (Attorney General) v. Burnham*, 2008 FCA 380 (F.C.A.) at para. 11, (2008), 384 N.R. 149 (F.C.A.).

71 But despite the first proposition set out in *Rafuse*, it is clear that, at a minimum, substitution of the Court's views for those of the administrative decision-maker can be achieved indirectly, or in effect, through remedies that the *Federal Courts Act* sets out. *Rafuse* itself recognized

this possibility in the second statement quoted above. A reviewing court can achieve indirect substitution in a number of ways.

72 The most obvious is to quash the tribunal's decision and give directions requiring the decision-maker to reach a particular result. It is now well-established that this form of relief, a combination of *certiorari* and *mandamus*, is available where on the facts and the law there is only one lawful response, or one reasonable conclusion, open to the administrative decision-maker, so that no useful purpose would be served if the decision-maker were to redetermine the matter: see *Trinity Western University v. College of Teachers (British Columbia)*, 2001 SCC 31 (S.C.C.) at paras. 41-44, [2001] 1 S.C.R. 772 (S.C.C.); *Lebon v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FCA 55 (F.C.A.) at paras. 13-14, (2013), 444 N.R. 93 (F.C.A.); *D'Errico v. Canada (Attorney General)*, 2014 FCA 95 (F.C.A.) at paras. 14-16, (2014), 459 N.R. 167 (F.C.A.); *Sharif v. Canada (Attorney General)*, 2018 FCA 205 (F.C.A.) at paras. 54, 59.

73 This Court has observed that, when granting relief of this nature, "the reviewing court acts in a practical sense as the merits-decider": *'Namgis First Nation v. Canada (Fisheries and Oceans)*, 2019 FCA 149 (F.C.A.) at para. 6; see also *Layden* at para. 10. As put by the Federal Court, "this Court [can] accomplish indirectly what it is not authorized to do directly. It [can] compel the Board to reach a specific conclusion thereby, in effect, substituting its decision for that made by the Board": *Turanskaya v. Canada (Minister of Citizenship & Immigration)* (1995), 111 F.T.R. 314 (Fed. T.D.) at para. 6, 1995 CarswellNat 1163 (Fed. T.D.), affirmed (1997), 145 D.L.R. (4th) 259, 210 N.R. 235 (Fed. C.A.).

74 As indicated above, this type of *certiorari* and *mandamus* relief (as well as other relief amounting to indirect substitution, discussed below) is sometimes referred to as a "directed verdict," terminology employed by the application judge here. Strictly speaking, this terminology is incorrect; to avoid confusion, it would be better not to use it. "Directed verdict" is a criminal law, not an administrative law, concept: see *R. v. Rowbotham*, [1994] 2 S.C.R. 463 (S.C.C.) at 467, (1994), 168 N.R. 220 (S.C.C.). However, the phrase can be understood to capture, among other things, a remedy of indirect substitution granted because there is only one reasonable outcome.

75 A reviewing court may also achieve substitution indirectly through a declaration recognizing the parties' rights. This type of indirect substitution also appears to be available when there is only one reasonable determination of the issue as to which a declaration is granted.

76 The Supreme Court recognized that a declaration may have the effect of substitution in *Kelso v. Canada*, [1981] 1 S.C.R. 199, 120 D.L.R. (3d) 1 (S.C.C.), where the issue was whether Mr. Kelso was entitled to be reinstated to his former position in the public service. In response to the argument that only the Public Service Commission, and not the Court, had authority to make appointments, the Court observed (at 210) that while it was "quite correct to state that the Court cannot actually appoint Mr. Kelso to the Public Service," and "[t]he administrative act of appointment must be

performed by the Commission," the Court was "entitled to 'declare' the respective legal rights of the appellant and the respondent." The Court granted a declaration that "the appellant [was] entitled to remain in, or be reinstated to, [his] position [...]." *Glynos v. Canada*, discussed above, is another example.

77 While *Kelso* and *Glynos* involved actions for a declaration, declarations amounting to substitution are also granted in the context of applications for judicial review: see for example, *Giguère c. Chambre des notaires du Québec*, 2004 SCC 1, [2004] 1 S.C.R. 3 (S.C.C.), in which the Court granted a declaration of entitlement to compensation that the Chambre had refused, and *Gehl v. Canada (Attorney General)*, referred to above.

78 It is also possible that, in certain administrative proceedings, setting aside the decision under review without further relief will, in effect, restore the parties to their positions prior to the decision. In these cases, merely setting aside the administrative decision may indirectly substitute the reviewing court's view: see *Stetler v. Ontario (Flue-Cured Tobacco Growers' Marketing Board)*, 2009 ONCA 234 (Ont. C.A.) at para. 49, (2009), 311 D.L.R. (4th) 109 (Ont. C.A.); *Retail, Wholesale Department Store Union v. Yorkton Cooperative Association*, 2017 SKCA 107 (Sask. C.A.) at para. 48; *Telus Communications Inc. and TWU (Underwood), Re*, 2014 ABCA 199 (Alta. C.A.) at paras. 35-36, (2014), 575 A.R. 325 (Alta. C.A.); *Sûreté du Québec c. Bergeron*, 2010 QCCA 2053 (C.A. Que.) at paras. 6, 73, leave to appeal refused, [2011] 2 S.C.R. v (note) (S.C.C.).

79 Indirect substitution is thus a recognized, albeit exceptional, power under the law of judicial review. But that law also recognizes a power even of direct substitution, in which the court itself grants the relief sought from the administrative decision-maker — again, in exceptional circumstances: see, for example, *Renaud c. Québec (Commission des affaires sociales)*, [1999] 3 S.C.R. 855 (S.C.C.) at para. 3, (1999), 184 D.L.R. (4th) 441 (S.C.C.); and *Bessette v. British Columbia (Attorney General)*, 2019 SCC 31 (S.C.C.) at para. 94.

80 In her dissenting reasons in *Giguère*, Justice Deschamps set out as follows the circumstances in which a reviewing court may substitute its view for that of the administrative decision-maker (at para. 66, citations omitted and emphasis added):

> A court of law may not substitute its decision for that of an administrative decision-maker lightly or arbitrarily. It must have serious grounds for doing so. A court of law may render a decision on the merits if returning the case to the administrative tribunal would be pointless [...]. Such is also the case when, once an illegality has been corrected, the administrative decision-maker's jurisdiction has no foundation in law: [...]. The courts may also intervene in cases where, in light of the circumstances and the evidence in the record, only one interpretation or solution is possible, that is, where any other interpretation or solution would be unreasonable: [...]. It is also accepted that a case may not be sent back to the competent

> authority if it is no longer fit to act, such as in cases where there is a reasonable apprehension of bias [...].

81 The premise of this statement appears to be that substitution in the limited circumstances that Justice Deschamps sets out does not intrude on the separation of powers between the judiciary and the executive, and does not undermine the reasons why decision-making authority is vested in administrative decision-makers: see also *Giguère* at paras. 67-69.

82 Though in dissent, Justice Deschamps's statement as to the availability of substitution in cases in which the court concludes that there is only one reasonable outcome, so that returning the matter to the administrative decision-maker would be pointless, has since been accepted and relied on in a number of cases, involving both direct and indirect substitution. Her statement has also now been approved and applied by a majority of the Supreme Court, though in a statutory appeal in which the court appealed to had a legislated power of direct substitution: *Groia v. Law Society of Upper Canada*, 2018 SCC 27 (S.C.C.) at para. 161, [2018] 1 S.C.R. 772 (S.C.C.).

83 This Court has in at least two cases engaged in direct substitution in reliance on Justice Deschamps's reasons in *Giguère — Canada (Minister of Aboriginal Affairs and Northern Development) v. Williams Lake Indian Band*, 2016 FCA 63, 396 D.L.R. (4th) 164 (F.C.A.), reversed on other grounds, 2018 SCC 4, [2018] 1 S.C.R. 83 (S.C.C.), and *Canada (Procureur général) c. Bétournay*, 2018 FCA 230 (F.C.A.). These decisions appear to treat the first proposition in *Rafuse* and the statement in *Jada Fishing Co.* as having been overtaken.

84 *Williams Lake* was an application for judicial review of a decision of the Specific Claims Tribunal under the *Specific Claims Tribunal Act*, S.C. 2008, c. 22, and section 28 of the *Federal Courts Act*. The Court concluded that only one result was possible, and therefore (at para. 119) "dismiss[ed] the specific claim brought pursuant to paragraphs 14(1)(*b*) and 14(1)(*c*) of the *Specific Claims Tribunal Act*." In *Bétournay*, also an application for judicial review under section 28 of the *Federal Courts Act*, this Court held (at para. 69) that although it is not generally appropriate for a reviewing court to substitute its decision for that of a tribunal, an exception to this principle exists where only one reasonable conclusion is available. It then proceeded (at para. 70) to allow the application for judicial review, and "[m]aking the decision that the Board should have made, [to dismiss] the grievance [and] set aside the order to reimburse the wages and benefits for the suspension period [...]."

85 Other appellate courts have also applied Justice Deschamps's statement in the judicial review context: see, for example, *Canadian Centre for Bio-Ethical Reform v. South Coast British Columbia Transportation Authority*, 2018 BCCA 344 (B.C. C.A.) at para. 60, (2018), 426 D.L.R. (4th) 333 (B.C. C.A.) ; and *Stetler v. Ontario (Flue-Cured Tobacco Growers' Marketing Board)* at paras. 42, 49, referred to above as an example of indirect substitution through the portion of its order setting aside the administrative decision. In *Stetler* the Ontario Court of Appeal, after

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invoking *Giguère*, also granted "for greater clarity" a declaration reinstating the quota that the Board had denied.

86 In this case, the application to the Minister was for a certificate of Canadian citizenship under subsection 12(1) of the *Citizenship Act*. The application judge did not grant that relief. What he granted, having found that there was only one reasonable conclusion on the question whether Andrew is a citizen, was a declaration that will as a practical matter require that the Minister issue a certificate. As noted above, this type of substitution remedy may follow in the exceptional cases in which a court determines that substitution is warranted.

87 As already noted, the application judge discussed at some length in his reasons the availability and appropriateness of a "directed verdict," a term which he used to describe a remedy amounting to substitution. He concluded that, although it is an exceptional remedy, it was a remedy available to him. In coming to this conclusion he found (at para. 28) that there was only one reasonable outcome — that "[t]he only logical conclusion on the evidence is that Dr. Tennant was in the employment of CIDA and thereby he was a Crown servant" — and that returning the matter to the Minister for redetermination would be futile. This finding brings this case into the class of exceptional cases in which relief amounting to substitution has been recognized as appropriate.

88 The application judge may have erred in his appreciation of the record in making this finding and coming to his conclusion that the prerequisites for granting a substitution remedy were met. The application judge may in addition have failed to show sufficient deference to the Minister's decision; he did not even refer to the standard of review. Nor did he discuss at any length the legal criteria for determining status as an employee. And the application judge may also have erred, as the Minister submits, in relying in part on evidence, in the affidavits of Mr. Tennant and Dr. Tennant, that was not before the Minister when the decision under review was rendered and did not come within the exceptions for additional evidence on judicial review: see *Sharma v. Canada (Attorney General)*, 2018 FCA 48 (F.C.A.) at paras. 7-9.

89 But assuming that the application judge did err in these respects, his errors in my view would constitute "mere" or "everyday" errors, of a kind that this Court regularly corrects in the absence of a preclusive clause: see, for a recent example, *Canada (Procureur général) c. Allard*, 2018 FCA 85 (F.C.A.) at paras. 44-46. They do not reach a level that would bring this case into any of the categories of cases in which this Court would be justified in disregarding the preclusive clause that Parliament has enacted in paragraph 22.2(*d*).

90 Since the preclusive clause applies, it is not this Court's place ultimately to decide whether the application judge committed these errors in substituting his view for that of the Minister. It follows that this Court should not be taken either to endorse or to disapprove of the application judge's approach. However, these reasons should not be read as an invitation to judges conducting judicial reviews under statutes containing preclusive clauses to disregard the requirements of that

process, including the requirement to show deference to administrative decision-makers. Remedies amounting to substitution of the court's view for that of the administrative decision-maker remain appropriate only in exceptional cases.

VI. Proposed disposition

91 For the reasons I have set out, I conclude that paragraph 22.2(*d*) of the *Citizenship Act* bars this appeal by the Minister. In the exercise of this Court's power under paragraph 52(*a*) of the *Federal Courts Act*, I would therefore quash the appeal. Mr. Tennant does not seek costs, and I would not award them.

***Wyman W. Webb J.A.*:**

I agree.

***D.G. Near J.A.* (Dissenting Reasons):**

92 I have read the reasons of the majority and am unfortunately unable to agree with the conclusions reached. There is no need to repeat the factual and procedural background to this matter as it is set out in a comprehensive manner in the majority reasons.

93 It is common ground that the Federal Court has the authority to issue declaratory relief in deciding an application for judicial review. In this case there was an application for judicial review but the Federal Court did not engage in conducting a judicial review. Rather, the Federal Court simply made a declaration of fact based on newly admitted evidence that was not before the Minister when the Minister made his original decision pursuant to the authority granted to him by Parliament under section12 of the *Citizenship Act*.

94 The Federal Court concluded that Dr. Tennant was a Crown servant in 1971 based on this newly admitted evidence which led directly to it declaring that the respondent is a Canadian citizen. It drew this conclusion despite not having conducted a judicial review or possibly entertaining a *mandamus* application as a remedy (rather than a "directed verdict", a concept unknown in administrative law), as it could have done if so inclined based on the record that had been originally considered by the Minister. Instead, the Federal Court declared what it found to be the facts based on new evidence not originally considered by the Minister. This Court in *Makara v. Canada (Attorney General)* [2017 CarswellNat 4406 (F.C.A.)] (at para. 16) found that the Federal Court "does not have jurisdiction to make declarations pertaining solely to findings of fact." I agree, and in my view, the nature of the application judge's declaration, despite carrying legal implications in relation to the respondent's citizenship rights, pertained solely to the Federal Court's findings of fact and not those of the Minister: that Dr. Tennant was working abroad as a Crown servant when Mr. Tennant was born, and as a consequence, that the respondent is a Canadian citizen.

306 Accordingly, the Federal Court's declaration in these circumstances amounted to an error sufficient to conclude that the preclusive clause does not apply in this case.

95 This finding is sufficient to dispose of the matter and to allow the appeal. However, in my view, the Federal Court also usurped the role of the Minister and rendered a decision on the merits despite the fact that Parliament has given the Minister exclusive authority to determine applications made under subsection 12(1) of the *Citizenship Act*. The Federal Court clearly substituted its decision for that of the Minister. It is uncontested that generally upon judicial review the Court does not have the power to substitute its opinion for that of the administrative decision-maker whose decision is under judicial review, and, make the decision that the administrative decision-maker should have made (*Canada (Procureur général) c. Bétournay* [2018 CarswellNat 8084 (F.C.A.)] at para. 69; *Rafuse v. Canada (Pension Appeals Board)* [2002 CarswellNat 190 (Fed. C.A.)] at para. 9; *Xie v. Canada (Minister of Employment & Immigration)* [1994 CarswellNat 484 (Fed. T.D.)] at para. 17). The majority reasons correctly set out that there are exceptions in extraordinary circumstances whereby using a combination of *certiorari* and *mandamus*, the Court may achieve such a result indirectly. But such extraordinary circumstances do not arise on the facts of this case. Indeed, the Federal Court conducted no judicial review and showed no deference to the Minister as the original decision-maker.

96 The majority correctly refer to the *Giguère* line of cases based on Justice Deschamps's reasoning that in extraordinary cases a Court may substitute its finding where it concludes "in light of the circumstances and the evidence on the record, only one interpretation or solution is possible, that is, where any other interpretation or solution would be unreasonable [...]" (*Giguère c. Chambre des notaires du Québec* [2004 CarswellQue 19 (S.C.C.)] at para. 66). It is common ground that such a substitution is an exceptional power under the law of judicial review and is to be exercised with caution. This is not such a case. The litany of possible errors referred to in the majority reasons (at para. 88) illustrate that the decision was far from self-evident. In my view, given that the Federal Court failed to conduct a judicial review and relied upon evidence not placed before the Minister and that is contested, it is not at all clear that the Federal Court's factual declaration that the respondent is a Canadian citizen was the only reasonable determination of the matter. Nor is this an exceptional situation calling out for the Court to substitute its decision for that of the Minister, rather than, as is the normal case, send the matter back for redetermination based on a complete review of the facts conducted by the Minister as mandated by Parliament.

97 Contrary to the majority reasons, failure to return the matter to the Minister in these circumstances will, in my view, act as an "invitation to judges conducting judicial reviews under statutes containing preclusive clauses to disregard the requirements of that process, including the requirement to show deference to administrative decision makers". It will be an invitation for a reviewing Court to make declarations of fact based on evidence that may not have even been before the original decision maker, refuse to certify a question, and then rely upon the preclusive clause to shield any review in situations which are clearly not exceptional or extraordinary.

98 For these reasons, I would allow the appeal, quash the decision of the Federal Court, and remit the matter to a different citizenship officer for redetermination without costs.

Appeal quashed.

1998 CarswellNat 387
Supreme Court of Canada

Canada (Human Rights Commission) v. Canadian Liberty Net

1998 CarswellNat 387, 1998 CarswellNat 388, [1998] 1 S.C.R. 626, [1998] 2 F.C. i, [1998] S.C.J. No. 31, 147 F.T.R. 305 (note), 157 D.L.R. (4th) 385, 224 N.R. 241, 22 C.P.C. (4th) 1, 31 C.H.R.R. D/433, 50 C.R.R. (2d) 189, 6 Admin. L.R. (3d) 1, 78 A.C.W.S. (3d) 705, J.E. 98-935

Canadian Human Rights Commission, Appellant v. Canadian Liberty Net and Tony McAleer (alias Derek J. Peterson), Respondents

Canadian Liberty Net and Tony McAleer (alias Derek J. Peterson), Appellants v. Canadian Human Rights Commission, Respondent and The Attorney General of Canada and the League for Human Rights of B'Nai Brith Canada, Interveners

L'Heureux-Dubé, Gonthier, McLachlin, Major and Bastarache JJ.

Heard: December 10, 1997
Judgment: April 9, 1998
Docket: 25228

Proceedings: reversing (1996), 192 N.R. 298 (Fed. C.A.); affirming (1996), 192 N.R. 313 (Fed. C.A.); affirming (1992), 48 F.T.R. 285 (Fed. T.D.); affirming (1996), 192 N.R. 313 (Fed. C.A.); affirming (1992), 56 F.T.R. 42 (Fed. T.D.)

Counsel: *William F. Pentney* and *Eddie Taylor*, for the appellant/respondent the Canadian Human Rights Commission.
Douglas H. Christie, for the respondents/appellants Canadian Liberty Net and Tony McAleer.
David Sgayias, Q.C., and *Brian Saunders*, for the intervener the Attorney General of Canada.
David Matas, for the intervener the League for Human Rights of B'Nai Brith Canada.

Subject: Public; Civil Practice and Procedure; Constitutional

APPEAL from judgment reported 192 N.R. 298, 132 D.L.R. (4th) 95, 108 F.T.R. 79 (note), [1996] 1 F.C. 804, 38 Admin. L.R. (2d) 27, *(*sub nom. *Canada (Human Rights Commission) v. Canadian Liberty Net (No. 2))* 26 C.H.R.R. D/242 (Fed. C.A.), allowing appeal from judgment reported 48 F.T.R. 285, 9 C.R.R. (2d) 330, 90 D.L.R. (4th) 190, [1992] 3 F.C. 155, 14 Admin. L.R. (2d) 294, *(*sub nom. *Canada (Human Rights Commission) v. Candian Liberty Net (No. 1))* 26 C.H.R.R. D/194 (Fed. T.D.), granting application for interlocutory injunction.

APPEAL from judgment reported 192 N.R. 313, 108 F.T.R. 80 (note), [1996] 1 F.C. 787, *(sub nom. Canada (Human Rights Commission) v. Canadian Liberty Net (No. 3))* 26 C.H.R.R. D/260 (Fed. C.A.), dismissing appeal from judgment reported, *(sub nom. Canada (Human Rights Commission) v. Canadian Liberty Net (No. 2))* 56 F.T.R. 42, [1992] 3 F.C. 504, *(sub nom. Canada (Human Rights Commission) v. Canadian Liberty Net (No. 2))* 26 C.H.R.R. D/221 (Fed. T.D.), convicting respondents for contempt of court. POURVOI du jugement publié à 192 N.R. 298, 132 D.L.R. (4th) 95, 108 F.T.R. 79 (note), [1996] 1 F.C. 804, 38 Admin. L.R. (2d) 27, *(sub nom. Canada (Human Rights Commission) v. Canadian Liberty Net (No. 2))* 26 C.H.R.R. D/242 (Fed. C.A.), accueillant l'appel du jugement publié à 48 F.T.R. 285, 9 C.R.R. (2d) 330, 90 D.L.R. (4th) 190, [1992] 3 F.C. 155, 14 Admin. L.R. (2d) 294, *(sub nom. Canada (Human Rights Commission) v. Candian Liberty Net (No. 1))* 26 C.H.R.R. D/194 (Fed. T.D.), accordant la requête pour injonction interlocutoire. POURVOI du jugement publié à 192 N.R. 313, 108 F.T.R. 80 (note), [1996] 1 F.C. 787, *(sub nom. Canada (Human Rights Commission) v. Canadian Liberty Net (No. 3))* 26 C.H.R.R. D/260 (Fed. C.A.), rejetant l'appel du jugement publié à (sub nom. *Canada (Human Rights Commission) v. Canadian Liberty Net (No. 2)*), 56 F.T.R. 42, [1992] 3 F.C. 504, *(sub nom. Canada (Human Rights Commission) v. Canadian Liberty Net (No. 2))* 26 C.H.R.R. D/221 (Fed. T.D.), condamnant les défendeurs pour outrage au tribunal.

Statutes considered by/Législation citée par *McLachlin* and *Major JJ.* (dissenting in part):

— referred to

— considered

— considered

— considered

— considered

— considered

— referred to

— considered

— considered

***Bastarache J.* (*L'Heureux-Dubé* and *Gonthier JJ.* concurring):**

1 This case raises the issue of the existence and proper exercise of an injunctive power in the Federal Court of Canada in support of federal legislation, the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the "*Human Rights Act*"). As the injunction sought in this case would prohibit

speech, it also implicates important issues regarding the guarantee of freedom of expression in s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. Finally, there is the question of whether a person who violates an injunction can invoke lack of jurisdiction in the granting court, or wrongful exercise of that jurisdiction, as a defence to proceedings in contempt.

Facts

2 In December 1991, the Canadian Human Rights Commission (the "Commission") received five complaints regarding telephone messages made available by an organization advertising itself as "Canadian Liberty Net". Callers to the Liberty Net phone number were offered a menu of telephone messages to choose from, by subject area. These messages included denials of the existence or extent of the Holocaust; assertions that non-white "aliens" are importing crime and problems into Canada, and the implicit suggestion that violence could be helpful to "set matters straight"; criticism of an alleged "Kosher tax" on some foods to ensure that some percentage can be certified as Kosher; complaints about the alleged domination of the entertainment industry by Jews; and a number of messages decrying the alleged persecution of well-known leaders of the white supremacist movement. After having investigated the content of the messages, the Commission requested on January 20, 1992 that a Human Rights Tribunal (the "Tribunal") be empanelled to decide whether these messages were in violation of s. 13(1) of the *Human Rights Act*, which makes it a "a discriminatory practice ... to communicate telephonically ... any matter that is likely to expose a person or persons to hatred or contempt ... on the basis of a prohibited ground of discrimination". Section 3 of the Act includes race, national or ethnic origin, colour, and religion as prohibited grounds of discrimination.

3 On January 27, 1992, one week after the request to the Tribunal, the Commission filed an originating notice of motion before the Federal Court of Canada, Trial Division, seeking an injunction, enjoining Liberty Net, including Tony McAleer and any other associates in the Liberty Net organization, from making available any phone messages "that are likely to expose persons to hatred or contempt by reason of the fact that those persons are identifiable on the basis of race, national or ethnic origin, colour or religion", until a final order of the Tribunal is rendered. On February 5 and 6, the motion was argued, and on March 3, 1992, Muldoon J. granted the injunction sought: [1992] 3 F.C. 155 (Fed. T.D.). Upon further submissions of the parties, Muldoon J. varied the content of his order slightly, although those changes are not germane to any controversy in this appeal.

4 A Tribunal was empanelled in response to the Commission's request and held hearings for a total of five days in May and August 1992. The panel reserved its decision for more than a year, finally rendering a decision on September 9, 1993. Thus, the injunction order of Muldoon J. was in effect for almost eighteen months, from March 3, 1992 until September 9, 1993.

5 On June 5, 1992, a Commission investigator telephoned the Liberty Net phone number and heard a message referring callers to a new number of the Canadian Liberty Net "in exile" where they could "say exactly what we want without officious criticism and sanction". This new number was rented from a telephone company in the State of Washington, in the United States. Callers to that number then had access to a similar menu of messages as had been available prior to the issuance of Muldoon J.'s order of March 3. Indeed, Liberty Net admitted before the Court of Appeal that some of those messages were specifically covered by the injunction, but they contended that the messages were not in breach of the order because they emanated from a source outside Canada, and thus outside the jurisdiction of the Federal Court.

Issues

6 Two separate cases heard by the Federal Court have been combined in the appeal now before this Court. One is an appeal from the original order of Muldoon J. as to the issuance of the order (I will refer to this as the "injunction appeal"); the other is an appeal from a finding of contempt of court by Teitelbaum J. ([1992] 3 F.C. 504 (Fed. T.D.)) arising from the message on the Canadian Liberty Net phone line referring callers to the new number in the United States which contained messages whose content was proscribed by the order (the "contempt appeal"). The injunction appeal divides into two questions: first, did the Federal Court have jurisdiction to issue the injunction? Second, if it did have jurisdiction to issue the injunction, was the issuance of an injunctive order appropriate in this case? The contempt appeal has been inextricably tied to the substance of the injunction appeal by the defendants in this case. The third question before this Court, which arises from the contempt appeal, is: if the injunction was wrongly issued on either basis above, can the defendants be held in contempt of court for breach of the order?

7 Strictly speaking, since there has been a final determination by the Human Rights Tribunal on the substantive issue of the violation of s. 13(1), and an order made by the Tribunal which supplants the order of Muldoon J., the injunction appeal is now moot. However, given the manner in which the questions have been presented to this Court, it is impossible to address the contempt issue without addressing to some degree the injunction issue. Since it would be inconvenient and difficult at the outset to distinguish those principles pertaining to the injunction which are necessary to the contempt appeal from those which are not, I propose to articulate those principles as fully as possible given the facts of the case before us, and then turn to the contempt appeal. In my view, this is particularly important since there appears to have been considerable confusion in the courts below in distinguishing the tests for determining the *existence* of jurisdiction, from the *appropriateness* of exercising jurisdiction in a particular case. Having once set out and distinguished those principles, however, it is my view that there clearly is no need to apply the principles as to the *appropriateness* of the injunction in this case, as the contempt appeal in no way turns on that point. That point is undoubtedly moot and I propose to leave the application of those principles to specific facts for another day.

First Question: Does the Federal Court Have Jurisdiction?

8 Does the Federal Court have jurisdiction to issue an injunction in support of the prohibitions contained in the *Human Rights Act*? The classic statement as to the jurisdiction of the Federal Court in modem jurisprudence was given by McIntyre J. in *Miida Electronics Inc. v. Mitsui O.S.K. Lines Ltd.*, [1986] 1 S.C.R. 752 (S.C.C.), at p. 766, who posits three requirements:

> 1. There must be a statutory grant of jurisdiction by the federal Parliament.
>
> 2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
>
> 3. The law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the *Constitution Act, 1867*.

In my view, it is the first of these three conditions which presents the greatest obstacle for the Commission. It attempted to found a statutory grant of jurisdiction on three grounds arising from the interlocking structure of the *Federal Court Act*, R.S.C., 1985, c. F-7, and the *Human Rights Act*.

(i) Section 25 of the Federal Court Act

9

> **25.** The Trial Division has original jurisdiction, between subject and subject as well as otherwise, in any case in which a claim for relief is made or a remedy is sought under or by virtue of the laws of Canada if no other court constituted, established, or continued under any of the *Constitution Acts, 1867 to 1982* has jurisdiction in respect of that claim or remedy.

Muldoon J. found that no other court had jurisdiction over an interlocutory order giving effect to the *Human Rights Act* (at p. 168) and that this section therefore was a grant of jurisdiction to the Federal Court. The Tribunal was not competent to issue an interlocutory, only a final, order. By contrast, Strayer J.A. for the majority of the Court of Appeal ([1996] 1 F.C. 804 (Fed. C.A.)) engaged in an extensive analysis of the provisions of the *Human Rights Act* and found that Parliament had implicitly intended the scheme of remedies conferred on the Tribunal to be exhaustive. Thus, another court (the Tribunal) had, in fact, been vested with jurisdiction which ousted that of the Federal Court pursuant to s. 25. He also asserted, *obiter*, that a provincial superior court did not have jurisdiction to issue an injunction.

10 Before this Court, the appellant abandoned its argument under s. 25. It did so on the basis of this Court's decision in *B.M.W.E. v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495 (S.C.C.), in which this Court held that a provincial superior court constituted under s. 96 of the *Constitution Act, 1867*, does have authority to issue an injunction in aid of the *Canada Labour Code*, R.S.C.,

1985, c. L-2, notwithstanding the comprehensiveness of the provisions of that Act. McLachlin J. stated the law succinctly (at paras. 5 and 7):

> The governing principle on this issue is that notwithstanding the existence of a comprehensive code for settling labour disputes, where "no adequate alternative remedy exists" the courts retain a residual discretionary power to grant interlocutory relief such as injunctions, a power which flows from the inherent jurisdiction of the courts over interlocutory matters....
>
> ...deference to labour tribunals and exclusivity of jurisdiction to an arbitrator are not inconsistent with a residual jurisdiction in the courts to grant relief unavailable under the statutory labour scheme. There has never been any dispute in this case that the arbitrator and the arbitrator alone is entitled to resolve the dispute between the employer and the employees.

The "courts" to which she refers are the provincial superior courts, and, in that case, the British Columbia Supreme Court "in the exercise of its inherent jurisdiction" (at para. 6). The features of the *Canada Labour Code* in issue in the *B.M.W.E.* case are in all salient respects identical to the features of the *Human Rights Act*: an administrative tribunal vested with power of final determination of claims brought under an Act; absence of reference to injunctive relief in the Act; and a tailored scheme of other remedies which was held not to implicitly preclude the existence of an injunctive remedy. The appellant concluded that those facts were applicable to the case at bar, and that, therefore, there was an "other court" which had jurisdiction which precluded the operation of s. 25.

11 Section 25 was not before the Court in *B.M.W.E.*, and the relationship between that section and the inherent jurisdiction of a provincial superior court was not the object of that decision. The appellant's concession before us relates to this relationship. Given my findings below as to the proper interpretation of s. 44 of the *Federal Court Act*, and in the absence of argument by the parties on this point, I prefer to exercise caution and refrain from expressing any opinion on this issue.

(ii) Implied Grant in the Human Rights Act

12 The Commission urged *R. v. Rhine*, [1980] 2 S.C.R. 442 (S.C.C.), upon us for the proposition that there need not be an express grant of authority for jurisdiction to be found in the provisions of a federal Act. But in that case, there was a clear statutory grant of jurisdiction under the *Federal Court Act* and the issue being decided by this Court, to use the language adopted in *Miida, supra*, was whether the cause of action was nourished by existing federal law. The principles in that case are not applicable to the question of whether there is an implied statutory grant.

13 Although Muldoon J. did not consider the question of implied statutory grant in the *Human Rights Act*, Strayer J.A. devotes a significant part of his analysis to this question. He draws upon remarks by Dickson C.J. in *Canada (Canadian Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 (S.C.C.), at p. 924, as to the "conciliatory nature" of the procedures under the Act,

whose objective is "to encourage reform of the communicator of hate propaganda". Dickson C.J. is also quoted as observing that "s. 13(1) plays a minimal role in the imposition of moral, financial or incarcerating sanctions, the primary goal being to act directly for the benefit of those likely to be exposed to the harms caused by hate propaganda" (p. 940). Strayer J.A. asserts (at p. 822) that:

> The result in the Supreme Court, I believe, demonstrates the reason for the very cautious approach taken by Parliament in section 13 to remedy telephone hate messages within the context of the remedial provisions of the *Canadian Human Rights Act*. It also militates against there being an implied authority for the courts to issue interlocutory orders to stop communications prior to a full hearing by a tribunal.... The violation of an injunction based on such evidence involves criminal sanctions, something not contemplated by the Act until a full hearing by a tribunal, its determination of a violation of subsection 13(1), the issue of the prohibitory order, and the violation of that order.

14 With respect, this reasoning suffers from two flaws. First, the concerns expressed in the passage above could be dealt with in the context of the criteria for determining the appropriateness of issuing an injunction. A stringent test for the issuance of an injunction would satisfy Strayer J.A.'s concern that the constitutional constraints on the exercise of judicial power under s. 13(1) be respected. In my view, assuming that these concerns affect an implied jurisdiction is to mistake the question of appropriateness of exercising, for the existence, of the injunctive power.

15 Second, Strayer J.A. does not indicate the criteria which he considers necessary for a finding of implied jurisdiction. The intervener Attorney General for Canada advocated a relatively flexible and fluid approach to determining whether jurisdiction should be implied from the provisions of federal legislation, and suggested that the *Human Rights Act* contained such an implied jurisdiction. Indeed, although Strayer J.A. finds against Federal Court jurisdiction in this case, his methodology actually lends support to the idea of a relatively fluid approach to implied jurisdiction.

16 In my opinion, the standard for finding an implied power in the existing jurisprudence is actually much more stringent. An injunctive power has only been implied where that power is actually *necessary* for the administration of the terms of the legislation; coherence, logicality, or desirability are not sufficient. The Attorney General cited two cases: *New Brunswick Electric Power Commission v. Maritime Electric Co.*, [1985] 2 F.C. 13 (Fed. C.A.), and *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 (S.C.C.). In the latter case, the implied "jurisdiction" referred not to remedy, but rather to whether the Human Rights Commission had the power to make determinations as to the constitutionality of its own constitutive statute. In considering that question. La Forest J., at para. 59, stated that "[i]n such an endeavour practical considerations may be of assistance in determining the intention of Parliament, but they are not determinative". But the "endeavour" in that case was not the addition of remedies to those spelled out in an Act, but rather the standard of review exercisable by a court over an administrative

body. Reading a remedial power into a statute is of an entirely different nature than attempting to determine legislative intent as to the proper standard of review and relative competence to decide constitutionality as between an administrative body and a court. In the latter case, the function must be exercised by one or the other institution, whereas in the former, the issue is whether the power exists at all where the Act is silent. Attempting to use the rules of implicit legislative intent in one case should not be automatically inferred for the other case.

17 The leading Federal Court authority on "implied" remedial jurisdiction suggests that far more conservative interpretative principles apply. In *New Brunswick Electric Power, supra* (*per* Stone J.A., Mahoney and Ryan JJ.A. concurring), the Federal Court of Appeal found that there was an implied right to issue a stay of execution of an order of the National Energy Board pending the disposition of an appeal where there was a statutory right of appeal. Quoting from an *obiter* remark of Pratte J.A. in *National Bank of Canada v. Granda* (1984), 60 N.R. 201 (Fed. C.A.), at p. 202, the court observed (at p. 27):

> It is clear that those provisions do not expressly confer on the court a power to stay the execution of decisions which it is asked to review. However, it could be argued that Parliament has conferred this power on the court by implication, in so far as the existence and exercise of the power are necessary for the court to fully exercise the jurisdiction expressly conferred on it by s. 28. In my opinion, this is the only possible source of any power the Court of Appeal may have to order a stay in the execution of a decision which is the subject of an appeal under s. 28. It follows logically that, if the court can order a stay in the execution of such decisions, it can only do so in the rare cases in which the exercise of this power is necessary to allow it to exercise the jurisdiction conferred on it by s. 28. [Emphasis added.]

In that case, failure to order a stay would have rendered the provision for the appeal nugatory. To a similar effect, and in contrast to the position of a court of inherent jurisdiction, the following observations were made in *Natural Law Party of Canada v. Canadian Broadcasting Corp.* (1993), [1994] 1 F.C. 580 (Fed. T.D.) (*per* McKeown J.), at pp. 583-84:

> There is no provision in the *Broadcasting Act* for providing relief on an expedited basis, but this does not mean that the Federal Court of Canada can obtain jurisdiction. Section 23 of the *Federal Court Act* ... limits the jurisdiction of the Federal Court to the extent that jurisdiction has been otherwise specially assigned. Since the *Broadcasting Act* has assigned jurisdiction to the CRTC, I do not have jurisdiction.
>
> This Court is a statutory court. I am unable to rely on the inherent jurisdiction of other superior courts as was the case in *Green Party Political Assn. of British Columbia v. Canadian Broadcasting Corp. (CBC)* ... where Colver J. accepted jurisdiction. Colver J. was a judge of the Supreme Court of British Columbia, which is not a statutory court. There is no gap in the jurisdiction.

Because s. 23 of the *Federal Court Act* referred the question of jurisdiction to the *Broadcasting Act*, the Court looked primarily to that Act as the foundation for its jurisdiction. Distinguishing his position from that of a court of inherent jurisdiction, McKeown J. refused to read that Act liberally to imply a power, even though he recognized that an inherent jurisdiction court might do so. Subject to what I have to say below about the operation of s. 44, this decision also indicates that "gaps" within federal legislation may only be filled where such a power is a necessary incident to the discharge of the scheme of the Act as constituted.

18 The scheme of the *Human Rights Act* does not come close to that It is not a necessary incident to any of the Tribunal's functions or powers that there be an injunctive power to restrain violations of s. 13(1). The existence of a "gap" in the range of remedies available in the Act itself does not mean that Parliament intended the Federal Court to have the power to issue an injunction. The Act could just as easily be read to mean that Parliament intended the "gap" to exist. Under these circumstances, it is inappropriate to engage in an extensive analysis of what is desirable to carry out the aims of the Act. The threshold test was precisely stated by Stone J.A. in *New Brunswick Electric Power, supra*, at p. 27:

> These observations bring into focus the absurdity that could result if, pending an appeal, operation of the order appealed from rendered it nugatory. Our appellate mandate would then become futile and be reduced to mere words lacking in practical substance.... The appeal process would be stifled. It would not, as it should, hold out the possibility of redress to a party invoking it. This Court could not, as was intended, render an effective result.

It cannot be said that the other remedies contained in the *Human Rights Act* would be rendered "nugatory" in the absence of an injunctive power in the Federal Court. Failing that, no such power can be implied into the scheme of the Act.

(iii) Section 44 of the Federal Court Act

19 Section 44 states:

> **44.** In addition to any other relief that the Court may grant or award, a *mandamus*, injunction or order for specific performance may be granted or a receiver appointed by the Court in all cases in which it appears to the Court to be just or convenient to do so, and any such order may be made either unconditionally or on such terms and conditions as the Court deems just.

A number of other sections of the *Federal Court Act* and *Human Rights Act* are helpful in understanding the ambit of this section. First, there are those sections setting out the purposes of the Act relevant to this appeal:

> **Human Rights Act**

> **2.** The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which a pardon has been granted.
>
> **13.**(1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

Second, there are descriptions of the general status and purpose of the Federal Court:

> **Federal Court Act**
>
> **3.** The court of law, equity and admiralty in and for Canada now existing under the name of the Federal Court of Canada is hereby continued as an additional court for the better administration of the laws of Canada and shall continue to be a superior court of record having civil and criminal jurisdiction.
>
> **Constitution Act, 1867**
>
> **101.** The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

Third, there are a number of sections of both Acts which describe the powers and relationship between the Federal Court and the *Human Rights Act* adjudication scheme:

> **Human Rights Act**
>
> **57.** Any order of a Tribunal ... may, for the purposes of enforcement, be made an order of the Federal Court by following the usual practice and procedure or, in lieu thereof, by the Commission filing in the Registry of the Court a copy of the order certified to be a true copy, and thereupon that order becomes an order of the Court.

58.(1) Where any investigator or Tribunal requires the disclosure of any information and a minister of the Crown or any other person interested objects to its disclosure, the Commission may apply to the Federal Court for a determination of the matter.

Federal Court Act

17. ...

(6) Where 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 Trial Division has no jurisdiction to entertain any proceeding in respect of the same matter unless the Act expressly confers that jurisdiction on the Court.

18.(1) Subject to section 28 [having to do with the original jurisdiction of the Federal Court of Appeal], the Trial Division has exclusive original jurisdiction

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

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.

(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.

20 The principal objection to s. 44 as a source of jurisdiction to issue an injunction is that there is no "other relief that the Court may grant or award" in this case. This objection has two versions. The first version is that the words used in s. 44 cannot support the exercise of a "free-standing" injunction — that is, an injunction granted where there is no action pending before the court as to the final resolution of the merits of the claim. This objection does not relate to the status of the Federal Court as distinguished from provincial superior courts; rather, it asserts that words akin to s. 44 as applied to *any court* could not support a free-standing injunction, but only an interlocutory injunction pending the determination before *that* court of the cause of action. The objection arises out of a controversy to this effect in English law which has now been resolved by the recent decision of the House of Lords in *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.*, [1993] A.C. 334 (U.K. H.L.). In that case, the issue was whether an English court had jurisdiction to

grant an injunction where it was likely (although not certain) that an arbitral body had jurisdiction over the final determination of the dispute. In commenting on a previous case, *"Siskina" (The) v. Distos Compania Naviera S.A.* (1977), [1979] A.C. 210 (U.K. H.L.), which appeared to suggest that there was no such jurisdiction. Lord Browne-Wilkinson stated (at pp. 342-43) that:

> I can see nothing in the language employed by Lord Diplock (or in later cases in this House commenting on *The Siskina*) which suggest that a court has to be satisfied, at the time it grants interlocutory relief, that the final order, if any, will be made by an English court....
>
> Even applying the test laid down by *The Siskina* the court has power to grant interlocutory relief based on a cause of action recognised by English law against a defendant duly served where such relief is ancillary to a final order whether to be granted by an English court or by some other court or arbitral body.

That approach has now been adopted by this Court in the *B.M.W.E.* case already mentioned, where McLachlin J. comments (at para. 16):

> Canadian courts since *Channel Tunnel* have applied it for the proposition that the courts have jurisdiction to grant an injunction where there is a justiciable right, wherever that right may fall to be determined.... This accords with the more general recognition throughout Canada that the court may grant interim relief where final relief will be granted in another forum....

The wording of the clause granting jurisdiction to the Supreme Court of British Columbia in *B.M.W.E.* was virtually identical to that in effect in England at the time of *"Siskina" (The), supra*. The *Law and Equity Act*, R.S.B.C. 1979, c. 224, states:

> **36.** A mandamus or an injunction may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made, and the order may be made either unconditionally or on terms and conditions the court thinks just....

By virtue of this decision, there is now no doubt that the power of a court of inherent jurisdiction to award injunctive relief extends to disputes even in the event that the substance of the dispute falls to be determined by another decision-maker. Based on the principles articulated in *B.M.W.E.*, it is clear that if this injunction had been sought before the Supreme Court of British Columbia, that court could have granted the order.

21 This brings us to the more difficult version of the objection mentioned above. Section 44 uses the words "[i]n addition to any other relief that the Court may grant or award". The plain words might be interpreted in two quite divergent ways. The Commission contends that "in addition to" means simply "separate and apart from" any other relief which the Federal Court may grant or award. Rather than a clause of limitation, it is said to be an introductory clause to a power-

conferring section which is, in all purposes and effects, identical to s. 36 of the *Law and Equity Act*. By contrast, the words "in addition to" might be read as a clause of limitation, which creates an injunctive power only "ancillary to" other remedies which the court could award. Since no other relief may be issued by the Federal Court at the interlocutory stage, it is argued, no injunction is authorized by this section. The idea that there is "other relief" conferred on the court under the interlocking scheme of the *Human Rights Act* and the *Federal Court Act* is rejected, largely on the basis of a strict reading of s. 44. I would add that even if we adopt the "ancillary to" interpretation favoured by the respondents, a liberal approach to those words could favour an interpretation of the various powers of supervision over the Human Rights Tribunal as orders "ancillary to" which an injunctive order could be issued under s. 44.

22 I should say at the outset that I find that both the interpretations which favour a grant of jurisdiction, and that which does not, are plausible on the face of the section. When confronting an interpretative challenge such as this, it is necessary to examine the entire Act in question in order to determine its intendment, and to determine whether the language of the Act can support distinguishing this case from *B.M.W.E.*. The respondents contend that a reading which denies jurisdiction to grant the injunctive remedy is justified by the Federal Court's status as a mere "statutory court", which requires grants of jurisdiction to be read narrowly. By contrast, the Supreme Court of British Columbia is a superior court of inherent jurisdiction, and only it has jurisdiction to issue the injunction in this case.

23 That outcome appears anomalous. The sections of the *Human Rights Act* and *Federal Court Act* indicate a high degree of supervision of the Human Rights Tribunal by the Federal Court. The Federal Court is responsible for judicial review over decisions of the Tribunal (*Federal Court Act*, s. 18.1); it may issue injunctions *against* the Tribunal (*Federal Court Act*, s. 18(1)); recourse to it is necessary to order disclosure of information required in the course of an investigation or Tribunal hearing (*Human Rights Act*, s. 58(1)); and, an order of the Tribunal may be filed with and transformed into an order of the Federal Court (*Human Rights Act*, s. 57). And yet, it is argued that none of these powers are to be accepted as "other relief" because the relief sought at the interlocutory, or pre-filing stage, is said to be conceptually distinct from the relief which may be ordered under these provisions. Meanwhile, the provincial superior court would be competent as a court of "inherent jurisdiction".

24 Of course, while policy factors may be helpful in gleaning Parliament's intention as to whether there has been a statutory grant, they cannot be determinative. But the general statement in s. 3 as to the status of the Federal Court as "a superior court of record having civil and criminal jurisdiction", combined with the many powers of supervision, control, and enforcement of this and many other Tribunals, leaves one wondering why statutory authorization could not be inferred from s. 44 when its language is similar to that used to describe the powers of a superior court in s. 36 of the *Law and Equity Act*.

25 At this point, it is necessary to explore more carefully the concept of "inherent jurisdiction" to determine how it operates to give the provincial superior court remedial jurisdiction, and why this would require that the Federal Court, described as a "statutory court", would be bound by a very strict and narrow reading of its authorizing statute which effectively would deprive it of jurisdiction over an area where it is otherwise explicitly given extensive powers of supervision. Indeed, the doctrine of inherent jurisdiction has been used in this case as a corollary for the proposition that a federal statute granting authority to the Federal Court should be read narrowly. Whether the doctrine of inherent jurisdiction supports that approach merits closer inspection,

26 In *Wewayakum Indian Band v. Canada*, [1989] 1 S.C.R. 322 (S.C.C.), at p. 331, Wilson J. articulated the narrow view:

> The statutory grant of jurisdiction by Parliament to the Federal Court is contained in the *Federal Court Act*. Because the Federal Court is without any inherent jurisdiction such as that existing in provincial superior courts, the language of the Act is completely determinative of the scope of the Court's jurisdiction.

What is this notion of inherent jurisdiction which is used to justify a strict approach to the interpretation of the *Federal Court Act*? The notion of inherent jurisdiction has developed from the role of provincial superior courts in Canada's legal system. The unique historical feature of provincial superior courts, as opposed to the Federal Court, is that they have traditionally exercised general jurisdiction over all matters of a civil or criminal nature. This general jurisdictional function in the Canadian justice system precedes Confederation, and was expressly continued by s. 129 of the *Constitution Act, 1867*, "as if the Union had not been made". Under s. 92(14), the provinces exercise authority over the "Administration of Justice in the Province", including the "Constitution. Maintenance, and Organization" of provincial superior courts. The unique institutional feature of these courts is that by s. 96 of the *Constitution Act, 1867*, judges of provincial superior courts are appointed by the Governor General, not by the provinces. Responsibility for s. 96 courts is thus shared between the two levels of government, unlike either inferior provincial courts, or courts created under s. 101. Estey J., in *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.), at pp. 326-27, explained the unique nature of provincial superior courts in the following way:

> The provincial superior courts have always occupied a position of prime importance in the constitutional pattern of this country. They are the descendants of the Royal Courts of Justice as courts of general jurisdiction. They cross the dividing line, as it were, in the federal-provincial scheme of division of jurisdiction, being organized by the provinces under s. 92(14) of the [*Constitution Act, 1867*] and are presided over by judges appointed and paid by the federal government (sections 96 and 100 of the [*Constitution Act, 1867*]).

27 In addition to s. 129 providing for the post-Confederation continuation of provincial superior courts, s. 96 also impliedly contemplates their continued existence. The constitutional fact of their continued existence endorses their general jurisdiction and, in effect, guarantees a traditional core of superior court jurisdiction (*Reference re Residential Tenancies Act (Ontario)*, [1981] 1 S.C.R. 714 (S.C.C.); *Court of Unified Criminal Jurisdiction, Re*, [1983] 1 S.C.R. 704 (S.C.C.); *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 (S.C.C.). See also *Valin v. Langlois* (1879), 3 S.C.R. 1 (S.C.C.), at pp. 19-20; *Ontario (Attorney General) v. Pembina Exploration Canada Ltd.*, [1989] 1 S.C.R. 206 (S.C.C.), at p. 217; Hogg, "Federalism and the Jurisdiction of Canadian Courts" (1981), 30 *U.N.B.L.J.* 9).

28 The historical origins and constitutional basis of the Federal Court of Canada demonstrate its more particular, as opposed to general, jurisdiction. Section 101 of the *Constitution Act, 1867* authorizes Parliament to create "any additional Courts for the better Administration of the Laws of Canada". This it did, in 1875, with the establishment of the Exchequer Court, which was granted a very limited jurisdiction, confined to "cases in which demand shall be made or relief sought in respect of any matter which might in England be the subject of a suit or action in the Court of Exchequer on its revenue side against the Crown, or any officer of the Crown" (*Supreme and Exchequer Courts Act*, S.C. 1875, c. 11, s. 58). In 1887, and again in 1890 and 1891, this jurisdiction was expanded modestly, to cover intellectual property, other actions brought by the government, admiralty, and expropriation of land by the government (*An Act to amend "The Supreme and Exchequer Courts Act", and to make better provision for the Trial of Claims against the Crown*, S.C. 1887, c. 16; the *Colonial Courts of Admiralty Act, 1890* (U.K.), 53 & 54 Vict., c. 27; *The Exchequer Court Amendment Act, 1891*, S.C. 1891, c. 26, s. 4). From an interpretation of the Federal Court's constitutional origins in s. 101, Professor Hogg draws the following conclusions (in *Constitutional Law of Canada* (loose-leafed.), vol. 1, at p. 7-15):

> Section 101 does not authorize the establishment of courts of general jurisdiction akin to the provincial courts. It only authorizes courts for the 'better administration of the laws of Canada'. This has two important consequences. First, it means that the Federal Court of Canada has no inherent jurisdiction; its jurisdiction is confined to those subject matters conferred upon it by the Federal Court Act or other statute. Secondly, it means that the Federal Court can be given jurisdiction over only subject matters governed by the 'laws of Canada'.

Thus, even when squarely within the realm of valid federal law, the Federal Court of Canada is not presumed to have jurisdiction in the absence of an express federal enactment. On the other hand, by virtue of their general jurisdiction over all civil and criminal, provincial, federal, and constitutional matters, provincial superior courts do enjoy such a presumption.

29 This presumption is not a necessary incident of the structure of our Constitution. Section 101 empowers Parliament to create a federal court with *general* jurisdiction over the administration

of all federal law. For whatever reasons, Parliament has not chosen to create such a court. Moreover, the presumption is the product of a long line of jurisprudence which has responded to the constitutional and historical indications described above, rather than an explicit constitutional requirement. Apposite are the comments of Bora Laskin, later Chief Justice of Canada, who described the situation in 1969 (in *The British Tradition in Canadian Law*, at pp. 113-14):

> There has been no great need in Canada to establish a separate system of federal courts for federal law, because, as a mere matter of course, provincial courts have from the beginning of the Canadian federation exercised jurisdiction in disputes arising out of or involving federal law. Unlike the case in Australia, where the Constitution empowers the Commonwealth Parliament to invest the State courts with jurisdiction in federal matters, the British North America Act is not express on the matter. Inferentially, the legislative authority of the Provinces in relation to the administration of justice therein, and including the constitution, organisation and maintenance of provincial courts both of civil and criminal jurisdiction — without limitation as to matters within federal competence — is an indication of the availability of provincial courts for litigating federal causes of action and for enforcing federal criminal law.... They may be considered, *pro tanto*, as federal courts in so far as they administer federal law.
>
> ...This view of the omnicompetence of provincial superior courts was fed by a decision of the Privy Council, suggestive of inherent superior court jurisdiction, that (to use its words) "if the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the [Queen's] Courts of Justice". [Emphasis added.]

30 The case quoted by Laskin, *Board v. Board*, [1919] A.C. 956 (Alberta P.C.), concerned the jurisdiction of the provincial superior court in Alberta to deal with matters arising under the *Matrimonial Causes Act, 1857* ((U.K.), 20 & 21 Vict., c. 85). Although marriage and divorce fall within s. 91 of the *Constitution Act, 1867*, and the applicable English law was received into federal law as a consequence, the provincial superior court was held to have jurisdiction in the absence of any express federal enactment which conferred jurisdiction. The reason for this was quite simple. As of 1919, Parliament had only granted a very limited jurisdiction to the federal court system, as noted above, which did not include jurisdiction over marriage and divorce matters. By contrast, the *Supreme Court Act* of Alberta, S.A. 1907, c. 3, passed in 1907, expansively based the jurisdiction of the superior courts of that province on

> the jurisdiction which on July 15, 1870, was vested in, or capable of being exercised in England by (1.) the High Court of Chancery, as a Common Law Court, as well as a Court of Equity, including the jurisdiction of the Master of the Rolls as a judge or Master of the Court of Chancery, and any jurisdiction exercised by him in relation to the Court of Chancery as a common law Court; (2.) The Court of Queen's Bench; (3.) The Court of Common Pleas

> at Westminster; (4.) The Court of Exchequer as a Court of Revenue as well as a Common Law Court; (5.) The Court of Probate; (6.) The Court created by Commissioners of Oyer and Terminer, and of Gaol Delivery, or of any such Commissions.

(*Per* Viscount Haldane, at p. 960, referring to s. 9 of the Act.)

31 Perhaps as a result of an oversight, the English court responsible for divorces was not among those courts listed above. Nevertheless, the Privy Council held, on the basis of the Supreme Court of Alberta' s general jurisdiction, that "that Court was bound to entertain and to give effect to proceedings for making [the right of divorce] operative" (p. 962). In referring to its interpretation of the jurisdiction-conferring clause of Alberta's *Supreme Court Act* of 1907, the Privy Council explained its reasons for recognizing the jurisdiction of the Supreme Court of Alberta in the following manner (at pp. 962-63):

> ...a well-known rule makes it plain that the language there used ought to be interpreted as not excluding the jurisdiction. If the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the King's Courts of Justice. In order to oust jurisdiction, it is necessary in the absence of a special law excluding it altogether, to plead that jurisdiction exists in some other Court. This is the effect of authorities ... [The Alberta] Act set up a Superior Court, and it is the rule as regards presumption of jurisdiction in such a Court that, as stated by Willes J. in *London Corporation v. Cox* ((1867) L.R., 2 H.L. 239, 259), nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so.

32 The notion of "inherent jurisdiction" arises from the presumption that if there is a justiciable right, then there must be a court competent to vindicate the right. The issue addressed in *Board v. Board* was whether a failure to grant jurisdiction should be read as implicitly excluding jurisdiction. In that context, the doctrine of inherent jurisdiction requires that only an explicit ouster of jurisdiction should be allowed to deny jurisdiction to the superior court. In my view, the case does not stand for the fundamentally different proposition that statutes which purport to grant jurisdiction to another court should be read narrowly so as to protect the jurisdiction of the superior court. That is not the purpose of the doctrine of inherent jurisdiction, which is simply to ensure that a right will not be without a superior court forum in which it can be recognized. Although certain language in *Board v. Board* could be taken to stand for the former proposition, a reading of the entire case indicates that a choice was not being made between the jurisdiction of the s. 96 court and the jurisdiction of the federal court (which was extremely narrow at the time). The Privy Council simply did not consider the possible jurisdiction of the Exchequer Court in *Board v. Board*. The case was not an attempt to answer the question "which court?", but rather "is there a court?" The former question can only be determined by considering the constitutional, statutory and historical factors which I have canvassed above, while the latter can be dealt with by means

of the simple presumption that only an express ouster will deny jurisdiction to the superior court to hear such a case.

33 The statutory position of the Federal Court has changed since *Board v. Board*, a case in which the possible jurisdiction of the Exchequer Court was not even considered, because its jurisdiction at that time was so marginal. The passage of the *Federal Court Act* in 1971 substantially expanded the jurisdiction of the Exchequer Court (and changed its name to the Federal Court of Canada), and by necessary implication, removed jurisdiction over many matters from the provincial superior courts. The new Federal Court of Canada was granted an expanded jurisdiction, not only by specific enumeration of new subject matters, as, for example, in s. 23(*c*) of the Act, but also in a more general fashion. In essence, by virtue of ss. 3, 18, and 18.1, it was made a court of review and of appeal which stands at the apex of all the administrative decision-makers on whom power has been granted by individual Acts of Parliament. Significant confusion had developed prior to the Act as superior courts in different provinces reached conflicting outcomes as to the disposition of applications for judicial review from these administrative decision-makers, as to the proper test for standing, and as to the geographical reach of their decisions (I. Bushnell, *The Federal Court of Canada: A History, 1875-1992* (1997), at p. 159). The growth of administrative decision-makers adjudicating a myriad of laws within federal competence, without a single court to supervise that structure below the Supreme Court of Canada, created difficulties which an expanded Federal Court was intended to address.

34 These are the historical and constitutional factors which led to the development of the notion of inherent jurisdiction in provincial superior courts, which to a certain extent has been compared and contrasted to the more limited statutory jurisdiction of the Federal Court of Canada. But in my view, there is nothing in this articulation of the essentially remedial concept of inherent jurisdiction which in any way can be used to justify a narrow, rather than a fair and liberal, interpretation of federal statutes granting jurisdiction to the Federal Court. The legitimate proposition that the institutional and constitutional position of provincial superior courts warrants the grant to them of a residual jurisdiction over all federal matters where there is a "gap" in statutory grants of jurisdiction, is entirely different from the proposition that federal statutes should be read to find "gaps" unless the words of the statute explicitly close them. The doctrine of inherent jurisdiction raises no valid reasons, constitutional or otherwise, for jealously protecting the jurisdiction of provincial superior courts as against the Federal Court of Canada.

35 In my view, the doctrine of inherent jurisdiction operates to ensure that, having once analysed the various statutory grants of jurisdiction, there will always be a court which has the power to vindicate a legal right independent of any statutory grant. The court which benefits from the inherent jurisdiction is the court of general jurisdiction, namely, the provincial superior court. The doctrine does not operate to narrowly confine a statutory grant of jurisdiction; indeed, it says nothing about the proper interpretation of such a grant. As noted by McLachlin J. in *B.M.W.E., supra*, at para. 7, it is a "residual jurisdiction". In a federal system, the doctrine of

inherent jurisdiction does not provide a rationale for narrowly reading federal legislation which confers jurisdiction on the Federal Court.

36 As is clear from the face of the *Federal Court Act*, and confirmed by the additional role conferred on it in other federal Acts, in this case the *Human Rights Act*, Parliament intended to grant a general administrative jurisdiction over federal tribunals to the Federal Court. Within the sphere of control and exercise of powers over administrative decision-makers, the powers conferred on the Federal Court by statute should not be interpreted in a narrow fashion. This means that where an issue is clearly related to the control and exercise of powers of an administrative agency, which includes the interim measures to regulate disputes whose final disposition is left to an administrative decision-maker, the Federal Court can be considered to have a plenary jurisdiction.

37 In this case, I believe it is within the obvious intendment of the *Federal Court Act* and the *Human Rights Act* that s. 44 grant jurisdiction to issue an injunction in support of the latter. I reach this conclusion on the basis that the Federal Court does have the power to grant "other relief" in matters before the Human Rights Tribunal, and that fact is not altered merely because Parliament has conferred determination of the merits to an expert administrative decision-maker. As I have noted above, the decisions and operation of the Tribunal are subject to the close scrutiny and control of the Federal Court, including the transformation of the order of the Tribunal into an order of the Federal Court. These powers amount to "other relief" for the purposes of s.44.

38 In my view, this statutory jurisdiction is concurrent with the inherent jurisdiction of a provincial superior court in accordance with the principles of *B.M.W.E.*. There is no repugnance in the concept of a concurrent jurisdiction; indeed, it is common in our judicial structure. As one author has observed (T. A. Cromwell, "Aspects of Constitutional Judicial Review in Canada" (1995), 46 *S.C. L. Rev.* 1027, at p. 1030):

> The provincial superior courts and the purely provincial courts share large areas of concurrent jurisdiction, particularly in criminal law. While considerably less significant, there also is a good deal of overlap in the civil jurisdiction of the provincial superior courts and the Federal Court.

The standard for a complete ouster of the s. 96 court's jurisdiction is significantly higher than that for determining whether jurisdiction has been granted at all. This is appropriate because, as a result of our federal division of powers, the exercise of jurisdiction over the same matter is based on heads of power which are not mutually exclusive. An example of this lack of mutual exclusivity is provided in this Court's decision in *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631 (S.C.C.), which involved a challenge to the Justice Minister's decision not to exercise his discretionary authority to refuse to extradite the appellant. Review of that decision was conferred on the Federal Court by virtue of s. 18 of the *Federal Court Act*, which granted jurisdiction based on the identity of the decision-maker as a Federal Minister. The appellant sought a writ of *habeas*

corpus and a writ of *certiorari* in aid to quash the warrant of surrender on the grounds of improper procedures followed by the Minister. Vindication of the liberty interest through the writ of *habeas corpus* is a traditional function of as. 96 court. I note that in the case at bar there is a similar asymmetry: on the one hand, the granting of an injunction generally is a traditional function of s. 96 courts; on the other hand, the issuance of *this* injunction is integrally connected to the functioning of an administrative tribunal under the supervisory jurisdiction of the Federal Court. In considering whether the latter jurisdiction had been displaced or ousted by virtue of the *Federal Court Act*, Cory J. for a unanimous Court on this point said, at p. 651:

> The *Federal Court Act* does not remove the historic and long standing jurisdiction of provincial superior courts to hear an application for a writ of *habeas corpus*. To remove that jurisdiction from the superior courts would require clear and direct statutory language such as that used in the section referring to members of the Canadian Forces stationed overseas. It follows that the respondents fail in their contention that the Federal Court has exclusive jurisdiction in this matter. Rather it is clear that there is concurrent jurisdiction in the provincial superior courts and the Federal Court to hear all *habeas corpus* applications other than those specified in s. 17(6) [pertaining to the Canadian Forces] of the *Federal Court Act*.

The same standard was articulated in *Pringle v. Fraser*, [1972] S.C.R. 821 (S.C.C.), at p. 826. That standard of "clear and direct statutory language" is not satisfied in this case and, therefore, the jurisdiction of the Federal Court is concurrent with that of the provincial superior court.

39 As is clear, I have taken a different approach here with respect to s. 44 from that which I took in the previous section regarding an implied grant of authority within the *Human Rights Act*, read on its own. The reason for this should be made explicit. Many federal Acts do not provide for the exercise of administrative decision-making authority. Where that is the case, the reasoning adopted here with respect to the broad supervisory jurisdiction of the Federal Court is inapplicable.

40 I do not believe that anything in this approach undermines the special position of s. 96 courts, or that there is any likelihood of s. 101 courts acting beyond their constitutional competence. The third requirement of the *Miida, supra*, test — that the law be a constitutionally valid law of Canada — guarantees that from a doctrinal perspective. From an institutional perspective, I believe the ultimate guarantee is provided by this Court, whose purpose is to serve as the court of appeal for the federal and each provincial superior court system, and to ensure that each remains within its jurisdictional limits. Nor should anything which I have said in the foregoing be taken to undermine the long-established principle that where there is no federal law in a matter of federal jurisdiction, provincial superior courts continue to have jurisdiction by virtue of the doctrine of inherent jurisdiction. Even where federal law has been enacted, but there is no administrative decision-maker subject to the operation of the *Federal Court Act* or any other grant of jurisdiction to the Federal Court in the Act in question, then s. 96 courts continue to exercise an inherent jurisdiction.

41 Before this Court and in the courts below, it has been suggested that the finely balanced and tailored scheme of remedies contained in the *Human Rights Act* amounts to an implied ouster of the jurisdiction of the Federal Court. I would agree with McLachlin J. in *B.M.W.E.* who, when confronted with similar arguments, found that "[t]hese arguments go not to jurisdiction, but to whether, assuming jurisdiction, it was appropriate to grant the interim injunction" (para. 12). I will turn to that question in due course. Moreover, I would also agree with her observation in that case that an injunctive remedy will not be available where there is an adequate, alternative remedy conferred by statute on some other decision maker. If there is, then no jurisdiction should be found in the Federal Court under s. 44.

(iv) Section 23(c) of the Federal Court Act

42 At the hearing, the appellant suggested that another ground of jurisdiction could be found in s. 23(c) of the *Federal Court Act*. Given my finding in the previous section, and the lack of argument or supporting evidence presented by the parties, I consider it prudent to express no opinion on this submission.

Does Federal Law "Nourish" the Grant?

43 The requirement that there be valid federal law which nourishes the statutory grant of jurisdiction serves primarily to ensure that federal courts are kept within their constitutionally mandated sphere. As Wilson J. noted in *Wewayakum Indian Band*, *supra*, the second and third requirements set out in *Miida, supra*, of a nourishing body of federal law, and its constitutional validity, go hand in hand:

> While there is clearly an overlap between the second and third elements of the test for Federal Court jurisdiction, the second element, as I understand it, requires a general body of federal law covering the area of the dispute, i.e., in this case the law relating to Indians and Indian interests in reserve lands ... [Emphasis added.]

The dispute over which jurisdiction is sought must rely principally and essentially on federal law. If the dispute is only tangentially related to any corpus of federal law, then there is a possibility that assuming jurisdiction would take the Federal Court out of its constitutionally mandated role.

44 This case presents no such difficulties. The only relevant law that could cover the facts of this case is the *Human Rights Act*, confined as it is to the federal jurisdiction over telephonic means of communication. The prescription on which the Commission seeks to base the claim for an injunction is solely and exclusively s. 13(1) of the *Human Rights Act*. That is the normative root of its claim, and it clearly nourishes the statutory grant which I have found is conferred on the Federal Court. Whether an interlocutory power of restraint is conferred by federal law is best dealt with exclusively by the more nuanced and direct jurisprudence relating to the existence of

a statutory grant. Once that issue is decided, the nourishment requirement should not be used to subvert the conclusion of that analysis, but rather to ensure that the statutory grant is being exercised in a constitutionally valid manner. That is clearly the case here, and I find that the substantive provisions of the *Human Rights Act* nourish the statutory grant.

45 The appeal of the decision of the Court of Appeal on jurisdiction is therefore allowed with costs.

Second Question: Was the Exercise of Jurisdiction Appropriate?

46 Rule 469(3) of the *Federal Court Rules*, C.R.C., c. 663, states:

> The plaintiff may not make an application under this Rule before commencement of the action except in case of urgency, and in that case the injunction may be granted on terms providing for the commencement of the action and on such other terms, if any, as seem just.

Considerable argument before this Court and in the courts below was devoted to extrapolating the meaning of this provision based upon the landmark decision in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (U.K. H.L.), whose methodology was generally approved by this Court in *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.), at pp. 128-29, and reaffirmed in *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), at pp. 332-333. The three-stage test was defined in the latter case as follows (*per* Sopinka and Cory JJ., at p. 334):

> First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

The appellants sought to fine-tune each of these elements in order to respond to the initial perception that they set the threshold fairly low in a case such as this one. In particular, they recommended that the initial criterion of "serious question to be tried" be raised to a "strong *prima fade* case". They also urged that in considering the balance of convenience criterion, the public interest ought to be weighed against the individual interests of the speaker at the balance of convenience stage.

47 In my view, the *Cyanamid* test, even with these slight modifications, is inappropriate to the circumstances presented here. The main reason for this is that *Cyanamid*, as well as the two other cases mentioned above, involved the commercial context in which the criteria of "balance of convenience" and "irreparable harm" had some measurable meaning and which varied from case to case. Moreover, where expression is unmixed with some other commercial purpose or activity,

it is virtually impossible to use the second and third criteria without grievously undermining the right to freedom of expression contained in 2(*b*) of the *Charter*. The reason for this is that the speaker usually has no tangible or measurable interest *other than the expression itself*, whereas the party seeking the injunction will almost always have such an interest. This test developed in the commercial context stacks the cards against the non-commercial speaker where there is no tangible, immediate utility arising from the expression other than the freedom of expression itself.

48 The inappropriateness of the *Cyanamid* test is confirmed by the jurisprudence relating to injunctions against allegedly defamatory statements, in both England and Canada. In both countries, the *Cyanamid* test has been rejected for injunctions against dissemination of defamatory statements. Although defamation does not possess precisely the same characteristics as discriminatory hate speech, it is a much closer analogy than restraining commercial activity, even where that commercial activity includes a speech element. Defamation typically involves damage to only one person's reputation and not an entire group. On the other hand, given the widespread circulation of many defamatory statements in the press and the crystallized damage which a defamatory statement may have, compared with the slow, insidious effect of a relatively isolated bigoted commentary, the two are not necessarily substantially different in terms of the "urgency" requirement. Certainly from the point of view of the rights of the speaker, bigotry and defamation cases both represent potentially low-or no-value speech and are in that sense, extremely similar. It is therefore helpful to look at the approach to injunctions in cases of defamatory speech to determine how "urgency" should be defined in the context of s. 13(1) of the *Human Rights Act*.

49 In his treatise *Injunctions and Specific Performance* (2nd ed. 1992 (loose-leaf)), Robert Sharpe says the following, at paras. 5.40-5.70 (pp. 5.2-5.4):

> There is a significant public interest in the free and uncensored circulation of information and the important principle of freedom of the press to be safeguarded....
>
> The well-established rule is that an interlocutory injunction will not be granted where the defendant indicates an intention to justify [ie. prove the truth of] the statements complained of, unless the plaintiff is able to satisfy the court at the interlocutory stage that the words are both clearly defamatory and impossible to justify.
>
> ...it seems clear that the rule is unaffected by the *American Cyanamid* case and that the balance of convenience is not a factor.

One of the leading English authorities has a close affinity to the *Human Rights Act* in that it was a statutory prohibition on certain expression. *Herbage v. Pressdram Ltd.*, [1984] 1 W.L.R. 1160 (Eng. C.A.), involved the application of the *Rehabilitation of Offenders Act 1974*, which had been enacted by Parliament to prevent indefinite reference to an individual's criminal history, after the individual had served his or her sentence. Based on that specific legislative intention, contended

the applicant, an injunction should be issued. Griffiths L.J. (on behalf of himself and Kerr L.J. on a two-judge panel) rejected that approach (at p. 1163):

> If the court were to accept this argument, the practical effect would I believe be that in very many cases the plaintiff would obtain an injunction, for on the *American Cyanamid* principles he would often show a serious issue to be tried, that damages would not be realistic compensation, and that the balance of convenience favoured restraining repetition of the alleged libel until trial of the action. It would thus be a very considerable incursion into the present rule which is based on freedom of speech.

In *Rapp v. McClelland & Stewart Ltd.* (1981), 34 O.R. (2d) 452 (Ont. H.C.), Griffiths J. attempted to define the precise threshold for the granting of an injunction in the following terms (at pp. 455-56):

> The guiding principle then is, that the injunction should only issue where the words complained of are so manifestly defamatory that any jury verdict to the contrary would be considered perverse by the Court of Appeal. To put it another way where it is impossible to say that a reasonable jury must inevitably find the words defamatory the injunction should not issue.
>
> ...*American Cyanamid* ... has not affected the well established principle in cases of libel that an interim injunction should not be granted unless the jury would inevitably come to the conclusion that the words were defamatory. [Emphasis added.]

This passage has recently been cited with approval in the Quebec Court of Appeal in *CEGEP de Jonquière c. Champagne*, [1997] R.J.Q. 2395 (Que. C.A.). Rothman J.A., on this point speaking on behalf of Delisle and Robert JJ.A., went on to comment on the constitutional dimension of these common law approaches to the use of the injunctive power (at pp. 2402-3):

> With the coming into force of the Canadian Charter and the Quebec Charter, these safeguards protecting freedom of expression and freedom of the press have become even more compelling.
>
> The common law authorities in Canada and the United Kingdom have suggested the guiding principle that interlocutory injunctions should only be granted to restrain in advance written or spoken words in the rarest and clearest of cases — where the words are so manifestly defamatory and impossible to justify that an action in defamation would almost certainly succeed. Given the value we place on freedom of expression, particularly in matters of public interest, that guiding principle has much to recommend it. [Emphasis added.]

These cases indicate quite clearly that the *Cyanamid* test is not applicable in cases of pure speech and, therefore, the appellants are misguided in presuming that this test does apply. As Griffiths L.J.

points out in *Herbage v. Pressdram, supra*, such a test would seldom, if ever, protect controversial speech. Nor do I believe that the modifications suggested by the appellants sufficiently relieve that problem. The same tests discussed here with respect to restraining potentially defamatory speech should be applied in cases of restraint of potential hate-speech, subject to modification which may prove necessary given the particular nature of bigotry as opposed to defamation. As the question now before us is moot, and as the parties did not address themselves to the appropriate tests, it would be inappropriate to speculate here as to how such distinctions might affect the analysis, if at all.

50 The second factor affecting the exercise of jurisdiction in this case is that the very constitutionality of s. 13(1) is predicated on the absence of remedies of this kind existing in the scheme of the Act. A major issue in *Taylor*, *supra*, which followed on the heels of *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), where the hate speech provision of the *Criminal Code* was narrowly upheld, was whether the absence of an intent requirement ins. 13(1) of the *Human Rights Act* rendered it impermissibly broad under the *Oakes* criteria. On that point, Dickson C.J. stated (at p. 932):

> In coming to this conclusion, I do not mean to say that the purpose of eradicating discrimination in all its forms can justify any degree of impairment upon the freedom of expression, but it is well to remember that the present appeal concerns an infringement of s. 2(*b*) in the context of a human rights statute. The chill placed upon open expression in such a context will ordinarily be less severe than that occasioned where criminal legislation is involved, for attached to a criminal conviction is a significant degree of stigma and punishment, whereas the extent of opprobrium connected with the finding of discrimination is much diminished and the aim of remedial measures is more upon compensation and protection of the victim. [Second emphasis added.]

The constitutional concerns expressed in the *Rapp* and *CEGEP de Jonquière* cases mirror those of Dickson C.J. In my view, those tests would confine the issuance of an injunction to cases where it would be constitutionally justifiable. Elaborations of that test in the context of enforcement of s. 13(1) must be mindful of the guarantee of freedom of expression in the *Charter*. Given the mootness of the disposition of the appeal on this point, I refrain from expressing an opinion on the application of these principles to this case.

Third Question: Was Liberty Net in Contempt of Court?

51 On this issue, the appellants argue that they were not in contempt on two separate grounds. Their first ground of attack has to do with the validity of the order. As I have found above that the Federal Court had jurisdiction to issue the order, at its highest, the appellants can only suggest that that jurisdiction was exercised wrongly. Such an order is neither void nor nugatory, and violation of

334 its terms constitutes contempt of court. The words of McLachlin J. in *Taylor*, *supra*, at pp. 974-75, are both definitive and eloquent on this point:

> In my opinion, the 1979 order of the Tribunal, entered in the judgment and order book of the Federal Court in this case, continues to stand unaffected by the *Charter* violation until set aside. This result is as it should be. If people are free to ignore court orders because they believe that their foundation is unconstitutional, anarchy cannot be far behind. The citizens' safeguard is in seeking to have illegal orders set aside through the legal process, not in disobeying them.
>
> ...For the purposes of the contempt proceedings, [the order] must be considered to be valid until set aside by legal process. Thus, the ultimate invalidity of the order is no defence to the contempt citation.

52 The appellants' second ground of attack is that the contempt order is inapplicable because it seeks to restrain conduct taking place outside of Canada, and, therefore, beyond the territorial jurisdiction of the Federal Court of Canada. This argument is misguided. The violation being impugned here is not the existence of the phone number in the United States without more, but rather the combined effect of that American phone number with the offending messages, and the referral message to that phone number on Liberty Net's old line. The gravamen of the violation of the order is the communication of the offending messages; that communication takes place by virtue of the advertisement on the Canadian phone line and the broadcast of the message on the American phone line. The former element took place "by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament", as provided for under s. 13 of the *Human Rights Act*. As long as at least part of an offence has taken place in Canada, Canadian courts are competent to exert jurisdiction. As La Forest J. articulates the principle in *R. v. Libman*, [1985] 2 S.C.R. 178 (S.C.C.), at pp. 212-13:

> As I see it, all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there be a "real and substantial link" between an offence and this country, a test well-known in public and private international law...

This case does not even test the outer limits of that principle. There was here an advertisement for a message which violated the terms of the order, and that advertisement was made in Canada, on the very phone line where the offending messages had formerly been available, and this advertisement was done with knowledge of the content of those messages and with knowledge that that content violated the terms of the order of Muldoon J.

53 The defendants knowingly violated the order of Muldoon J. and were properly found to be in contempt of court by Teitelbaum J.

54 The second appeal is dismissed with costs.

***McLachlin* and *Major JJ.* (dissenting in part):**

55 We have read the reasons of Justice Bastarache. We agree with him that there is no implied grant of jurisdiction to the Federal Court in the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. As well, we agree that the appeal on the contempt conviction should be dismissed. We disagree with his conclusion on s. 44 of the *Federal Court Act*, R.S.C. 1985, c. F-7.

I. Facts

56 The facts are set out in the decision of Bastarache J.

II. Issues

57 There are two issues in these appeals. The first issue arises out of the original order of Muldoon J. ([1992] 3 F.C. 155 (Fed. T.D.)) enjoining the Canadian Liberty Net from operating its telephone message service. The second issue concerns the contempt order issued by Teitelbaum J. ([1992] 3 F.C. 504 (Fed. T.D.)) in response to the relocation of the Canadian Liberty Net to the State of Washington in the United States of America.

A. Did The Federal Court Have Jurisdiction To Issue An Injunction?

58 The Federal Court of Canada is a statutory court that derives all its jurisdiction from the *Federal Court Act*. The traditional jurisdiction test for that court is set out by McIntyre J. in *Miida Electronics Inc. v. Mitsui O.S.K. Lines Ltd.*, [1986] 1 S.C.R. 752 (S.C.C.), at p. 766:

> 1. There must be a statutory grant of jurisdiction by the federal Parliament.
>
> 2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
>
> 3. The law on which the case is based must be a "law of Canada" as the phrase is used ins. 101 of the *Constitution Act, 1867*.

59 The first test requires a party seeking to bring a matter before the Federal Court to find an express or implied grant of jurisdiction. In this appeal that jurisdiction will be found if at all in the *Canadian Human Rights Act* or the *Federal Court Act*. Neither of these statutes provides jurisdiction to the Federal Court of Canada to issue an injunction in aid of the Canadian Human Rights Commission pending the determination of a complaint by a Human Rights Tribunal.

(1) Grant of Authority Under s. 25 of the Federal Court Act

60 The jurisdiction sections of the *Federal Court Act* exhaustively enumerate all cases over which the Federal Court, Trial Division has jurisdiction. Save for s. 25, it is evident that none of the provisions grant the Federal Court, Trial Division jurisdiction to issue the injunction sought in this appeal.

61 Section 25 reads:

> **25.** The Trial Division has original jurisdiction, between subject and subject as well as otherwise, in any case in which a claim for relief is made or a remedy is sought under or by virtue of the laws of Canada if no other court constituted, established or continued under any of the *Constitution Acts, 1867 to 1982* has jurisdiction in respect of that claim or remedy. [Emphasis added.]

62 Section 25 grants limited original jurisdiction when there is no other court that can hear the matter. Only in the absence of a forum to rule on ajusticiable right is the Federal Court able to rely upon s. 25. This appeal does not qualify as such a case. In *B.M.W.E. v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495 (S.C.C.), McLachlin J., writing for a unanimous nine-member Court, held that a s. 96 provincial superior court's inherent jurisdiction allowed it to issue an interim "free-standing" injunction in response to a gap in the *Canada Labour Code*.

63 Section 25 does not support the appellant's claim that the Federal Court has jurisdiction because another court, the Supreme Court of British Columbia, has jurisdiction to issue the precise injunction. While concurrent jurisdiction between the Federal Court and provincial superior courts exists in limited circumstances it is inconsistent with our primarily unitary court system. In *Reference re Residential Tenancies Act (Ontario)*, [1981] 1 S.C.R. 714 (S.C.C.), at p. 728, Dickson J. (as he then was) noted the importance of maintaining this system:

> Section 92(14) and ss. 96 to 100 represent one of the important compromises of the Fathers of Confederation.... What was conceived as a strong constitutional base for national unity, through a unitary judicial system, would be gravely undermined.

Interpretations that result in concurrent jurisdiction are undesirable as they not only detract from our unitary court system, but inevitably result in forum shopping.

(2) Implied Grant Of Authority From the Canadian Human Rights Act

64 The Human Rights Commission position was that a careful examination of the *Canadian Human Rights Act* reveals an implied grant of statutory authority to issue an injunction. We agree with Bastarache J. that the scheme of the *Canadian Human Rights Act* does not contemplate the Federal Court granting injunctive relief in support of alleged breaches of the Act. An implied grant of jurisdiction has previously been recognized by the Federal Court of Appeal only when

an injunctive remedy was a necessary incident to a Tribunal's function (*New Brunswick Electric Power Commission v. Maritime Electric Co.*, [1985] 2 F.C. 13 (Fed. C.A.)). That is not the situation in this appeal.

65 On the contrary, the *Canadian Human Rights Act* arguably negates the power of the Federal Court to grant injunctions restraining speech before a tribunal finds a contravention of s. 13(1) of the Act. Section 13 is the only provision in the Act dealing with communications. It is restricted to repeated communications by telephone likely to expose persons to hatred or contempt identification on the basis of a prohibited ground of discrimination. This Court upheld s. 13 on the basis that its ambit was narrow: *Canada (Canadian Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 (S.C.C.). Parliament has adopted a narrow and measured approach to the question of when human rights concerns can trump the constitutional right of free speech. While we agree with Bastarache J. that these concerns might appropriately be raised at the point of applying for an injunction, this does not negate the point that nothing in the *Canadian Human Rights Act* suggests that Parliament intended by that Act to confer on the Federal Court the right to restrain speech alleged to violate the *Canadian Human Rights Act* prior to a hearing by the Commission. On the contrary, the Act suggests that Parliament was willing to trench on free speech only in very particular circumstances.

(3) Section 44 of the Federal Court Act

66 Section 44 was raised by several of the parties as a possible source of jurisdiction for allowing the Federal Court to grant the injunction.

> **44.** In addition to any other relief that the Court may grant or award, a *mandamus*, injunction or order for specific performance may be granted or a receiver appointed by the Court in all cases in which it appears to the Court to be just or convenient to do so, and any such order may be made either unconditionally or on such terms and conditions as the Court deems just.

The jurisdictional inquiry is twofold: Does s. 44 grant jurisdiction to issue an injunction and does s. 44 provide jurisdiction to grant "free-standing" injunctions? The key words in s. 44 are "[i]n addition to any other relief that the Court may grant or award". Two interpretations are possible. The appellant argues that "in addition to" refers to the Federal Court's independent ability to grant any relief or remedy. In contrast, the respondents argue that "in addition to" should be read as a limiting clause, which only permits the exercise of injunctive power that is "ancillary to" other preexisting remedies that the Court can grant. We agree with Pratte J.A. and prefer the latter interpretation.

67 In our view, the words "[i]n addition to any other relief that the Court may grant or award" indicate that s. 44 is an ancillary provision, and does not itself grant jurisdiction to the Federal Court, Trial Division. In order to avail itself of s. 44 the Federal Court must possess pre-existing jurisdiction over the subject matter at hand. A similar view was expressed by Rouleau J. in *C.U.P.E.*

v. Canadian Broadcasting Corp., [1991] 2 F.C. 455 (Fed. T.D.), where he held that s. 44 could not independently authorize the Federal Court to grant injunctive relief when the Court was not vested with jurisdiction under the *Federal Court Act*.

68 Clearly, the Federal Court, Trial Division does not have jurisdiction to hear or determine a complaint based on the *Canadian Human Rights Act*. That task is exclusively assigned to the Canadian Human Rights Commission. It follows that s. 44 does not clothe the Federal Court with jurisdiction to grant an interlocutory injunction.

69 The structure of the *Federal Court Act* is indicative of Parliament's intent with respect to s. 44 and the jurisdiction of the Federal Court. The Act is divided into divisions with each division set off by a bold heading. Section 44 appears within the division of the *Federal Court Act* headed "Substantive Provisions", as opposed to the division titled "Jurisdiction Of Trial Division". We are here concerned with an issue of jurisdiction. If the power to grant injunctions in a case such as this is to be found in the *Federal Court Act*, we would expect to find it in ss. 17 to 26, not in s. 44, which finds its place among the residual housekeeping sections of the Act.

70 As the Federal Court, Trial Division is a statutory court, there is no persuasive reason to interpret s. 44 in a broad manner. Bastarache J. sets out a number of other statutory provisions in his judgment that he reasons aid in ascertaining the proper interpretation of s. 44. Unlike a provincial superior court, the Federal Court's jurisdiction is limited by the statute and does not include residual or inherent jurisdiction. Wilson J. in *Wewayakum Indian Band v. Canada*, [1989] 1 S.C.R. 322 (S.C.C.), at p. 331, stated:

> The statutory grant of jurisdiction by Parliament to the Federal Court is contained in the *Federal Court Act*. Because the Federal Court is without any inherent jurisdiction such as that existing in Provincial Superior Courts, the language of the Act is completely determinative of the scope of the Court's jurisdiction.

71 Clearly, it would be contrary to the explicit language of the *Federal Court Act* and well-established jurisprudence of this Court to recognize jurisdiction that was not conferred on the Federal Court by Parliament. While the provincial superior courts and the Federal Court are both created by statute, the inherent jurisdiction of the s. 96 superior courts is an important distinguishing feature. Their inherent or residual nature was recognized in *Valin v. Langlois* (1879), 3 S.C.R. 1 (S.C.C.), and by the Privy Council in *Board v. Board*, [1919] A.C. 956 (Alberta P.C.), and in 1982 Estey J. in *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.), at pp. 326-27, stated:

> The provincial superior courts have always occupied a position of prime importance in the constitutional pattern of this country. They are the descendants of the Royal Courts of Justice as courts of general jurisdiction. They cross the dividing line, as it were, in the federal-provincial scheme of division of jurisdiction, being organized by the provinces under s. 92(14)

of the *Constitution Act* and are presided over by judges appointed and paid for by the federal government (sections 96 and 100 of the *Constitution Act*.)

72 The appellant is not prevented from seeking an injunction. The only question is: where does it find jurisdiction? It is clear from the *B.M.W.E., supra*, decision that a provincial superior court has the jurisdiction to issue an injunction in the present circumstances.

73 Given the result we have reached it is not necessary to determine the ability of the Federal Court to grant "free-standing" interim injunctions. We would dismiss this appeal on the ground that the Federal Court does not have jurisdiction to grant an injunction under the circumstances of this case.

B. Was Liberty Net in Contempt of Court?

74 The appellants were held in contempt of court by Teitelbaum J. for violating the injunction issued by Muldoon J. McAleer and Canadian Liberty Net argued that if the injunction was issued without jurisdiction it was void, and therefore the conviction should be set aside. We disagree and concur in the result of Bastarache J. and would dismiss the appeal.

Commission's Appeal allowed.

Respondents' Appeal dismissed.

Appel de la Commission accueilli.

Appel des défendeurs rejeté.

2017 FC 1131, 2017 CF 1131
Federal Court

Canadian Council For Refugees v. Canada (Immigration, Refugees and Citizenship)

2017 CarswellNat 7863, 2017 CarswellNat 8118, 2017 FC 1131,
2017 CF 1131, 289 A.C.W.S. (3d) 289, 42 Admin. L.R. (6th) 258

THE CANADIAN COUNCIL FOR REFUGEES AMNESTY INTERNATIONAL THE CANADIAN COUNCIL OF CHURCHES ABC DE [BY HER LITIGATION GUARDIAN ABC] AND FG [BY HER LITIGATION GUARDIAN ABC] (Applicants) and THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP ANDTHE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS (Respondents)

Alan S. Diner J.

Heard: November 16, 2017
Judgment: December 11, 2017
Docket: IMM-2977-17

Counsel: A. Brouwer, H. Neufeld, E. Simpson, K. Webster, P. Balasundaram, for Applicants
M. Anderson, L. Gregory, N. Prasad, for Respondents

***Alan S. Diner J.*:**

I. Introduction

1 The Respondents bring this motion for a final determination of whether the Canadian Council for Refugees [CCR], Amnesty International [Amnesty], and the Canadian Council of Churches [CCC — together, the Organizations], meet the test for public interest standing. Having considered the parties' submissions and reviewed the law, I have decided that (i) the question of public interest standing should be finally decided now, at this early stage of the proceeding, and (ii) the Organizations meet the test for public interest standing.

II. Background

2 This application for leave and judicial review [Application] was brought by the Organizations, and an El Salvadorian mother and her two children [Family] whose names are protected by a confidentiality order.

3 The Application seeks leave to judicially review the July 5, 2017 decision of a Canadian Border Services Agency officer who found that the Family was ineligible to be referred to the Refugee Protection Division under section 101(1)(e) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and section 159.3 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations]. The Application challenges the constitutionality of these provisions and the ongoing designation of the United States as a "Safe Third Country" [STC] under IRPA and the Regulations.

4 By order dated July 6, 2017, Justice McDonald stayed the return of the Family to the United States, pending the determination of this Application. However, leave has not yet been decided, as the Respondents brought this motion prior to the perfection of the Application.

5 Two other applications for judicial review have been brought against the Respondents that also challenge the constitutionality of STC provisions in respect of the United States. The first, IMM-775-17, for which leave was granted on July 25, 2017, involves four individual applicants, Mohammad Majd Maher Homsi and her three children [*Homsi*]. Leave was granted in the second application, IMM-2229-17, brought by Nedira Jemal Mustefa, on December 11, 2017 [*Mustefa*]. A decision on a request to consolidate those two proceedings and the instant Application has been deferred until after this leave has been determined.

6 *Mustefa*, *Homsi*, and this Application are not the first time that STC constitutionality within IRPA and the Regulations has been challenged: the Organizations themselves did so successfully over ten years ago in *Canadian Council for Refugees v. R.*, 2007 FC 1262 (F.C.) [*CCR* (FC)], in which Justice Phelan granted them public interest standing. However, *CCR (FC)* was overturned when the Federal Court of Appeal [FCA] found there was "no factual basis" underlying the constitutional challenge. The FCA decided that such a basis had to be advanced by a refugee in order to provide the "proper factual context" (*Canadian Council for Refugees v. R.*, 2008 FCA 229 (F.C.A.) at paras 101-103 [*CCR* (FCA)], leave to appeal ref'd 2009 CarswellNat 3778 (S.C.C.) (WL Can)].

7 These two cases, decided nearly a decade ago, remain important because the same Organizations have once again asserted public interest standing in this Application, which raises substantially the same constitutional challenges. Thus, the reasoning of the FCA in *CCR (FCA)* has some bearing on the current issue of public interest standing, as will be further discussed below.

III. Analysis

A. What is the nature of this motion?

8 The Respondents have, at this preliminary stage of the Application, moved for an order "striking" the Organizations as parties. The underlying argument is that the Organizations do not meet the test for public interest standing.

9 It is to be remembered that this Application was brought under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [Act]. Section 18.4(1) of the Act directs that applications made under section 18.1 must be heard and determined without delay and in a summary way. Preliminary determinations of any kind are discouraged (*Z. (Y.) v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 892 (F.C.) at para 37 [*YZ*]).

10 In other words, the type of relief sought by the Respondents is infrequently entertained by this Court. For that reason, I must be clear on what the nature of the Respondents' motion is, as that will affect which authorities govern, the applicable burden of proof, the legal standards to be met, and the finality of any determinations made. To that end, I will first provide the procedural context of this motion and my analysis on the Court's jurisdiction to entertain it at this stage of the Application.

(1) Procedural context of this motion

11 By notice of motion filed September 5, 2017, the Respondents moved under Rules 367 and 369 of the *Federal Courts Rules*, SOR/98-106 [Rules], as well as section 18.1(1) of the Act, for an order "striking" the Organizations as parties because they "improperly purported to be Applicants". The Respondents argued that the Organizations did not meet the test for public interest standing, and asserted that it was improper for them to have asserted standing in the notice of application along with the Family, as opposed to first seeking a grant of standing from the Court.

12 Although the Organizations maintained, in response, that they met the test for public interest standing, they objected to the Respondents' motion on the basis that it was premature and brought in writing. On the point of the Respondents' allegations of impropriety, the Organizations relied upon this Court's decision in *Z. (Y.)*, submitting that public interest parties need not prove standing on a preliminary basis.

13 Following a case management conference with the parties, I ordered that the motion be heard orally and invited further submissions on this Court's jurisdiction to "strike" the Organizations for lack of standing at this juncture, including whether Rule 221 and its attendant jurisprudence had any relevance.

14 Rule 221, entitled "Motion to strike", permits the Court to strike out a pleading or dismiss an action where, for instance, it discloses no reasonable cause of action. The test on such a motion is whether it is "plain and obvious" that the action cannot succeed (*Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 (S.C.C.) at paras 17 and 22). Although Rule 221 does not apply directly

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to applications, this Court may, by analogy to Rule 221 and through its plenary jurisdiction to control its own process, strike out or dismiss an application where it is "so clearly improper as to be bereft of any possibility of success" (*Pharmacia Inc. v. Canada (Minister of National Health & Welfare)*, [1995] 1 F.C. 588 (Fed. C.A.) at 600 [*David Bull*]; *JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue*, 2013 FCA 250 (F.C.A.) [*JP Morgan*] at paras 47-48; *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54 (S.C.C.) at para 72 [*Windsor*]). The language of "plain and obvious" therefore remains useful on motions to strike applications (*Apotex Inc. v. Canada (Governor in Council)*, 2007 FCA 374 (F.C.A.) at para 16 [*Apotex*]; *Windsor* at paras 24 and 72).

15 In their further written submissions, the Respondents argued that theirs was not a motion to strike under the aegis of Rule 221, but rather a motion to remove the Organizations as parties, pursuant to Rule 369 and section 18.1(1) of the Act. The Respondents also invoked the Court's inherent jurisdiction to control its process, as well as Rule 104(1)(a), whereby the Court may remove an improper or unnecessary party from a proceeding (*Sakibayeva v. Canada (Minister of Citizenship & Immigration)*, 2007 FC 1045 (F.C.) (at para 5) [*Sakibayeva*]).

16 The Organizations, on the other hand, submitted that neither Rule 104(1)(a) nor *Sakibayeva* were of assistance. Instead, they characterized the Respondents' request as a "motion to strike" governed by the jurisprudence of the FCA in *JP Morgan* and *Apotex*, which follow *David Bull*. Generally, as I will explain further below, the *David Bull* line of cases set a high bar for any preliminary determination in an application, including on the basis of lack of standing.

17 I note that, in their initial written submissions, the Respondents relied upon *David Bull* and referred this Court to several other cases — including *Klippenstein v. R.*, 2014 FCA 216 (F.C.A.) — which determined strike motions brought under Rule 221. However, in their further written submissions and at the hearing, the Respondents endeavored to distance this motion from the *David Bull* cases and situate it under Rule 104(1)(a) instead, although they did not provide this Court with any authority that squarely addressed a preliminary determination of public interest standing under Rule 104(1)(a), despite being asked whether one existed during the hearing.

18 In the end result, I am not persuaded that Rule 104(1)(a) permits this Court to simply disregard the *David Bull* cases addressing preliminary determinations of standing in applications for judicial review, to which I will now turn.

(2) Determinations of standing in applications

19 A party may assert public interest standing by naming itself as an applicant in a notice of application. The Respondents have submitted, however, that this Court should discourage public interest organizations from doing so, arguing that public interest standing is "wholly improper" without a motion.

20 This Court disposed of similar arguments in *Z. (Y.)*, where the application was brought by an individual directly affected by the decision, along with the Canadian Association of Refugee Lawyers [CARL], which asserted public interest standing in the notice of application. Justice Boswell held at paragraph 37 of *Z. (Y.)* that no rule requires a party to prove public interest standing by preliminary motion, and that such a rule would be contrary to the guidance of the Supreme Court of Canada in *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 (S.C.C.), which states that standing cannot always be properly determined on a preliminary basis.

21 Thus, a party may assert standing when an application is commenced, and need not seek it by preliminary motion. In such cases, a party's standing to bring the application will typically be dealt with at the hearing on the merits. That occurred, for instance, in both *CCR (FC)* and *Z. (Y.)*, and it is consistent with the policy mandated in section 18.4(1) of the Act, that applications be heard in a summary manner. Nevertheless, where public interest standing is asserted in the notice of application, it is also possible for the Court to address the issue of standing on a preliminary motion, either by (a) a "motion to strike", or (b) a "preliminary determination of a question of law" (*Apotex* at paras 11 and 24).

(a) Motion to strike for lack of standing

22 The moving party bears the onus on a motion to strike for lack of standing (*League for Human Rights of B'Nai Brith Canada v. R.*, 2008 FC 146 (F.C.) at para 13, rev'd on other grounds in 2008 FC 732 (F.C.) [*B'Nai Brith* (FC)]). The test to be used on such a motion is whether it is "plain and obvious" that the application for judicial review is "bereft of success" because the impugned party has no standing (*Apotex* at para 11, cited recently in *Arctos Holdings Inc. v. Canada (Attorney General)*, 2017 FC 553 (F.C.) at para 46 [*Arctos*]). If the answer to this question is "yes", then the motion succeeds and the application is dismissed or the party without standing is struck out. Such a finding may only be made in exceptional cases (*Arctos* at para 45).

23 If, on the other hand, it is not plain and obvious that the party has no standing, then the motion to strike fails. In that case, the matter of standing is not actually decided, but rather is left to the judge hearing the application (*Arctos* at para 75; *Apotex* at para 24).

(b) Determination of standing on a preliminary motion

24 The jurisprudence also instructs that the Court may exercise its discretion to fully and finally determine the question of standing on a preliminary motion, i.e. before the hearing of the application. In such cases, the Court must be satisfied that determination at the preliminary stage is appropriate; if it is not, the issue should be heard with the merits of the application (*Apotex* at para 13). The discretion to make a determination of standing at an early stage of the proceeding must be explicitly exercised, but should only be exercised sparingly (*Apotex* at paras13-14). Ultimately,

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the overriding consideration is, again, that judicial review applications should proceed summarily and not be encumbered by interlocutory motions (*JP Morgan* at paras 47-48).

25 The Respondents' motion materials ask for the Organizations to be "struck" as parties and, in part, rely upon some of the *David Bull* and Rule 221 cases. However, it became clear to me at the hearing of this motion that the Respondents are actually asking this Court to exercise its discretion to finally determine the question of public interest standing at this preliminary stage of the Application.

26 The Respondents' desire to determine the matter of standing early in this proceeding is understandable. They cited jurisprudence suggesting that late-stage challenges to standing reflect a lack of diligence on the part of the moving party, and that it is difficult to "unscramble the egg" prior to a hearing when a matter has proceeded with the participation of all parties asserting standing (Order of Prothonotary Milczynski dated January 15, 2015 in IMM-3700-13 and IMM-5940-14 at 4, at page 24 of the Respondents' Motion Record; see also *League for Human Rights of B'Nai Brith Canada v. R.*, 2009 FCA 82 (F.C.A.) at paras 8-10).

27 I agree with the Respondents that the issue of the Organizations' standing can and should be finally determined now, rather than at some future point, or indeed at the hearing itself, if leave is granted.

28 Having reviewed the substantial evidentiary record and considered the extensive written and oral submissions of the parties, I do not foresee any relevant grounds with respect to the test for public interest standing, that would be better canvassed at the hearing (see *Sierra Club of Canada v. Canada (Minister of Finance)*, [1999] 2 F.C. 211 (Fed. T.D.) at para 25, excerpted in *Apotex* at para 13). In other words, this Court now has all the information it requires to finally determine whether the Organizations should be granted public interest standing (see *Canwest MediaWorks Inc. v. Canada (Minister of Health)*, 2008 FCA 207 (F.C.A.) at para 10).

29 Furthermore, in the particular circumstances of this Application, a final determination of public interest standing at this early juncture will ensure that the Application proceeds without delay as required by section 18.4(1) of the Act. It will also help to promote the objective of Rule 3, by securing the most expeditious and least expensive way forward.

30 Therefore, what remains to be considered is whether the "public interest standing" test is met by the Organizations, to whom the onus now shifts.

B. Should the Organizations be granted public interest standing?

31 The heart of the matter before this Court is whether the Organizations should be granted public interest standing. If the answer is "yes", then they are accordingly proper parties to the Application moving forward and I must deny the relief sought by the Respondents.

32 Section 18.1(1) of the 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", which includes parties with public interest standing (*Z. (Y.)* at para 36).

33 The Respondents, however, urged this Court to keep in mind the policy rationales for limiting standing to those who are directly affected by a proceeding. They submitted that such a limitation sharpens the debate before the Court, because having a personal stake ensures that arguments are presented thoroughly and diligently. They further observed that the addition of unnecessary parties adds cost and inconvenience with no corresponding benefit, and does not uphold the principle of conserving judicial resources. Against this policy backdrop, the Respondents submitted that the Organizations do not meet the test for public interest standing.

34 The SCC has developed a three-part test for determining public interest standing, refined in *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45 (S.C.C.) at paragraph 37 [*Downtown Eastside*]. To meet this test, the Organizations must demonstrate that (1) there is a serious justiciable issue raised, (2) they have a real stake or a genuine interest in that issue, and (3) the proposed application is a reasonable and effective way to bring that issue before the Court.

35 Public interest standing must be addressed in a flexible, liberal, and generous manner, and in light of the purposes of setting limits on standing, as confirmed in *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 (S.C.C.) at paragraph 43 [*Manitoba Metis*]. This approach has been the interpretative standard since at least *Canadian Council of Churches v. R.*, [1992] 1 S.C.R. 236 (S.C.C.) (at 253) [*Canadian Council of Churches*], and was broadened in *Downtown Eastside* and *Manitoba Metis*.

36 With these principles in mind, and for the reasons that follow, I agree with the Organizations that (1) there is a serious justiciable issue, (2) they have a genuine interest in that issue, and (3) their participation as parties will contribute significantly to reasonable and effective litigation.

37 The Respondents neither conceded, nor vigorously disputed, that the Organizations met the first two parts of the public interest standing test. As I explain below, the crux of this decision therefore comes down to whether the Application, with the participation of the Organizations, is a reasonable and effective way to bring the challenge of Canada's STC provisions in respect of the United States before the Court. Thus I will address the first two parts of the test only briefly, before moving on to the third, key issue.

(1) Does the Application raise a serious justiciable issue?

38 To answer the first part of the test for public interest standing, I must be satisfied that the Application raises a "serious justiciable issue", without getting into a "detailed screening" of the

348 merits (*Downtown Eastside* at para 56). The issue raised must be assessed pragmatically to ensure that it is "substantial", "important", and "far from frivolous" (*Downtown Eastside* at paras 54-56).

39 In their written representations, the Organizations summarize the issues raised in the Application as follows:

> (a) Whether section 159.3 of the *Regulations* is *ultra vires* or otherwise unlawful because the designation of the United States of America is not and/or was not at the time of the decision in conformity with sections 102(1)(a), 102(2) and 102(3) of IRPA;
>
> (b) Whether section 159.3 of the *Regulations* is inconsistent with Canada's international obligations under the *Convention relating to the Status of Refugees* and the *Convention Against Torture*;
>
> (c) Whether section 159.3 of the *Regulations* is of no force or effect pursuant to section 52 of the *Constitution Act, 1982*, because it violates sections 7 and/or 15(1) of the *Charter of Rights and Freedoms*; and
>
> (d) Whether section 101(1)(e) of IRPA is of no force or effect pursuant to section 52 of the *Constitution Act, 1982*, because it violates sections 7 and/or 15(1) of the *Charter of Rights and Freedoms*.

40 First, these are substantial and important constitutional issues, which were considered at length in *CCR (FC)* and *CCR (FCA)*. They are far from frivolous.

41 Second, when ordering a stay of the Family's deportation, Justice McDonald found that the Family established a "serious issue", as required by *Toth v. Canada (Minister of Employment & Immigration)* (1988), 86 N.R. 302 (Fed. C.A.). It should also be noted that leave has been granted in *Homsi* and *Mustefa*, which as explained above, raise similar constitutional issues. To obtain leave in the context of an application for judicial review, an applicant must establish a "fairly arguable case", which has been held to require a higher threshold than the "serious issue" that must be established for a stay of deportation (*Brown v. Canada (Minister of Citizenship & Immigration)*, 2006 FC 1250 (F.C.) at para 5).

42 Although these prior and related findings turn on different legal standards and are thus not determinative of the question before the Court now, they are, in my view, further evidence that a serious issue exists in this Application for the purposes of public interest standing. I therefore have no difficulty concluding that the Organizations meet the first part of the public interest standing test.

(2) Do the Organizations have a real stake or genuine interest in that issue?

43 The second part of the test for public interest standing is that the Organizations must have a real stake or genuine interest in the Application. This part of the test "reflects the concern for conserving scarce judicial resources and the need to screen out the mere busybody" (*Downtown Eastside* at para 43).

44 Again, I have no difficulty concluding that the Organizations meet this second part of the test. Each of the Organizations has constituents or stakeholders who are impacted by the subject matter challenged in the Application. Indeed, the Organizations have been extensively involved with cases turning on the STC provisions of IRPA and its Regulations for nearly three decades, including, as set out above, bringing the prior constitutional challenge before this Court in 2007.

45 Interestingly, *Canadian Council of Churches*, the SCC case which articulated the test for public interest standing in the early 1990s, was brought by one of the three Organizations seeking public interest standing in this Application. Back then, CCC challenged certain refugee procedures, including the precursor to the STC provisions now at issue. Although the SCC denied public interest standing to CCC on the third part of the public interest standing test, it concluded that there was "no doubt" that CCC had a genuine interest in the issue, holding that CCC enjoyed "the highest possible reputation" and had "demonstrated a real and continuing interest in the problems of the refugees and immigrants" (at page 254).

46 All three Organizations have long and consistently advocated for the rights of refugees, and have been widely recognized for their work in this area. They are also dedicated to human rights and social justice issues, and have collectively participated and intervened in numerous leading cases.

47 Given their histories and mandates, I find that the Organizations have a real stake and genuine interest in the issues raised in the Application. This interest is amply proven in the affidavit evidence submitted by each of the Organizations in response to this motion, which establishes in detail their significant and continued involvement in this area of refugee law, including since the time of their participation in *CCR (FC)* and *CCR (FCA)*. The Organizations have undertaken a tremendous amount of work assisting individuals, making representations to government, reporting to the press, and gathering evidence.

48 Indeed, the Respondents on this motion conceded that the Organizations' interest in the Application "cannot be disputed". However, relying on *CCR (FCA)*, the Respondents argued that the nature of the Organizations' interest is different from that of the Family. They submitted that the Organizations' interest does not ground public interest standing, but is more appropriately suited to participating in the litigation as intervenors or by "assisting those directly affected".

49 I will address the Respondents' suggestion that the Organizations ought to seek leave to intervene, or otherwise simply "assist" the Family, at the third stage of the test (below). At this

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point, suffice it to say that I have not been persuaded by the Respondents' attempts to minimize the nature of the Organizations' interest in relation to that of the Family. Rather, I find that the Organizations will bring a helpful, broad public interest perspective to the determination of these issues. Each has a genuine and long-demonstrated interest in the issues raised. They are far from "mere busybodies". Thus, the Organizations meet the second part of the test for public interest standing.

(3) Is the participation of the Organizations a reasonable and effective way to litigate?

50 This motion turns on the third part of the test for public interest standing, namely, whether the litigation — with the Organizations participating as public interest parties — is a "reasonable and effective way" to litigate the serious justiciable issues raised in the Application. Although the Organizations bear the onus of meeting this third part of the test, I will begin with the submissions of the Respondents, which go to the heart of the issue.

51 The Respondents argued that the Organizations do not meet the third part of the test because there are already several directly affected litigants before this Court, who the Respondents submitted will "thoroughly and diligently" argue the issues raised in this Application. Specifically, the Respondents noted that the Family members, as well as the applicants in *Homsi* and *Mustefa*, all have experienced counsel. As a result, they argued that the individuals are in the best position to litigate the issues raised. The Respondents submitted that the involvement of the Organizations would merely be duplicative, and create inefficiencies.

52 The Respondents relied on *Canadian Council of Churches* for the proposition that "the basic purpose for allowing public interest standing is to ensure that legislation is not immunized from challenge" (at page 256). The Respondents argued that here, like in *Canadian Council of Churches*, there is no such "immunization", because the Family and the *Mustefa* and *Homsi* applicants are already challenging the legislation's STC provisions. Therefore, the rationale for granting public interest standing to the Organizations disappears. In this regard, the Respondents urged the Court to follow the reasoning in IMM-1604-16 (Order of Justice Heneghan dated January 4, 2017 at page 16 of the Respondents' Motion Record [*Kashtem*]). In *Kashtem*, Justice Heneghan found that CARL did not have a sufficient interest in the proceeding to be granted public interest standing because the issues could be dealt with by the individual applicants (at pages 18-19 of the Respondents' Motion Record).

53 I find *Kashtem* to be distinguishable on its facts, which will be explained after first discussing the two key SCC cases on public interest standing (*Downtown Eastside* and *Manitoba Metis*), the considerations they raise, and why those considerations steer this outcome away from *Kashtem*'s.

(1) Guidance from the SCC in Downtown Eastside and Manitoba Metis

54 In contrast to the Respondents' submissions, *Manitoba Metis* found that the "presence of other claimants does not necessarily preclude public interest standing; the question is whether [the] litigation is a reasonable and effective means to bring a challenge to court" (at para 43).

55 Six months earlier, in *Downtown Eastside* (a case published before but heard after *Manitoba Metis*), the SCC provided significant guidance on the types of "interrelated matters" courts should consider when assessing the third part of the public interest standing test. These interrelated matters include (a) a party's capacity to bring forward a claim, including resources, expertise and factual setting, (b) whether the public interest transcends those most directly affected, including access to justice considerations, (c) any realistic alternative means which would favour a more efficient and effective use of judicial resources, and (d) the potential impact of the proceedings on the rights of others who are equally or more directly affected (*Downtown Eastside* at para 51).

56 Having taken each of these four interrelated considerations into account (explained below), I find that they favour a grant of public interest standing to the Organizations.

(a) Capacity of the Organizations

57 Given the historic involvement of the Organizations in refugee law matters generally, including in the policy-making, legislative, and judicial spheres, as well as the Organizations' involvement in the very matters at issue, they are uniquely situated to assist the Court in appreciating the broader effects of its potential findings. I am guided on this point by the holding in *Manitoba Metis* that even "if there are other plaintiffs with a direct interest in the issue, a court may consider whether the public interest plaintiff will bring any particularly useful or distinct perspective to the resolution of the issue at hand" (at para 43). It is clear that the Organizations have a useful and distinct perspective.

58 It is also clear from the notice of application and prior decisions in *CCR (FC)* and *CCR (FCA)*, that this Application raises complex and important issues, the determination of which will require a substantial evidentiary record. This Court would therefore benefit from the participation of the Organizations, who have all assisted the courts in immigration and refugee matters of national importance in the past.

59 In addition, the Organizations have submitted evidence on this motion that they have the requisite resources and relationships with American organizations and attorneys to gather expert evidence regarding the American asylum system in its current reality. They submit that the Family members do not have this expertise or resources, which is confirmed by the Applicant ABC in her affidavit.

60 On this first *Downtown Eastside* consideration, then, I am satisfied that the Organizations have the expertise, resources and ability to assist the Court in fairly determining the constitutional

352 issues raised in the Application. The Organizations will assist not only the Family in its presentation of the constitutional challenge, but also the Court in determining the issues. At the same time, the Family will ensure that those constitutional issues are determined in a well-developed and concrete factual context, mitigating the concerns raised in *CCR (FCA)*.

(b) Access to justice

61 The Organizations are willing to bring forward evidence and commit resources that would otherwise be unavailable to the Family. Their participation will therefore further the aims of access to justice, which are inherent to the notion of public interest standing.

62 This reality goes beyond the individual applicants who have brought this Application, and extends to those who are not in a position to launch their own challenges. Refugee claimants ordinarily cannot undertake major constitutional challenges alone: they are a vulnerable segment of the Canadian population, lacking both resources and immigration status, and require support in accessing justice.

63 These considerations must be weighed, not only with respect to the individuals involved in this case, but also given the realities for others similarly situated, who might not be in a position to apply to the Court (*Downtown Eastside* at para 67). Indeed, it has taken nearly ten years since *CCR (FCA)* for any individual applicants to come forward. Although the Family will provide the necessary factual context, they are at risk of being unable to see the litigation through to its conclusion, particularly if they are deported.

64 The participation of the Organizations will ensure that the Application is carried through to its conclusion. On this point, I am cognizant that the missing factual context was an issue in *CCR (FCA)* a decade ago, but the concerns identified by the FCA then are mitigated in this Application. In addition, as mentioned above, the law on public interest standing has significantly developed since *CCR (FCA)* through *Downtown Eastside* and *Manitoba Metis*.

(c) Efficient and effective use of judicial resources

65 The Organizations have undertaken to harmonize their input and not to prolong the length or scope of the litigation. This tempers the Respondents' concerns that the Organizations' involvement will become unwieldy and create inefficiencies in the process. The Organizations have demonstrated that they are cognizant of the need to conserve judicial resources through their written and oral submissions to the Court. For instance, should leave be granted in this Application, the Organizations have undertaken not to file separate written arguments from those submitted by the Family, and will not ask for additional time for oral submissions. Thus, I am satisfied that granting public interest standing to the Organizations will not impose any undue burden on court resources.

(d) Potential impact of the proceedings on the rights of others

66 This final consideration from *Downtown Eastside* has been covered off in the above discussion. To summarize, I am satisfied that the inclusion of the Organizations as public interest parties will have a salutary effect on the rights of others, and that granting the Organizations public interest standing will not undermine the private interests of those who are unwilling or unable to pursue the constitutional challenges raised in the Application. To the contrary, their involvement will support those private interests.

67 I will briefly address the Respondents' submissions that the Organizations' interests are better suited to intervener status or "assisting" the Family behind-the-scenes, rather than as public interest parties.

68 First, the matter of intervener status is not before me. The Organizations are seeking public interest standing and that is the test I have applied. Second, given the extent of the Organizations' expertise and involvement in the issues, I do not agree with the Respondents' proposal that the Organizations should simply "assist" the Family. It is generally not appropriate for "ghost" parties to lurk in the background, providing extensive funding, evidence, advice, or information.

69 Finally, I turn to the relevant jurisprudence of this Court which post-dates both *Manitoba Metis* and *Downtown Eastside*.

(2) Guidance from this Court

70 First, I refer to Justice Mactavish's comments in her comprehensive decision *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651 (F.C.), which I find to be applicable on this motion. There, too, the Court granted public interest standing even where there were directly-affected applicants. Justice Mactavish affirmed the importance of access to justice for disadvantaged persons whose legal rights are affected, finding that:

> 347 The three applicant organizations seeking public interest standing in this case are credible organizations with demonstrated expertise in the issues raised by these applications. They are represented by experienced counsel, and have the capacity, resources, and ability to present these issues concretely in a well-developed factual setting: *Downtown Eastside*, above at para. 51. This suggests that this litigation constitutes an effective means of bringing the issues raised by the application to court in a context suitable for adversarial determination.

71 Justice Mactavish went on to observe that the issues raised "impact on an admittedly economically disadvantaged and vulnerable group, and are clearly matters of significant public interest which transcend the interests of those most directly affected" (at para 350). Further, on the point of duplicative litigation, Justice Mactavish noted that it made the most sense, "from a

resource allocation perspective" to litigate the issues "once, in a coherent, comprehensive manner, rather than have them litigated in a piecemeal fashion down the road" (at para 344).

72 Second, I also rely upon the analysis in *Z. (Y.)* as follows:

> 42 Granting public interest standing to CARL is also a reasonable and effective way by which the constitutional concerns about paragraph 110(2)(d.1) of the *IRPA* can be brought before the Court. CARL's resources and expertise are such that the constitutional issues have been presented in a concrete factual setting. Although the existence of other potential DCO claimants is a relevant consideration, CARL has joined its application with three private litigants and thus ensured that judicial resources will not be wasted (*Downtown* at paragraph 50). Also, the practical prospects of other claimants bringing the matter to Court at all or by equally reasonable and effective means needs to be considered in light of the fact that many potential claimants could be deported before they even try to challenge the legislation... Most refugee claimants arrive with little money and lack the financial means to litigate complex constitutional issues; whereas CARL has secured test case funding from Legal Aid Ontario... CARL will be in a good position to continue this litigation in the event that Y.Z., G.S., or C.S. should be unable or unwilling to do so.

73 Lastly, *Kashtem* is distinguishable on the basis of the (i) unique connection that the Organizations have to the issues raised in this Application, and (ii) expertise, resources, and evidence that will be required to effectively litigate the constitutional challenges raised here, the tremendous scope of which is evident from *CCR (FC)* and *CCR (FCA)*.

IV. Conclusion

74 The issues raised in this judicial review are important nationally, and transcend the immediate interests of the individual parties. Having exercised my discretion to determine — with final effect — the question of public interest standing, I find that test has been met: the Application raises a serious justiciable issue in which the Organizations have a genuine interest. That issue will be reasonably and effectively litigated with the Organizations' participation as parties. Accordingly, the Organizations are granted public interest standing, and the Respondents' request to strike them as parties to this Application is denied.

ORDER in IMM-2977-17

THIS COURT ORDERS that

> 1. The Respondents' request for an order striking the Canadian Council for Refugees, Amnesty International, and Canadian Council of Churches as parties is denied.
>
> 2. The Canadian Council for Refugees, Amnesty International, and Canadian Council of Churches are granted public interest standing with immediate and final effect.

Motion dismissed.

Indexed as:

Pharmacia Inc. v. Canada (Minister of National Health and Welfare) (F.C.A.)

Between
David Bull Laboratories (Canada) Inc., appellant, and
Pharmacia Inc., Farmitalia Carlo Erba S.R.L. and the Minister of National Health and Welfare, respondents

[1994] F.C.J. No. 1629

[1995] 1 F.C. 588

[1995] 1 C.F. 588

176 N.R. 48

58 C.P.R. (3d) 209

51 A.C.W.S. (3d) 799

Appeal No. A-332-94

Federal Court of Appeal
Ottawa, Ontario

Stone, Strayer and Robertson JJ.

Heard: October 18, 1994
Judgment: November 1, 1994

(11 pp.)

Patents of invention -- Practice, proceedings under the Patented Medicines Regulations -- Originating notice of motion for prohibition of issue of compulsory licence -- Contents of, mandatory requirements -- Striking out of, when available.

Appeal. Following the filing by the appellant of a notice of allegation pursuant to subsection 5(1) of

the Patented Medicines Regulations seeking a compulsory licence in respect of a medicine for which the respondents held a patent, the respondents filed an originating notice of motion seeking an order prohibiting the Minister of National Health and Welfare from granting the appellant's request. The notice of motion simply alleged that the respondents were the owner and licensee of a patent which included claims for the subject medicine and recited the fact that the appellant had filed the said notice of allegation. The only evidence supporting the originating notice was a short affidavit attesting essentially to the same facts as was set out in the notice. At the cross-examination of the deponent, he refused to answer several questions put to him by the appellant's counsel. The appellant then moved for an order striking out the originating notice under Rule 5 or Rule 419 of the Rules of Court or compelling the deponent to re-attend in order to provide answers to the questions he had refused to answer. The trial judge dismissed the appellant's motion taking the view that there was no basis for striking out the motion on any of the Rule 419 grounds.

HELD: Appeal dismissed. The court should not interfere with the exercise of discretion by a trial judge unless the trial judge had proceeded on an erroneous principle of law or on a misapprehension of the facts, or unless the decision would cause some injustice. None of those criteria were met by the appellant. Although there was jurisdiction in the court, either inherent or through Rule 5 by analogy to other rules, to dismiss in a summary manner, a notice of motion which was so clearly improper as to be bereft of any possibility of success, the cases in which such jurisdiction were properly exercised were very exceptional and could not include cases such as the present where there was simply a debatable issue as to the adequacy of the allegations in the notice of motion.

Statutes, Regulations and Rules Cited:

Patented Medicines (Notice of Compliance) Regulations, S.O.R./93- 133, ss. 5, 6(1), 7(1), 7(5).
Rules of the Federal Court of Canada, Rules 2, 5, 319(1), 419, 1602(2).

Susan Beaubien, for the appellant.
Gunars A. Gaikis and Peter R. Wilcox, for the respondents, Pharmacia Inc. and Farmitalia Carlo Erba S.R.L.
No one appearing, for the respondent, Minister of National Health and Welfare).

The judgment of the Court was delivered by

STRAYER J.:--

Relief Requested

1 This is an appeal from the decision of Noël J. of July 4, 1994. In that decision he dismissed the

application of the appellant David Bull Laboratories (Canada) Inc. (the respondent in Trial Division proceeding T-2991-93) to strike out the originating notice of motion for prohibition filed by Pharmacia Inc. ("Pharmacia") and Farmitalia Carlo Erba S.R.L. ("Farmitalia") in that Trial Division proceeding. He also refused the alternative request of the appellant that he order Robert J. Little, deponent of an affidavit filed by Pharmacia and Farmitalia in support of their originating notice of motion, to re-attend for cross-examination and to answer certain questions.

2 This appeal was heard together with A-410-94, an appeal by Pharmacia and Farmitalia against another interlocutory order in the same proceeding. That appeal was dismissed for reasons issued on October 18 and October 19, 1994.

Facts

3 The respondents Pharmacia and Farmitalia assert an interest in Canadian patents 1,248,453 (hereafter '453) and 1,291,037 (hereafter '037), included in patent lists dated April 7, 1993 in respect of Doxorubicin Hydrochloride (known as "Doxorubicin"), which lists were filed with the Minister of National Health and Welfare pursuant to the Patented Medicines (Notice of Compliance) Regulations.[1] On November 4, 1993 the appellant filed and served a notice of allegation pursuant to section 5 of those Regulations with respect to patent number '453 as referred to above. That notice of allegation alleged that the product for which the appellant was seeking a notice of compliance would not infringe any of the claims of this patent. On December 21, 1993 the respondents Pharmacia and Farmitalia filed a notice of motion pursuant to subsection 6(1) of the Regulations seeking an order prohibiting the Minister of National Health and Welfare from issuing a notice of compliance to the appellants in respect of the medicine Doxorubicin until after the expiration of both patents '453 and '037. That notice of motion simply alleged that the appellant Farmitalia is the owner of these patents each of which includes claims for the medicine Doxorubicin itself as well as claims for the use of the medicine, and that Pharmacia is a licensee under those patents and sells that medicine in Canada. The notice of motion recited the fact that Pharmacia had filed the patent lists and that the appellant (respondent in that originating notice of motion) had filed the notice of allegation as referred to previously. The only evidence ever produced in support of this originating notice of motion was a short affidavit by Robert J. Little, President of Pharmacia, attesting to essentially the same facts as set out in the originating notice of motion.

4 The appellant filed its evidence in response to the originating notice of motion on February 21, 1994. The deponents of affidavits from both sides were cross-examined on their affidavits, Mr. Little being cross-examined on June 15, 1994 and refusing to answer many of the questions put to him. On June 27, 1994 the appellants filed a notice of motion seeking to have the originating notice of motion struck out or in the alternative to have Mr. Little ordered to re-attend for further cross-examination to answer questions he refused to answer. This motion was heard by Noël J. on June 30, 1994 and on July 4, 1994 he issued the judgment from which this appeal has been brought.

5 Any further facts necessary for the disposition of this appeal will be referred to in connection

with the conclusions on each issue.

Conclusions

Motion to Strike

6 Before Noël J. the appellant appears to have based its case for striking out the originating notice of motion on Rule 419 or in the alternative the "gap" Rule, Rule 5. Noël J. expressed doubt that either Rule 419 or Rule 5 would support striking a notice of motion. He concluded that in any event there was no basis for striking out the originating notice of motion on any of the grounds stated in Rule 419. Before this Court on appeal counsel submitted a further alternative in support of the jurisdiction to strike out: either that this is part of the inherent jurisdiction of the Court or that there is a power of "summary dismissal" where an affidavit filed in judicial review proceedings does not meet the requirements of the Rules. (The latter argument may have been made to Noël J. in some form as he observes in his reasons that the affidavit filed in support of the motion is sufficient to verify the facts asserted).

7 This Court should not of course interfere with a trial judge's exercise of discretion, such as in a refusal to strike, unless he or she has proceeded on some wrong principle of law or has seriously misapprehended the facts, or unless an obvious injustice would otherwise result.[2] We can see no such error in the decision of the trial judge here. We need go no farther than to confirm that the remedy of striking out a notice of motion was not available in these circumstances. Given the extensive argument on this subject, however, it may be well to explain why in our view the learned judge was right in principle to doubt the applicability of Rule 419 or the gap rule.

8 It is clear that Rule 419 does not directly authorize the striking out of a notice of motion. The opening words of Rule 419(1) are:

> The Court may at any stage of an action order any pleading or anything in any pleading to be struck out . . . . (Emphasis added).

Rule 2 defines "action" as a proceeding in the Trial Division

> other than an appeal, an application or an originating motion . . . .

and it defines "pleading" as

> any document whereby an action in the Trial Division was initiated . . . .

Thus an application for prohibition commenced by notice of motion is not an "action" and the notice of motion is not a "pleading". It is argued, however, that by means of the "gap" Rule, Rule 5, the Court can resort to the law of either Ontario or Quebec. Rule 5 provides as follows:

> 5. In any proceeding in the Court where any matter arises not otherwise provided

> for by any provision in any Act of the Parliament of Canada or by any general rule or order of the Court (except this Rule), the practice and procedure shall be determined by the Court (either on a preliminary motion for directions, or after the event if no such motion has been made) for the particular matter by analogy
>
> (a) to the other provisions of these Rules, or (b) to the practice and procedure in force for similar proceedings in the courts of that province to which the subject matter of the proceedings most particularly relates,
>
> whichever is, in the opinion of the Court, most appropriate in the circumstances.

It was argued that as there are parties herein domiciled in both Ontario and Quebec the Court could have resort by analogy to the laws of those provinces which, unlike the Federal Court Rules provide a procedure for striking out originating documents other than pleadings.[3] The appellant also appears to argue that pursuant to Rule 5(a) the Court can apply Rule 419, by analogy, to originating notices of motion.

9 For Rule 5 to apply there must be a "gap" in the Federal Court Rules. Simply because those Rules do not contain every provision found in provincial court rules does not necessarily mean that there is a gap. If the absence of such a provision can be readily explained by the general scheme of the Federal Court Rules then that absence must be considered intentional and any application by analogy of provincial court rules or other provisions of the Federal Court Rules which are on their face inapplicable would amount to an amendment of the Federal Court Rules.

10 The basic explanation for the lack of a provision in the Federal Court Rules for striking out notices of motion can be found in the differences between actions and other proceedings. An action involves, once the pleadings are filed, discovery of documents, examinations for discovery, and then trials with viva voce evidence. It is obviously important that parties not be put to the delay and expense involved in taking a matter to trial if it is "plain and obvious" (the test for striking out pleadings) that the pleading in question cannot amount to a cause of action or a defence to a cause of action. Even though it is important both to the parties and the Court that futile claims or defences not be carried forward to trial, it is still the rare case where a judge is prepared to strike out a pleading under Rule 419. Further, the process of striking out is much more feasible in the case of actions because there are numerous rules which require precise pleadings as to the nature of the claim or the defence and the facts upon which it is based. There are no comparable rules with respect to notices of motion. Both Rule 319(1), the general provision with respect to applications to the Court, and Rule 1602(2), the relevant Rule in the present case which involves an application for judicial review, merely require that the notice of motion identify "the precise relief" being sought, and "the grounds intended to be argued". The lack of requirements for precise allegations of fact in notices of motion would make it far more risky for a court to strike such documents. Further, the

disposition of an application commenced by originating notice of motion does not involve discovery and trial, matters which can be avoided in actions by a decision to strike. In fact, the disposition of an originating notice proceeds in much the same way that an application to strike the notice of motion would proceed: on the basis of affidavit evidence and argument before a single judge of the Court. Thus, 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. This case well illustrates the waste of resources and time in adding on to what is supposed to be a summary judicial review proceeding the process of an interlocutory motion to strike. This motion to strike has involved a hearing before a trial judge and over one half day before the Court of Appeal, the latter involving the filing of several hundred pages of material, all to no avail. The originating notice of motion itself can and will be dealt with definitively on its merits at a hearing before a judge of the Trial Division now fixed for January 17, 1995.

11 The contrast between actions and motions in this Court is even more marked where the motion involved is for judicial review, as these applications for prohibition under subsection 6(1) of the Patent Medicine (Notice of Compliance) Regulations have been held to be.[4] Unlike the Rules pertaining to actions, the 1600 Rules pertaining to judicial review provide a strict timetable for preparation for hearing and a role for the Court in ensuring there is no undue delay. Time limits fixed by the rules can only be extended by a judge, not by consent.[5] The Court can of its own motion dismiss applications due to delay[6] and can also take the initiative in correcting originating documents.[7] This all reinforces the view that the focus in judicial review is on moving the application along to the hearing stage as quickly as possible. This ensures that objections to the originating notice can be dealt with promptly in the context of consideration of the merits of the case.

12 The Patented Medicines (Notice of Compliance) Regulations further indicate an intention that this particular kind of application for judicial review should be disposed of expeditiously. Subsection 7(1) of the Regulations provides that normally a notice of compliance should not be issued until thirty months have elapsed from the filing of the application for prohibition, unless the Court has in the meantime dismissed that application. Subsection 7(5) however, authorizes the Court to abbreviate or extend that thirty month period where it has not yet reached a decision on the application but where it finds that a party to the application "failed to reasonably cooperate in expediting the application". Thus if, for example, the applicant unduly delays in bringing the matter on for a hearing on the merits, the respondent can move to have the Court shorten the time limit for the issue of a notice of compliance.

13 Given the multitude of interlocutory proceedings now outstanding in the Trial Division of this nature, it is apparent that in many cases the parties have indeed tried to treat such proceedings as actions for infringement or declarations of validity of patents. As a result they have tried to have the Court strike out or order amendments to notices of allegation.[8] Parties have as in the present case sought to strike out originating notices of motion and have sought the equivalent of discovery of the opposing party. However this Court made clear in Merck Frosst v. Canada[9] that these proceedings

are not actions for determining validity or infringement: rather they are proceedings to determine whether the Minister may issue a notice of compliance. That decision must turn on whether there are allegations by the generic company sufficiently substantiated to support a conclusion for administrative purposes (the issue of a notice of compliance) that the applicant's patent would not be infringed if the generic's product is put on the market. It is useful to reiterate what the Court said in the Merck case.

> The proceedings are not an action and their object is solely to prohibit the issuance of a notice of compliance under the Food and Drug Regulations. Manifestly, they do not constitute "an action for infringement of a patent" . . . .
>
> Furthermore, since the regulations clearly allow the Minister, absent a timely application under s.6, to issue a notice of compliance on the basis of the allegations in the notice of allegation, it would seem that on the hearing of such an application, at least where the notice has alleged non-infringement, the court should start from the proposition that the allegations of fact in the notice of allegation are true except to the extent that the contrary has been shown by the applicant. In determining whether or not the allegations are "justified" (s.6(2)), the court must then decide whether, on the basis of such facts as have been assumed or proven, the allegations would give rise in law to the conclusion that the patent would not be infringed by the respondent.
>
> In this connection, it may be noted that, while s.7(2)(b) seems to envisage the court making a declaration of invalidity or non-infringement, it is clear to me that such declaration could not be given in the course of the s.6 proceedings themselves. Those proceedings, after all, are instituted by the patentee and seek a prohibition against the Minister, since they take the form of a summary application for judicial review, it is impossible to conceive of them giving rise to a counterclaim by the respondent seeking such a declaration. Patent invalidity, like patent infringement cannot be litigated in this kind of proceeding. I can only think that the draftsperson had in mind the possibility of there being parallel proceedings instituted by the second person which might give rise to such a declaration and be binding on the parties. It is, in any event, evident that the declaration referred to in s.7(2)(b) is not a precondition to the ultimate dismissal of the s.6 application, the consequences of which are separately dealt with in s.7(4).

It will be noted that the Regulations nowhere create or abolish any rights of action between the parties: instead they confer a right on the patentee to bring an application for prohibition against the Minister of National Health and Welfare. That is, the regulations pertain to public law, not private

rights of action. Of course the real adversary in such a prohibition proceeding is the generic company which served the notice of allegation.

14 If the Governor in Council had intended by these regulations to provide for a final determination of the issues of validity or infringement, a determination which would be binding on all private parties and preclude future litigation of the same issues, it surely would have said so. This Court is not prepared to accept that patentees and generic companies alike have been forced to make their sole assertion of their private rights through the summary procedure of a judicial review application. As the regulations direct that such issues as may be adjudicated at this time must be addressed through such a process, this is a fairly clear indication that these issues must be of a limited or preliminary nature. If a full trial of validity or infringement issues is required this can be obtained in the usual way by commencing an action.

15 For these reasons we are satisfied that the trial judge properly declined to make an order striking out, under Rule 419 or by means of the gap rule, as if this were an action. This is not to say that there is no jurisdiction in this Court either inherent or through Rule 5 by analogy to other rules, to dismiss in summary manner a notice of motion which is so clearly improper as to be bereft of any possibility of success.[10] Such cases must be very exceptional and cannot include cases such as the present where there is simply a debatable issue as to the adequacy of the allegations in the notice of motion.

16 Having come to this conclusion on the availability of striking out in such circumstances, I will not deal with the other finding of the learned trial judge that the originating notice of motion does in fact disclose a reasonable cause of action. I would not wish it to be thought, in not dealing with that issue, that this Court expresses any views on the conclusions of the learned trial judge in this respect. The ultimate adequacy of the respondents' allegations and evidence must be addressed by the judge hearing the application for prohibition on its merits.

Compelling Answers on Cross-Examination

17 In the proceedings before Noël J. the appellant had also requested that he order Robert J. Little, the deponent for the respondents Pharmacia and Farmitalia, to re-attend for further cross-examination on his affidavit and to reply to questions which he previously refused to answer. Noël J. declined to order such answers on the grounds that certain questions were not relevant to the issues to be addressed in the application for prohibition. In the case of certain questions allegedly related to credibility he examined the document supposedly creating an inconsistency in Mr. Little's position and decided that it did not.

18 I have examined these questions carefully and have concluded that there is no basis upon which this Court should interfere with the exercise of the trial judge's discretion. As indicated earlier, the Court should not interfere unless the trial judge has proceeded on an erroneous principle of law or on a misapprehension of the facts, or unless the decision would cause some injustice. None of these criteria have been met by the appellant in the present case. This is not to suggest of

course that the appellant cannot make some of the same arguments in support of the proposition that the applicants for prohibition have not adequately proven their case. That is a matter to be argued before the judge of the Trial Division hearing the application for prohibition.

Disposition

19 This appeal should therefore be dismissed with costs.

STRAYER J.
STONE J.:-- I agree
ROBERTSON J.:-- I agree

1 S.O.R./93-133.

2 See e.g. Nabisco Brands Ltd. - Nabisco Brands Ltée v. Procter & Gamble Co. et al (1985) 5 C.P.R.(3d) 417 at 418 (F.C.A.).

3 Quebec Code of Civil Procedure, chapter III.1, section 75.1; Ontario Rules of Civil Procedure, Rule 14.09.

4 Bayer A.G. v. Canada (1993) 51 C.P.R.(3d) 329 (F.C.A.); Merck Frosst Canada Inc. et al v. Canada (1994) 55 C.P.R.(3d) 302 (F.C.A.).

5 Rule 1614(2).

6 Rule 1617.

7 Rule 1605.

8 In the associated appeal involving the same parties heard at the same time as the present appeal, A-410-94, reasons dated October 18, 1994 [Please see [1994] F.C.J. No. 1549], this Court held that "the notice of allegation is beyond the reach of the Court's jurisdiction in a judicial review proceeding" on the basis that such a document is a document filed with the Minister and not with the Court.

9 Supra note 4.

10 See e.g. Cyanamid Agricultural de Puerto Rico Inc. v. Commissioner of Patents (1983) 74 C.P.R.(2d) 133 (F.C.T.D.); and the discussion in Vancouver Island Peace Society v. Canada

(1994) 1 F.C. 102 at 120-21 (F.C.T.D.).

2019 FC 388, 2019 CF 388
Federal Court

Democracy Watch v. Canada (Attorney General)

2019 CarswellNat 1110, 2019 CarswellNat 3075,
2019 FC 388, 2019 CF 388, 307 A.C.W.S. (3d) 295

DEMOCRACY WATCH (Applicant) and THE ATTORNEY GENERAL OF CANADA (Respondent)

Patrick Gleeson J.

Heard: November 6, 2018
Judgment: March 29, 2019
Docket: T-115-18

Counsel: Sebastian Spano, for Applicant
Alexander Gay, Davie Aaron, for Respondent

***Patrick Gleeson J.*:**

I. Overview

1 The applicant, Democracy Watch [DW], seeks judicial review of the September 18, 2017 decision of Karen Shepherd, the former interim Commissioner of Lobbying [Commissioner], responding to a written complaint alleging a breach of the *Lobbyists' Code of Conduct* (Ottawa: Office of the Commissioner of Lobbying, 2015) [Lobbyists' Code]. The complaint alleged that Prince Sha Karim Al Hussaini Aga Khan [the Aga Khan] was in breach of the Lobbyists' Code as a consequence of having hosted the Right Honourable Justin Trudeau and his family and friends on a private island in the Caribbean.

2 The Commissioner concluded that an investigation was not necessary to ensure compliance with the Lobbyists' Code or the *Lobbying Act*, RSC 1985, c 44 (4th Supp) [*Lobbying Act*] as the Code did not apply to the Aga Khan's interactions with the Prime Minister.

3 DW did not initiate the complaint resulting in the impugned decision; however, it argues that it should be granted public interest standing to advance its arguments on judicial review. In seeking judicial review, DW argues that the Commissioner's participation in a matter involving the Prime Minister, where the Commissioner held the position on an interim basis, was contrary to the conflict of interest provisions of the *Conflict of Interest Act*, SC 2006, c 9, s 2 [*COI Act*].

DW further argues that the process was procedurally unfair: there was a legitimate expectation that an interim commissioner would not participate in consideration of the complaint and the Commissioner's failure to recuse herself in this circumstance raises a real apprehension of bias. Finally, DW argues the decision was wrong in law. DW seeks an order quashing the decision and directing the Commissioner to proceed with a full investigation of the alleged breach of the Lobbyists' Code. In the alternative, the applicant seeks an order remitting the matter back to the Commissioner for redetermination.

4 The respondent submits that DW should not be given public interest standing, that the alleged breach of the *COI Act* is not a matter that is justiciable, and that the Commissioner's decision is not reviewable. The respondent further submits that neither the *COI Act* nor the common law create an expectation that the Commissioner would recuse herself, that there is no reasonable apprehension of bias, and that the process was fair. The respondent argues the Commissioner's finding that the Lobbyists' Code did not apply was reasonable.

5 For the reasons that follow, DW is granted standing to bring the judicial review application and the application is granted.

II. Background

A. The Complaint

6 In early January 2017, the media reported that the Prime Minister's Office had confirmed that the Prime Minister, his family, and some friends had accepted, from the Aga Khan, the gift of a vacation on the Aga Khan's private island in the Bahamas.

7 On January 11, 2017, a private citizen sent a complaint to the Commissioner alleging that the Aga Khan had violated the Lobbyists' Code by gifting the vacation to the Prime Minister.

8 The Commissioner's office acknowledged receipt of the complaint, and the Directorate of Investigations initiated an administrative review. The identity of the complainant is not disclosed in the record before me.

B. The Commissioner's Decision

9 In a memorandum to the Commissioner dated September 13, 2017, the Director of Investigations addressed whether the Aga Khan's gift violated rules 8 (preferential access) or 10 (gifts) of the Lobbyists' Code. It briefly detailed the content of media reports relating to the gifted vacation and the complaint that had triggered the administrative review. It then reviewed the role of the Aga Khan Foundation of Canada [Foundation], noting that the Aga Khan is a member of its Board of Directors and that the Foundation has an active in-house return in the Registry of Lobbyists. It noted the Aga Khan is not registered as a lobbyist.

10 The memorandum to the Commissioner concluded that the Lobbyists' Code did not apply to the Aga Khan's interactions with the Prime Minister as there was no evidence indicating that the Aga Khan was remunerated for his work at the Foundation. Consequently, the allegations of a breach of the Lobbyists' Code were unfounded. The memo recommended that the administrative review be closed.

11 The memorandum states in part:

> **ISSUE**
>
> Whether the Aga Khan was in breach of Rule 8 (Preferential Access) and/or Rule 10 (Gifts) of the *Lobbyists' Code of Conduct* (2015) as a consequence of hosting the Right Honourable Justin Trudeau and his family on a private island in the Caribbean.
>
> **BACKGROUND**
>
> ***Media Reports***
>
> On January 6, 2017, media reports stated that Mr. Justin Trudeau, Prime Minister of Canada, his family "and a few friends" had celebrated the new year on a private island in the Bahamas as guests of Prince Shah Karim Al Hussaini, known Aga Khan IV, a religious leader.
>
> ***Complaint***
>
> On January 11, 2017, [name redacted], a private citizen, sent a complaint to the Commissioner related to this matter. On January 16, 2017, the Directorate sent an acknowledgement letter to the complainant.
>
> ***The Aga Khan Foundation of Canada (AKFC)***
>
> The AKFC is a charitable organization which intervenes in the poorest regions of the world. His Highness the Aga Khan is listed as a member of the foundation's Board of Directors on the AKFC's website.
>
> The foundation has an active in-house (organizations) return in the Registry of Lobbyists. During the Prime Minister's vacation in the Bahamas, the Aga Khan Foundation of Canada had an active return. The Aga Khan is not registered as a lobbyist.
>
> . . .
>
> **ANALYSIS**
>
> The Directorate has found no evidence to indicate that Prince Shah Karim Al Hussaini, Aga Khan IV, is remunerated for his work with the AKFC and, therefore, that he was engaged in registrable lobbying activity during the Prime Minister's Christmas vacation.

> Consequently, the *Lobbyists' Code of Conduct* does not apply to the Aga Khan's interactions with the Prime Minister.
>
> **RECOMMENDATION**
>
> The Investigations Directorate recommends that the administrative review be closed as there is no basis to conclude that the Aga Khan engaged in registrable lobbying activities, on behalf of the AKFC. The Directorate has a basis to conclude that the *Lobbyists' Code of Conduct* does not apply to the Aga Khan's interactions with the Prime Minister.

12 On September 18, 2017, the Commissioner accepted the Director of Investigation's recommendation. That decision is the subject of this judicial review.

C. The Record before the Court

13 The case-specific documentation before me is limited to a single document, the September 13, 2017 memorandum to the Commissioner. The record before the Commissioner contained at least the complaint letter and presumably material gathered and generated in the course of the administrative review. The respondent objected to the production of a more extensive record, and the applicant did not take issue with the respondent's position.

D. The Interim Appointment

14 In June 2009, Ms. Karen Shepherd was appointed as Commissioner for a seven-year term. In anticipation of the expiration of Ms. Shepherd's mandate, the Privy Council Office commenced a process to appoint a new Commissioner in May of 2016.

15 The process to select and appoint a new Commissioner was ongoing in June 2016 when Ms. Shepherd's mandate expired. At that time, Ms. Shepherd was appointed to the position for a six-month interim term commencing in June 2016. It was reported in November 2016 that Ms. Shepherd was not seeking reappointment to the Commissioner's position.

16 As a result of an extended selection process, Ms. Shepherd was appointed to a second six-month interim term in December 2016 and then a third in June 2017.

17 A new Commissioner of Lobbying, Ms. Nancy Bélanger, was appointed by the Governor in Council on December 14, 2017 after consultation with recognized party leaders and groups in the Senate and House of Commons and approval of the appointment by the House of Commons and the Senate.

III. Relevant Legislation

18 The *Federal Accountability Act*, SC 2006, c 9, enacted the *COI Act* and amended several other statutes including the *Lobbyists Registration Act*, renaming it the *Lobbying Act*. The *COI Act* and *Lobbying Act* are described below, and relevant extracts are reproduced in the Annex to these reasons for ease of reference.

A. COI Act

19 The *COI Act* has several purposes, which include: (1) establishing clear conflict of interest and post-employment rules for public office holders; (2) minimizing the possibility of conflicts of interest and providing resolution mechanisms should conflicts arise; and (3) mandating the Conflict of Interest and Ethics Commissioner [Ethics Commissioner] to determine the measures necessary to avoid conflicts and to determine whether a contravention of the *COI Act* has occurred (*COI Act*, s 3).

20 The *COI Act* prohibits public office holders from making decisions or participating in decision making related to the exercise of an official power, duty, or function if they know or ought to know that they would be in a conflict of interest in doing so (*COI Act*, s 6(1)).

21 Public office holders are in a conflict of interest when they exercise an official power, duty, or function that provides an opportunity to further their own private interests or that of their relatives, friends, or another person (*COI Act*, s 4). A "private interest" is defined in subsection 2(1) of the *COI Act* by way of exclusion:

> ***private interest*** does not include an interest in a decision or matter
>
> (a) that is of general application;
>
> (b) that affects a public office holder as one of a broad class of persons; or
>
> (c) that concerns the remuneration or benefits received by virtue of being a public office holder. (*intérêt personnel*)
>
> ***intérêt personnel*** N'est pas visé l'intérêt dans une décision ou une affaire:
>
> a) de portée générale;
>
> b) touchant le titulaire de charge publique faisant partie d'une vaste catégorie de personnes;
>
> c) touchant la rémunération ou les avantages sociaux d'un titulaire de charge publique. (*private interest*)

22 Public office holders are required to recuse themselves from any discussion, decision, debate, or vote on any matter in which a conflict of interest would arise (*COI Act*, s 21).

23 The Ethics Commissioner is responsible for administering and enforcing the *COI Act*.

24 A member of the Senate or the House of Commons may request in writing that the Ethics Commissioner examine an alleged contravention. The Ethics Commissioner shall comply with the request unless he or she determines the request is frivolous, vexatious, or made in bad faith. The Ethics Commissioner may also examine a matter on his or her own initiative (ss 44(1), 44(3), 45(1)).

25 Where the Ethics Commissioner undertakes an examination, he or she shall complete a report setting out his or her factual findings, analysis, and conclusions. The report is to be provided to the Prime Minister, the public officer holder who is the subject of the report, and the public. In those cases where the Ethics Commissioner is acting upon a request from a member of Parliament, a copy is also provided to that member (ss 44(7), (8) and 45(2), (4)).

26 The Ethics Commissioner's conclusions in a report relating to whether a public office holder has or has not contravened the *COI Act* are final, but the report is not determinative of the measures to be taken as a result (s 47). The *COI Act* also provides that the Ethics Commissioner's orders and decisions are only subject to review on the grounds set out in paragraphs 18.1(4)(a), (b), or (e) of the *Federal Courts Act*, RSC 1985, c F-7 (s 66).

B. The Lobbying Act

27 The *Lobbying Act*'s preamble sets out four underlying principles: (1) free and open access to government is an important matter of public interest; (2) lobbying public office holders is a legitimate activity; (3) public office holders and the public should be able to know who is engaged in lobbying activities; and (4) a system for registration of paid lobbyists should not impede free and open access to government.

28 Section 4.1 of the Act provides for the appointment of the Commissioner by the Governor in Council for a renewable term of seven years, after consultation with the leader of every recognized party in the Senate and House of Commons and a resolution of the Senate and House of Commons approving the appointment (ss 4.1(1), (2)). A Commissioner is eligible to be reappointed (s 4.1(3)).

29 A qualified individual may be appointed on an interim basis for a term not to exceed six months where, among other reasons, the office is vacant (s 4.1(4)). In the case of an interim appointment, the *Lobbying Act* does not impose a prior requirement to consult with the leaders of recognized parties in Parliament or require that the interim appointment be approved by resolution of the Senate and House of Commons.

30 The Act requires that the Commissioner, among other things, develop the Lobbyists' Code; establish and maintain a registry open to public inspection; and conduct investigations, where necessary, to ensure compliance with the Act and the Lobbyists' Code (ss 9, 10.2, 10.4).

31 The Commissioner reports directly to Parliament through the Speaker of the House of Commons and the Speaker of the Senate (ss 10.5, 11, 11.1).

32 The Act requires the Commissioner to conduct investigations where there is reason to believe, including based on information received from a member of the House of Commons or the Senate, that an investigation is necessary to ensure compliance with the Lobbyists' Code or the Act (s 10.4(1)). The Commissioner can refuse to investigate or cease an investigation if he or she is of the opinion that: (a) the matter would be more appropriately dealt with under a procedure in another Act of Parliament; (b) the matter is not sufficiently important; (c) dealing with the matter would serve no useful purpose as too much time has passed; or (d) there is any other valid reason not to deal with the matter (s 10.4(1.1)).

33 Upon concluding an investigation, the Commissioner must prepare a report to include his or her findings, conclusions, and the reasons for the conclusions reached and submit the report to the Speakers of the Senate and the House of Commons. The Speakers shall, in turn, table the report in each House (ss 10.5(1), (2)). Certain contraventions of the Act constitute offences (s 14).

34 The Act recognizes two categories of lobbyists: in-house lobbyists and consultant lobbyists. Both in-house lobbyists and consultant lobbyists are required to file returns with the Commissioner setting out various details relating to their activities (ss 5, 7).

35 A consultant lobbyist is an individual who, on behalf of any person or organization, for payment, communicates with public office holders for enumerated purposes or arranges meetings between a public officer holder and any other individual (s 5).

36 An individual is an in-house lobbyist where: (1) he or she is employed for a corporation or organization; (2) his or her duties include communication with public office holders for enumerated purposes; and (3) that activity constitutes a significant part of their duties or would constitute a significant part of the duties of one employee if it was performed by only one employee (s 7).

37 A public office holder is defined as including members of the Senate and members of the House of Commons (s 2(1); *Designated Public Office Holder Regulations*, SOR/2008-117, schedule).

C. The Lobbyists' Code

38 The Lobbyists' Code came into force on December 1, 2015, replacing the initial version of the Code that had come into effect in 1997. The Code's introduction states its purpose is to "assure

the Canadian public that when lobbying of public office holders takes place, it is done ethically and with the highest standards with a view to enhancing public confidence and trust in the integrity of government decision making." The introduction further states the Code applies where the Act requires an individual to register, whether or not a registration has been filed.

39 The Lobbyists' Code identifies four principles upon which it was developed: respect for democratic institutions; integrity and honesty; openness; and professionalism. The Code sets out ten rules that address the broad issues of transparency, use of information, and conflicts of interest. Rule 6 provides that a lobbyist shall not propose or take action that will place a public office holder in a real or apparent conflict of interest. Rules 7 through 10 provide more specific guidance on the avoidance of real or apparent conflicts of interest:

> **Conflict of Interest**
>
> **6.** A lobbyist shall not propose or undertake any action that would place a public office holder in a real or apparent conflict of interest.
>
> ***In particular:***
>
> *Preferential access*
>
> **7.** A lobbyist shall not arrange for another person a meeting with a public office holder when the lobbyist and public office holder share a relationship that could reasonably be seen to create a sense of obligation.
>
> **8.** A lobbyist shall not lobby a public office holder with whom they share a relationship that could reasonably be seen to create a sense of obligation.
>
> **Political activities**
>
> **9.** When a lobbyist undertakes political activities on behalf of a person which could reasonably be seen to create a sense of obligation, they may not lobby that person for a specified period if that person is or becomes a public office holder. If that person is an elected official, the lobbyist shall also not lobby staff in their office(s).
>
> **Gifts**
>
> **10.** To avoid the creation of a sense of obligation, a lobbyist shall not provide or promise a gift, favour, or other benefit to a public office holder, whom they are lobbying or will lobby, which the public office holder is not allowed to accept.
>
> **Conflit d'intérêts**
>
> **6.** Un lobbyiste ne doit proposer ni entreprendre aucune action qui placerait un titulaire d'une charge publique en situation de conflit d'intérêts réel ou apparent.

Plus particulièrement:

Accès préférentiel

7. Un lobbyiste ne doit pas organiser pour une autre personne une rencontre avec un titulaire d'une charge publique lorsque le lobbyiste et le titulaire d'une charge publique entretiennent une relation qui pourrait vraisemblablement faire croire à la création d'un sentiment d'obligation.

8. Un lobbyiste ne doit pas faire de lobbying auprès d'un titulaire d'une charge publique avec lequel il entretient une relation qui pourrait vraisemblablement faire croire à la création d'un sentiment d'obligation.

Activités politiques

9. Si un lobbyiste entreprend des activités politiques pour le compte d'une personne qui pourraient vraisemblablement faire croire à la création d'un sentiment d'obligation, il ne peut pas faire de lobbying auprès de cette personne pour une période déterminée si cette personne est ou devient un titulaire d'une charge publique. Si cette personne est un élu, le lobbyiste ne doit pas non plus faire de lobbying auprès du personnel du bureau dudit titulaire.

Cadeaux

10. Afin d'éviter la création d'un sentiment d'obligation, un lobbyiste ne doit pas offrir ou promettre un cadeau, une faveur ou un autre avantage à un titulaire d'une charge publique, auprès duquel il fait ou fera du lobbying, que le titulaire d'une charge publique n'est pas autorisé à accepter.

40 The legal status of the Code has been judicially considered. This Court has recognized that the Code is not an enactment of Parliament, nor is it a statutory instrument pursuant to the *Statutory Instruments Act*, RSC 1985, c S-22 (*Lobbying Act*, s 10.2(4); *Democracy Watch v. Canada (Attorney General)*, 2004 FC 969 (F.C.) at para 23 [*Democracy Watch 2004*]; *Makhija v. Canada (Attorney General)*, 2010 FC 141 (F.C.) at para 15 [*Makhija FC 2010*]). However, the Act requires that the Code be developed in consultation with interested parties, that it be referred to a Committee of the House of Commons prior to being published, and that it be published in the *Canada Gazette* (s 10.2). Although breaches of the Code are not sanctioned by charges and penalties, lobbyists must comply with the Code (s 10.3; *Makhija v. Canada (Attorney General)*, 2010 FCA 342 (F.C.A.) at para 7 [*Makhija FCA 2010*]).

41 The Code provides that anyone who suspects the Code has been violated should forward information to the Commissioner (Lobbyists' Code, Introduction).

IV. Issues

42 The applicant has raised a series of issues: (1) whether DW should be granted standing; (2) whether the Commissioner breached the *COI Act*; (3) whether the Commissioner was required to recuse herself; and (4) whether the Commissioner erred in deciding not to investigate the complaint.

43 The respondent raises the following additional issues: (1) whether the Commissioner's alleged breach of the *COI Act* is justiciable, and (2) whether the Commissioner's decision not to investigate is reviewable within the meaning of subsection 18.1(3) of the *Federal Courts Act*.

44 I have framed the issues as follows:

A. Does DW meet the test for public interest standing?

B. Is the alleged breach of the *COI Act* justiciable?

C. Is the Commissioner's decision not to investigate reviewable?

D. What is the standard of review?

E. Does a reasonable apprehension of bias arise?

F. Does the doctrine of legitimate expectation apply?

G. Was the decision reasonable?

V. Analysis

A. Does DW meet the test for public interest standing?

45 The Supreme Court of Canada reviewed and refined the test for public interest standing in *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45 (S.C.C.) [*Downtown Eastside*].

46 In that decision, the Court noted that despite long recognized and needed limitations on standing, there are occasions in the public law context where public interest litigation is an appropriate vehicle by which to bring matters of public interest and importance before the courts (para 22). In determining whether to grant standing, courts must balance the underlying rationale for restricting standing with the important role courts play in assessing the legality of government action (para 23).

47 The Supreme Court addressed the traditional reasons underlying the limitations on standing. These reasons include the proper allocation of scarce judicial resources, a factor that is concerned with the effective operation of the court system as a whole; the screening out of the mere busybody; ensuring that courts have the benefit of the contending points of view of those most directly

affected by the determination of the matters in issue; and preserving the proper role of the courts and their constitutional relationship to the other branches of government (paras 25-30). The Court further stated that the principle of legality — a principle that encompasses the notions that state action must conform to the Constitution and statutory authority and that there must be a practical and effective means to challenge the legality of state action — informs the careful exercise of the court's discretion when considering the question of public interest standing (paras 31-35).

48 In exercising discretion a court is to consider the following: (1) whether a serious justiciable issue is raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts (para 37). The Supreme Court emphasized that these factors are not to be applied as a "rigid checklist"; rather, they should be "assessed and weighed cumulatively, in light of the underlying purposes limiting standing and applied in a flexible and generous manner that best serves those underlying purposes" (para 20).

49 In considering the first factor, the Court defined a "justiciable question" as "a question that is appropriate for judicial determination" (para 30). It stated that for a question to be a "serious issue," it must be a "substantial constitutional issue" or an "important one," and the claim must be "far from frivolous"; however, a court "should not examine the merits of the case in other than a preliminary manner" (para 42).

50 The second factor entails a consideration of "whether the plaintiff has a real stake in the proceedings or is engaged with the issues they raise" (para 43).

51 Finally, at the third stage, a court should take a purposive approach and consider "whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality" (para 50). The Court noted a list of illustrative factors to consider at the third stage: the plaintiff's capacity to bring forward a claim; whether the case is of public interest; whether there are realistic alternative means favouring a more efficient and effective use of judicial resources; and the potential impact on granting public interest standing on others who are equally or more directly affected (para 51).

52 DW argues it meets the test for public interest standing. First, it contends that issues of compliance with the *COI Act* and the common law and the application of the *Lobbying Act* and Lobbyists' Code are serious justiciable issues. Second, it argues it has a "genuine interest" and "real stake" in the proceedings, as demonstrated by its mandate, experience, expertise, and active involvement in policymaking and legislative processes in the areas of lobbying and conflicts of interest. Finally, DW argues it is likely the only interested party with the ability to bring this application before the Court.

53 The respondent argues DW does not meet the test. It asserts there is no serious issue as the alleged breach of the *COI Act* is a matter for the Ethics Commissioner to determine and is therefore not justiciable. In effect, the applicant is attempting to involve the Court in matters that are properly left to Parliament and in which the applicant is not directly engaged. The respondent also takes the position that the application is not a reasonable and effective means to bring the case before the Court as only the Ethics Commissioner can investigate any alleged conflict of interest. It also notes that the private citizen who made this complaint has not brought this application.

54 Applying the factors from *Downtown Eastside*, I am persuaded that the circumstances warrant the exercise of discretion in favour of granting DW public interest standing.

(1) A serious issue is raised

55 The issues raised in this application engage questions that involve the interpretation of the *COI Act*, the *Lobbying Act*, and the Lobbyists' Code as well as the application of common law principles relating to bias and legitimate expectations. The legislation and instruments in issue are intended to contribute to public confidence, trust, and transparency in the conduct of public office holders and those who engage with them.

56 As noted above, the respondent argues that the alleged breach of the *COI Act* is not justiciable and that the decision the applicant seeks to challenge is not reviewable by this Court. I address both of these matters in greater detail below. However, the application also raises questions of fairness and bias, questions that in my view arise independently of, even if nourished by, the statutory frameworks in issue.

57 The applicant also argues that the Commissioner erred in applying the test set out in the *Lobbying Act* for determining when an investigation is necessary. This raises a matter of the interpretation and application of the Act, and the respondent acknowledges the Court's "obvious role in the interpretation and enforcement of statutory obligations."

58 I am satisfied that the application raises a "serious issue" or an "important one" that is "far from frivolous" and that the issues are justiciable (*Downtown Eastside* at para 42).

(2) Does DW have a real stake or genuine interest in the proceedings?

59 The respondent argues that the applicant is seeking to involve the Court in matters that are left to Parliament and that "[a]s an outsider, the applicant is not directly engaged in Parliamentary matters and does not satisfy the second branch of the test." This position fails to adequately address whether the applicant has a real stake or genuine interest in the proceedings. The record sets out in some detail what the applicant describes in written submissions as its "important role in the development of government oversight and accountability legislation and in the subsequent use

of these mechanisms to continue promoting and advancing transparency and accountability in government."

60 I am satisfied, based on DW's history of active participation in public policymaking and legislative processes — including amendments to the *Lobbying Act* and its predecessors, the creation of the position of the Ethics Commissioner, the enactment of the *COI Act*, and the drafting and amendment of the Lobbyists' Code — that DW has a genuine interest in the matters raised in this application.

(3) Is the application a reasonable and effective way to bring the issues before the Court?

61 The respondent argues the applicant should fail on this prong. The respondent submits that only the Ethics Commissioner can investigate alleged breaches of the *COI Act*; that complaints were not initiated alleging a conflict of interest by the Commissioner of Lobbying; and that the accountability mechanisms built into the *COI Act* do not involve the courts.

62 As stated above and addressed in greater detail below, the issues raised in this application extend beyond the question of an alleged breach by the Commissioner of the *COI Act.* The respondent's position that this single issue leads to the conclusion that the application is not a reasonable and effective way to bring the series of issues raised before the Court is not persuasive.

63 The respondent also notes that there is a more directly affected party, the private citizen who initiated the complaint, who has chosen not to pursue this matter. This is a relevant consideration in applying the third prong of the test, but it is not determinative (*Downtown Eastside* at paras 50, 51).

64 This third prong of the public interest standing test is not to be applied rigidly, but in a liberal and generous fashion (*Downtown Eastside* at paras 47, 48). In this case, the identity of the complainant has not been disclosed on the record. There is no evidence indicating the nature or extent of the complainant's interest or of the complainant's circumstances.

65 I have concluded that the other two prongs of the test have been met: a serious issue is raised and the applicant has a genuine interest in the application. The Court has received extensive submissions on issues that engage the public interest, and those issues have been presented in a context suitable for judicial determination. As the Federal Court of Appeal recently noted, DW brings a "useful and distinctive perspective" to the issues, issues unlikely to otherwise be raised before the courts (*Democracy Watch v. Canada (Attorney General)*, 2018 FCA 194 (F.C.A.) at para 21 [*Democracy Watch 2018*]).

66 Considering all the circumstances and approaching this prong of the test in a pragmatic and practical manner, I am satisfied that the application is a reasonable and effective means of bringing the issues before the Court.

B. Is the alleged breach of the COI Act justiciable?

67 The respondent argues that the alleged breach of the *COI Act* is not justiciable. The respondent submits that it was open to Parliament to reserve for itself the sole enforcement role as it related to the obligations imposed by the *COI Act* and that Parliament has vested in the Ethics Commissioner the sole jurisdiction to investigate any alleged breaches of the *COI Act*.

68 Justiciability essentially asks whether it is appropriate for the courts to decide a particular issue (*Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 (S.C.C.) at para 32 [*Wall*]). Questions of justiciability involve "a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue or, instead, deferring to other decision-making institutions of the polity" (*Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49 (S.C.C.) at 90-91 [*Canada (Auditor General)*]).

69 As the Supreme Court recently noted in *Wall* at paragraph 34:

> There is "no single set of rules" for determining justiciability. It depends to some degree on context, and the proper approach to determining justiciability must be flexible. The court should ask whether it has the institutional capacity and legitimacy to adjudicate the matter...In determining this, courts should consider "that the matter before the court would be an economical and efficient investment of judicial resources to resolve, that there is a sufficient factual and evidentiary basis for the claim, that there would be an adequate adversarial presentation of the parties' positions and that no other administrative or political body has been given prior jurisdiction of the matter by statute."
>
> [Emphasis added]

70 While justiciability is a flexible and contextual concept, trends have emerged in the case law. Some matters have been held not to be justiciable by virtue of the separation of powers; these include the exercise of prosecutorial discretion, questions of parliamentary privilege, and the legislative process. Other matters are purely political, such as the designation of a person as a *persona non grata*, the bestowing of a political honour, or the making of treaties. Still others involve statutory provisions that the legislature intends to be enforceable through the legislature itself rather than the courts (Robert W Macaulay, James LH Sprague & Lorne Sossin, *Practice and Procedure before Administrative Tribunals* (Toronto: Thomson Reuters, 2018) (loose-leaf updated 2019, release 2019-2), 28.3(c)(i)-(iii)). It is this final category upon which the respondent relies in contending that the decision is not justiciable.

71 In considering questions of justiciability, courts must be sensitive to the separation of functions between the legislative, judicial, and executive branches of government and must not

usurp the role of other branches (*Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62 (S.C.C.) at paras 33-36).

72 In *Canada (Auditor General)*, the Supreme Court considered a statutory scheme that purported to confine remedies to Parliament. In that case, the Auditor General was unable to obtain documents from Cabinet. The relevant statute provided for a reporting process in which the Auditor General reported annually to the House of Commons on whether all required information had been provided, and the Auditor General had made two such reports.

73 The Court noted that Parliamentary sovereignty empowered Parliament to "make its intention known as to the role the courts are to play in interpreting, applying and enforcing its statutes" (*Canada (Auditor General)* at 91). However, if a statute provides for an alternative remedy, the court must still inquire into the adequacy of the alternative remedy, and "when Parliament fails to state explicitly that a statutory remedy is the sole or exclusive remedy, it will always be the case that exclusivity cannot be automatically assumed" (*Canada (Auditor General)* at 96).

74 In considering exclusivity, the Court identified a number of factors leading to the conclusion that Parliament intended for the provisions at issue to be an exclusive remedy. First, there was a "linkage" between the statutory right and the statutory remedy in that similar language was used to describe entitlements and the corresponding remedies (*Canada (Auditor General)* at 99). Second, the relevant sections of the Act had been added when the Auditor General's rights and duties were consolidated in the *Auditor General Act*, SC 1976-77, c 34, for the first time, which was "consistent with Parliament having designated itself as final arbiter of any disputes over the Auditor General's access to information" (*Canada (Auditor General)* at 99-100). Third, the provisions were part of a comprehensive remedial code, as there were other provisions governing the Auditor General's ability to obtain information (*Canada (Auditor General)* at 100).

75 In *Representative for Children & Youth v. British Columbia (Office of the Premier)*, 2010 BCSC 697 (B.C. S.C.), the Court noted at paragraph 31 that a three-part test emerged from *Canada (Auditor General)*. First, the court must determine if there is a remedial provision in the statute. Second, it must consider whether Parliament intended for that statutory remedy to be the exclusive remedy. Finally, it must examine the adequacy of that remedy.

76 In written submissions, the applicant sets out a brief history of the *COI Act*, stating its enactment in 2006 as part of the *Federal Accountability Act*, SC 2006, c 9, was the culmination of several decades of attempted reforms to a conflict of interest regime at the federal level. The applicant notes that the regime is enforced and administered by the Ethics Commissioner, who reports directly to Parliament, is granted broad investigative and enforcement powers, and exercises quasi-judicial functions.

77 The applicant submits that the *COI Act* imposes demanding standards on public office holders and is but one of several pieces of legislation designed to maintain ethical conduct in government at the federal level, the others being the *Criminal Code*, RSC 1985, c C-46, and the *Lobbying Act*. The applicant notes that this broad regime serves "the important goal of preserving the integrity of government" (*R. v. Hinchey*, [1996] 3 S.C.R. 1128 (S.C.C.) at para 13). The regime was intended to be, and has been, interpreted as encompassing situations of both real and apparent conflicts of interest where there is potential to compromise the appearance of integrity (*Hinchey* at para 17; see also *Democracy Watch v. Campbell*, 2009 FCA 79 (F.C.A.) at para 49 [*Campbell*]).

78 In this case, the applicant alleges that in deciding not to investigate the alleged breach of the Lobbyists' Code arising from the Aga Khan's gift, the Commissioner of Lobbying was in a conflict of interest and thereby breached the *COI Act*. This is because the Commissioner was seized with matters, including this matter, in which the Prime Minister had a private interest, and the Commissioner in turn had a real or apparent private interest in having her interim position renewed, a decision that rested with the Prime Minister and the Governor in Council.

79 In identifying the alleged conflict of interest, the applicant describes a number of alternative processes for the appointment of a Commissioner that it submits would have avoided the alleged conflict. These alternative policy options are of limited relevance and assistance in the context of a judicial review.

80 The respondent argues that in enacting the *COI Act*, Parliament has reserved for itself the role of investigating and enforcing the *COI Act* and has in turn vested that authority in the Ethics Commissioner, an Officer of Parliament. As a result, the alleged breach of the *COI Act* is not justiciable. I agree with the respondent.

81 At the first stage of the *Auditor General* analysis, I must determine if the *COI Act* contains remedial provisions. It does. One of the purposes of the Act is to "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" (*COI Act*, s 3(c)). It is the Commissioner who reviews the confidential reports of public office holders and the measures taken to comply with the Act (*COI Act*, s 28). The Commissioner also determines the compliance measures to be taken by a public office holder (*COI Act*, s 29). Finally, the Commissioner has the authority to order a public office holder to undertake any compliance measure he or she deems necessary to comply with the Act (*COI Act*, s 30).

82 Together, these sections demonstrate that the Ethics Commissioner determines when breaches of the *COI Act* have occurred and is empowered to order public office holders to take compliance measures if necessary.

83 In addressing the second part of the test, I must consider whether Parliament intended for these provisions to be an exclusive remedy. Such intention is derived through the interpretation of the statute (*Friends of the Earth - Les Ami(e)s de la Terre v. Canada (Governor in Council)*, 2008 FC 1183 (F.C.) at para 26, aff'd 2009 FCA 297 (F.C.A.)). As the Supreme Court noted, if there is no explicit statement to the effect that a statutory remedy is the sole or exclusive remedy, exclusivity should not be assumed (*Canada (Auditor General)* at 96).

84 As discussed above, the Court in *Canada (Auditor General)* identified a number of factors leading to the conclusion that Parliament intended for the provisions at issue to be an exclusive remedy: the "linkage" between the statutory right and statutory remedy; the timing of the introduction of the provisions at issue; and the fact that the provisions were part of a comprehensive remedial code (*Canada (Auditor General)* at 99-100).

85 In this case, Parliament, through the *COI Act*, has vested in the Ethics Commissioner, an Officer of Parliament, the authority to ensure compliance with the *COI Act* through a comprehensive reporting and review regime. This regime empowers the Ethics Commissioner to impose compliance measures upon those subject to the *COI Act*. The *COI Act* also establishes a complaint and investigation mechanism in which the Ethics Commissioner is responsible for the receipt and investigation of complaints (s 44). The Ethics Commissioner is also granted the authority to initiate an examination on his or her own initiative (s 45).

86 Following an examination, the Ethics Commissioner has a number of reporting obligations, including an obligation to make the report available to the public (ss 44(8), 45(4)). The *COI Act* also establishes procedures for consultation with the public office holder prior to the finalization of a report and provides that the Commissioner's conclusion as to whether a public office holder has contravened the *COI Act* is final (ss 46, 47).

87 In addition, the *COI Act* expressly addresses the circumstances in which a decision of the Ethics Commissioner is to be subject to judicial review and limits review to issues of jurisdiction; a failure to observe a principle of natural justice, procedural fairness, or other procedure required at law; or an action or failure to act by reason of fraud or perjured evidence (*COI Act*, s 66; *Federal Courts Act*, ss 18.1(4)(a), (b), (e)). This privative clause is not determinative but is a relevant factor when considering the respondent's position that Parliament has reserved for itself the role of investigating and enforcing the *COI Act* (*Canada (Auditor General)* at 99, 100).

88 The *COI Act* demonstrates a clear linkage between the obligations imposed on public office holders and the Ethics Commissioner's duties to, on the one hand, ensure and enforce compliance, and on the other, to investigate and address alleged breaches of the *COI Act*. In my opinion, the *COI Act* does establish a "comprehensive remedial code" that is aimed at identifying, preventing, and, where allegations of conflict arise, investigating and addressing those conflicts in a manner that is

complete and transparent. Parliament has reserved to itself the right to investigate and determine breaches of the *COI Act*.

89 The final part of the analysis asks whether the alternative remedies are adequate.

90 The *COI Act* establishes a "comprehensive remedial code" that includes the imposition of administrative monetary penalties where a contravention of prescribed sections of the *COI Act* has occurred (s 52). In addition to the prescribed monetary penalties, the *COI Act* provides for matters to be brought to the public's attention (ss 44(8), 45(4)).

91 In *Canada (Auditor General)* at page 104, the Supreme Court recognized that the reporting remedy, described as a "political remedy," alone can be adequate; it brings a matter to public attention:

> The adequacy of the s. 7(1)(*b*) remedy must not be underestimated. A report by the Auditor General to the House of Commons that the government of the day has refused to provide information brings the matter to public attention. It is open to the Opposition in Parliament to make the issue part of the public debate. The Auditor General's complaint that the government has not been willing to provide all the information requested may, as a result, affect the public's assessment of the government's performance. Thus, the s. 7(1)(*b*) remedy has an important role to play in strengthening Parliament's control over the executive with respect to financial matters.

92 The same reasoning is applicable here. The remedy under the *COI Act*, whereby reports are made available to the public, is an adequate alternative remedy.

93 In the face of the scheme established by Parliament, it is not for the Court to step into the role of the Ethics Commissioner to consider whether the Commissioner of Lobbying was in breach of the *COI Act*. In the absence of prior consideration of the matter and a decision of the Ethics Commissioner, the alleged breach of the *COI Act* is not a matter that is justiciable.

C. Is the Commissioner's decision reviewable?

94 Relying on *Democracy Watch v. Canada (Conflict of Interest & Ethics Commissioner)*, 2009 FCA 15 (F.C.A.) [*Democracy Watch 2009*], the respondent argues that the Commissioner of Lobbying's decision is not reviewable, as the Commissioner did not issue a decision or order within the meaning of subsection 18.1(3) of the *Federal Courts Act* (*Democracy Watch 2009* at para 9).

95 *Democracy Watch 2009* concerned a decision of the Ethics Commissioner not to investigate actions by Prime Minister Stephen Harper, the Attorney General, and other Cabinet ministers in relation to the Mulroney-Schreiber Airbus affair. In brief reasons, the Court of Appeal held the decision was not judicially reviewable as it was not a decision or order within the meaning

of section 66 of the *COI Act* (which refers to a "decision or order" of the Commissioner) or of subsection 18.1(3) of the *Federal Courts Act* (*Democracy Watch 2009* at para 9). The Supreme Court refused leave to appeal ([2009] S.C.C.A. No. 139 (S.C.C.)).

96 In finding the directives in issue were not judicially reviewable, the Federal Court of Appeal found the absence of a decision or order to be fatal. It also noted that "[w]here administrative action does not affect an applicant's rights or carry legal consequences, it is not amenable to judicial review" and that Democracy Watch "has no statutory right to have its complaint investigated by the Commissioner and the Commissioner has no statutory duty to act on it" (*Democracy Watch 2009* at paras 10, 11). It also noted the Commissioner's decision was not binding, as the Commissioner retained the discretion to investigate the matter later (at para 12).

97 In coming to this conclusion, the Court of Appeal addressed the decision of this Court in *Democracy Watch 2004*, where four decisions of the then Ethics Counsellor were reviewed. The Court of Appeal took no position on whether the decisions in issue were properly reviewable in *Democracy Watch 2004* but noted they arose in the context of a different statutory scheme (*Democracy Watch 2009* at para 13). I also note that in *Democracy Watch 2004*, the parties did not dispute "that, at all relevant times, the Ethics Counsellor was a federal board, commission or other tribunal whose rulings or decisions were subject to judicial review by this Court" (*Democracy Watch 2004* at para 21).

98 In *Air Canada v. Toronto Port Authority*, 2011 FCA 347 (F.C.A.) [*Air Canada*], the Federal Court of Appeal again addressed and clarified the circumstances in which administrative action will be susceptible to judicial review.

99 In that case, Air Canada brought applications for judicial review of two bulletins issued by the Toronto Port Authority. In finding the bulletins were not subject to judicial review, the Court clarified that a "decision" or "order" is not a prerequisite for judicial review. The Court noted that subsection 18.1(1) of the *Federal Courts Act* provides that an application for judicial review can be made regarding any "matter in respect of which relief is sought." Further, "[a] 'matter' that can be [the] 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*." The Court further noted that subsection 18.1(3) of the *Federal Courts Act* "refer[s] 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.'" The Court finally noted that Rule 300 of the *Federal Court Rules*, SOR/98-106, refers to "applications for judicial review of administrative action," not just judicial review of orders and decisions (*Air Canada* at paras 23-24).

100 The Court held that the issue to be addressed was not whether the bulletins in issue were reflective of a "decision" or "order," but rather whether the Toronto Port Authority had done something to trigger Air Canada's right to bring a judicial review. Citing *Democracy Watch 2009*,

386

the Court noted that the jurisprudence recognized many situations where an administrative body's conduct will not trigger the right to judicial review, including where the impugned conduct "fails to affect legal rights, impose legal obligations, or cause prejudicial effects" (*Air Canada* at paras 26-29). The Court found that neither bulletin had affected Air Canada's legal rights, imposed legal obligations, or caused it prejudicial effects (*Air Canada* at paras 37, 39).

101 I am satisfied that the absence of a "decision or order" cannot be taken as the test for determining if a matter is reviewable. Rather, the factors to consider include whether an administrative body's conduct or actions affected an applicant's legal rights, imposed legal obligations, or caused prejudicial effects.

102 The Federal Court of Appeal's recent decision in *Democracy Watch 2018* does not alter this conclusion. In that case, the Court considered whether two compliance measures under section 29 of the *COI Act* were reviewable, noting factors that pointed both to reviewability and non-reviewability (*Democracy Watch 2018* at paras 25-36). It confirmed that *Democracy Watch 2009* has "been used in support of the idea that 'an application for judicial review cannot be brought where the conduct attacked in the application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects'" (*Democracy Watch 2018* at para 29). The Court did not find it necessary to finally decide whether the measures were reviewable, finding that even if they were, the Commissioner's interpretation and application of the Act were reasonable (*Democracy Watch 2018* at para 37).

103 Considering the *Air Canada* factors in the context of the *Lobbying Act* and Lobbyists' Code, I am satisfied that the Commissioner's decision not to investigate the alleged breach is reviewable.

104 The Lobbyists' Code acknowledges and encourages "anyone" suspecting non-compliance to forward information to the Commissioner (Lobbyists' Code, Introduction). Where a member of the public provides information to the Commissioner relating to compliance, the Commissioner is required to consider that information and determine whether an investigation is necessary (*Lobbying Act*, s 10.4(1)).

105 The *Lobbying Act* and Lobbyists' Code impose a broader obligation upon the Commissioner to receive and consider information from members of the public than is imposed on the Ethics Commissioner, who need only receive information from or through members of Parliament (*COI Act*, s 44(4); see also *Democracy Watch 2018* at para 22, where the Federal Court of Appeal noted that "[n]o direct mechanism exists for a member of the public to request an investigation into such issues"). This broader obligation to receive and consider information is consistent with the purposes of the Act and the Code, which include "assuring the Canadian public that when lobbying of public office holders takes place, it is done ethically and with the highest standards with a view to enhancing public confidence and trust in the integrity of government decision making" (Lobbyists' Code, Introduction). It also reflects the wider breadth of application; the

Lobbying Act and Lobbyists' Code impose obligations on Canadians who engage in lobbying whereas the application of the *COI Act* is limited to public office holders.

106 The ability to provide information or initiate a complaint coupled with the Commissioner's duty to review, consider, and render a decision on that information leads me to conclude that legal rights are affected by a decision under subsection 10.4(1) of the Act. If that decision is reached in a manner contrary to the principles of fairness or if it fails to reflect the elements of reasonableness articulated by the Supreme Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (S.C.C.) [*Dunsmuir*], the decision can also be presumed to have a prejudicial effect.

107 In finding the decision of the Ethics Commissioner was not reviewable in *Democracy Watch 2009*, the Federal Court of Appeal examined the question within the context of a different statutory regime. As noted, the *COI Act* expressly excludes the possibility that a member of the public can directly transmit information to the Ethics Commissioner in circumstances that obligate the Ethics Commissioner to either consider the information or render a decision in respect of that information (*COI Act*, ss 44 and 45; also see *Democracy Watch 2018* at para 22). The circumstances in this case are clearly distinguishable. I am satisfied that the Commissioner's decision not to investigate the complaint is reviewable.

D. What is the standard of review?

108 The applicant submits that the correctness standard applies to issues of procedural fairness. The respondent submits that reasonableness applies throughout.

109 It has been generally held that a correctness standard of review is to be applied where questions of procedural fairness arise; however, the jurisprudence has acknowledged that in assessing fairness, the court must afford some deference to the decision maker's procedural choices. This question was recently addressed by the Federal Court of Appeal in *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 (F.C.A.).

110 In that case, the Court held that the notion that procedural fairness is assessed on a correctness standard with deference to the tribunal's procedural choices was both "confusing and unhelpful." The question a reviewing court must answer is "*whether* fairness has been met" (at paras 44, 46 [emphasis in original]). In the end, the Court found at paragraph 54 that "even though there is awkwardness in the use of terminology, the reviewing exercise is 'best reflected in the correctness standard.'" However, in this context, correctness requires the Court to assess whether it is satisfied, in light of the factors set out in *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) [*Baker*], that the process followed achieved the standard of fairness required in the circumstances (*Lv v. Canada (Citizenship and Immigration)*, 2018 FC 935 (F.C.) at para 16).

111 A reasonableness standard of review presumptively applies where the Commissioner's interpretation of the *Lobbying Act*, her home statute, arises (*Democracy Watch 2018* at para 39). The application of the *Lobbying Act* to the circumstances before the Commissioner engages questions of mixed fact and law that are also reviewable against a standard of reasonableness (*Campbell* at para 24).

112 Reasonableness is a deferential standard. A reviewing court is to be concerned with whether (1) the decision-making process reflects the elements of justification, transparency, and intelligibility; and (2) the decision falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law (*Dunsmuir* at para 47).

E. Does a reasonable apprehension of bias arise?

113 The Supreme Court summarized the key principles relating to reasonable apprehension of bias in *Yukon Francophone School Board, Education Area No. 23 v. Yukon Territory (Attorney General)*, 2015 SCC 25 (S.C.C.). It affirmed that the applicable test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly" (para 20, citing *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 (S.C.C.) at 394). The Court noted that this test is meant to ensure both the reality and the appearance of a fair adjudicative process and that it is essential for maintaining public confidence in the legal system (paras 22-23). The strong presumption of impartiality is not easily displaced; a "real likelihood or probability of bias" is required, and there is a high burden on the party alleging bias. The inquiry is inherently contextual and fact-specific (paras 25-26).

114 A reasonable apprehension of bias may also result where questions of institutional independence and impartiality arise (*Bell Canada v. C.T.E.A.*, 2003 SCC 36 (S.C.C.) at para 17 [*Bell Canada*]). As the Supreme Court explained in *Bell Canada* at paragraph 19, these components are not to be conflated:

> [T]he requirement of independence "pertains to the structure of tribunals, and to the relationship between their members and others, including members of other branches of government, such as the executive. The test does not have to do with independence of thought. A tribunal must certainly exercise independence of thought, in the sense that it must not be unduly influenced by improper considerations. But this is just another way of saying that it must be impartial.
>
> [Emphasis in original]

115 The applicant argues that a reasonable apprehension of bias arises as the Commissioner lacked security of tenure — she was serving at the pleasure of the Prime Minister at the time the decision in issue was made. In advancing this argument, the applicant relies on *Democracy Watch 2004*, where Justice Frederick Gibson held that the then Ethics Counsellor position gave rise to institutional or structural bias because it did not benefit from a security of tenure and the incumbent was appointed by the Prime Minister (paras 41-45, 50-56). The Court further noted that the Ethics Counsellor fulfilled differing roles that in themselves placed him and his office in a "constant state of potential conflict of interest" (para 54).

116 The respondent submits that the mere possibility of a renewal of an interim appointment does not establish a reasonable apprehension of bias. The test requires a "real likelihood or probability" of bias, not the mere "possibility of mischief." The respondent argues there is no evidence that the Commissioner based her decision on anything other than the law. In addition, she had publicly stated she was not seeking reappointment. The respondent distinguishes *Democracy Watch 2004* on the basis that the appointment process in that case, which was described as "informal in the extreme," did not require consultation with Parliamentary leaders or fixed tenure. Meanwhile, the appointment of the Commissioner of Lobbying requires consultation with the leaders of the recognized political parties in Parliament, is for a fixed term, and must be confirmed by Parliamentary approval.

117 The applicant's argument in this case is based on a simple assertion: Ms. Shepherd's interim appointments would cause an informed person, viewing the matter realistically and practically and having thought the matter through, to conclude that it is more likely than not that Ms. Shepherd, consciously or unconsciously, would not decide the issue fairly.

118 Unlike courts, administrative tribunals do not have constitutional guarantees to individual and institutional independence, as they "lack [a] constitutional distinction from the executive" (*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2001 SCC 52 (S.C.C.) at paras 23-24 [*Ocean Port Hotel Ltd.*]). As tribunals are created with the purpose of implementing government policy, Parliament and the legislatures determine a tribunal's composition and structure; therefore, "the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected" (*Ocean Port Hotel Ltd.* at para 24).

119 The areas of concern leading to the finding in *Democracy Watch 2004* do not arise here. The Commissioner's role is to implement and enforce the *Lobbying Act*. Through the *Lobbying Act*, Parliament has made the Commissioner accountable to Parliament and required that the Commissioner not hold any other office or employment (ss 4.1, 4.2(1)). Parliament has provided Cabinet with the authority to appoint an interim Commissioner (s 4.1(4)). The Act formally sets out the Commissioner's duties and responsibilities and establishes reporting mechanisms in respect

of those duties and functions. In choosing to enact the legislative regime it has, Parliament is presumed to have foreseen the possibility that the Commissioner would be called upon to address matters that would be of interest to individual members of Parliament and Cabinet. Parliament's choice in this regard should be respected (*Ocean Port Hotel Ltd.* at para 24).

120 Ms. Shepherd's interim appointments were made in accordance with the *Lobbying Act*. The parties do not dispute that Ms. Shepherd had publicly announced she was not seeking reappointment to the position. There is no evidence on the record to suggest Ms. Shepherd's decision was driven by improper considerations. The applicant has fallen well short in advancing the view that the strong presumption of impartiality has been displaced in this case. A reasonable apprehension of bias does not arise.

F. Does the doctrine of legitimate expectation apply?

121 The doctrine of legitimate expectation was addressed by the Supreme Court in *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 (S.C.C.) [*Agraira*]:

> [94] [...] If a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been. Likewise, if representations with respect to a substantive result have been made to an individual, the duty owed to him by the public authority in terms of the procedures it must follow before making a contrary decision will be more onerous.
>
> [95] The specific conditions which must be satisfied in order for the doctrine of legitimate expectations to apply are summarized succinctly in a leading authority entitled *Judicial Review of Administrative Action in Canada*:
>
> > The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated. As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to a legitimate expectation that such procedures will be followed. Of course, the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified.
> >
> > [Emphasis added.]

> (D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §7:1710; see also *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281, at para. 29; *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504, at para. 68.)

> [96] In *Mavi*, Binnie J. recently explained what is meant by "clear, unambiguous and unqualified" representations by drawing an analogy with the law of contract (at para. 69):
>
> > Generally speaking, government representations will be considered sufficiently precise for purposes of the doctrine of legitimate expectations if, had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement.
>
> [97] An important limit on the doctrine of legitimate expectations is that it cannot give rise to substantive rights (*Baker*, at para. 26; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557). In other words, "[w]here the conditions for its application are satisfied, the Court may [only] grant appropriate procedural remedies to respond to the 'legitimate' expectation" (*C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, at para. 131 (emphasis added)).

122 The applicant argues it had a legitimate expectation arising from the objects and purposes of the *COI Act* that the Commissioner of Lobbying, a public office holder subject to the *COI Act*, would recuse herself from ruling on the Aga Khan's gift.

123 The respondent submits the applicant is essentially seeking to use the doctrine of legitimate expectations to obtain substantive rights, which the doctrine does not support. Moreover, the applicant has not identified words or actions that would create a legitimate expectation. The *Lobbying Act* sets out clear parameters for the interim appointment of the Commissioner and the standards for conducting an investigation, neither of which can be said to have taken the applicant by surprise. The respondent makes no representations in respect of the applicant's position that it is the *COI Act*, not the *Lobbying Act*, that gives rise to the expectation.

124 The doctrine of legitimate expectation has repeatedly been described in relation to the conduct, representations, promises, and past practices of an administrative actor (*Baker* at para 26; *Moreau-Bérubé c. Nouveau-Brunswick*, 2002 SCC 11 (S.C.C.) at para 78 [*Moreau-Bérubé*]; *Agraira* at para 94; Donald JM Brown & The Honourable John M Evans with the assistance of David Fairlie, *Judicial Review of Administrative Action in Canada* (Toronto: Thomson Reuters, 2017) (loose-leaf updated 2018, release 2018-4), ¶7:1710). It has been raised in cases involving guidelines (e.g. *Agraira*), treaties (e.g. *Baker*), letters from officials (e.g. *dela Fuente v. Canada (Minister of Citizenship & Immigration)*, 2006 FCA 186 (F.C.A.)), non-binding reports (e.g. *Moreau-Bérubé*), and the like.

125 The applicant's position that a legitimate expectation may arise from the stated objects and purposes of legislation appears to be novel and the applicant cites no authority in support of the proposition. The jurisprudence suggests such expectations arise from the conduct, past practices, representations, etc. of an administrative actor, which may be gleaned from a non-statutory instrument but not the statute itself.

126 However, even if I were to assume that the doctrine may arise in the circumstances relied upon by the applicant, the applicant identifies no clear and unambiguous representation, practice, or assurance that certain procedures would be followed. Reliance on the objects and purposes of the *COI Act* is insufficient to trigger the doctrine.

G. Was the decision reasonable?

127 The applicant submits the Commissioner erred in law in deciding not to further investigate the circumstances raised in the private citizen's complaint.

128 In advancing its position, the applicant argues that the *Lobbying Act* does not require evidence of an actual violation of the Act or the Code to trigger an investigation. Rather, the Act requires that the Commissioner need only be satisfied that an investigation is necessary to ensure compliance with the Act or Code. The applicant submits that in conducting the administrative review, the Commissioner unreasonably and unlawfully narrowed the issue to a consideration of a "breach" of rule 8 or rule 10 of the Code.

129 The applicant submits the Commissioner should have considered whether *any* registered lobbyist at the Foundation may not have complied with the Code or whether the circumstances triggered obligations under the Code for registered lobbyists within the Foundation. She should have also considered that as a board member of the Foundation, the Aga Khan was directly and legally connected to the Foundation and was acting as its representative in giving a gift to the Prime Minister. In the applicant's view, the decision "creates a loophole that the Code does not intend or permit, a loophole that allows any organization to use unpaid officers to do things for, and give things to, public office holders to place them in a conflict of interest."

130 In support of its arguments, the applicant relies upon:

A. the Lobbyists' Code's stated purpose: "to assure the Canadian public that when lobbying of public office holders takes place, it is done ethically and with the highest standards with a view of enhancing public confidence and trust in the integrity of government decision making";

B. the Integrity and Professionalism principles contained in the Code;

C. the Code's rules addressing conflicts of interest (rules 6-10), citing in particular rule 6, which prohibits lobbyists from proposing or undertaking action that would place a public

office holder in a real or apparent conflict of interest, and rule 10, which addresses the provision or promise of gifts, favours, or other benefits to public office holders; and

D. subsection 10.4(1) of the *Lobbying Act*, which requires the Commissioner to conduct an investigation where he or she believes an investigation is necessary to ensure compliance with the Code or the Act.

131 The respondent notes that the Commissioner's jurisdiction is limited to investigating activities regulated by the *Lobbying Act*. Here, the Commissioner lacked jurisdiction as there was no evidence the Aga Khan was engaged in activities on behalf of the Foundation. The Act applies to consultant lobbyists and in-house lobbyists, individuals who are in receipt of some kind of remuneration. In the respondent's submission, "[a] person acting in a volunteer capacity is not a lobbyist under the Lobbying Act." As the Aga Khan did not receive remuneration for the activities he undertook on the Foundation's behalf, he was not a registered lobbyist and the Code did not apply. The Commissioner reasonably concluded an investigation was not necessary.

132 The applicant's submissions are essentially to the effect that in deciding an investigation was not necessary, the Commissioner committed a reviewable error by limiting her consideration to a single circumstance — whether the Aga Khan was a remunerated member of the Foundation's Board of Directors and was therefore subject to the *Lobbying Act*. I agree.

133 The memorandum reporting on the administrative review discloses that the Foundation had "an active in-house (organizations) return in the Registry of Lobbyists," that the Aga Khan was listed as member of the Board of Directors, and that the Aga Khan was not a registered lobbyist. As submitted by the applicant, the background set out in the memorandum raises potential compliance questions in respect of the Foundation's senior officer, the officer responsible for the filing of returns, and other lobbyists at the Foundation. Potential compliance questions relating to the Aga Khan also arise.

134 The analysis undertaken in the administrative review memorandum is limited to a single sentence, stating in part that "[t]he Directorate has found no evidence to indicate [the Aga Khan] is remunerated for his work with the AKFC." This limited analysis undermines both the intelligibility and justifiability of the decision not to investigate and renders the decision unreasonable.

135 At the outset, I note that "remuneration" is not a term that is used in the *Lobbying Act* in reference to either consultant lobbyists or in-house lobbyists. Consultant lobbyists incur obligations under the Act when they undertake prescribed activities on behalf of a person or organization "for payment" (s 5). The Act also imposes obligations on employees of an organization who engage in prescribed activities as in-house lobbyists, as well as their employers (s 7). I note that "employee" is defined to include an officer of the corporation or organization who is compensated for the performance of his or her duties (s 7(6)).

136 "Payment" is broadly defined in subsection 2(1) of the *Lobbying Act* as follows:

> ***payment*** means money or anything of value and includes a contract, promise or agreement to pay money or anything of value; (*paiement*)
>
> ***paiement*** Argent ou autre objet de valeur. Y est assimilée toute entente ou promesse de paiement. (*payment*)

137 "Remunerate" is defined in the *Concise Oxford English Dictionary* as "pay for services rendered or work done." "Pay" in turn denotes the giving of money in return for a service: "give (someone) money due for work, goods, or a debt incurred": Angus Stevenson & Maurice Waite, eds, *Concise Oxford English Dictionary*, 12th ed (Oxford: Oxford University Press, 2011) sub verbos "remunerate" and "pay".

138 It goes without saying that "remuneration" is narrower in scope than "payment" as that term is used in section 5 of the Act.

139 The Act's definition of "payment" might reasonably encompass things of value that fall outside the scope of "remuneration." For example, and without expressing any view on the question, "anything of value" might reasonably include a directorship within a corporation or organization, even in circumstances where the position is voluntary. Parliament's broad definition of "payment" is consistent with the overarching purpose and intent of the *Lobbying Act* and the Lobbyists' Code of enhancing public confidence and trust in the integrity of government decision making.

140 The Commissioner's analysis does not consider whether the Aga Khan may have received "anything of value"; it begins and ends with the simple question of monetary payment. Restricting the analysis to this narrow question is inconsistent with both the wording of the Act and the objects and purposes of the Code.

141 In recommending the administrative review be closed, the review memorandum states "[t]he Directorate has a basis to conclude the Lobbyists' Code of Conduct does not apply..." This mischaracterizes the question Parliament has charged the Commissioner with considering — is "an investigation ... necessary to ensure compliance with the Code or this Act" (*Lobbying Act*, s 10.4(1)).

142 The decision indicates that it was made with reference to the Commissioner's "Advisory Opinions on Board of Directors."

143 The *Lobbying Act* empowers the Commissioner to issue "advisory opinions and interpretation bulletins with respect to the enforcement, interpretation or application of this Act" (s 10(1)). These opinions and bulletins are not statutory instruments pursuant to the *Statutory*

Instruments Act and are not binding (s 10(2)). The content of the advisory opinion might well explain the limited nature of the Commissioner's analysis, but it cannot have the effect of limiting the provisions of the Act or the Code. The Commissioner's limited analysis excluded any consideration of potential compliance issues relating to the Foundation, its senior officer, or its other registered lobbyists. The Aga Khan's status as a board member, coupled with the Foundation's active in-house return, flag all of these as areas for review.

144 A reviewing court may look to the record for the purpose of assessing the reasonableness of an outcome (*N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62 (S.C.C.) at para 15). In this case, access to the original complaint from the private citizen may well have assisted in assessing the reasonableness of the Commissioner's decision. However, the complaint is not before me, and the remaining record is of little assistance in this regard.

145 As previously noted, subsection 10.4(1) requires the Commissioner to broadly consider whether there may have been a lack of compliance with the Act or the Code. The Act imposes no limitations on this initial inquiry. In this regard, it is important to recognize that it is the activities an individual undertakes, not whether they have registered as a lobbyist, that triggers compliance obligations under the Act and the Code (*Makhija v. Canada (Registrar General)*, 2008 FCA 402 (F.C.A.) at paras 5-6).

146 I am of the view, in light of the purposes and objectives of the *Lobbying Act* and the Code and the investigative obligation imposed by section 10.4 of the Act, that the Commissioner was required to take a broad view of the circumstances in addressing the complaint. Instead, the record before the Court reflects a narrow, technical, and targeted analysis that is lacking in transparency, justification, and intelligibility when considered in the context the Commissioner's duties and functions. The decision is unreasonable.

VI. Relief

147 Having concluded that the Commissioner's decision is unreasonable, I now turn to the relief sought. The applicant seeks an order directing the Commissioner to proceed with a full investigation. A court requiring an administrative decision maker to pursue a specific course of action is a form of *mandamus* (*Lebon v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FCA 55 (F.C.A.) at para 13 [*LeBon*]). An order of *mandamus* is only appropriate in very limited circumstances (*LeBon* at paras 14, 15). No submissions have been made to justify the awarding of the remedy sought. Instead, the decision is quashed and returned for redetermination in accordance with the reasons above.

148 In written submissions, both parties sought costs. In oral submissions, the applicant took the position that as a public interest litigant, costs should not be awarded against it. The public interest nature of the application coupled with the applicant's position that it should not be subject

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to a costs award are considerations to which I attach significant weight. I decline to exercise my discretion to order costs.

JUDGMENT IN T-115-18

THIS COURT'S JUDGMENT is that:

1. The application is granted;

2. The matter is returned for redetermination; and

3. There shall be no award of costs.

Application granted; matter referred for redetermination.

Annex

Conflict of Interest Act, SC 2006, c 9, s 2,

Definitions

2 (1) The following definitions apply in this Act.

private interest does not include an interest in a decision or matter

(a) that is of general application;

(b) that affects a public office holder as one of a broad class of persons; or

(c) that concerns the remuneration or benefits received by virtue of being a public office holder. (*intérêt personnel*)

Purpose of the Act

3 The purpose of this Act is to

(a) establish clear conflict of interest and post-employment rules for public office holders;

(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;

(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;

(d) encourage experienced and competent persons to seek and accept public office; and

(e) facilitate interchange between the private and public sector.

Conflict of interest

4 For the purposes of this Act, a public office holder is in a conflict of interest when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person's private interests.

[...]

Decision-making

6 (1) No public office holder shall make a decision or participate in making a decision related to the exercise of an official power, duty or function if the public office holder knows or reasonably should know that, in the making of the decision, he or she would be in a conflict of interest.

[...]

Duty to recuse

21 A public office holder shall recuse himself or herself from any discussion, decision, debate or vote on any matter in respect of which he or she would be in a conflict of interest.

[...]

Annual review

28 The Commissioner shall review annually with each reporting public office holder the information contained in his or her confidential reports and the measures taken to satisfy his or her obligations under this Act.

Determination of appropriate measures

29 Before they are finalized, the Commissioner shall determine the appropriate measures by which a public office holder shall comply with this Act and, in doing so, shall try to achieve agreement with the public office holder.

Compliance order

30 In addition to the specific compliance measures provided for in this Part, the Commissioner may order a public office holder, in respect of any matter, to take any compliance measure, including divestment or recusal, that the Commissioner determines is necessary to comply with this Act.

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[...]

Request from parliamentarian

44 (1) A member of the Senate or House of Commons who has reasonable grounds to believe that a public office holder or former public office holder has contravened this Act may, in writing, request that the Commissioner examine the matter.

Content of request

44 (2) The request shall identify the provisions of this Act alleged to have been contravened and set out the reasonable grounds for the belief that the contravention has occurred.

Examination

44 (3) If the Commissioner determines that the request is frivolous or vexatious or is made in bad faith, he or she may decline to examine the matter. Otherwise, he or she shall examine the matter described in the request and, having regard to all the circumstances of the case, may discontinue the examination.

Information from public

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.

[...]

Report

44 (7) The Commissioner shall provide the Prime Minister with a report setting out the facts in question as well as the Commissioner's analysis and conclusions in relation to the request. The report shall be provided even if the Commissioner determines that the request was frivolous or vexatious or was made in bad faith or the examination of the matter was discontinued under subsection (3).

Making report available

44 (8) The Commissioner shall, at the same time that the report is provided under subsection (7), provide a copy of it to the member who made the request — and the public office holder or former public office holder who is the subject of the request — and make the report available to the public.

Examination on own initiative

45 (1) If the Commissioner has reason to believe that a public office holder or former public office holder has contravened this Act, the Commissioner may examine the matter on his or her own initiative.

[...]

Report

45 (3) Unless the examination is discontinued, the Commissioner shall provide the Prime Minister with a report setting out the facts in question as well as the Commissioner's analysis and conclusions.

Making report available

45 (4) The Commissioner shall, at the same time that the report is provided under subsection (3) to the Prime Minister, provide a copy of it to the public office holder or former public office holder who is the subject of the report and make the report available to the public.

Presentation of views

46 Before providing confidential advice under paragraph 43(a) or a report under section 44 or 45, the Commissioner shall provide the public office holder or former public office holder concerned with a reasonable opportunity to present his or her views.

Conclusion in report final

47 A conclusion by the Commissioner set out in a report under section 44 or 45 that a public office holder or former public office holder has or has not contravened this Act may not be altered by anyone but is not determinative of the measures to be taken as a result of the report.

[...]

Violation

52 Every public office holder who contravenes one of the following provisions commits a violation and is liable to an administrative monetary penalty not exceeding $500:

(a) subsections 22(1), (2) and (5);

(b) section 23;

(c) subsections 24(1) and (2);

(d) subsections 25(1) to (6);

(e) subsections 26(1) and (2); and

(f) subsection 27(7).

[...]

Orders and decisions final

66 Every order and decision of the Commissioner is final and shall not be questioned or reviewed in any court, except in accordance with the *Federal Courts Act* on the grounds referred to in paragraph 18.1(4)(a), (b) or (e) of that Act.

Lobbying Act, RSC 1985, c 44 (4th Supp)

Interpretation

2(1) In this Act,

payment means money or anything of value and includes a contract, promise or agreement to pay money or anything of value; (*paiement*)

public office holder means any officer or employee of Her Majesty in right of Canada and includes

(a) a member of the Senate or the House of Commons and any person on the staff of such a member,

(b) a person who is appointed to any office or body by or with the approval of the Governor in Council or a minister of the Crown, other than a judge receiving a salary under the Judges Act or the lieutenant governor of a province,

(c) an officer, director or employee of any federal board, commission or other tribunal as defined in the *Federal Courts Act*,

(d) a member of the Canadian Armed Forces, and

(e) a member of the Royal Canadian Mounted Police; (titulaire d'une charge publique)

[...]

Commissioner of Lobbying

4.1 (1) The Governor in Council shall, by commission under the Great Seal, appoint a Commissioner of Lobbying after consultation with the leader of every recognized party in the Senate and House of Commons and approval of the appointment by resolution of the Senate and House of Commons.

Tenure of office and removal

4.1 (2) Subject to this section, the Commissioner holds office during good behaviour for a term of seven years, but may be removed for cause by the Governor in Council at any time on address of the Senate and House of Commons.

Further terms

4.1 (3) The Commissioner, on the expiry of a first or any subsequent term of office, is eligible to be reappointed for a further term not exceeding seven years.

Interim appointment

4.1 (4) In the event of the absence or incapacity of the Commissioner, or if that office is vacant, the Governor in Council may appoint any qualified person to hold that office in the interim for a term not exceeding six months, and that person shall, while holding office, be paid the salary or other remuneration and expenses that may be fixed by the Governor in Council.

Rank and powers

4.2 (1) The Commissioner has the rank and powers of a deputy head of a department, shall engage exclusively in the duties of the office of Commissioner under this Act or any other Act of Parliament and shall not hold any other office or employment for reward.

Duties and functions

4.2 (2) The Commissioner's duties and functions, in addition to those set out elsewhere in this Act, include developing and implementing educational programs to foster public awareness of the requirements of this Act, particularly on the part of lobbyists, their clients and public office holders.

Requirement to file return

5 (1) An individual shall file with the Commissioner, in the prescribed form and manner, a return setting out the information referred to in subsection

(2), if the individual, for payment, on behalf of any person or organization (in this section referred to as the "client"), undertakes to

(a) communicate with a public office holder in respect of

(i) the development of any legislative proposal by the Government of Canada or by a member of the Senate or the House of Commons,

(ii) the introduction of any Bill or resolution in either House of Parliament or the passage, defeat or amendment of any Bill or resolution that is before either House of Parliament,

(iii) the making or amendment of any regulation as defined in subsection 2(1) of the *Statutory Instruments Act*,

(iv) the development or amendment of any policy or program of the Government of Canada,

(v) the awarding of any grant, contribution or other financial benefit by or on behalf of Her Majesty in right of Canada, or

(vi) the awarding of any contract by or on behalf of Her Majesty in right of Canada; or

(b) arrange a meeting between a public office holder and any other person.

[...]

Requirement to file return

7 (1) The officer responsible for filing returns for a corporation or organization shall file with the Commissioner, in the prescribed form and manner, a return setting out the information referred to in subsection (3) if

(a) the corporation or organization employs one or more individuals any part of whose duties is to communicate with public office holders on behalf of the employer or, if the employer is a corporation, on behalf of any subsidiary of the employer or any corporation of which the employer is a subsidiary, in respect of

(i) the development of any legislative proposal by the Government of Canada or by a member of the Senate or the House of Commons,

(ii) the introduction of any Bill or resolution in either House of Parliament or the passage, defeat or amendment of any Bill or resolution that is before either House of Parliament,

(iii) the making or amendment of any regulation as defined in subsection 2(1) of the *Statutory Instruments Act*,

(iv) the development or amendment of any policy or program of the Government of Canada, or

(v) the awarding of any grant, contribution or other financial benefit by or on behalf of Her Majesty in right of Canada; and

(b) those duties constitute a significant part of the duties of one employee or would constitute a significant part of the duties of one employee if they were performed by only one employee.

Definitions

7 (6) In this section,

employee includes an officer who is compensated for the performance of their duties; (employé)

[...]

Registry

9 (1) The Commissioner shall establish and maintain a registry in which shall be kept a record of all returns and other documents submitted to the Commissioner under this Act and of any information sent under subsection 9.1(1) and responses provided relative to that information.

[...]

Access to registry

9 (4) The registry shall be open to public inspection at such place and at such reasonable hours as the Commissioner may determine.

Interpretation bulletins

10 (1) The Commissioner may issue advisory opinions and interpretation bulletins with respect to the enforcement, interpretation or application of this Act other than under sections 10.2 to 10.5.

Interpretation bulletins not statutory instruments

10 (2) The advisory opinions and interpretation bulletins are not statutory instruments for the purposes of the and are not binding.

[...]

Lobbyists' Code of Conduct

10.2 (1) The Commissioner shall develop a Lobbyists' Code of Conduct respecting the activities described in subsections 5(1) and 7(1). Code not a statutory instrument

[...]

10.2 (4) The Code is not a statutory instrument for the purposes of the Statutory Instruments Act, but the Code shall be published in the Canada Gazette.

Compliance with Code

10.3 (1) The following individuals shall comply with the Code:

(a) an individual who is required to file a return under subsection 5(1); and

(b) an employee who, in accordance with paragraph 7(3)(f) or (f.1), is named in a return filed under subsection 7(1).

Investigation

10.4 (1) The Commissioner shall conduct an investigation if he or she has reason to believe, including on the basis of information received from a member of the Senate or the House of Commons, that an investigation is necessary to ensure compliance with the Code or this Act, as applicable.

Exception

10.4 (1.1) The Commissioner may refuse to conduct or may cease an investigation with respect to any matter if he or she is of the opinion that

(a) the matter is one that could more appropriately be dealt with according to a procedure provided for under another Act of Parliament;

(b) the matter is not sufficiently important;

(c) dealing with the matter would serve no useful purpose because of the length of time that has elapsed since the matter arose; or

(d) there is any other valid reason for not dealing with the matter.

Report on investigation

10.5 (1) After conducting an investigation, the Commissioner shall prepare a report of the investigation, including the findings, conclusions and reasons for the Commissioner's conclusions, and submit it to the Speaker of the Senate and the Speaker of the House of Commons, who shall each table the report in the House over which he or she presides forthwith after receiving it or, if that House is not then sitting, on any of the first fifteen days on which that House is sitting after the Speaker receives it.

Annual report

11 The Commissioner shall, within three months after the end of each fiscal year, prepare a report with regard to the administration of this Act during that fiscal year and submit the report to the Speaker of the Senate and the Speaker of the House of Commons, who shall each table the report in the House over which he or she presides forthwith after receiving it or, if that House is not then sitting, on any of the first fifteen days on which that House is sitting after the Speaker receives it.

Special reports

11.1 (1) The Commissioner may, at any time, prepare a special report concerning any matter within the scope of the powers, duties and functions of the Commissioner if, in the opinion of the Commissioner, the matter is of such urgency or importance that a report on it should not be deferred until the next annual report.

Tabling of special report

11.1 (2) The Commissioner shall submit the special report to the Speaker of the Senate and the Speaker of the House of Commons, who shall each table the report in the House over which he or she presides forthwith after receiving it or, if that House is not then sitting, on any of the first fifteen days on which that House is sitting after the Speaker receives it.

Contravention

14 (1) Every individual who fails to file a return as required under subsection 5(1) or (3) or 7(1) or (4), or knowingly makes any false or misleading statement in any return or other document submitted to the Commissioner under this Act or in any response provided relative to information sent under subsection 9.1(1), whether in electronic or other form, is guilty of an offence and liable

(a) on summary conviction, to a fine not exceeding $50,000 or to imprisonment for a term not exceeding six months, or to both; and

(b) on proceedings by way of indictment, to a fine not exceeding $200,000 or to imprisonment for a term not exceeding two years, or to both.

Federal Courts Act, RSC 1985, c F-7

Powers of Federal Court

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

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

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

Grounds of review

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

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

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

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

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

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

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

2008 SCC 9, 2008 CSC 9
Supreme Court of Canada

Dunsmuir v. New Brunswick

2008 CarswellNB 124, 2008 CarswellNB 125, 2008 SCC 9, 2008 CSC 9, [2008] 1 S.C.R. 190, [2008] A.C.S. No. 9, [2008] S.C.J. No. 9, 164 A.C.W.S. (3d) 727, 170 L.A.C. (4th) 1, 2008 C.L.L.C. 220-020, 291 D.L.R. (4th) 577, 329 N.B.R. (2d) 1, 372 N.R. 1, 64 C.C.E.L. (3d) 1, 69 Imm. L.R. (3d) 1, 69 Admin. L.R. (4th) 1, 844 A.P.R. 1, 95 L.C.R. 65, J.E. 2008-547, D.T.E. 2008T-223

David Dunsmuir (Appellant) v. Her Majesty the Queen in Right of the Province of New Brunswick as represented by Board of Management (Respondent)

McLachlin C.J.C., Bastarache, Binnie, LeBel,
Deschamps, Fish, Abella, Charron, Rothstein JJ.

Heard: May 15, 2007
Judgment: March 7, 2008 *
Docket: 31459

Proceedings: affirming *New Brunswick (Board of Management) v. Dunsmuir* (2006), 2006 CarswellNB 155, 2006 CarswellNB 156, 2006 NBCA 27, *(*sub nom. *Dunsmuir v. R.)* 2006 C.L.L.C. 220-030, 297 N.B.R. (2d) 151, 771 A.P.R. 151, 44 Admin. L.R. (4th) 92, 48 C.C.E.L. (3d) 196, 265 D.L.R. (4th) 609 (N.B. C.A.)**Proceedings: affirming *New Brunswick (Board of Management) v. Dunsmuir* (2005), 2005 NBQB 270, 2005 CarswellNB 444, 293 N.B.R. (2d) 5, 762 A.P.R. 5, 43 C.C.E.L. (3d) 205 (N.B. Q.B.)**

Counsel: J. Gordon Petrie, Q.C., Clarence L. Bennett for Appellant
C. Clyde Spinney, Q.C., Keith P. Mullin for Respondent

***Bastarache, LeBel JJ.*:**

I. Introduction

1 This appeal calls on the Court to consider, once again, the troubling question of the approach to be taken in judicial review of decisions of administrative tribunals. The recent history of judicial review in Canada has been marked by ebbs and flows of deference, confounding tests and new words for old problems, but no solutions that provide real guidance for litigants, counsel,

administrative decision makers or judicial review judges. The time has arrived for a reassessment of the question.

A. Facts

2 The appellant, David Dunsmuir, was employed by the Department of Justice for the Province of New Brunswick. His employment began on February 25, 2002, as a Legal Officer in the Fredericton Court Services Branch. The appellant was placed on an initial six-month probationary term. On March 14, 2002, by Order-in-Council, he was appointed to the offices of Clerk of the Court of Queen's Bench, Trial Division, Administrator of the Court of Queen's Bench, Family Division, and Clerk of the Probate Court of New Brunswick, all for the Judicial District of Fredericton.

3 The employment relationship was not perfect. The appellant's probationary period was extended twice, to the maximum 12 months. At the end of each probationary period, the appellant was given a performance review. The first such review, which occurred in August 2002, identified four specific areas for improvement. The second review, three months later, cited the same four areas for development, but noted improvements in two. At the end of the third probationary period, the Regional Director of Court Services noted that the appellant had met all expectations and his employment was continued on a permanent basis.

4 The employer reprimanded the appellant on three separate occasions during the course of his employment. The first incident occurred in July 2002. The appellant had sent an email to the Chief Justice of the Court of Queen's Bench objecting to a request that had been made by the judge of the Fredericton Judicial District for the preparation of a practice directive. The Regional Director issued a reprimand letter to the appellant, explaining that the means he had used to raise his concerns were inappropriate and exhibited serious error in judgment. In the event that a similar concern arose in the future, he was directed to discuss the matter first with the Registrar or the Regional Director. The letter warned that failure to comply would lead to additional disciplinary measures and, if necessary, to dismissal.

5 A second disciplinary measure occurred when, in April 2004, it came to the attention of the Assistant Deputy Minister that the appellant was being advertised as a lecturer at legal seminars offered in the private sector. The appellant had inquired previously into the possibility of doing legal work outside his employment. In February 2004, the Assistant Deputy Minister had informed him that lawyers in the public service should not practise law in the private sector. A month later, the appellant wrote a letter to the Law Society of New Brunswick stating that his participation as a non-remunerated lecturer had been vetted by his employer, who had voiced no objection. On June 3, 2004, the Assistant Deputy Minister issued to the appellant written notice of a one-day suspension with pay regarding the incident. The letter also referred to issues regarding the appellant's work performance, including complaints from unnamed staff, lawyers and members of

the public regarding his difficulties with timeliness and organization. This second letter concluded with the statement that "[f]uture occurrences of this nature and failure to develop more efficient organized work habits will result in disciplinary action up to and including dismissal".

6 Third, on July 21, 2004, the Regional Director wrote a formal letter of reprimand to the appellant regarding three alleged incidents relating to his job performance. This letter, too, concluded with a warning that the appellant's failure to improve his organization and timeliness would result in further disciplinary action up to and including dismissal. The appellant responded to the letter by informing the Regional Director that he would be seeking legal advice and, until that time, would not meet with her to discuss the matter further.

7 A review of the appellant's work performance had been due in April 2004 but did not take place. The appellant met with the Regional Director on a couple of occasions to discuss backlogs and organizational problems. Complaints were relayed to her by staff but they were not documented and it is unknown how many complaints there had been. The Regional Director notified the appellant on August 11, 2004, that his performance review was overdue and would occur by August 20. A meeting had been arranged for August 19 between the appellant, the Regional Director, the Assistant Deputy Minister and counsel for the appellant and the employer. While preparing for that meeting, the Regional Director and the Assistant Deputy Minister concluded that the appellant was not right for the job. The scheduled meeting was cancelled and a termination notice was faxed to the appellant. A formal letter of termination from the Deputy Minister was delivered to the appellant's lawyer the next day. The letter terminated the appellant's employment with the Province of New Brunswick, effective December 31, 2004. It read, in relevant part:

> I regret to advise you that I have come to the conclusion that your particular skill set does not meet the needs of your employer in your current position, and that it is advisable to terminate your employment on reasonable notice, pursuant to section 20 of the *Civil Service Act*. You are accordingly hereby advised that your employment with the Province of New Brunswick will terminate on December 31, 2004. Cause for termination is not alleged.
>
> To aid in your search for other employment, you are not required to report to work during the notice period and your salary will be continued until the date indicated or for such shorter period as you require either to find a job with equivalent remuneration, or you commence self-employment.
>
> . . . . .
>
> In the circumstances, we would request that you avoid returning to the workplace until your departure has been announced to staff, and until you have returned your keys and government identification to your supervisor, Ms. Laundry as well as any other property of the employer still in your possession...

8 On February 3, 2005, the appellant was removed from his statutory offices by order of the Lieutenant-Governor in Council.

9 The appellant commenced the grievance process under s. 100.1 of the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25 ("*PSLRA*"; see Appendix), by letter to the Deputy Minister on September 1, 2004. That provision grants non-unionized employees of the provincial public service the right to file a grievance with respect to a "discharge, suspension or a financial penalty" (s. 100.1(2)). The appellant asserted several grounds of complaint in his grievance letter, in particular, that the reasons for the employer's dissatisfaction were not made known; that he did not receive a reasonable opportunity to respond to the employer's concerns; that the employer's actions in terminating him were without notice, due process or procedural fairness; and that the length of the notice period was inadequate. The grievance was denied. The appellant then gave notice that he would refer the grievance to adjudication under the *PSLRA*. The adjudicator was selected by agreement of the parties and appointed by the Labour and Employment Board.

10 The adjudication hearing was convened and counsel for the appellant produced as evidence a volume of 169 documents. Counsel for the respondent objected to the inclusion of almost half of the documents. The objection was made on the ground that the documents were irrelevant since the appellant's dismissal was not disciplinary but rather was a termination on reasonable notice. The preliminary issue therefore arose of whether, where dismissal was with notice or pay in lieu thereof, the adjudicator was authorized to assess the reasons underlying the province's decision to terminate. Following his preliminary ruling on that issue, the adjudicator heard and decided the merits of the grievance.

B. Decisions of the Adjudicator

(1) Preliminary Ruling (January 10, 2005)

11 The adjudicator began his preliminary ruling by considering s. 97(2.1) of the *PSLRA*. He reasoned that because the appellant was not included in a bargaining unit and there was no collective agreement or arbitral award, the section ought to be interpreted to mean that where an adjudicator determines that an employee has been discharged for cause, the adjudicator may substitute another penalty for the discharge as seems just and reasonable in the circumstances. The adjudicator considered and relied on the decision of the New Brunswick Court of Appeal in *Dr. Everett Chalmers Hospital v. Mills* (1989), 102 N.B.R. (2d) 1 (N.B. C.A.).

12 Turning to s. 100.1 of the *PSLRA*, he noted the referential incorporation of s. 97 in s. 100.1(5). He stated that such incorporation "necessarily means that an adjudicator has jurisdiction to make the determination described in s. 97(2.1), i.e. that an employee has been discharged or otherwise disciplined for cause" (p. 5). The adjudicator noted that an employee to whom s. 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1 (see Appendix), applies may be discharged for cause, with reasonable notice or with pay in lieu of reasonable notice. He concluded by holding that an employer cannot avoid an inquiry into its real reasons for dismissing an employee by stating that cause is not alleged. Rather, a grieving employee is entitled to an adjudication as to whether a

discharge purportedly with notice or pay in lieu thereof was in fact for cause. He therefore held that he had jurisdiction to make such a determination.

(2) Ruling on the Merits (February 16, 2005)

13 In his decision on the merits, released shortly thereafter, the adjudicator found that the termination letter of August 19 effected termination with pay in lieu of notice. The employer did not allege cause. Inquiring into the reasons for dismissal the adjudicator was satisfied that, on his view of the evidence, the termination was not disciplinary. Rather, the decision to terminate was based on the employer's concerns about the appellant's work performance and his suitability for the positions he held.

14 The adjudicator then considered the appellant's claim that he was dismissed without procedural fairness in that the employer did not inform him of the reasons for its dissatisfaction and did not give him an opportunity to respond. The adjudicator placed some responsibility on the employer for cancelling the performance review scheduled for August 19. He also opined that the employer was not so much dissatisfied with the appellant's quality of work as with his lack of organization.

15 The adjudicator's decision relied on *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 (S.C.C.), for the relevant legal principles regarding the right of "at pleasure" office holders to procedural fairness. As the appellant's employment was "hybrid in character" (para. 53) — he was both a Legal Officer under the *Civil Service Act* and, as Clerk, an office holder "at pleasure" — the adjudicator held that the appellant was entitled to procedural fairness in the employer's decision to terminate his employment. He declared that the termination was void *ab initio* and ordered the appellant reinstated as of August 19, 2004, the date of dismissal.

16 The adjudicator added that in the event that his reinstatement order was quashed on judicial review, he would find the appropriate notice period to be eight months.

C. Judicial History

(1) Court of Queen's Bench of New Brunswick (2005), 293 N.B.R. (2d) 5, 2005 NBQB 270 (N.B. Q.B.)

17 The Province of New Brunswick applied for judicial review of the adjudicator's decision on numerous grounds. In particular, it argued that the adjudicator had exceeded his jurisdiction in his preliminary ruling by holding that he was authorized to determine whether the termination was in fact for cause. The Province further argued that the adjudicator had acted incorrectly or unreasonably in deciding the procedural fairness issue. The application was heard by Rideout J.

18 The reviewing judge applied a pragmatic and functional analysis, considering the presence of a full privative clause in the *PSLRA*, the relative expertise of adjudicators appointed under the *PSLRA*, the purposes of ss. 97(2.1) and 100.1 of the *PSLRA* as well as s. 20 of the *Civil Service Act*, and the nature of the question as one of statutory interpretation. He concluded that the correctness standard of review applied and that the court need not show curial deference to the decision of an adjudicator regarding the interpretation of those statutory provisions.

19 Regarding the preliminary ruling, the reviewing judge noted that the appellant was employed "at pleasure" and fell under s. 20 of the *Civil Service Act*. In his view, the adjudicator had overlooked the effects of s. 20 and had mistakenly given ss. 97(2.1) and 100.1 of the *PSLRA* a substantive, rather than procedural, interpretation. Those sections are procedural in nature. They provide an employee with a right to grieve his or her dismissal and set out the steps that must be followed to pursue a grievance. The adjudicator is bound to apply the contractual provisions as they exist and has no authority to change those provisions. Thus, in cases in which s. 20 of the *Civil Service Act* applies, the adjudicator must apply the ordinary rules of contract. The reviewing judge held that the adjudicator had erred in removing the words "and the collective agreement or arbitral award does not contain a specific penalty for the infraction that resulted in the employee being discharged or otherwise disciplined" from s. 97(2.1). Those words limit s. 97(2.1) to employees who are not employed "at pleasure". In the view of the reviewing judge, the adjudicator did not have jurisdiction to inquire into the reasons for the termination. His authority was limited to determining whether the notice period was reasonable. Having found that the adjudicator had exceeded his jurisdiction, the reviewing judge quashed his preliminary ruling.

20 With respect to the adjudicator's award on the merits, the reviewing judge commented that some aspects of the decision are factual in nature and should be reviewed on a patent unreasonableness standard, while other aspects involve questions of mixed fact and law which are subject to a reasonableness *simpliciter* standard. The reviewing judge agreed with the Province that the adjudicator's reasons do not stand up to a "somewhat probing examination" (para. 76). The reviewing judge held that the adjudicator's award of reinstatement could not stand as he was not empowered by the *PSLRA* to make Lieutenant-Governor in Council appointments. In addition, by concluding that the decision was void *ab initio* owing to a lack of procedural fairness, the adjudicator failed to consider the doctrine of adequate alternative remedy. The appellant received procedural fairness by virtue of the grievance hearing before the adjudicator. The adjudicator had provisionally increased the notice period to eight months — that provided an adequate alternative remedy. Concluding that the adjudicator's decision did not stand up to review on a reasonableness *simpliciter* standard, the reviewing judge quashed the reinstatement order but upheld the adjudicator's provisional award of eight months' notice.

(2) Court of Appeal of New Brunswick (2006), 297 N.B.R. (2d) 151, 2006 NBCA 27 (N.B. C.A.)

21 The appellant appealed the decision of the reviewing judge. The Court of Appeal, Robertson J.A. writing, held that the proper standard with respect to the interpretation of the adjudicator's authority under the *PSLRA* was reasonableness *simpliciter* and that the reviewing judge had erred in adopting the correctness standard. The court reached that conclusion by proceeding through a pragmatic and functional analysis, placing particular emphasis on the presence of a full privative clause in the *PSLRA* and the relative expertise of an adjudicator in the labour relations and employment context. The court also relied on the decision of this Court in *A.U.P.E. v. Lethbridge Community College*, [2004] 1 S.C.R. 727, 2004 SCC 28 (S.C.C.). However, the court noted that the adjudicator's interpretation of the *Mills* decision warranted no deference and that "correctness is the proper review standard when it comes to the interpretation and application of caselaw" (para. 17).

22 Applying the reasonableness *simpliciter* standard, the court held that the adjudicator's decision was unreasonable. Robertson J.A. began by considering s. 20 of the *Civil Service Act* and noted that under the ordinary rules of contract, an employer holds the right to dismiss an employee with cause or with reasonable notice or with pay in lieu of notice. Section 20 of the *Civil Service Act* limits the Crown's common law right to dismiss its employees without cause or notice. Robertson J.A. reasoned that s. 97(2.1) of the *PSLRA* applies in principle to non-unionized employees, but that it is only where an employee has been discharged or disciplined *for cause* that an adjudicator may substitute such other penalty as seems just and reasonable in the circumstances. Where the employer elects to dismiss with notice or pay in lieu of notice, however, s. 97(2.1) does not apply. In such circumstances, the employee may only grieve the length of the notice period. The only exception is where the employee alleges that the decision to terminate was based on a prohibited ground of discrimination.

23 On the issue of procedural fairness, the court found that the appellant exercised his right to grieve, and thus a finding that the duty of fairness had been breached was without legal foundation. The court dismissed the appeal.

II. Issues

24 At issue, firstly is the approach to be taken in the judicial review of a decision of a particular adjudicative tribunal which was seized of a grievance filed by the appellant after his employment was terminated. This appeal gives us the opportunity to re-examine the foundations of judicial review and the standards of review applicable in various situations.

25 The second issue involves examining whether the appellant who held an office "at pleasure" in the civil service of New Brunswick, had the right to procedural fairness in the employer's decision to terminate him. On this occasion, we will reassess the rule that has found formal expression in *Knight*.

26 The two types of judicial review, on the merits and on the process, are therefore engaged in this case. Our review of the system will therefore be comprehensive, which is preferable since a holistic approach is needed when considering fundamental principles.

III. Issue 1: Review of the Adjudicator's statutory interpretation determination

A. Judicial Review

27 As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.

28 By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

29 Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220 (S.C.C.), at p. 234; also *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226, 2003 SCC 19 (S.C.C.), at para. 21.

30 In addition to the role judicial review plays in upholding the rule of law, it also performs an important constitutional function in maintaining legislative supremacy. As noted by Justice Thomas Cromwell, "the rule of law is affirmed by assuring that the courts have the final say on the jurisdictional limits of a tribunal's authority; second, legislative supremacy is affirmed by adopting the principle that the concept of jurisdiction should be narrowly circumscribed and

defined according to the intent of the legislature in a contextual and purposeful way; third, legislative supremacy is affirmed and the court-centric conception of the rule of law is reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law" (T. A. Cromwell, "Appellate Review: Policy and Pragmatism", in *2006 Isaac Pitblado Lectures, Appellate Courts: Policy, Law and Practice*, V-1, p. V-12). In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent.

31 The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect (*British Columbia (Minister of Finance) v. Woodward Estate* (1972), [1973] S.C.R. 120 (S.C.C.), at p. 127). The inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867*: *Crevier*. As noted by Beetz J. in *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298*, [1988] 2 S.C.R. 1048 (S.C.C.), [hereinafter *Bibeault*], at p. 1090, "[t]he role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection". In short, judicial review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits. As Laskin C.J. explained in *Crevier*, at pp. 237-38:

> Where ... questions of law have been specifically covered in a privative enactment, this Court, as in *Farrah*, has not hesitated to recognize this limitation on judicial review as serving the interests of an express legislative policy to protect decisions of adjudicative agencies from external correction. Thus, it has, in my opinion, balanced the competing interests of a provincial Legislature in its enactment of substantively valid legislation and of the courts as ultimate interpreters of the *British North America Act*, and s. 96 thereof. The same considerations do not, however, apply to issues of jurisdiction which are not far removed from issues of constitutionality. It cannot be left to a provincial statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review.

See also D. J. Mullan, *Administrative Law* (2001), at p. 50.

32 Despite the clear, stable constitutional foundations of the system of judicial review, the operation of judicial review in Canada has been in a constant state of evolution over the years, as courts have attempted to devise approaches to judicial review that are both theoretically sound and effective in practice. Despite efforts to refine and clarify it, the present system has proven to be difficult to implement. The time has arrived to re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable.

33 Although the instant appeal deals with the particular problem of judicial review of the decisions of an adjudicative tribunal, these reasons will address first and foremost the structure and characteristics of the system of judicial review as a whole. In the wake of *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 (S.C.C.), *Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé & des Services sociaux)*, [2001] 2 S.C.R. 281, 2001 SCC 41 (S.C.C.), and *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29 (S.C.C.), it has become apparent that the present system must be simplified. The comments of LeBel J. in *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86 (S.C.C.), at paras. 190 and 195, questioning the applicability of the "pragmatic and functional approach" to the decisions and actions of all kinds of administrative actors, illustrated the need for change.

B. Reconsidering the Standards of Judicial Review

34 The current approach to judicial review involves three standards of review, which range from correctness, where no deference is shown, to patent unreasonableness, which is most deferential to the decision maker, the standard of reasonableness *simpliciter* lying, theoretically, in the middle. In our view, it is necessary to reconsider both the number and definitions of the various standards of review, and the analytical process employed to determine which standard applies in a given situation. We conclude that there ought to be two standards of review — correctness and reasonableness.

35 The existing system of judicial review has its roots in several landmark decisions beginning in the late 1970s in which this Court developed the theory of substantive review to be applied to determinations of law, and determinations of fact and of mixed law and fact made by administrative tribunals. In *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 (S.C.C.) ("*CUPE*"), Dickson J. introduced the idea that, depending on the legal and administrative contexts, a specialized administrative tribunal with particular expertise, which has been given the protection of a privative clause, if acting within its jurisdiction, could provide an interpretation of its enabling legislation that would be allowed to stand unless "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review" (p. 237). Prior to *CUPE*, judicial review followed the "preliminary question doctrine", which inquired into whether a tribunal had erred in determining the scope of its jurisdiction. By simply branding an issue as "jurisdictional", courts could replace a decision of the tribunal with one they preferred, often at the expense of a legislative intention that the matter lie in the hands of the administrative tribunal. *CUPE* marked a significant turning point in the approach of courts to judicial review, most notably in Dickson J.'s warning that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be

doubtfully so" (p. 233). Dickson J.'s policy of judicial respect for administrative decision making marked the beginning of the modern era of Canadian administrative law.

36 *CUPE* did not do away with correctness review altogether and in *Bibeault*, the Court affirmed that there are still questions on which a tribunal must be correct. As Beetz J. explained, "the jurisdiction conferred on administrative tribunals and other bodies created by statute is limited, and ... such a tribunal cannot by a misinterpretation of an enactment assume a power not given to it by the legislator" (p. 1086). *Bibeault* introduced the concept of a "pragmatic and functional analysis" to determine the jurisdiction of a tribunal, abandoning the "preliminary question" theory. In arriving at the appropriate standard of review, courts were to consider a number of factors including the wording of the provision conferring jurisdiction on the tribunal, the purpose of the enabling statute, the reason for the existence of the tribunal, the expertise of its members, and the nature of the problem (p. 1088). The new approach would put "renewed emphasis on the superintending and reforming function of the superior courts" (p. 1090). The "pragmatic and functional analysis", as it came to be known, was later expanded to determine the appropriate degree of deference in respect of various forms of administrative decision making.

37 In *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), a third standard of review was introduced into Canadian administrative law. The legislative context of that case, which provided a statutory right of appeal from the decision of a specialized tribunal, suggested that none of the existing standards was entirely satisfactory. As a result, the reasonableness *simpliciter* standard was introduced. It asks whether the tribunal's decision was reasonable. If so, the decision should stand; if not, it must fall. In *Southam*, Iacobucci J. described an unreasonable decision as one that "is not supported by any reasons that can stand up to a somewhat probing examination" (para. 56) and explained that the difference between patent unreasonableness and reasonableness *simpliciter* is the "immediacy" or "obviousness" of the defect in the tribunal's decision (para. 57). The defect will appear on the face of a patently unreasonable decision, but where the decision is merely unreasonable, it will take a searching review to find the defect.

38 The three standards of review have since remained in Canadian administrative law, the approach to determining the appropriate standard of review having been refined in *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.).

39 The operation of three standards of review has not been without practical and theoretical difficulties, neither has it been free of criticism. One major problem lies in distinguishing between the patent unreasonableness standard and the reasonableness *simpliciter* standard. The difficulty in distinguishing between those standards contributes to the problem of choosing the right standard of review. An even greater problem lies in the application of the patent unreasonableness standard, which at times seems to require parties to accept an unreasonable decision.

40 The definitions of the patent unreasonableness standard that arise from the case law tend to focus on the magnitude of the defect and on the immediacy of the defect (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63 (S.C.C.), at para. 78, *per* LeBel J.). Those two hallmarks of review under the patent unreasonableness standard have been used consistently in the jurisprudence to distinguish it from review under the standard of reasonableness *simpliciter*. As it had become clear that, after *Southam*, lower courts were struggling with the conceptual distinction between patent unreasonableness and reasonableness *simpliciter*, Iacobucci J., writing for the Court in *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, 2003 SCC 20 (S.C.C.), attempted to bring some clarity to the issue. He explained the different operations of the two deferential standards as follows, at paras. 52-53:

> [A] patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason". ... A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.
>
> A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after "significant searching or testing" (*Southam*, *supra*, at para. 57). Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did.

41 As discussed by LeBel J. at length in *Toronto (City) v. C.U.P.E., Local 79*, notwithstanding the increased clarity that *Ryan* brought to the issue and the theoretical differences between the standards of patent unreasonableness and reasonableness *simpliciter*, a review of the cases reveals that any actual difference between them in terms of their operation appears to be illusory (see also the comments of Abella J. in *VIA Rail Canada Inc. v. Canadian Transportation Agency*, [2007] 1 S.C.R. 650 (S.C.C.), paras. 101-103). Indeed, even this Court divided when attempting to determine whether a particular decision was "patently unreasonable", although this should have been self-evident under the existing test (see *C.U.P.E. v. Ontario (Minister of Labour)*). This result is explained by the fact that both standards are based on the idea that there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported. Looking to either the magnitude or the immediacy of the defect in the tribunal's decision provides no meaningful way in practice of distinguishing between a patently unreasonable and an unreasonable decision. As Mullan has explained:

> [T]o maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality *simpliciter* will not is to make a nonsense of the

> law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality.

See D. M. Mullan, "Recent Developments in Standard of Review", in Canadian Bar Association (Ontario), *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (2000), at p. 25.

42 Moreover, even if one could conceive of a situation in which a clearly or highly irrational decision were distinguishable from a merely irrational decision, it would be unpalatable to require parties to accept an irrational decision simply because, on a deferential standard, the irrationality of the decision is not clear *enough*. It is also inconsistent with the rule of law to retain an irrational decision. As LeBel J. explained in his concurring reasons in *Toronto (City) v. C.U.P.E., Local 79*, at para. 108:

> In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision, regardless of whether the standard applied is reasonableness *simpliciter* or patent unreasonableness. ...

See also *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, 2004 SCC 23 (S.C.C.), at paras. 40-41, *per* LeBel J.

C. Two Standards of Review

43 The Court has moved from a highly formalistic, artificial "jurisdiction" test that could easily be manipulated, to a highly contextual "functional" test that provides great flexibility but little real on-the-ground guidance, and offers too many standards of review. What is needed is a test that offers guidance, is not formalistic or artificial, and permits review where justice requires it, but not otherwise. A simpler test is needed.

(1) Defining the Concepts of Reasonabless and Correctness

44 As explained above, the patent unreasonableness standard was developed many years prior to the introduction of the reasonableness *simpliciter* standard in *Southam*. The intermediate standard was developed to respond to what the Court viewed as problems in the operation of judicial review in Canada, particularly the perceived all-or-nothing approach to deference, and in order to create a more finely calibrated system of judicial review (see also L. Sossin and C. M. Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law" (2007), 57 *U.T.L.J.* 581). However, the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review. Though we are of the view that the three-standard model

is too difficult to apply to justify its retention, now, several years after *Southam*, we believe that it would be a step backwards to simply remove the reasonableness *simpliciter* standard and revert to pre-*Southam* law. As we see it, the problems that *Southam* attempted to remedy with the introduction of the intermediate standard are best addressed not by three standards of review, but by two standards, defined appropriately.

45 We therefore conclude that the two variants of reasonableness review should be collapsed into a single form of "reasonableness" review. The result is a system of judicial review comprising two standards — correctness and reasonableness. But the revised system cannot be expected to be simpler and more workable unless the concepts it employs are clearly defined.

46 What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?

47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

48 The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (*Mossop*, [*infra*], at p. 596, *per* L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered

or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, *per* L'Heureux-Dubé J.; *Ryan*, at para. 49).

49 Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

50 As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

(2) Determining the Appropriate Standard of Review

51 Having dealt with the nature of the standards of review, we now turn our attention to the method for selecting the appropriate standard in individual cases. As we will now demonstrate, questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.

52 The existence of a privative or preclusive clause gives rise to a strong indication of review pursuant to the reasonableness standard. This conclusion is appropriate because a privative clause is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. This does not mean, however, that the presence of a privative clause is determinative. The rule of law requires that the constitutional role of superior courts be preserved and, as indicated above, neither Parliament nor any legislature can completely remove the courts' power to review the actions and decisions

of administrative bodies. This power is constitutionally protected. Judicial review is necessary to ensure that the privative clause is read in its appropriate statutory context and that administrative bodies do not exceed their jurisdiction.

53 Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 (S.C.C.), at pp. 599-600; *Q.*, at para. 29; *Suresh*, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

54 Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *A.C.T.R.A. v. Canadian Broadcasting Corp.*, [1995] 1 S.C.R. 157 (S.C.C.), at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 (S.C.C.), at para. 39. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: *Toronto (City) v. C.U.P.E., Local 79*, at para. 72. Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan* (1974), [1975] 1 S.C.R. 517 (S.C.C.), where it was held that an administrative decision maker will always risk having its interpretation of an external statute set aside upon judicial review.

55 A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:

- A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.

- A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).

- The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E., Local 79*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

56 If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided

on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.

57 An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard (*Cartaway Resources Corp., Re*, [2004] 1 S.C.R. 672, 2004 SCC 26 (S.C.C.)). This simply means that the analysis required is already deemed to have been performed and need not be repeated.

58 For example, correctness review has been found to apply to constitutional questions regarding the division of powers between Parliament and the provinces in the *Constitution Act, 1867*: *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322 (S.C.C.). Such questions, as well as other constitutional issues, are necessarily subject to correctness review because of the unique role of s. 96 courts as interpreters of the Constitution: *Martin v. Nova Scotia (Workers' Compensation Board)*, [2003] 2 S.C.R. 504, 2003 SCC 54 (S.C.C.); Mullan, *Administrative Law*, at p. 60.

59 Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf ed.), at pp. 14-3 to 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19 (S.C.C.). In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, Bastarache J.). That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

60 As mentioned earlier, courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (*Toronto (City) v. C.U.P.E., Local 79*, at para. 62, *per* LeBel J.). Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers. Such was the case in *Toronto (City) v. C.U.P.E., Local 79*, which dealt with complex common law rules and conflicting

jurisprudence on the doctrines of *res judicata* and abuse of process — issues that are at the heart of the administration of justice (see para. 15, *per* Arbour J.).

61 Questions regarding the jurisdictional lines between two or more competing specialized tribunals have also been subject to review on a correctness basis: *Regina Police Assn. v. Regina (City) Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14 (S.C.C.); *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Québec (Procureure générale)*, [2004] 2 S.C.R. 185, 2004 SCC 39 (S.C.C.).

62 In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

63 The existing approach to determining the appropriate standard of review has commonly been referred to as "pragmatic and functional". That name is unimportant. Reviewing courts must not get fixated on the label at the expense of a proper understanding of what the inquiry actually entails. Because the phrase "pragmatic and functional approach" may have misguided courts in the past, we prefer to refer simply to the "standard of review analysis" in the future.

64 The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

D. Application

65 Returning to the instant appeal and bearing in mind the foregoing discussion, we must determine the standard of review applicable to the adjudicator's interpretation of the *PSLRA*, in particular ss. 97(2.1) and 100.1, and s. 20 of the *Civil Service Act*. That standard of review must then be applied to the adjudicator's decision. In order to determine the applicable standard, we will now examine the factors relevant to the standard of review analysis.

(1) Proper Standard of Review on the Statutory Interpretation Issue

66 The specific question on this front is whether the combined effect of s. 97(2.1) and s. 100.1 of the *PSLRA* permits the adjudicator to inquire into the employer's reason for dismissing an employee with notice or pay in lieu of notice. This is a question of law. The question to be answered

is therefore whether in light of the privative clause, the regime under which the adjudicator acted, and the nature of the question of law involved, a standard of correctness should apply.

67 The adjudicator was appointed and empowered under the *PSLRA*; s. 101(1) of that statute contains a full privative clause, stating in no uncertain terms that "every order, award, direction, decision, declaration or ruling of ... an adjudicator is final and shall not be questioned or reviewed in any court". Section 101(2) adds that "[n]o order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, judicial review, or otherwise, to question, review, prohibit or restrain ... an adjudicator in any of its or his proceedings." The inclusion of a full privative clause in the *PSLRA* gives rise to a strong indication that the reasonableness standard of review will apply.

68 The nature of the regime also favours the standard of reasonableness. This Court has often recognized the relative expertise of labour arbitrators in the interpretation of collective agreements, and counselled that the review of their decisions should be approached with deference: *CUPE*, at pp. 235-36; *Canada Safeway Ltd. v. R.W.D.S.U., Local 454*, [1998] 1 S.C.R. 1079 (S.C.C.), at para. 58; *Voice Construction*, at para. 22. The adjudicator in this case was, in fact, interpreting his enabling statute. Although the adjudicator was appointed on an *ad hoc* basis, he was selected by the mutual agreement of the parties and, at an institutional level, adjudicators acting under the *PSLRA* can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions. See *A.U.P.E. v. Lethbridge Community College*. This factor also suggests a reasonableness standard of review.

69 The legislative purpose confirms this view of the regime. The *PSLRA* establishes a time- and cost-effective method of resolving employment disputes. It provides an alternative to judicial determination. Section 100.1 of the *PSLRA* defines the adjudicator's powers in deciding a dispute, but it also provides remedial protection for employees who are not unionized. The remedial nature of s. 100.1 and its provision for timely and binding settlements of disputes also imply that a reasonableness review is appropriate.

70 Finally, the nature of the legal question at issue is not one that is of central importance to the legal system and outside the specialized expertise of the adjudicator. This also suggests that the standard of reasonableness should apply.

71 Considering the privative clause, the nature of the regime, and the nature of the question of law here at issue, we conclude that the appropriate standard is reasonableness. We must now apply that standard to the issue considered by the adjudicator in his preliminary ruling.

(2) Was the Adjudicator's Interpretation Unreasonable?

72 While we are required to give deference to the determination of the adjudicator, considering the decision in the preliminary ruling as a whole, we are unable to accept that it reaches the standard of reasonableness. The reasoning process of the adjudicator was deeply flawed. It relied on and led to a construction of the statute that fell outside the range of admissible statutory interpretations.

73 The adjudicator considered the New Brunswick Court of Appeal decision in *Dr. Everett Chalmers Hospital v. Mills* as well as amendments made to the *PSLRA* in 1990 (S.N.B. 1990, c. 30). Under the former version of the Act, an employee could grieve "with respect to ... disciplinary action resulting in discharge, suspension or a financial penalty" (s. 92(1)). The amended legislation grants the right to grieve "with respect to discharge, suspension or a financial penalty" (*PSLRA*, s. 100.1(2)). The adjudicator reasoned that the referential incorporation of s. 97(2.1) in s. 100.1(5) "necessarily means that an adjudicator has jurisdiction to make the determination described in subsection 97(2.1), i.e. that an employee has been discharged or otherwise disciplined for cause" (p. 5). He further stated that an employer "cannot avoid an inquiry into its real reasons for a discharge, or exclude resort to subsection 97(2.1), *by simply stating that cause is not alleged*" (*ibid*, emphasis added). The adjudicator concluded that he could determine whether a discharge purportedly with notice or pay in lieu of notice was in reality for cause.

74 The interpretation of the law is always contextual. The law does not operate in a vacuum. The adjudicator was required to take into account the legal context in which he was to apply the law. The employment relationship between the parties in this case was governed by private law. The contractual terms of employment could not reasonably be ignored. That is made clear by s. 20 of the *Civil Service Act*. Under the ordinary rules of contract, the employer is entitled to discharge an employee for cause, with notice or with pay in lieu of notice. Where the employer chooses to exercise its right to discharge with reasonable notice or pay in lieu thereof, the employer is not required to assert cause for discharge. The grievance process cannot have the effect of changing the terms of the contract of employment. The respondent chose to exercise its right to terminate without alleging cause in this case. By giving the *PSLRA* an interpretation that allowed him to inquire into the reasons for discharge where the employer had the right not to provide — or even have — such reasons, the adjudicator adopted a reasoning process that was fundamentally inconsistent with the employment contract and, thus, fatally flawed. For this reason, the decision does not fall within the range of acceptable outcomes that are defensible in respect of the facts and the law.

75 The decision of the adjudicator treated the appellant, a non-unionized employee, as a unionized employee. His interpretation of the *PSLRA*, which permits an adjudicator to inquire into the reasons for discharge where notice is given and, under s. 97(2.1), substitute a penalty that he or she determines just and reasonable in the circumstances, creates a requirement that the employer show cause before dismissal. There can be no justification for this; no reasonable interpretation can lead to that result. Section 100.1(5) incorporates s. 97(2.1) by reference into the determination of grievances brought by non-unionized employees. The employees subject to the *PSLRA* are

usually unionized and the terms of their employment are determined by collective agreement; s. 97(2.1) explicitly refers to the collective agreement context. Section 100.1(5) referentially incorporates s. 97(2.1) *mutatis mutandis* into the non-collective agreement context so that non-unionized employees who are discharged *for cause and without notice* have the right to grieve the discharge and have the adjudicator substitute another penalty as seems just and reasonable in the circumstances. Therefore, the combined effect of s. 97(2.1) and s. 100.1 cannot, on any reasonable interpretation, remove the employer's right under contract law to discharge an employee with reasonable notice or pay in lieu of notice.

76 The interpretation of the adjudicator was simply unreasonable in the context of the legislative wording and the larger labour context in which it is embedded. It must be set aside. Nevertheless, it must be acknowledged that his interpretation of the *PSLRA* was ultimately inconsequential to the overall determination of the grievance, since the adjudicator made no finding as to whether the discharge was or was not, in fact, for cause. The decision on the merits, which resulted in an order that the appellant be reinstated, instead turned on the adjudicator's decision on a separate issue — whether the appellant was entitled to and, if so, received procedural fairness with regard to the employer's decision to terminate his employment. This issue is discrete and isolated from the statutory interpretation issue, and it raises very different considerations.

IV. Issue 2: Review of the Adjudicator's Procedural Fairness Determination

77 Procedural fairness has many faces. It is at issue where an administrative body may have prescribed rules of procedure that have been breached. It is also concerned with general principles involving the right to answer and defence where one's rights are affected. In this case, the appellant raised in his grievance letter that the reasons for the employer's dissatisfaction were not specified and that he did not have a reasonable opportunity to respond to the employer's concerns. There was, in his view, lack of due process and a breach of procedural fairness.

78 The procedural fairness issue was dealt with only briefly by the Court of Appeal. Robertson J.A. mentioned at the end of his reasons that a duty of fairness did not arise in this case since the appellant had been terminated with notice and had exercised his right to grieve. Before this Court, however, the appellant argued that he was entitled to procedural fairness as a result of this Court's jurisprudence. Although ultimately we do not agree with the appellant, his contention raises important issues that need to be examined more fully.

A. Duty of Fairness

79 Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. Thus stated the principle is easy to grasp. It is not, however, always easy to apply. As has been noted many times, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case" (*Knight*, at p. 682; *Baker*, at para.

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21; *Moreau-Bérubé c. Nouveau-Brunswick*, [2002] 1 S.C.R. 249, 2002 SCC 11 (S.C.C.), at paras. 74-75).

80 This case raises the issue of the extent to which a duty of fairness applies to the dismissal of a public employee pursuant to a contract of employment. The grievance adjudicator concluded that the appellant had been denied procedural fairness because he had not been granted a hearing by the employer before being dismissed with four months' pay in lieu of notice. This conclusion was said to flow from this Court's decision in *Knight*, where it was held that the holder of an office "at pleasure" was entitled to be given the reasons for his or her dismissal and an opportunity to be heard before being dismissed (p. 683).

81 We are of the view that the principles established in *Knight* relating to the applicability of a duty of fairness in the context of public employment merit reconsideration. While the majority opinion in *Knight* properly recognized the important place of a general duty of fairness in administrative law, in our opinion, it incorrectly analyzed the effects of a contract of employment on such a duty. The majority in *Knight* proceeded on the premise that a duty of fairness based on public law applied unless expressly excluded by the employment contract or the statute (p. 681), without consideration of the terms of the contract with regard to fairness issues. It also upheld the distinction between office holders and contractual employees for procedural fairness purposes (pp. 670-76). In our view, what matters is the nature of the employment relationship between the public employee and the public employer. Where a public employee is employed under a contract of employment, regardless of his or her status as a public office holder, the applicable law governing his or her dismissal is the law of contract, not general principles arising out of public law. What *Knight* truly stands for is the principle that there is always a recourse available where the employee is an office holder and the applicable law leaves him or her without any protection whatsoever when dismissed.

82 This conclusion does not detract from the general duty of fairness owed by administrative decision makers. Rather it acknowledges that in the specific context of dismissal from public employment, disputes should be viewed through the lens of contract law rather than public law.

83 In order to understand why a reconsideration of *Knight* is warranted, it is necessary to review the development of the duty of fairness in Canadian administrative law. As we shall see, its development in the public employment context was intimately related to the distinction between public office holders and contractual employees, a distinction which, in our view, has become increasingly difficult to maintain both in principle and in practice.

(1) The Preliminary Issue of Jurisdiction

84 Before dealing with the scope of the duty of fairness in this case, a word should be said about the respondent's preliminary objection to the jurisdiction of the adjudicator under the *PSLRA* to consider procedural fairness. The respondent argues that allowing adjudicators to consider

procedural fairness risks granting them the inherent powers of a court. We disagree. We can see nothing problematic with a grievance adjudicator considering a public law duty of fairness issue where such a duty exists. It falls squarely within the adjudicator's task to resolve a grievance. However, as will be explained below, the proper approach is to first identify the nature of the employment relationship and the applicable law. Where, as here, the relationship is contractual, a public law duty of fairness is not engaged and therefore should play no role in resolving the grievance.

(2) The Development of the Duty of Fairness in Canadian Public Law

85 In Canada, the modern concept of procedural fairness in administrative law was inspired by the House of Lords' landmark decision in *Ridge v. Baldwin*, [1963] 2 All E.R. 66 (U.K. H.L.), a case which involved the summary dismissal of the chief constable of Brighton. The House of Lords declared the chief constable's dismissal a nullity on the grounds that the administrative body which had dismissed him had failed to provide the reasons for his dismissal or to accord him an opportunity to be heard in violation of the rules of natural justice. Central to the reasoning in the case was Lord Reid's distinction between (i) master-servant relationships (i.e. contractual employment), (ii) offices held "at pleasure", and (iii) offices where there must be cause for dismissal, which included the chief constable's position. According to Lord Reid, only the last category of persons was entitled to procedural fairness in relation to their dismissal since both contractual employees and office holders employed "at pleasure" could be dismissed without reason (p. 72). As the authors Wade and Forsyth note that, after a period of retreat from imposing procedural fairness requirements on administrative decision makers, *Ridge v. Baldwin* "marked an important change of judicial policy, indicating that natural justice was restored to favour and would be applied on a wide basis" (W. Wade and C. Forsyth, *Administrative Law* (8th ed. 2000), at p. 438).

86 The principles established by *Ridge v. Baldwin* were followed by this Court in *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police* (1978), [1979] 1 S.C.R. 311 (S.C.C.). *Nicholson*, like its U.K. predecessor, marked the return to a less rigid approach to natural justice in Canada (see Brown and Evans, at pp. 7-5 to 7-9). *Nicholson* concerned the summary dismissal of a probationary police officer by a regional board of police commissioners. Laskin C.J., for the majority, at p. 328, declared the dismissal void on the ground that the officer fell into Lord Reid's third category and was therefore entitled to the same procedural protections as in *Ridge v. Baldwin*.

87 Although *Ridge v. Baldwin* and *Nicholson* were concerned with procedural fairness in the context of the dismissal of public office holders, the concept of fairness was quickly extended to other types of administrative decisions (see e.g. *Martineau v. Matsqui Institution (No. 2)* (1979), [1980] 1 S.C.R. 602 (S.C.C.); *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105 (S.C.C.); *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735 (S.C.C.)).

430 In *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 (S.C.C.), Le Dain J. stated that the duty of fairness was a general principle of law applicable to all public authorities:

> This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual. ... [p. 653]
>
> (See also *Baker*, at para. 20.)

88 In *Knight*, the Court relied on the statement of Le Dain J. in *Cardinal v. Kent Institution* that the existence of a general duty to act fairly will depend on "(i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's rights" (*Knight*, at p. 669).

89 The dispute in *Knight* centred on whether a board of education had failed to accord procedural fairness when it dismissed a director of education with three months' notice pursuant to his contract of employment. The main issue was whether the director's employment relationship with the school board was one that attracted a public law duty of fairness. L'Heureux-Dubé J., for the majority, held that it did attract such a duty on the ground that the director's position had a "strong 'statutory flavour'" and could thus be qualified as a public office (p. 672). In doing so, she specifically recognized that, contrary to Lord Reid's holding in *Ridge v. Baldwin*, holders of an office "at pleasure", were also entitled to procedural fairness before being dismissed (pp. 673-74). The fact that the director's written contract of employment specifically provided that he could be dismissed with three months' notice was held not to be enough to displace a public law duty to act fairly (p. 681).

90 From these foundational cases, procedural fairness has grown to become a central principle of Canadian administrative law. Its overarching purpose is not difficult to discern: administrative decision makers, in the exercise of public powers, should act fairly in coming to decisions that affect the interests of individuals. In other words, "[t]he observance of fair procedures is central to the notion of the 'just' exercise of power" (Brown and Evans, at p. 7-3). What is less clear, however, is whether this purpose is served by imposing public law procedural fairness requirements on public bodies in the exercise of their contractual rights as employers.

(3) Procedural Fairness in the Public Employment Context

91 *Ridge v. Baldwin* and *Nicholson* established that a public employee's right to procedural fairness depended on his or her status as an office holder. While *Knight* extended a duty of fairness to office holders during pleasure, it nevertheless upheld the distinction between office holders and contractual employees as an important criterion in establishing whether a duty of fairness was owed. Courts have continued to rely on this distinction, either extending or denying procedural

protections depending on the characterization of the public employee's legal status as an office holder or contractual employee (see e.g. *Reglin v. Creston (Town)* (2004), 34 C.C.E.L. (3d) 123, 2004 BCSC 790 (B.C. S.C.); *Gismondi v. Toronto (City)* (2003), 64 O.R. (3d) 688 (Ont. C.A.); *Seshia v. Health Sciences Centre* (2001), 160 Man. R. (2d) 41, 2001 MBCA 151 (Man. C.A.); *Rosen v. Saskatoon District Health Board* (2001), 202 D.L.R. (4th) 35, 2001 SKCA 83 (Sask. C.A.); *Hanis v. Teevan* (1998), 111 O.A.C. 91 (Ont. C.A.); *Gerrard v. Sackville (Town)* (1992), 124 N.B.R. (2d) 70 (N.B. C.A.)).

92 In practice, a clear distinction between office holders and contractual employees has been difficult to maintain:

> Although the law makes a sharp distinction between office and service in theory, in practice it may be difficult to tell which is which. For tax purposes "office" has long been defined as a "subsisting, permanent substantive position which has an existence independent of the person who fills it", but for the purposes of natural justice the test may not be the same. Nor need an office necessarily be statutory, although nearly all public offices of importance in administrative law are statutory. A statutory public authority may have many employees who are in law merely its servants, and others of higher grades who are office-holders.
>
> (Wade and Forsyth, at pp. 532-33)

93 Lord Wilberforce noted that attempting to separate office holders from contractual employees

> involves the risk of a compartmental approach which, although convenient as a solvent, may lead to narrower distinctions than are appropriate to the broader issues of administrative law. A comparative list of situations in which persons have been held entitled or not entitled to a hearing, or to observation of rules of natural justice, according to the master and servant test, looks illogical and even bizarre.
>
> (*Malloch v. Aberdeen Corp.*, [1971] 2 All E.R. 1278 (U.K. H.L.), at p. 1294)

94 There is no reason to think that the distinction has been easier to apply in Canada. In *Knight*, as has been noted, the majority judgment relied on whether the public employee's position had a "strong 'statutory flavour'" (p. 672), but as Brown and Evans observe, "there is no simple test for determining whether there is a sufficiently strong 'statutory flavour' to a job for it to be classified as an 'office'" (p. 7-19). This has led to uncertainty as to whether procedural fairness attaches to particular positions. For instance, there are conflicting decisions on whether the position of a "middle manager" in a municipality is sufficiently important to attract a duty of fairness (compare *Gismondi*, at para. 53, and *Hughes v. Moncton (City)* (1990), 111 N.B.R. (2d) 184 (N.B. Q.B.) aff'd (1991), 118 N.B.R. (2d) 306 (N.B. C.A.). Similarly, physicians working in the public health system may or may not be entitled to a duty of fairness (compare *Seshia* and *Rosen v. Saskatoon District Health Board*, [2000] 4 W.W.R. 606, 2000 SKQB 40 (Sask. Q.B.)).

95 Further complicating the distinction is the fact that public employment is for the most part now viewed as a regular contractual employment relationship. The traditional position at common law was that public servants were literally "servants of the Crown" and could therefore be dismissed at will. However, it is now recognized that most public employees are employed on a contractual basis: *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 (S.C.C.).

96 *Wells* concerned the dismissal without compensation of a public office holder whose position had been abolished by statute. The Court held that, while Wells' position was created by statute, his employment relationship with the Crown was contractual and therefore he was entitled to be compensated for breach of contract according to ordinary private law principles. Indeed, *Wells* recognized that most civil servants and public officers are employed under contracts of employment, either as members of unions bound by collective agreements or as non-unionized employees under individual contracts of employment (paras. 20-21 and 29-32). Only certain officers, like ministers of the Crown and "others who fulfill constitutionally defined state roles", do not have a contractual relationship with the Crown, since the terms of their positions cannot be modified by agreement (*Wells*, at paras. 29-32).

97 The effect of *Wells*, as Professors Hogg and Monahan note, is that

> [t]he government's common law relationship with its employees will now be governed, for the most part, by the general law of contract, in the same way as private employment relationships. This does not mean that governments cannot provide for a right to terminate employment contracts at pleasure. However, if the government wishes to have such a right, it must either contract for it or make provision (expressly or by necessary implication) by way of statute.
>
> (P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000, at p. 240)

The important point for our purposes is that *Wells* confirmed that most public office holders have a contractual employment relationship. Of course, office holders' positions will also often be governed by statute and regulations, but the essence of the employment relationship is still contractual. In this context, attempting to make a clear distinction between office holders and contractual employees for the purposes of procedural fairness becomes even more difficult.

98 If the distinction has become difficult to maintain in practice, it is also increasingly hard to justify in principle. There would appear to be three main reasons for distinguishing between office holders and contractual employees and for extending procedural fairness protections only to the former, all of which, in our view, are problematic.

99 First, historically, offices were viewed as a form of property, and thus could be recovered by the office holder who was removed contrary to the principles of natural justice. Employees who

were dismissed in breach of their contract, however, could only sue for damages, since specific performance is not generally available for contracts for personal service (Wade and Forsyth, at pp. 531-32). This conception of public office has long since faded from our law: public offices are no longer treated as a form of private property.

100 A second and more persuasive reason for the distinction is that dismissal from public office involves the exercise of delegated statutory power and should therefore be subject to public law controls like any other administrative decision (*Knight*, at p. 675; *Malloch*, at p. 1293, *per* Lord Wilberforce). In contrast, the dismissal of a contractual employee only implicates a public authority's private law rights as an employer.

101 A third reason is that, unlike contractual employees, office holders did not typically benefit from contractual rights protecting them from summary discharge. This was true of the public office holders in *Ridge v. Baldwin* and *Nicholson*. Indeed, in both cases the statutory language purported to authorize dismissal without notice. The holders of an office "at pleasure" were in an even more tenuous position since by definition they could be dismissed without notice *and* without reason (*Nicholson*, at p. 323; *Black's Law Dictionary* (8th ed. (2004), p. 1192 "pleasure appointment"). Because of this relative insecurity it was seen to be desirable to impose minimal procedural requirements in order to ensure that office holders were not deprived of their positions arbitrarily (*Nicholson*, at pp. 322-23; *Knight*, at pp. 674-75; Wade and Forsyth, at pp. 536-37).

102 In our view, the existence of a contract of employment, not the public employee's status as an office holder, is the crucial consideration. Where a public office holder is employed under a contract of employment the justifications for imposing a public law duty of fairness with respect to his or her dismissal lose much of their force.

103 Where the employment relationship is contractual, it becomes difficult to see how a public employer is acting any differently in dismissing a public office holder and a contractual employee. In both cases, it would seem that the public employer is merely exercising its private law rights as an employer. For instance, in *Knight*, the director's position was terminated by a resolution passed by the board of education pursuant to statute, but it was done in accordance with the contract of employment, which provided for dismissal on three months' notice. Similarly, the appellant in this case was dismissed pursuant to s. 20 of the New Brunswick *Civil Service Act*, but that section provides that the ordinary rules of contract govern dismissal. He could therefore only be dismissed for just cause or on reasonable notice, and any failure to do so would give rise to a right to damages. In seeking to end the employment relationship with four months' pay in lieu of notice, the respondent was acting no differently than any other employer at common law. In *Wells*, Major J. noted that public employment had all of the features of a contractual relationship:

> A common-sense view of what it means to work for the government suggests that these relationships have all the hallmarks of contract. There are negotiations leading to agreement

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> and employment. This gives rise to enforceable obligations on both sides. The Crown is acting much as an ordinary citizen would, engaging in mutually beneficial commercial relations with individual and corporate actors. Although the Crown may have statutory guidelines, the result is still a contract of employment.
>
> [Emphasis added; para. 22.]

If the Crown is acting as any other private actor would in hiring its employees, then it follows that the dismissal of its employees should be viewed in the same way.

104 Furthermore, while public law is rightly concerned with preventing the arbitrary exercise of delegated powers, the good faith exercise of the contractual rights of an employer, such as the right to end the employment relationship on reasonable notice, cannot be qualified as arbitrary. Where the terms of the employment contract were explicitly agreed to, it will be assumed that procedural fairness was dealt with by the parties (see, for example, in the context of collective agreements: *Southeast Kootenay School District No. 5 v. B.C.T.F.* (2000), 94 L.A.C. (4th) 56 (B.C. Arb. Bd.)). If, however, the contract of employment is silent, the fundamental terms will be supplied by the common law or the civil law, in which case dismissal may only be for just cause or on reasonable notice.

105 In the context of this appeal, it must be emphasized that dismissal with reasonable notice is not unfair *per se*. An employer's right to terminate the employment relationship with due notice is simply the counterpart to the employee's right to quit with due notice (G. England, *Employment Law in Canada* (4th ed. (loose-leaf)), at para. 13.3). It is a well-established principle of the common law that, unless otherwise provided, both parties to an employment contract may end the relationship without alleging cause so long as they provide adequate notice. An employer's right to terminate on reasonable notice must be exercised within the framework of an employer's general obligations of good faith and fair dealing: *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.), at para. 95. But the good faith exercise of a common law contractual right to dismiss with notice does not give rise to concerns about the illegitimate exercise of public power. Moreover, as will be discussed below, where public employers do act in bad faith or engage in unfair dealing, the private law provides a more appropriate form of relief and there is no reason that they should be treated differently than private sector employers who engage in similar conduct.

106 Of course, a public authority must abide by any statutory restrictions on the exercise of its discretion as an employer, regardless of the terms of an employment contract, and failure to do so may give rise to a public law remedy. A public authority cannot contract out of its statutory duties. But where a dismissal decision is properly within the public authority's powers and is taken pursuant to a contract of employment, there is no compelling public law purpose for imposing a duty of fairness.

107 Nor is the protection of office holders a justification for imposing a duty of fairness when the employee is protected from wrongful dismissal by contract. The appellant's situation provides a good illustration of why this is so. As an office holder, the appellant was employed "at pleasure", and could therefore be terminated without notice or reason (*Interpretation Act*, R.S.N.B. 1973, c. I-13, s. 20). However, he was also a civil servant and, pursuant to s. 20 of the *Civil Service Act*, his dismissal was governed by the ordinary rules of contract. If his employer had dismissed him without notice and without cause he would have been entitled to claim damages for breach of contract. Even if he was dismissed with notice, it was open to him to challenge the length of notice or amount of pay in lieu of notice given. On the facts, the respondent gave the appellant four months' worth of pay in lieu of notice, which he was successful in having increased to eight months before the grievance adjudicator.

108 It is true that the remedy of reinstatement is not available for breach of contract at common law. In this regard, it might be argued that contractual remedies, on their own, offer insufficient protection to office holders (see *de Smith, Woolf & Jowell: Judicial Review of Administrative Action* (5th ed. 1995), at p. 187). However, it must be kept in mind that breach of a public law duty of fairness also does not lead to full reinstatement. The effect of a breach of procedural fairness is to render the dismissal decision void *ab initio* (*Ridge v. Baldwin*, at p. 81). Accordingly, the employment is deemed to have never ceased and the office holder is entitled to unpaid wages and benefits from the date of the dismissal to the date of judgment (see England, at para. 17.224). However, an employer is free to follow the correct procedure and dismiss the office holder again. A breach of the duty of fairness simply requires that the dismissal decision be retaken. It therefore is incorrect to equate it to reinstatement (see *Malloch*, at p. 1284).

109 In addition, a public law remedy can lead to unfairness. The amount of unpaid wages and benefits an office holder is entitled to will be a function of the length of time the judicial process has taken to wend its way to a final resolution rather than criteria related to the employee's situation. Furthermore, in principle, there is no duty to mitigate since unpaid wages are not technically damages. As a result, an employee may recoup much more than he or she actually lost (see England, at para. 17.224).

110 In contrast, the private law offers a more principled and fair remedy. The length of notice or amount of pay in lieu of notice an employee is entitled to depends on a number of factors including length of service, age, experience and the availability of alternative employment (see *Wallace*, at paras. 81 ff.). The notice period may be increased if it is established that the employer acted in bad faith or engaged in unfair dealing when acting to dismiss the employee (*Wallace*, at para. 95). These considerations aim at ensuring that dismissed employees are afforded some measure of protection while looking for new employment.

111 It is important to note as well that the appellant, as a public employee employed under a contract of employment, also had access to all of the same statutory and common law protections that surround private sector employment. He was protected from dismissal on the basis of a prohibited ground of discrimination under the *Human Rights Act*, R.S.N.B. 1973, c. H-11. His employer was bound to respect the norms laid down by the *Employment Standards Act*, S.N.B. 1982, c. E-7.2. As has already been mentioned, if his dismissal had been in bad faith or he had been subject to unfair dealing, it would have been open to him to argue for an extension of the notice period pursuant to the principles laid down in *Wallace*. In short, the appellant was not without legal protections or remedies in the face of his dismissal.

(4) The Proper Approach to the Dismissal of Public Employees

112 In our view, the distinction between office holder and contractual employee for the purposes of a public law duty of fairness is problematic and should be done away with. The distinction is difficult to apply in practice and does not correspond with the justifications for imposing public law procedural fairness requirements. What is important in assessing the actions of a public employer in relation to its employees is the nature of the employment relationship. Where the relationship is contractual, it should be viewed as any other private law employment relationship regardless of an employee's status as an office holder.

113 The starting point, therefore, in any analysis, should be to determine the nature of the employment relationship with the public authority. Following *Wells*, it is assumed that most public employment relationships are contractual. Where this is the case, disputes relating to dismissal should be resolved according to the express or implied terms of the contract of employment and any applicable statutes and regulations, without regard for whether the employee is an office holder. A public authority which dismisses an employee pursuant to a contract of employment should not be subject to any additional public law duty of fairness. Where the dismissal results in a breach of contract, the public employee will have access to ordinary contractual remedies.

114 The principles expressed in *Knight* in relation to the general duty of fairness owed by public authorities when making decisions that affect the rights, privileges or interests of individuals are valid and important. However, to the extent that the majority decision in *Knight* ignored the important effect of a contract of employment, it should not be followed. Where a public employee is protected from wrongful dismissal by contract, his or her remedy should be in private law, not in public law.

115 The dismissal of a public employee should therefore generally be viewed as a typical employment law dispute. However, there may be occasions where a public law duty of fairness will still apply. We can envision two such situations at present. The first occurs where a public employee is not, in fact, protected by a contract of employment. This will be the case with judges, ministers of the Crown and others who "fulfill constitutionally defined state roles" (*Wells*, at para.

31). It may also be that the terms of appointment of some public office holders expressly provide for summary dismissal or, at the very least, are silent on the matter, in which case the office holders may be deemed to hold office "at pleasure" (see e.g. *New Brunswick Interpretation Act*, R.S.N.B. 1973, c. I-13, s. 20; *Interpretation Act*, R.S.C. 1985, c. I-21, s. 23(1)). Because an employee in this situation is truly subject to the will of the Crown, procedural fairness is required to ensure that public power is not exercised capriciously.

116 A second situation occurs when a duty of fairness flows by necessary implication from a statutory power governing the employment relationship. In *Malloch*, the applicable statute provided that dismissal of a teacher could only take place if the teacher was given three weeks' notice of the motion to dismiss. The House of Lords found that this necessarily implied a right for the teacher to make representations at the meeting where the dismissal motion was being considered. Otherwise, there would have been little reason for Parliament to have provided for the notice procedure in the first place (p. 1282). Whether and what type of procedural requirements result from a particular statutory power will of course depend on the specific wording at issue and will vary with the context (*Knight*, at p. 682).

B. Conclusion

117 In this case, the appellant was a contractual employee of the respondent in addition to being a public office holder. Section 20 of the *Civil Service Act* provided that, as a civil servant, he could only be dismissed in accordance with the ordinary rules of contract. In these circumstances it was unnecessary to consider any public law duty of procedural fairness. The respondent was fully within its rights to dismiss the appellant with pay in lieu of notice without affording him a hearing. The respondent dismissed the appellant with four months' pay in lieu of notice. The appellant was successful in increasing this amount to eight months. The appellant was protected by contract and was able to obtain contractual remedies in relation to his dismissal. By imposing procedural fairness requirements on the respondent over and above its contractual obligations and ordering the full "reinstatement" of the appellant, the adjudicator erred in his application of the duty of fairness and his decision was therefore correctly struck down by the Court of Queen's Bench.

V. Disposition

118 We would dismiss the appeal. There will be no order for costs in this Court as the respondent is not requesting them.

***Binnie J.* (concurring):**

119 I agree with my colleagues that the appellant's former employment relationship with the respondent is governed by contract. The respondent chose to exercise its right to terminate the employment without alleging cause. The adjudicator adopted an unreasonable interpretation of s. 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1, and of ss. 97(2.1) and 100.1 of the *Public Service*

Labour Relations Act, R.S.N.B. 1973, c. P-25. The appellant was a non-unionized employee whose job was terminated in accordance with contract law. Public law principles of procedural fairness were not applicable in the circumstances. These conclusions are enough to dispose of the appeal.

120 However, my colleagues Bastarache and LeBel JJ. are embarked on a more ambitious mission, stating that:

> Although the instant appeal deals with the particular problem of judicial review of the decisions of an adjudicative tribunal, these reasons will address first and foremost the structure and characteristics of the system as a whole.
>
> . . . . .
>
> The time has arrived to reexamine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable. [Emphasis added; paras. 33 and 32.]

121 The need for such a re-examination is widely recognized, but in the end my colleagues' reasons for judgment do not deal with the "system as a whole". They focus on administrative tribunals. In that context, they reduce the applicable standards of review from three to two ("correctness" and "reasonableness"), but retain the pragmatic and functional analysis, although now it is to be called "the standard of review analysis" (para. 63). A broader reappraisal is called for. Changing the name of the old pragmatic and functional test represents a limited advance, but as the poet says:

> What's in a name? that which we call a rose
>
> By any other name would smell as sweet;
>
> (*Romeo and Juliet*, Act II, Scene i)

122 I am emboldened by my colleagues' insistence that "a holistic approach is needed when considering fundamental principles" (para. 26) to express the following views. Judicial review is an idea that has lately become unduly burdened with law office metaphysics. We are concerned with substance not nomenclature. The words themselves are unobjectionable. The dreaded reference to "functional" can simply be taken to mean that generally speaking courts have the last word on what *they* consider the correct decision on legal matters (because deciding legal issues is their "function"), while administrators should generally have the last word within *their* function, which is to decide administrative matters. The word "pragmatic" not only signals a distaste for formalism but recognizes that a conceptually tidy division of functions has to be tempered by practical considerations: for example a labour board is better placed than the courts to interpret the intricacies of provisions in a labour statute governing replacement of union workers; see e.g., *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 (S.C.C.).

123 Parliament or a provincial legislature is often well advised to allocate an administrative decision to someone other than a judge. The judge is on the outside of the administration looking in. The legislators are entitled to put their trust in the viewpoint of the designated decision maker (particularly as to what constitutes a reasonable outcome), not only in the case of the administrative tribunals of principal concern to my colleagues but (taking a "holistic approach") also in the case of a minister, a board, a public servant, a commission, an elected council or other administrative bodies and statutory decision makers. In the absence of a full statutory right of appeal, the court ought generally to respect the exercise of the administrative discretion, particularly in the face of a privative clause.

124 On the other hand, a court is right to insist that *its* view of the correct opinion (i.e. the "correctness" standard of review) is accepted on questions concerning the Constitution, the common law, and the interpretation of a statute other than the administrator's enabling statute (the "home statute") or a rule or statute closely connected with it; see generally D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf ed.), at para. 14: 2210.

125 Thus the law (or, more grandly, the "rule of law") sets the boundaries of potential administrative action. It is sometimes said by judges that an administrator acting within his or her discretion "has the right to be wrong". This reflects an unduly court-centred view of the universe. A disagreement between the court and an administrator does not necessarily mean that the administrator is wrong.

A. Limits on the Allocation of Decision Making

126 It should not be difficult in the course of judicial review to identify legal questions requiring disposition by a judge. There are three basic legal limits on the allocation of administrative discretion.

127 Firstly, the Constitution restricts the legislator's ability to allocate issues to administrative bodies which s. 96 of the *Constitution Act, 1867* has allocated to the courts. The logic of the constitutional limitation is obvious. If the limitation did not exist, the government could transfer the work of the courts to administrative bodies that are not independent of the executive and by statute immunize the decisions of these bodies from effective judicial review. The country would still possess an independent judiciary, but the courts would not be available to citizens whose rights or interests are trapped in the administration.

128 Secondly, administrative action must be founded on statutory or prerogative (i.e. common law) powers. This too is a simple idea. No one can exercise a power they do not possess. Whether or not the power (or jurisdiction) exists is a question of law for the courts to determine, just as it is for the courts (not the administrators) to have the final word on questions of general law that may be relevant to the resolution of an administrative issue. The instances where this Court has deferred

to an administrator's conclusion of law *outside* his or her home statute, or a statute "intimately" connected thereto, are exceptional. We should say so. Instead, my colleagues say the court's view of the law will prevail

> where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise". [para. 60]

It is, with respect, a distraction to unleash a debate in the reviewing judge's courtroom about whether or not a particular question of law is "of central importance to the legal system as a whole". It should be sufficient to frame a rule exempting from the correctness standard the provisions of the home statute and closely related statutes which require the expertise of the administrative decision maker (as in the labour board example). Apart from that exception, we should prefer clarity to needless complexity and hold that the last word on questions of general law should be left to judges.

129 Thirdly, a fair procedure is said to be the handmaiden of justice. Accordingly, procedural limits are placed on administrative bodies by statute and the common law. These include the requirements of "procedural fairness", which will vary with the type of decision maker and the type of decision under review. On such matters, as well, the courts have the final say. The need for such procedural safeguards is obvious. Nobody should have his or her rights, interests or privileges adversely dealt with by an unjust process. Nor is such an unjust intent to be attributed easily to legislators. *Hansard* is full of expressions of concern by Ministers and Members of Parliament regarding the fairness of proposed legislative provisions. There is a dated *hauteur* about judicial pronouncements such as that the "justice of the common law will supply the omission of the legislature" (*Cooper v. Wandsworth Board of Works* (1863), 14 C.B.N.S. 180, 143 E.R. 414 (Eng. C.P.), at p. 420). Generally speaking, legislators and judges in this country are working with a common set of basic legal and constitutional values. They share a belief in the rule of law. Constitutional considerations aside, however, statutory protections can nevertheless be repealed and common law protections can be modified by statute, as was demonstrated in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52 (S.C.C).

B. Reasonableness of Outcome

130 At this point, judicial review shifts gears. When the applicant for judicial review challenges the substantive *outcome* of an administrative action, the judge is invited to cross the line into second-guessing matters that lie within the function of the administrator. This is controversial because it is not immediately obvious why a judge's view of the reasonableness of an administrative policy or the exercise of an administrative discretion should be preferred to that of the administrator to whom Parliament or a legislature has allocated the decision, unless there is a full statutory right of appeal to the courts, or it is otherwise indicated in the conferring legislation that a "correctness" standard is intended.

131 In *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298*, [1988] 2 S.C.R. 1048 (S.C.C.), Beetz J. adopted the view that "[t]o a large extent judicial review of administrative action is a specialized branch of statutory interpretation" (p. 1087(emphasis in original deleted)). Judicial intervention in administrative decisions on grounds of substance (in the absence of a constitutional challenge) has been based on presumed legislative intent in a line of cases from *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*, [1947] 2 All E.R. 680 (Eng. C.A.) ("you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority" (p. 683)) to *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.* ("was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation...?" (p. 237)). More recent examples are *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) (para. 53), and *Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé & des Services sociaux)*, [2001] 2 S.C.R. 281, 2001 SCC 41 (S.C.C.), (paras. 60-61). Judicial review proceeds on the justified presumption that legislators do not intend results that depart from *reasonable* standards.

C. The Need to Reappraise the Approach to Judicial Review

132 The present difficulty, it seems, does not lie in the component parts of judicial review, most of which are well entrenched in decades of case law, but in the current methodology for putting those component parts into action. There is afoot in the legal profession a desire for clearer guidance than is provided by lists of principles, factors and spectrums. It must be recognized, of course, that complexity is inherent in all legal principles that must address the vast range of administrative decision making.

The objection is that our present "pragmatic and functional" approach is more complicated than is required by the subject matter.

133 People who feel victimized or unjustly dealt with by the apparatus of government, and who have no recourse to an administrative appeal, should have access to an independent judge through a procedure that is quick and relatively inexpensive. Like much litigation these days, however, judicial review is burdened with undue cost and delay. Litigants understandably hesitate to go to court to seek redress for a perceived administrative injustice if their lawyers cannot predict with confidence even what standard of review will be applied. The disposition of the case may well *turn* on the choice of standard of review. If litigants do take the plunge, they may find the court's attention focussed not on their complaints, or the government's response, but on lengthy and arcane discussions of something they are told is the pragmatic and functional test. Every hour of a lawyer's preparation and court time devoted to unproductive "lawyer's talk" poses a significant cost to the applicant. If the challenge is unsuccessful, the unhappy applicant may also face a substantial bill of costs from the successful government agency. A victory before the reviewing court may

be overturned on appeal because the wrong "standard of review" was selected. A small business denied a licence or a professional person who wants to challenge disciplinary action should be able to seek judicial review without betting the store or the house on the outcome. Thus, in my view, the law of judicial review should be pruned of some of its unduly subtle, unproductive, or esoteric features.

D. Standards of Review

134 My colleagues conclude that three standards of review should be reduced to two standards of review. I agree that this simplification will avoid some of the arcane debates about the point at which "unreasonableness" becomes "patent unreasonableness". However, in my view the repercussions of their position go well beyond administrative tribunals. My colleagues conclude, and I agree:

> Looking to either the magnitude or the immediacy of the defect in the tribunal's decision provides no meaningful way in practice of distinguishing between a patently unreasonable and an unreasonable decision. [para. 41]

More broadly, they declare that "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review" (para. 44), and "any actual difference between them in terms of their operation appears to be illusory" (para. 41). A test which is incoherent when applied to administrative tribunals does not gain in coherence or logic when applied to other administrative decision makers such as mid-level bureaucrats or, for that matter, Ministers. If logic and language cannot capture the distinction in one context, it must equally be deficient elsewhere in the field of judicial review. I therefore proceed on the basis that the distinction between "patent unreasonableness" and "reasonableness *simpliciter*" has been declared by the Court to be abandoned. I propose at this point to examine what I see as some of the implications of this abandonment.

E. Degrees of Deference

135 The distinction between reasonableness *simpliciter* and patent unreasonableness was not directed merely to "the magnitude or the immediacy of the defect" in the administrative decision (para. 41). The distinction also recognized that different administrative decisions command different degrees of deference, depending on who is deciding what.

136 A minister making decisions under the *Extradition Act*, R.S.C. 1985, c. E-23, to surrender a fugitive, for example, is said to be "at the extreme legislative end of the *continuum* of administrative decision making" (*Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631 (S.C.C.), at p. 659). On the other hand, a ministerial delegate making a deportation decision according to ministerial guidelines was accorded considerably less deference in *Baker* (where

the "reasonableness *simpliciter*" standard was applied). The difference does not lie only in the judge's view of the perceived immediacy of the defect in the administrative decision. In *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 (S.C.C.), a unanimous Court adopted the caution in the context of counter-terrorism measures that "[i]f the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove" (para. 33). Administrative decision makers generally command respect more for their expertise than for their prominence in the administrative food chain. Far more numerous are the lesser officials who reside in the bowels and recesses of government departments adjudicating pension benefits or the granting or withholding of licences, or municipal boards poring over budgets or allocating costs of local improvements. Then there are the Cabinet and Ministers of the Crown who make broad decisions of public policy such as testing cruise missiles, *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.), or policy decisions arising out of decisions of major administrative tribunals, as in *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735 (S.C.C.), at p. 753, where the Court said: "The very nature of the body must be taken into account in assessing the technique of review which has been adopted by the Governor in Council."

137 Of course, the degree of deference also depends on the nature and content of the question. An adjudicative tribunal called on to approve pipelines based on "public convenience and necessity" (*Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322 (S.C.C.)) or simply to take a decision in the "public interest" is necessarily accorded more room to manoeuvre than is a professional body, given the task of determining an appropriate sanction for a member's misconduct (*Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, 2003 SCC 20 (S.C.C.)).

138 In our recent jurisprudence, the "nature of the question" before the decision maker has been considered as one of a number of elements to be considered in choosing amongst the various standards of review. At this point, however, I believe it plays a more important role in terms of substantive review. It helps to define the range of reasonable outcomes within which the administrator is authorized to choose.

139 The judicial sensitivity to different levels of respect (or deference) required in different situations is quite legitimate. "Contextualizing" a single standard of review will shift the debate (slightly) from choosing *between* two standards of reasonableness that each represent a different level of deference to a debate *within* a single standard of reasonableness to determine the appropriate level of deference. In practice, the result of today's decision may be like the bold innovations of a traffic engineer that in the end do no more than shift rush hour congestion from one road intersection to another without any overall saving to motorists in time or expense.

140 That said, I agree that the repeated attempts to define and explain the difference between reasonableness *simpliciter* and "patent" unreasonableness can be seen with the benefit of hindsight

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to be unproductive and distracting. Nevertheless, the underlying issue of degrees of deference (which the two standards were designed to address) remains.

141 Historically, our law recognized "patent" unreasonableness before it recognized what became known as reasonableness *simpliciter*. The adjective "patent" initially underscored the level of respect that was due to the designated decision maker, and signalled the narrow authority of the courts to interfere with a particular administrative *outcome* on substantive grounds. The reasonableness *simpliciter* standard was added at a later date to recognize a reduced level of deference. Reducing three standards of review to two standards of review does not alter the reality that at the high end "patent" unreasonableness (in the sense of manifestly indefensible) was not a bad description of the hurdle an applicant had to get over to have an administrative decision quashed on a ground of substance. The danger of labelling the most "deferential" standard as "reasonableness" is that it may be taken (wrongly) as an invitation to reviewing judges not simply to identify the usual issues, such as whether irrelevant matters were taken into consideration, or relevant matters were not taken into consideration, but to reweigh the input that resulted in the administrator's decision as if it were the judge's view of "reasonableness" that counts. At this point, the judge's role is to identify the outer boundaries of reasonable outcomes within which the administrative decision maker is free to choose.

F. Multiple Aspects of Administrative Decisions

142 Mention should be made of a further feature that also reflects the complexity of the subject matter of judicial review. An applicant may advance several grounds for quashing an administrative decision. He or she may contend that the decision maker has misinterpreted the general law. He or she may argue, in the alternative, that even if the decision maker got the general law straight (an issue on which the court's view of what is correct will prevail), the decision maker did not properly apply it to the facts (an issue on which the decision maker is entitled to deference). In a challenge under the *Canadian Charter of Rights and Freedoms* to a surrender for extradition, for example, the minister will have to comply with the Court's view of *Charter* principles (the "correctness" standard), but if he or she correctly appreciates the applicable law, the court will properly recognize a wide discretion in the application of those principles to the particular facts. The same approach is taken to less exalted decision makers (*Moreau-Bérubé c. Nouveau-Brunswick*, [2002] 1 S.C.R. 249, 2002 SCC 11 (S.C.C.)). In the jargon of the judicial review bar, this is known as "segmentation".

G. The Existence of a Privative Clause

143 The existence of a privative clause is currently subsumed within the "pragmatic and functional" test as one factor amongst others to be considered in determining the appropriate standard of review, where it supports the choice of the patent unreasonableness standard. A single standard of "reasonableness" cannot mean that the degree of deference is unaffected by the

existence of a suitably worded privative clause. It is certainly a relevant contextual circumstance that helps to calibrate the intrusiveness of a court's review. It signals the level of respect that must be shown. Chief Justice Laskin during argument once memorably condemned the quashing of a labour board decision protected by a strong privative clause, by saying "what's wrong with these people [the judges], can't they read?" A system of judicial review based on the rule of law ought not to treat a privative clause as conclusive, but it is more than just another "factor" in the hopper of pragmatism and functionality. Its existence should presumptively foreclose judicial review on the basis of *outcome* on substantive grounds unless the applicant can show that the clause, properly interpreted, permits it or there is some legal reason why it cannot be given effect.

H. A Broader Reappraisal

144 "Reasonableness" is a big tent that will have to accommodate a lot of variables that inform and limit a court's review of the outcome of administrative decision making.

145 The theory of our recent case law has been that once the appropriate standard of review is selected, it is a fairly straightforward matter to apply it. In practice, the criteria for selection among "reasonableness" standards of review proved to be undefinable and their application unpredictable. The present incarnation of the "standard of review" analysis requires a threshold debate about the four factors (non-exhaustive) which critics say too often leads to unnecessary delay, uncertainty and costs as arguments rage before the court about balancing expertise against the "real" nature of the question before the administrator, or whether the existence of a privative clause trumps the larger statutory purpose, and so on. And this is all mere *preparation* for the argument about the actual substance of the case. While a measure of uncertainty is inherent in the subject matter and unavoidable in litigation (otherwise there wouldn't be any), we should at least (i) establish some presumptive rules and (ii) get the parties away from arguing about the tests and back to arguing about the substantive merits of their case.

146 The going-in presumption should be that the standard of review of any administrative outcome on grounds of substance is not correctness but reasonableness ("contextually" applied). The fact that the legislature designated someone other than the court as the decision maker calls for deference to (or judicial respect for) the outcome, absent a broad statutory right of appeal. Administrative decisions generally call for the exercise of discretion. Everybody recognizes in such cases that there is *no* single "correct" outcome. It should also be presumed, in accordance with the ordinary rules of litigation, that the decision under review *is* reasonable until the applicant shows otherwise.

147 An applicant urging the non-deferential "correctness" standard should be required to demonstrate that the decision under review rests on an error in the determination of a *legal* issue not confided (or which constitutionally *could* not be confided) to the administrative decision maker to decide, whether in relation to jurisdiction or the general law. Labour arbitrators, as in this case,

command deference on legal matters within their enabling statute or on legal matters intimately connected thereto.

148 When, then, should a decision be deemed "unreasonable"? My colleagues suggest a test *of irrationality* (para. 46), but the editors of de Smith point out that "many decisions which fall foul of [unreasonableness] have been coldly rational" (*Judicial Review of Administrative Action* (5th ed., H. Woolf and J. Jowell, 1995), para. 13-003). A decision meeting this description by this Court is *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29 (S.C.C.), where the Minister's appointment of retired judges with little experience in labour matters to chair "interest" arbitrations (as opposed to "grievance" arbitrations) between hospitals and hospital workers was "coldly rational" in terms of the Minister's own agenda, but was held by a majority of this Court to be patently unreasonable in terms of the history, object and purpose of the authorizing legislation. He had not used the appointment power for the purposes for which the legislature had conferred it.

149 Reasonableness rather than rationality has been the traditional standard and, properly interpreted, it works. That said, a single "reasonableness" standard will now necessarily incorporate *both* the degree of deference formerly reflected in the distinction between patent unreasonableness and reasonableness *simpliciter*, *and* an assessment of the range of options reasonably open to the decision maker in the circumstances, in light of the reasons given for the decision. Any reappraisal of our approach to judicial review should, I think, explicitly recognize these different dimensions to the "reasonableness" standard.

I. Judging "Reasonableness"

150 I agree with my colleagues that "reasonableness" depends on the context. It must be calibrated to fit the circumstances. A driving speed that is "reasonable" when motoring along a four-lane interprovincial highway is not "reasonable" when driving along an inner city street. The standard ("reasonableness") stays the same, but the reasonableness assessment will vary with the relevant circumstances.

151 This, of course, is the nub of the difficulty. My colleagues write:

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [para. 47]

I agree with this summary but what is required, with respect, is a more easily applied framework into which the judicial review court and litigants can plug in the relevant context. No one doubts that in order to overturn an administrative outcome on grounds of substance (i.e. leaving aside errors of fairness or law which lie within the supervising "function" of the courts), the reviewing court must be satisfied that the outcome was outside the scope of reasonable responses open to the

decision maker under its grant of authority, usually a statute. "[T]here is always a perspective", observed Rand J., "within which a statute is intended [by the legislature] to operate", *Roncarelli v. Duplessis*, [1959] S.C.R. 121 (S.C.C.), at p. 140. How is that "perspective" to be ascertained? The reviewing judge will obviously want to consider the precise nature and function of the decision maker including its expertise, the terms and objectives of the governing statute (or common law) conferring the power of decision, including the existence of a privative clause and the nature of the issue being decided. Careful consideration of these matters will reveal the extent of the discretion conferred, for example, the extent to which the decision formulates or implements broad public policy. In such cases, the range of permissible considerations will obviously be much broader than where the decision to be made is more narrowly circumscribed, e.g., whether a particular claimant is entitled to a disability benefit under governmental social programs. In some cases, the court will have to recognize that the decision maker was required to strike a proper balance (or achieve proportionality) between the adverse impact of a decision on the rights and interests of the applicant or others directly affected weighed against the public purpose which is sought to be advanced. In each case, careful consideration will have to be given to the reasons given for the decision. To this list, of course, may be added as many "contextual" considerations as the court considers relevant and material.

152 Some of these indicia were included from the outset in the pragmatic and functional test itself (see *Bibeault*, at p. 1088). The problem, however, is that under *Bibeault*, and the cases that followed it, these indicia were used to choose among the different standards of review, which were themselves considered more or less fixed. In *Ryan v. Law Society (New Brunswick)*, for example, the Court *rejected* the argument that "it is sometimes appropriate to apply the reasonableness standard more deferentially and sometimes less deferentially depending on the circumstances" (para. 43). It seems to me that collapsing everything beyond "correctness" into a single "reasonableness" standard will require a reviewing court to do exactly that.

153 The Court's adoption in this case of a single "reasonableness" standard that covers both the degree of deference assessment and the reviewing court's evaluation, in light of the appropriate degree of deference, of whether the decision falls within a range of reasonable administrative choices will require a reviewing court to juggle a number of variables that are necessarily to be considered together. Asking courts to have regard to more than one variable is not asking too much, in my opinion. In other disciplines, data are routinely plotted simultaneously along both an *X* axis and a *Y* axis, without traumatizing the participants.

154 It is not as though we lack guidance in the decided cases. Much has been written by various courts about deference and reasonableness in the particular contexts of different administrative situations. Leaving aside the "pragmatic and functional" test, we have ample precedents to show when it is (or is not) appropriate for a court to intervene in the outcome of an administrative decision. The problem is that courts have lately felt obliged to devote too much time to multi-part

threshold tests instead of focussing on the who, what, why and wherefor of the litigant's complaint on its merits.

155 That having been said, a reviewing court ought to recognize throughout the exercise that fundamentally the "reasonableness" of the outcome is an issue given to others to decide. The exercise of discretion is an important part of administrative decision making. Adoption of a single "reasonableness" standard should not be seen by potential litigants as a lowering of the bar to judicial intervention.

J. Application to This Case

156 Labour arbitrators often have to juggle different statutory provisions in disposing of a grievance. The courts have generally attached great importance to their expertise in keeping labour peace. In this case, the adjudicator was dealing with his "home statute" plus other statutes intimately linked to public sector relations in New Brunswick. He was working on his "home turf", and the legislature has made clear in the privative clause that it intended the adjudicator to determine the outcome of the appellant's grievance. In this field, quick and cheap justice (capped by finality) advances the achievement of the legislative scheme. Recourse to judicial review is discouraged. I would therefore apply a reasonableness standard to the adjudicator's interpretation of his "home turf" statutory framework.

157 Once under the flag of reasonableness, however, the salient question before the adjudicator in this case was essentially legal in nature, as reflected in the reasons he gave for his decision. He was not called on to implement public policy; nor was there a lot of discretion in dealing with a non-unionized employee. The basic facts were not in dispute. He was disposing of a *lis* which he believed to be governed by the legislation. He was right to be conscious of the impact of his decision on the appellant, but he stretched the law too far in coming to his rescue. I therefore join with my colleagues in dismissing the appeal.

***Deschamps J.* (concurring):**

158 The law of judicial review of administrative action not only requires repairs, it needs to be cleared of superfluous discussions and processes. This area of the law can be simplified by examining the *substance* of the work courts are called upon to do when reviewing any case, whether it be in the context of administrative or of appellate review. Any review starts with the identification of the questions at issue as questions of law, questions of fact or questions of mixed fact and law. Very little else needs to be done in order to determine whether deference needs to be shown to an administrative body.

159 By virtue of the Constitution, superior courts are the only courts that possess inherent jurisdiction. They are responsible both for applying the laws enacted by Parliament and the legislatures and for insuring that statutory bodies respect their legal boundaries. Parliament and the

legislatures cannot totally exclude judicial oversight without overstepping the division between legislative or executive powers and judicial powers. Superior courts are, in the end, the protectors of the integrity of the rule of law and the justice system. Judicial review of administrative action is rooted in these fundamental principles and its boundaries are largely informed by the roles of the respective branches of government.

160 The judicial review of administrative action has, over the past 20 years, been viewed as involving a preliminary analysis of whether deference is owed to an administrative body based on four factors: (1) the nature of the question, (2) the presence or absence of a privative clause, (3) the expertise of the administrative decision maker and (4) the object of the statute. The process of answering this preliminary question has become more complex than the determination of the substantive questions the court is called upon to resolve. In my view, the analysis can be made plainer if the focus is placed on the issues the parties need to have adjudicated rather than on the nature of the judicial review process itself. By focusing first on "the nature of the question", to use what has become familiar parlance, it will become apparent that all four factors need not be considered in every case and that the judicial review of administrative action is often not distinguishable from the appellate review of court decisions.

161 Questions before the courts have consistently been identified as either questions of fact, questions of law or questions of mixed fact and law. Whether undergoing appellate review or administrative law review, decisions on questions of fact always attract deference. The use of different terminology — "palpable and overriding error" versus "unreasonable decision" — does not change the substance of the review. Indeed, in the context of appellate review of court decisions, this Court has recognized that these expressions as well as others all encapsulate the same principle of deference with respect to a trial judge's findings of fact: *L. (H.) v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25 (S.C.C.), at paras. 55-56. Therefore, when the issue is limited to questions of fact, there is no need to enquire into any other factor in order to determine that deference is owed to an administrative decision maker.

162 Questions of law, by contrast, require more thorough scrutiny when deference is evaluated, and the particular context of administrative decision making can make judicial review different than appellate review. Although superior courts have a core expertise to interpret questions of law, Parliament or a legislature may have provided that the decision of an administrative body is protected from judicial review by a privative clause. When an administrative body is created to interpret and apply certain legal rules, it develops specific expertise in exercising its jurisdiction and has a more comprehensive view of those rules. Where there is a privative clause, Parliament or a legislature's intent to leave the final decision to that body cannot be doubted and deference is usually owed to the body.

163 However, privative clauses cannot totally shield an administrative body from review. Parliament, or a legislature, cannot have intended that the body would be protected were it to

overstep its delegated powers. Moreover, if such a body is asked to interpret laws in respect of which it does not have expertise, the constitutional responsibility of the superior courts as guardians of the rule of law compels them to insure that laws falling outside an administrative body's core expertise are interpreted correctly. This reduced deference insures that laws of general application, such as the Constitution, the common law and the *Civil Code*, are interpreted correctly and consistently. Consistency of the law is of prime societal importance. Finally, deference is not owed on questions of law where Parliament or a legislature has provided for a statutory right of review on such questions.

164 The category of questions of mixed fact and law should be limited to cases in which the determination of a legal issue is inextricably intertwined with the determination of facts. Often, an administrative body will first identify the rule and then apply it. Identifying the contours and the content of a legal rule are questions of law. Applying the rule, however, is a question of mixed fact and law. When considering a question of mixed fact and law, a reviewing court should show an adjudicator the same deference as an appeal court would show a lower court.

165 In addition, Parliament or a legislature may confer a discretionary power on an administrative body. Since the case at bar does not concern a discretionary power, it will suffice for the purposes of these reasons to note that, in any analysis, deference is owed to an exercise of discretion unless the body has exceeded its mandate.

166 In summary, in the adjudicative context, the same deference is owed in respect of questions of fact and questions of mixed fact and law on administrative review as on an appeal from a court decision. A decision on a question of law will also attract deference, provided it concerns the interpretation of the enabling statute and provided there is no right of review.

167 I would be remiss were I to disregard the difficulty inherent in any exercise of deference. In *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63 (S.C.C.), LeBel J. explained why a distinction between the standards of patent unreasonableness and unreasonableness *simpliciter* is untenable. I agree. The problem with the definitions resides in attempts by the courts to enclose the concept of reasonableness in a formula fitting all cases. No matter how this Court defines this concept, any context considered by a reviewing court will, more often than not, look more like a rainbow than a black and white situation. One cannot change this reality. I use the word "deference" to define the contours of reasonableness because it describes the attitude adopted towards the decision maker. The word "reasonableness" concerns the decision. However, neither the concept of reasonableness nor that of deference is particular to the field of administrative law. These concepts are also found in the context of criminal and civil appellate review of court decisions. Yet, the exercise of the judicial supervisory role in those fields has not given rise to the complexities encountered in administrative law. The process of stepping back and taking an *ex post facto* look at the decision to determine whether there is an error justifying

intervention should not be more complex in the administrative law context than in the criminal and civil law contexts.

168 In the case at bar, the adjudicator was asked to adjudicate the grievance of a non-unionized employee. This meant that he had to identify the rules governing the contract. Identifying those rules is a question of law. Section 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1, incorporates the rules of the common law, which accordingly become the starting point of the analysis. The adjudicator had to decide whether those rules had been ousted by the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25 ("*PSLRA*"), as applied, *mutatis mutandis*, to the case of a non-unionized employee (ss. 97(2.1), 100.1(2) and 100.1(5)). The common law rules relating to the dismissal of an employee differ completely from the ones provided for in the *PSLRA* that the adjudicator is regularly required to interpret. Since the common law, not the adjudicator's enabling statute, is the starting point of the analysis, and since the adjudicator does not have specific expertise in interpreting the common law, the reviewing court does not have to defer to his decision on the basis of expertise. This leads me to conclude that the reviewing court can proceed to its own interpretation of the rules applicable to the non-unionized employee's contract of employment and determine whether the adjudicator could enquire into the cause of the dismissal. The applicable standard of review is correctness.

169 It is clear from the adjudicator's reasoning that he did not even consider the common law rules. He said (p. 5):

> An employee to whom section 20 of the Civil Service Act and section 100.1 of the PSLR Act apply may be discharged for cause, with reasonable notice or with severance pay in lieu of reasonable notice. A discharge for cause may be for disciplinary or non-disciplinary reasons.

170 The employer's common law right to dismiss without cause is not alluded to in this key passage of the decision. Unlike a unionized employee, a non-unionized employee does not have employment security. His or her employment may be terminated without cause. The corollary of the employer's right to dismiss without cause is the employee's right to reasonable notice or to compensation in lieu of notice. The distinction between the common law rules of employment and the statutory rules applicable to a unionized employee is therefore essential if s. 97(2.1) is to be applied *mutatis mutandis* to the case of a non-unionized employee as required by s. 100.1(5). The adjudicator's failure to inform himself of this crucial difference led him to look for a cause, which was not relevant in the context of a dismissal without cause. In a case involving dismissal without cause, only the amount of the compensation or the length of the notice is relevant. In a case involving dismissal for cause, the employer takes the position that no compensation or notice is owed to the employee. This was not such a case. In the case at bar, the adjudicator's role was limited to evaluating the length of the notice. He erred in interpreting s. 97(2.1) in a vacuum. He overlooked the common law rules, misinterpreted s. 100.1(5) and applied s. 97(2.1) literally to the case of a non-unionized employee.

171 This case is one where, even if deference had been owed to the adjudicator, his interpretation could not have stood. The legislature could not have intended to grant employment security to non-unionized employees while providing only that the *PSLRA* was to apply *mutatis mutandis*. This right is so fundamental to an employment relationship that it could not have been granted in so indirect and obscure a manner.

172 In this case, the Court has been given both an opportunity and the responsibility to simplify and clarify the law of judicial review of administrative action. The judicial review of administrative action need not be a complex area of law in itself. Every day, reviewing courts decide cases raising multiple questions, some of fact, some of mixed fact and law and some purely of law; in various contexts, the first two of these types of questions tend to require deference, while the third often does not. Reviewing courts are already amply equipped to resolve such questions and do not need a specialized analytical toolbox in order to review administrative decisions.

173 On the issue of natural justice, I agree with my colleagues. On the result, I agree that the appeal should be dismissed.

Appeal dismissed.

Pourvoi rejeté.

APPENDIX

Relevant Statutory Provisions

Civil Service Act, S.N.B. 1984, c. C-5.1:

> **20** Subject to the provisions of this Act or any other Act, termination of the employment of a deputy head or an employee shall be governed by the ordinary rules of contract.

Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25:

> **92**(1) Where an employee has presented a grievance up to and including the final level in the grievance process with respect to
>
> > (a) the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award, or
> >
> > (b) disciplinary action resulting in discharge, suspension or a financial penalty,
>
> and his grievance has not been dealt with to his satisfaction, he may, subject to subsection (2), refer the grievance to adjudication.

Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25, as amended:

97(2.1) Where an adjudicator determines that an employee has been discharged or otherwise disciplined by the employer for cause and the collective agreement or arbitral award does not contain a specific penalty for the infraction that resulted in the employee being discharged or otherwise disciplined, the adjudicator may substitute such other penalty for the discharge or discipline as to the adjudicator seems just and reasonable in all the circumstances.

. . . . .

100.1(2) An employee who is not included in a bargaining unit may, in the manner, form and within such time as may be prescribed, present to the employer a grievance with respect to discharge, suspension or a financial penalty.

100.1(3) Where an employee has presented a grievance in accordance with subsection (2) and the grievance has not been dealt with to the employee's satisfaction, the employee may refer the grievance to the Board who shall, in the manner and within such time as may be prescribed, refer the grievance to an adjudicator appointed by the Board.

. . . . .

100.1(5) Sections 19, 97, 98.1, 101, 108 and 111 apply *mutatis mutandis* to an adjudicator to whom a grievance has been referred in accordance with subsection (3) and in relation to any decision rendered by such adjudicator.

. . . . .

101(1) Except as provided in this Act, every order, award, direction, decision, declaration or ruling of the Board, an arbitration tribunal or an adjudicator is final and shall not be questioned or reviewed in any court.

101(2) No order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, judicial review, or otherwise, to question, review, prohibit or restrain the Board, an arbitration tribunal or an adjudicator in any of its or his proceedings.

Footnotes

* Corrigenda issued by the Court on March 10, 11, 2008, and April 17, 2008 have been incoporated herein.

1 Para. 41

2 Para. 47

3 Para. 48

4 Para. 53

5 Para. 133

454

6 Para. 144

7 Para. 146

1994 CarswellOnt 1015
Ontario Court of Justice (General Division) [Divisional Court]

E.A. Manning Ltd. v. Ontario (Securities Commission)

1994 CarswellOnt 1015, [1994] O.J. No. 1026, 17 O.S.C.B. 2339, 18 O.R. (3d) 97, 24 Admin. L.R. (2d) 283, 3 C.C.L.S. 221, 47 A.C.W.S. (3d) 896, 72 O.A.C. 34

E.A. MANNING LIMITED, JUDITH MARCELLA MANNING, TIMOTHY EDWARD MANNING and WILLIAM DOUGLAS ELIK v. ONTARIO SECURITIES COMMISSION; APPLICATION UNDER THE JUDICIAL REVIEW PROCEDURE ACT, R.S.O. 1990, c. J.1

Montgomery, Dunnet and Howden JJ.

Heard: April 19 and 20, 1994
Judgment: May 13, 1994
Docket: Doc. 72/94

Counsel: *Bryan Finlay, Q.C.*, and *J. Gregory Richards*, for applicants.
Dennis R. O'Connor, Q.C., *James D.G. Douglas* and *Benjamin T. Glustein*, for respondent.

Subject: Securities; Public; Corporate and Commercial

Application for order prohibiting Ontario Securities Commission from proceeding with hearings.

The judgment of the court was delivered by *Montgomery J.*:

1 The applicants seeks prohibition to stop the Ontario Securities Commission ("OSC") from proceeding with two hearings that relate to allegedly improper sales practices by the applicants. Relief is sought on the ground of bias and in particular on the basis that the OSC has allegedly prejudged the case against the applicants.

The Issues

2 (1) Actual bias;

3 (2) Reasonable apprehension of bias;

4 (3) The doctrine of necessity.

5 These issues are to be decided under a legislative scheme which gives the OSC the following roles: investigator, prosecutor, policy maker and adjudicator.

6 The OSC is defined by s. 2 of the *Securities Act*, R.S.O. 1990, c. S.5 (the "Act") as consisting of a Chair and between 8 and 10 members, referred to as Commissioners, appointed by the Lieutenant Governor in Council. A quorum is two members. By subs. 3(3), where a Commissioner has, as part of his or her duties in the investigative and enforcement roles of the Commission, ordered proceedings to be instituted, that Commissioner may not participate in the resulting hearing. This is an important and apparently the only express statutory guide as to how the OSC is to keep its adjudicative role separate from its other duties. The issues in this case deal with the standard and application of the common law duty of a tribunal, with several conflicting functions assigned to its members and its staff, to act fairly, without bias or conduct indicating bias, when it comes to its adjudicative role.

The Facts

7 On December 15, 1993, the OSC issued a notice of hearing (the "first notice of hearing"), pursuant to the Act, to consider:

> (a) whether under s. 27 of the Act, it is in the public interest that the registrations of the applicants E.A. Manning Limited ("Manning Limited"), Judith Marcella Manning ("Judith Manning"), Timothy Edward Manning ("Ted Manning") and William Douglas Elik ("Elik") and certain other employees or officers of Manning Limited be suspended, cancelled, restricted or made subject to conditions;
>
> (b) whether under s. 128 of the Act, it is in the public interest to order that any or all of the exemptions contained in ss. 35, 72, 73 and 93 of the Act no longer apply to the said applicants and others.

First Notice of Hearing

8 With respect to the applicants named in the first notice of hearing, the staff of the OSC allege that they engaged in conduct involving trading in the securities of BelTeco Holdings Inc. ("BelTeco") and Torvalon Corporation ("Torvalon") which was abusive of the capital markets and contrary to the public interest.

9 In particular, the staff of the OSC allege that the applicants named in the first notice of hearing conducted trades in the securities of BelTeco and Torvalon contrary to the public interest by:

> (a) failing to adequately advise purchasers of the securities of BelTeco and Torvalon that Manning Limited was selling the securities as principal, not agent, and failing to disclose

to purchasers of the securities that mark-ups were included in the purchase price of those securities;

(b) permitting, encouraging or requiring salespersons of Manning Limited to approach customers with no bona fide independent verification of the nature of the businesses and the financial condition of BelTeco or Torvalon;

(c) failing to disclose to purchasers of the securities of BelTeco and Torvalon, inter alia, the limited marketability of the securities, and the nature of the businesses and the financial condition of BelTeco and Torvalon;

(d) using high pressure sales tactics to induce persons to purchase the securities of BelTeco and Torvalon;

(e) failing to comply with their suitability and "know your client" obligations, contrary to s. 114 of Regulation 1015, R.R.O. 1990;

(f) failing to make any bona fide independent effort to verify the nature of the businesses and the financial condition of BelTeco and Torvalon;

(g) giving undertakings to clients concerning the future value of the securities of BelTeco and Torvalon with the intention of effecting a trade in such securities;

(h) executing orders on behalf of clients in the securities of BelTeco and Torvalon without prior authorization;

(i) failing to execute, or refusing to accept, sell orders by clients in respect of the securities of BelTeco and Torvalon;

(j) failing to advise potential purchasers of the securities of BelTeco and Torvalon that investment in those securities was highly speculative and involved a significant risk;

(k) failing to advise clients of the commissions received by the salesperson in respect of the securities of BelTeco and Torvalon; and

(l) failing to deal fairly, honestly and in good faith with their clients in respect of the securities of BelTeco and Torvalon.

10 In addition, the staff of the OSC allege in the first notice of hearing that Judith Manning and Manning Limited failed to properly supervise the activities of Ted Manning and Elik, and the trading of Manning Limited in the securities of BelTeco and Torvalon.

11 The proceeding arising from the first notice of hearing is scheduled to commence on Monday, September 19, 1994.

Second Notice of Hearing

12 On February 1, 1994, the staff of the OSC informed Manning Limited that the staff would be attending before the OSC on February 2, 1994 at 2:00 p.m. to seek an order under s. 27(2) of the Act, for an interim suspension of the registration of Manning Limited.

13 On February 2, 1994, a panel of two Commissioners, Vice-chair Smart and Commissioner Blain, dismissed the s. 27(2) application and held that the allegations grounding the application should be considered at a full hearing under s. 27(1) of the Act.

14 Consequently, on February 4, 1994, the OSC issued a notice of hearing (the "second notice of hearing") to consider:

> (a) whether under s. 27(1) of the Act, it is in the public interest that the registrations of all of the applicants be suspended, cancelled, restricted or made subject to conditions; and
>
> (b) whether under s. 37(1) of the Act, it is in the public interest to suspend, cancel, restrict or impose terms and conditions upon the right of the applicants to call at or telephone to any residence in Ontario for the purpose of trading in any security or in any class of securities.

15 The staff of the OSC allege that from January 4, 1994, all of the present applicants, and from September 1992, the applicant Elik, have failed and continue to fail to deal fairly with and act in the best interests of clients during telephone calls made to induce individuals to purchase securities from Manning Limited, and in particular that the applicants:

> (a) failed to adequately disclose that Manning Limited was selling securities to its clients at markups and that Manning Limited's salespersons were receiving commissions at 17-1/2% on each client's purchase;
>
> (b) failed to disclose that Manning Limited salespersons would lose their entitlement to commissions if clients sold securities within a certain period of time;
>
> (c) used high pressure sales tactics;
>
> (d) resisted or refused to sell securities when so instructed by their clients;
>
> (e) failed to adequately advise about the risks associated with purchases and in particular that the purchases were highly speculative in nature and could result in significant loss of invested capital;
>
> (f) failed to comply with their "know your client" obligations;
>
> (g) misrepresented the commissions received by salespersons;

(h) gave oral undertakings relating to the future value or price of the securities sold or attempted to be sold and/or made unjustifiable statements with respect to the anticipated price of the securities sold or attempted to be sold;

(i) made unjustifiable, misleading and/or false statements with respect to companies whose securities were being sold or attempted to be sold;

(j) made representations based upon purported knowledge of inside information;

(k) misrepresented the results of previous securities recommendations; and/or

(l) instructed Manning Limited's salespersons to use the sale practices set out above.

16 The staff also allege that Manning Limited, Judith Manning and Mary Martha Fritz failed to adequately supervise salespersons of Manning Limited.

17 The proceeding arising from the second notice of hearing is scheduled to commence on Monday, June 13, 1994.

Background to Application

18 Policy 1.10 was adopted by the OSC on March 25, 1993. Its purpose was to address unfair or abusive sales practices that the OSC believed some securities dealers employed from time to time in connection with the marketing and sale of low cost, highly speculative securities ("penny stocks"). Policy 1.10 outlined certain business practices which the OSC regarded appropriate for securities dealers to adopt in connection with the marketing and sale of penny stocks. These practices were considered to be consistent with the duty to deal fairly, honestly, and in good faith with the securities dealers' customers.

19 Policy 1.10 purports to provide against any prejudgment of whether conduct by a particular securities dealer would constitute a breach of s. 27(1) of the Act. Page 2 of Policy 1.10 provided that:

> Subsection 27(1) of the Act provides that the Commission, after giving a registrant an opportunity to be heard, may suspend, cancel, restrict or impose terms and conditions upon the registration of or reprimand a registrant where in its opinion such action is in the public interest. In determining whether any failure to comply with this Policy constitutes grounds for the Commission taking action under subsection 27(1) of the Act or any other section of the Act, the Commission will continue to consider the particular facts and circumstances of each case.

20 The purpose of Policy 1.10 was to serve as a guide to assist securities dealers and their employees in satisfying their obligations under the Act in connection with the marketing and sale of penny stocks.

Investigation

21 I accept the fact that the Commissioners did not participate in the investigation of the alleged misconduct of the applicants. Investigations are conducted by OSC staff who make up the Enforcement Branch of the OSC. If an investigation discloses an apparent breach of the Act or conduct of a market participant contrary to the public interest, the Director of Enforcement, in consultation with the Executive Director of the OSC, considers whether it is appropriate to call a hearing before the Commissioners.

22 The investigation involving the shares of BelTeco and Torvalon arose out of two separate reports from the Toronto Stock Exchange. Neither of these reports was forwarded to nor reviewed by the Commissioners.

The Impugned Conduct

23 The applicants contend that the OSC has already made up its mind on the issues raised for hearings. Further, they say the Commissioners prejudged them before issuing Policy 1.10 and this is evidenced by the fact that the policy, as noted by the OSC in their factum of the *Ainsley*, infra, case, was issued in response "to the abusive and unfair sales practices that it had found to exist".

24 In *Ainsley Financial Corp. v. Ontario (Securities Commission)* (1993), 106 D.L.R. (4th) 507 [1 C.C.L.S. 1] (Ont. Gen. Div. [Commercial List]), Blair J. declared Policy 1.10 to be invalid as the Policy exceeded the OSC's statutory jurisdiction. At p. 509, the Court said:

> O.S.C. Policy Statement 1.10, with which the commission expects securities dealers to comply, contains very detailed and embracive measures regarding the trading of speculative penny stocks. Trading in such stocks comprises the predominant portion of the plaintiffs' business. They say that Policy 1.10 will drive them out of business and is designed to do just that.

And at pp. 511 to 513, Blair J. described in some detail its purpose and its very specific requirements:

> **Policy 1.10**
>
> Policy Statement 1.10, entitled "Marketing and Sale of Penny Stocks", was issued in its final form on March 25, 1993, to come into effect on June 1, 1993. The commission has agreed to hold the policy in abeyance pending the release of this decision.

Purpose of the policy

Policy 1.10 was developed by the commission as result of a growing concern over the employment of high pressure and unfair sales practices by securities dealers on a widespread basis in connection with the marketing and trading of low cost, highly speculative penny stocks in the over-the-counter market. The policy is designed to redress the abuses perceived by the commission in this respect.

The purpose of the policy is stated at some length in the body of the text. I set out that statement of purpose in full, because it is of some importance. The policy asserts:

> **Purpose of this Policy**
>
> The Act and the regulations under the Act (the 'Regulations' require, among other things, that registrants 'know their clients' and deal 'fairly, honestly and in good faith' with their customers and clients. The Commission is concerned that securities dealers engaged in unfair sales practices like those mentioned above are not complying with these obligations and are recommending investments in penny stocks that are highly speculative and often are not appropriate for an investor given his/her personal circumstances, investment experience, investment objectives and financial means. The Commission is also concerned that, as a result of the sales practices employed, investors often purchase penny stocks unaware of the risks involved and without adequate consideration being given to the suitability of the purchase. Losses of a significant portion of an investment in penny stocks are common. The Commission has concluded that these sales practices have a significant adverse impact on the fairness and integrity of the capital markets in Ontario.
>
> The Commission is issuing this Policy as a guide to identify what the Commission believes are appropriate business practices to assist securities dealers and their employees in satisfying their obligations under the Act in connection with the marketing and sale of penny stocks. This Policy is intended to inform interested parties that the Commission will be guided by this Policy in exercising its public interest jurisdiction under subsection 27(1) of the Act and its general public interest jurisdiction to protect investors and promote and maintain fair, equitable and efficient capital markets in Ontario.
>
> This Commission believes that the business practices set out in this Policy should be adopted by securities dealers when selling penny stocks. The Commission believes that such practices are in the public interest to promote and maintain fair, equitable and efficient capital markets in Ontario and to protect investors from high pressure and other unfair sales practices employed in the marketing and sale of penny stocks and that these business practices are consistent with the duty of securities dealers and their officers,

> partners, salespersons and directors to deal fairly, honestly and in good faith with their customers and clients. Subsection 27(1) of the Act provides that the Commission, after giving a registrant an opportunity to be heard, may suspend, cancel, restrict or impose terms and conditions upon the registration of or reprimand a registrant where in its opinion such action is in the public interest. In determining whether any failure to comply with this Policy constitutes grounds for the Commission taking action under subsection 27(1) of the Act or any other section of the Act, the Commission will continue to consider the particular facts and circumstances of each case.
>
> This policy is not intended to restrict unduly legitimate investment opportunities in the penny stock market or capital formation for small businesses but merely to regulate the high pressure and other unfair sales practices often employed in the marketing and sale of penny stocks. The Commission believes that this Policy will carry out its purposes without unduly inhibiting legitimate investment opportunities in the penny stock market or capital formation for small businesses.

In a section entitled "Appropriate Business Practices", the policy states:

> The Commission has concluded that it is in the public interest that the business practices identified in this Policy be adopted by securities dealers in connection with the marketing and sale of penny stocks.

The operative portions of Policy 1.10 call for the following, in furtherance of this conclusion and the objectives of the policy:

> (1) *the furnishing of a risk disclosure statement* to the client — in Form 1, attached to the Policy — together with a sufficient explanation of its contents to the client that the client understands he or she is purchasing a penny stock and is aware of and willing to assume the risks associated with such an investment; and before any order to purchase a penny stock can be accepted,
>
> (2) *the provision of a suitability statement in Form 2* (also attached to the policy) to the client, completed and signed by the salesperson, together with an explanation of its contents; and
>
> (3) *the return of the suitability statement, signed by the client*, to the securities dealer; and thereafter
>
> (4) *an agreement between the client and the securities dealer* with respect to the price of the penny stock to be purchased.

In addition, Policy 1.10 provides:

(5) that the securities dealer is to disclose to the client in advance of the trade that it is acting as principal or as agent for another securities dealer acting as principal on the transaction where that is so; *and*

(6) that the securities dealer is to disclose "the nature and amount of all compensation payable to the securities dealer, its salespersons, employees, agents and associates or any other person", including mark-ups, bonuses and commissions.

25 The OSC issued the Proposed Policy in draft form on August 11, 1992. In the "Introduction", the following appears:

1. *General*: The Ontario Securities Commission (the "Commission") is concerned about *the widespread use of high pressure and other unfair sales practices being employed* in connection with the marketing and sale of low cost, highly speculative securities commonly referred to as "penny stocks". These sales practices include:

(a) repeated unsolicited phone calls to potential customers at their homes and/or places of business and other high pressure tactics designed to encourage purchases of penny stocks;

(b) promises of great returns, including promises that the value or price of a penny stock will increase;

(c) representations that the dealer is in possession of favourable inside information;

(d) failing to advise customers that the dealer is selling the penny stocks as principal and is receiving a significant mark-up;

(e) failing to make necessary inquiries of customers to determine their personal circumstances, including their investment objectives, investment experience and financial resources, to enable the dealer to determine whether or not penny stocks are a suitable investment;

(f) failing to adequately advise investors of the risks associated with investing in penny stocks; and

(g) failing to advise customers of the compensation/commissions being paid to the salesperson.

These sales practices *are being engaged in by many securities dealers* and their salesperson engaged in the business of selling penny stocks and *who are not members of the Toronto Stock Exchange (the "TSE") or the Investment Dealers Association (the "IDA")*. The penny stocks involved do not generally trade on a stock exchange, but rather trade in the over-the-counter market in Ontario. The issuers of these securities often do not have significant tangible assets.

[Emphasis added.]

26 It is not disputed that there were, at the time the Policy was formulated, only some ten securities dealers trading primarily in highly speculative penny stocks. The applicant Manning was one of these dealers. Reliance is placed upon the underlined words to demonstrate that the OSC *had concluded* the ten or so were engaging in improper activity and, therefore, these comments are indicative of a closed mind.

27 On March 25, 1993, the *OSC* issued its Final Policy Statement 1.10. This document had been considered at many meetings of the Commissioners and was approved by them. The changes from the Proposed Policy are largely cosmetic.

28 As was the case in the Proposed Policy, the Final Policy reflected the OSC's *conclusion* that securities dealers like Manning Limited had engaged and continued to engage in the improper activity described in the Final Policy.

29 The *OSC* said in the "Background" portion of the Final Policy:

> The Ontario Securities Commission (the "Commission") is concerned about *high pressure and other unfair sales practices that are being employed on a widespread basis* in connection with the marketing and sale of low cost, highly speculative securities commonly known as "penny stocks". These sales practices include:
>
> • repeated, unsolicited phone calls to potential clients at their homes and/or places of business and other high pressure tactics designed to encourage purchases of penny stocks;
>
> • assurances of great returns, including assurances that the value or price of a penny stock will increase;
>
> • failing to advise investors adequately of the risks associated with investing in penny stocks;
>
> • failing to explain to clients adequately when the dealer is selling the penny stocks as principal and is receiving a significant mark-up;
>
> • failing to advise clients of the compensation/commission being paid to the salesperson; and
>
> failing to make necessary inquiries of clients to determine their personal circumstances, including their investment objectives, investment experience and financial resources, to enable the dealer to determine whether or not penny stocks are a suitable investment;

> *These sales practices often are conducted as part of a pattern of activity by securities dealers that* are engaged primarily in the business of selling penny stocks. While these Securities Dealers are registrants under the *Securities Act* (Ontario) (the "Act"), they *are not members of The Toronto Stock Exchange (the "TSE) or the Investment Dealers Association (the "IDA")* or any similar recognized self-regulatory organization and, accordingly, are not subject to the compliance, investigation, disciplinary or other rules, regulations, policies and by-laws of such self-regulatory organizations.

[Emphasis added.]

30 Under the heading "Purpose of this Policy", the *OSC* stated:

> The Act and the regulations under the Act (the "Regulations") require, among other things, that registrants "know their clients" and deal "fairly, honestly and in good faith" with their customers and clients. The Commission is concerned that *securities dealers* engaged in unfair sales practices like those mentioned above *are not complying with these obligations* and are recommending investments in penny stocks that are highly speculative and often are not appropriate for an investor given his/her personal circumstances, investment experience, investment objectives and financial means. The Commission is also concerned that, as a result of the sale practices employed, investors often purchase penny stocks unaware of the risks involved and without adequate consideration being given to the suitability of the purchase. Losses of a significant portion of an investment in penny stocks are common. The Commission *has concluded* that these sales practices have a significant adverse impact on the fairness and integrity of the capital markets in Ontario.

[Emphasis added.]

31 On August 18, 1993 the *OSC* issued a News Release in response to the *Ainsley* decision. The News Release stated in part:

> August 18, 1993 (Toronto) — The Ontario Securities Commission announced today that it is consulting with representatives of the Government of Ontario and other Canadian securities regulators, among others, with respect to the recent decision of the Ontario Court of Justice (General Division) in the action commenced by several securities dealers. In its decision, the Court concluded that the Commission does not have the jurisdiction to issue proposed Policy 1.10. *That policy was intended to address the abuses that the Commission believes to exist in the marketing and sale of penny stocks by certain securities dealers*. Among the issues under consideration is the desirability of an appeal of the court decision.
>
> . . . . .

> *The Commission has instructed its staff to continue to monitor penny stock abuses and to initiate any proceedings under the Act that may be available to protect investors from those abuses*.

[Emphasis added.]

32 As a further result of *Ainsley*, on October 7, 1993 the Ontario Minister of Finance announced the formation of a joint Ministry of Finance and OSC Task Force on securities regulation. The mandate of the Task Force was to review and to make recommendations in respect of the legislative framework for the development of securities policy in the Province of Ontario with particular attention to the policy-making role of the OSC.

33 The OSC staff, including the Chair and the other two full-time Commissioners, made a written submission to the Task Force. The submission was conveyed to the Task Force under cover of a December 17, 1993 transmittal letter from the OSC's Chair, Edward J. Waitzer.

34 I see nothing indicative of bias or reasonable apprehension of bias in the 13-page submission. It dealt exclusively with the reasons why the Task Force should recommend that the Legislature confer rule-making powers to the OSC.

35 The seven part-time Commissioners made a separate written submission to the Task Force. Their eleven-page submission is to the same effect as the prior submission and similarly contains no bias or views which would prompt any reasonable apprehension of bias.

36 The conclusions stated by the OSC in Policy 1.10 reflected the findings made in a Staff Report of July 8, 1992 which the Commissioners had before them and relied upon in formulating and approving Policy 1.10. The Staff Report sets out in detail the same allegations of ongoing improper conduct which are now the subject matter of the second notice of hearing. The sort of conclusions made in the Staff Report, which was in turn adopted by the OSC, can be observed in the following passage:

> Based upon our examination of the penny stock industry, we believe that as a result of the unfair sales practices engaged in by broker/dealers in the marketing of penny stocks:
>
> (a) Investors purchase penny stocks unaware of risks that:
>
> (i) there may be no market to sell their penny stocks after the broker/dealer has sold its inventory position; and
>
> (ii) they are likely to lose a significant portion of their investment.
>
> (b) Investors are unaware of the commission and/or mark-up charged by salespersons and broker-dealers;

(c) Investors are pressured into purchasing penny stocks over the phone; and

(d) Broker/dealers do not comply with their know-your-client obligations.

37 As can be seen, the unfair conduct alleged in the second notice of hearing has already been found to exist by the Commissioners. The *conclusions* stated in Policy 1.10 and the *conclusions* stated in the Staff Report, which the OSC expressly adopted in approving Policy 1.10, demonstrate that the subject matter of the hearing has already been decided by the Commissioners.

38 The affidavit of Mr. Gordon, a staff lawyer for the OSC, sufficiently creates the link between the unfair conduct alleged and the applicants. Mr. Gordon's affidavit was just part of the evidence relied upon by the OSC in the *Ainsley* case to support Policy 1.10. The conduct of Manning Limited which Mr. Gordon calls "unfair sales practices" is the same conduct alleged in the second notice of hearing.

39 Having considered all of the evidence filed by the OSC in the *Ainsley* case, the Honourable Mr. Justice R.A. Blair made a finding that the OSC had *concluded* that the plaintiff securities dealers (including Manning Limited) were guilty of various abuses. He said at p. 515:

> With the completion of this review, the commission was satisfied that it had found cogent evidence of abusive and unfair sales practices in the marketing of penny stocks, and in addition, I think it is fair to say, *had concluded that these abuses were centred in the practices of the plaintiff securities dealers*. It set out to remedy the situation for the reasons and in the manner outlined above. [i.e. by implementing Policy 1.10.]

[Emphasis added.]

40 On the material filed before me, it appears that the OSC has already decided that Manning Limited and related parties are guilty of these unfair practices.

41 The first notice of hearing merely goes through substantially the same allegations of improper conduct repeated in the second notice but relates them to the securities of two named companies, BelTeco and Torvalon, after certain dates in 1992 and 1994. These allegations are based on complaints of particular conduct about Manning Limited and other securities dealers which were before the Commissioners when they concluded such conduct was in fact occurring widely and approved Policy 1.10. In addition, on December 22, 1992, copies of the pleadings against the OSC in the *Ainsley* action were distributed to the Commissioners "to assist them in their review of the Draft Policy". In that action, substantial material was filed by the OSC specifically pertaining to complaints and practices now alleged against Manning Limited, its officers and employees and to be dealt with at the upcoming hearings.

42 Even if OSC staff tried to separate their investigative role from the Commissioners' role as adjudicators, the creation and adoption of Policy 1.10 and the additional evidence, including the mass of complaints specifically regarding Manning Limited and others in the staff report and the material led by the OSC in *Ainsley*, lead me to the irresistible conclusion that the roles have become so interwoven that there is a reasonable apprehension of bias against all Commissioners who took office prior to November 1993.

43 In a press interview, the Chair of the OSC, Mr. Waitzer, stated that dealing with penny stock dealers is a "perennial priority". "There will always be marginal players in the securities industry. Our task is to get these players into the self-regulatory system or get them out of the jurisdiction."

44 I conclude that Mr. Waitzer cannot sit on either hearing because of a reasonable apprehension of bias.

The Functions of the OSC

45 As previously noted, the OSC is investigator, prosecutor, policy maker and adjudicator. The 1993 annual report of the OSC to the Minister of Finance states in part:

> **The Mandate of the OSC**
>
> The OSC has administrative responsibility for the *Securities Act*, the *Commodity Futures Act* and the *Deposits Regulation Act*, as well as certain provisions of the *Ontario Business Corporations Act*. Most of the OSC's day-to-day operations relate to the administration and enforcement of the *Securities Act* and the *Commodity Futures Act*.
>
> **The Structure of the OSC**
>
> The OSC is a Schedule I regulatory agency of the Government of Ontario. The Minister of Finance answers for the OSC in the Legislature and presents OSC financial estimates as part of the Ministry of Finance's estimates.
>
> **The Commission**
>
> The OSC has two distinct parts. One part is an autonomous statutory tribunal — the Commission — the eleven members of which are appointed by Order-in-Council. At present, there is a full-time Chairman, one full-time Vice-Chair, and nine part-time Commissioners.
>
> . . . . .
>
> The OSC is empowered to grant official recognition to Self-Regulatory Organizations, and has recognized The Toronto Stock Exchange and The Toronto Futures Exchange. SROs, such as the TSE, the TFE and the IDA, impose financial and trading rules on their membres that are enforced through independent audit and compliance checks. The OSC reviews those rules and hears appeals from decisions of the SROs.

. . . . .

The Chairman is by statute the Commission's Chief Executive Officer. The Commission assists in the formulation of policy, sits as an administrative tribunal in hearings, acts as an appeal body from decisions made by the Executive Director and staff, hears appeals from decisions of the TSE and the TFE, and makes recommendations to the government for changes in legislation. Two members constitute a quorum. The Commission holds regular policy meetings, and also convenes in panels for administrative hearings.

The *Office of the Secretary* provides support to the Commission meetings and hearings, receives and co-ordinates the processing of applications to the OSC, publishes the weekly *OSC Bulletin*, coordinates corporate communications, provides library services and coordinates meetings of the CSA. (The CSA is an association of securities administrators from each of the provinces and territories in Canada. It seeks to achieve uniformity in legislation and policies.)

The Staff of the Commission

The other major part of the Commission is an administrative agency composed of more than 230 lawyers, accountants, investigators, managers and support staff. The *Executive Director* is the OSC's Chief Operating and Administrative Officer and is responsible for the day-to-day activities of the seven operating departments of the OSC — the Offices of the Chief Accountant, the General Counsel and the Chief of Compliance, and the Corporate Finance, Capital Markets/International Markets, Enforcement, and Administrative and Systems Services branches. The Executive Director also participates actively in policy development.

The Law

46 In *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, Cory J., speaking for the Court, said at pp. 636 to 637:

The Duty of Boards

All administrative bodies, no matter what their function, owe a duty of fairness to the regulated parties whose interest they must determine. This was recognized in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311. Chief Justice Laskin at p. 325 held:

> ... the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question.

> Although the duty of fairness applies to all administrative bodies, the extent of that duty will depend upon the nature and the function of the particular tribunal. See *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602. The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. It is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.
>
> In *Szilard v. Szasz*, [1955] S.C.R. 3, Rand J. found a commercial arbitration was invalid because of bias. He held that the arbitrator did not possess "judicial impartiality" because he had a business relationship with one of the parties to the arbitration. This raised an apprehension of bias that was sufficient to invalidate the proceedings. At p. 7 he wrote:
>
> > Each party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs.

And at pp. 638 to 639:

> It can be seen that there is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members of the board should be such that there could be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard will be much more lenient. In order to disqualify the members a challenging party must establish that there has been a prejudgment of the matter to such an extent that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the legislature.

And further at p. 642:

> During the investigative stage, a wide licence must be given to board members to make public comment. As long as those statements do not indicate a mind so closed that any submissions would be futile, they should not be subject to attack on the basis of bias.

47 Two other important cases must be addressed. *W.D. Latimer Co. v. Bray* [sub nom. *W.D. Latimer Co. v. Ontario (Attorney General)*] (1974), 6 O.R. (2d) 129 (C.A.) established the principle

that evidence of prejudgment, even in the context of the unique statutory scheme established by the *Securities Act*, is a ground for disqualification. However, it recognized that mere knowledge by Commissioners of market conditions or even of grounds for a complaint to be heard by them do not produce any apprehension of bias in the particular circumstances of this tribunal. Dubin J.A. (as he then was) delivered the judgment of the Court. He stated at pp. 140 to 141:

> Where by statute the tribunal is authorized to perform tripartite functions, disqualification must be founded upon some act of the tribunal going beyond the performance of the duties imposed upon it by the enactment pursuant to which the proceedings are conducted. Mere advance information as to the nature of the complaint and the grounds for it are not sufficient to disqualify the tribunal from completing its task. Evidence of prejudgment, however, is a ground for disqualification, unless the statute specifically permits the tribunal to have arrived at a preliminary judgment before conducting an inquiry.
>
> . . . . .
>
> I do not read s. 8 [now s. 27] of the *Securities Act* as permitting a prejudgment of the issues prior to the conduct of the inquiry.

48 The Court concluded on the facts there was no reasonable apprehension of bias.

49 In *Barry v. Alberta (Securities Commission)*, [1989] 1 S.C.R. 301, the Chairman of the Alberta Securities Commission was a member of a panel at a hearing under Alberta's securities legislation. At issue was whether or not there was a reasonable apprehension of bias because the Chair had received a report from the Deputy Director of Enforcement prior to the hearing.

50 In finding that there was no reasonable apprehension of bias on these facts, L'Heureux-Dubé J., delivering the judgment of the Court, relied heavily on the Court of Appeal's decision in *Latimer*. She said at p. 315:

> Dubin J.A. found that the structure of the Act whereby commissioners could be involved in both the investigatory and adjudicatory functions did not, by itself, give rise to a reasonable apprehension of bias.
>
> I am in agreement with this proposition. So long as the Chairman did not act outside of his statutory authority, and so long as there is no evidence to show involvement above and beyond the mere fact of the Chairman's fulfilling his statutory duties, a "reasonable apprehension of bias" affecting the Commission as a whole cannot be said to exist.

51 In the case at hand, the *OSC* did act outside its statutory authority in adopting Policy 1.10. The Commissioners, in effect, sought to legislate. This, as found by *Ainsley*, was ultra vires. In the process of formulating and deciding to issue the mandatory regulation presented by Policy 1.10, the Commissioners in March 1993 closed their minds to the issue of whether securities dealers, including Manning Limited, are guilty of unfair sales practices. This constitutes prejudgment.

52 In the context of the litigation brought by the securities dealers, including the motion for judgment in the *Ainsley* case and the pending appeal, the *OSC* went beyond merely defending itself and its jurisdiction and adopted the role of advocate against them and strenuously sought to demonstrate that Manning Limited and others are guilty of the very conduct which is now the subject of the current notices of hearing.

53 The affidavits filed on behalf of the *OSC* speak loudly in what they fail to address. The affidavit of Mr. Gordon does not say that there was no discussion between the staff and Commissioners about Manning Limited when Policy 1.10 was being prepared. There is no affidavit evidence to say the Commissioners have been canvassed and individually could make an unbiased decision. Further, there is no evidence to show that the 55 complaints about Manning, which were made to OSC staff and made know to the Commissioners in the 1992 report accepted by them, have not tainted them. It is reasonable to assume that the complaints played a part in the desire to establish Policy 1.10. Given these gaps in the respondent's material, it seems to me that "the informed bystander", to use the words of Cory J. in *Newfoundland Telephone*, "could reasonably perceive bias on the part of an adjudicator".

54 The OSC (both staff and Commissioners) were acting within the ambit of their statutory duties in assembling and considering information in respect of a certain segment of the securities market. But in using that information to conclude that the securities dealers (including Manning Limited) were in fact engaging in the practices alleged in Policy 1.10, and now in the notices of hearing, the Commissioners prejudged the case. They pursued a course in excess of their policy and regulatory functions due to a too-narrow focus on a small number of parties and very particular allegations of practices and that, in turn, has produced an overly specific regulation beyond the OSC's jurisdiction. It has also produced an obvious apprehension of bias, quite distinct from the situation in *Latimer*.

55 The OSC has repeatedly recorded its conclusion that the targeted dealers engaged in unfair sales practices. The OSC issued Policy 1.10 in an effort to protect the public from unfair sales practices it "had found to exist". In my view, this prejudgment coupled with the continued effort of the OSC to vindicate its position through the ongoing litigation with the security dealers, including the appeal in *Ainsley*, created a reasonable apprehension of bias that precludes all members of the OSC who were Commissioners prior to the fall of 1993 from sitting at the hearings involving the applicants. In addition, the new Chair, Mr. Waitzer, is precluded from sitting for reasons stated earlier.

Remaining Members of the OSC

56 By Order-in-Council dated November 3, 1993, John Arthur Geller was appointed a member and Vice-chair of the OSC for a period of three years. By Order-in-Council dated April 6, 1994,

Helen M. Meyer was appointed a member of the OSC for a period of six months. There still remains one vacancy on the OSC.

57 It is argued by the applicant that there is a corporate taint affecting all those Commissioners subsequently appointed to the OSC. There is no judicial authority for this proposition. Bias is a lack of neutrality.

58 Blake in *Administrative Law in Canada* (Toronto: Butterworths, 1992) states at p. 92:

> Many tribunals are part of a larger administrative body. The fact that one branch of that administrative body is biased does not mean that another branch that has carriage of the matter is biased. Bias on the part of an employee of the tribunal or a member who is not on the panel hearing the matter usually does not give rise to a reasonable apprehension of bias on the part of the tribunal. Even bias on the part of the Minister in charge of the department does not necessarily make the adjudicator employed by the Ministry biased.

59 There is no evidence that the views of the Chair are shared by the new Commissioners. Further, there is no evidence before the Court to indicate any underlying agenda of Mr. Geller or Ms. Meyer. As well, the minutes of the Commissioners indicate that they were not party to any of the decisions respecting Policy 1.10 or the OSC's position in *Ainsley*.

60 There must be a presumption in the absence of contrary evidence that a Commissioner will act fairly and impartially in discharging his/her adjudicative responsibility. As noted in *Bennett v. British Columbia (Securities Commission)* (1992), 69 B.C.L.R. (2d) 171 at 181 (C.A.); leave to appeal to the S.C.C. dismissed (27 August 1992), [1992] 6 W.W.R. lvii (note):

> Bias is an attitude of mind unique to an individual. An allegation of bias must be directed against a particular individual alleged, because of the circumstances, to be unable to bring an impartial mind to bear. No individual is identified here. Rather, the effect of the submissions is that all of the members of the commission appointed pursuant to s. 4 of the *Securities Act*, regardless of who they may be, are so tainted by staff conduct that none will be able to be an impartial judge. Counsel were unable to refer us to a single reported case where an entire tribunal of unidentified members had been disqualified from carrying out statutory responsibilities by reason of real or apprehended bias. We think that not to be surprising. The very proposition is so unlikely that it does not warrant serious consideration.

61 I therefore conclude that Mr. Geller and Ms. Meyer are not biased, nor is there any evidence of conduct by them raising any apprehension of bias. The vacant position may or may not be filled. The presumption remains that whomever is appointed to that vacancy is unbiased.

62 If it is felt elsewhere that there is some corporate taint, I would allow the above 2 or 3 persons, as the case may be, to sit on the basis of the doctrine of necessity. Natural justice must

give way to necessity. The doctrine of necessity was enunciated by Jackett C.J. in *Caccamo v. Canada (Minister of Manpower & Immigration)* (1977), 75 D.L.R. (3d) 720 (Fed. C.A.) at p. 726:

> As I understand the law concerning judicial bias, however, even where actual bias in the sense of a monetary interest in the subject of the litigation is involved, if all eligible adjudicating officers are subject to the same potential disqualification, the law must be carried out notwithstanding that potential disqualification. ... If this is the rule to be applied where actual bias is involved, as it seems to me, it must also be the rule where there is no actual case of bias but only a "probability" or reasonable suspicion arising from the impact of unfortunate statements on the public mind.

63 This case does not require the doctrine of necessity to be applied to the extent of the example referred to in *Caccamo v. Canada (Minister of Manpower & Immigration)*. The doctrine of necessity is properly used to prevent a failure of justice and not as an affront to justice: De Smith's *Judicial Review of Administrative Action*, 4th ed. (1980), at pp. 276-7. Neither new member has acted in any way or even participated in any process which could give rise to a reasonable apprehension of bias on their part. Therefore the doctrine of necessity is rightly applied in these facts to allow a panel to be constituted, in case any general corporate disqualification beyond those members' control were found. (R.R.S. Tracey, *Disqualified Adjudicators: The Doctrine of Necessity in Public Law*, [1982] Public Law 628, at p. 632.)

Conclusion

64 Mr. Geller and Ms. Meyer are capable of forming a quorum to conduct the s. 27 hearings. If the vacancy is filled, the person appointed could also sit, or any two of the three, as designated by the Chair of the OSC. The application is dismissed. The hearings may proceed only before a panel constituted as directed by this Court.

65 The matter of costs may be addressed by fax.

Application dismissed.

1995 CarswellOnt 1057
Ontario Court of Appeal

E.A. Manning Ltd. v. Ontario (Securities Commission)

1995 CarswellOnt 1057, [1995] O.J. No. 1305, 125 D.L.R. (4th) 305, 18 O.S.C.B. 2419, 23 O.R. (3d) 257, 32 Admin. L.R. (2d) 1, 55 A.C.W.S. (3d) 3, 7 C.C.L.S. 125, 80 O.A.C. 321

E.A. MANNING LIMITED, JUDITH MARCELLA MANNING, TIMOTHY EDWARD MANNING, WILLIAM DOUGLAS ELIK, MARY MARTHA FRITZ, MARC HAROLD SCHWALB and PETER JOHN FINANCE v. ONTARIO SECURITIES COMMISSION

Dubin C.J.O., Labrosse and Doherty JJ.A.

Heard: November 30 and December 2, 1994
Judgment: May 9, 1995 *
Docket: Doc. CA C18902

Counsel: *Bryan Finlay, Q.C.*, *Philip Anisman* and *J. Gregory Richards*, for appellants.
Dennis R. O'Connor, Q.C. and *Benjamin T. Glustein*, for respondent.

Subject: Securities; Corporate and Commercial; Public

Annotation

Introduction

On August 17, 1995 the Supreme Court of Canada refused leave to appeal the decision of the Ontario Court of Appeal in this case. [1] This brought to a close the efforts of Toronto-based broker dealer E.A. Manning Ltd. to prevent the Ontario Securities Commission from conducting a hearing into its fitness to stay in business.

The Issue

The central issue in this case was the allegation of a reasonable apprehension of bias. Bias cases tend to be quite rare. Cases in which tribunals are disqualified from proceeding, or have their decision quashed are rarer still. [2] There are several reasons why bias cases raise difficult issues.

Tribunals and Courts

A judge, in a court of law, will normally disqualify himself or herself before becoming involved in the proceedings if there is even the slightest question of bias. For example, a judge married to a lawyer in a particular firm will refuse to look at any files in which one of the counsel is from that firm. In other cases, a judge will ask counsel whether they would wish the judge to step down. [3]

Since judges are so cautious, if not hyper-sensitive, bias cases involving judges are exceedingly rare. The situation of administrative tribunals, however, is somewhat different, and not because of any lack of sensitivity on the part of tribunal members.

As the Court of Appeal in *Manning* quite appropriately observed, people are often appointed to tribunals for their expertise. For this reason, they are expected to have specialized knowledge of the matters within their jurisdiction. How are they to maintain this knowledge after they have been appointed, if not by reading about, and maintaining close contact with the regulated industry? Of equal importance, typically, a judge will encounter a particular set of parties only once in a judicial career (with the exception of special parties such as the Attorney General, who is really only notionally a party, but, in practice, the Government's lawyer). Many tribunals encounter the same few parties repeatedly.

A member of a regulatory tribunal such as the Ontario Securities Commission [4] will undoubtedly, over time, form opinions of the parties who appear before the Commission. Does this really mean that a party in a regulatory process must have a lower expectation of the degree of neutrality of the decision-maker than would a litigant in a court of law? The answer depends upon how one defines neutrality or, to put the issue the other way, how one defines bias.

The Open Mind

The public expectation is usually that the decision-maker will have an open mind. Rendering that expectation unrealistic is the obvious fact that there is no such thing as a totally open mind (except for a totally empty mind). The mature human mind can never be tabula rasa. There must be a continuum between a mind that is totally open to any point of view and one that is closed to at least one of the parties. At what point do the values and inclinations acquired during the lifetime of a decision-maker, or the views and inclinations of the matter at hand, as influenced by the firmly held opinions of a lifetime, give rise to a disqualifying bias? If one could measure degrees of open-mindedness as one does temperature, with a device analogous to a thermometer, one could easily set a standard. But there is no such scale. And even if there was, there would be no way to insert it into the mind of the decision-maker in order to obtain a reading. As we can never know what is in a decision-maker's mind we can never be certain whether it is or is not open or unbiased.

Every experienced counsel will have encountered decision-makers who appear to have it in for his or her client, judging by the decision-maker's demeanour and questions during the course of the

hearing, only to receive a favourable decision at the end of the case; or, conversely, to have the decision-maker smile approvingly and be friendly throughout, only to receive a decision which disagrees with the client's position on every important issue. Appearances can be, and frequently are, misleading. The more common situation, however, is that a negative or hostile reaction will precede loss of the case. But, even then, negative initial reactions of decision-makers can often be turned around through good advocacy. When they are not, it should still not be assumed that the negative initial reaction was due to bias against the individual applicant, rather than an honest expression of scepticism or disagreement with the individual applicant's arguments. In short, bias, like beauty, is very often in the eye of the beholder. The law, therefore, needs an objective test, and one that is not too quick to disqualify the relatively few members appointed to any tribunal from deciding cases.

The Presumption of Impartiality

Everyone is entitled to adjudication before an impartial decision-maker. But what does this mean in practice? Since, as we have said, there is no objective way to measure bias, and, as we do not give our decision-makers sodium pentathol, or some other "truth serum" before permitting them to make a decision, none of us can know what is in the mind of an individual decision-maker. The logical rule, therefore, as the Court of Appeal noted, is that the decision-maker is presumed not to be biased, absent proof to the contrary.

What form can this proof take? First, if the decision-maker writes an article or makes a speech which clearly indicates a pre-disposition in one direction, that may be a bias for suspecting that when a particular case appears before that decision-maker, the pre-disposition will determine the particular case. Canadian law, however, appears to require stronger proof than that before the decision-maker will be disqualified from participation in the decision, or the decision quashed. [5] There must be evidence that, for some further reason, the decision-maker cannot be trusted to bring objectivity to bear on the *particular* decision in issue. In other words, the presumption of impartiality in Canadian law is rather strong, and requires clear and direct evidence to overcome it. A mere apprehension of bias is not enough; a real likelihood of bias is required. [6]

The main occasions on which a disqualifying bias tends to arise, in practice, is where a decision-maker is alleged to have a proprietary or pecuniary interest in the outcome of a decision [7] or where there is some personal connection such as the decision-maker being a relative of one of the parties by birth or by marriage. Those cases are easy. They almost never result in litigation. The more difficult cases arise when a decision-maker has expressed a point of view on a subject, which is alleged to give rise to a real likelihood of bias. Judges can relatively easily avoid this problem by limiting their speeches to non-controversial subjects, or, at least, to subjects which are not likely to arise before them in a particular case. And, where a judge does make a speech on a subject, or writes an article, and the particular case does come up, there is usually a large enough pool of other judges available that there is no problem in finding an alternate judge. However, the problem is

greater for tribunals. Tribunal members are often required to make speeches, or to issue guidelines, as part of their regulatory duties, to provide guidance to the industry being regulated. The courts have held that it is better to do this openly and publicly than behind closed doors. [8] In some cases it will be necessary for a member of the tribunal, perhaps even one sitting on a case in which the issue is raised, to make a speech indicating a general policy or an inclination in a particular direction. The Court of Appeal left open the possibility that even that might not create a disqualifying bias, although the comment must be regarded as obiter, since it did not arise in the particular case. On the other hand, there are rare, extreme cases in which a member of a tribunal makes a speech which gives the impression that regardless of the evidence, he is very strongly inclined to a particular point of view, giving rise to a *real* likelihood of bias. [9]

Is There a Doctrine of "Corporate Taint"?

As if all of this was not complicated enough, the situation is further complicated when the decision-maker against whom bias is alleged may be only one member of a panel hearing the matter, or only one member of a tribunal, but not sitting on the panel hearing the matter. Is there some sort of doctrine of "corporate taint" in bias cases and, if so, when and how does it apply?

There does not appear to be any doctrine of "corporate taint" in Canadian law. The actions of one member of a tribunal do not, in ordinary circumstances, create a real likelihood of bias with respect to others. There are some circumstances, though, where the bias of one member will be imputed to others. If a tribunal makes a decision in a case, and then it is learned that one of the members of the panel which decided the case has a bias, a court will not speculate that the decision might have been the same had the member with the bias not participated. In those circumstances, the bias of one member will be seen as having tainted the entire panel. [10] On the other hand, as the Court of Appeal in *Manning* found, even if a member of a tribunal had a bias, if that member does not participate in making the decision, the decision is not tainted by that bias. [11] The reason for the difference in the two situations is that once a member with a bias participates on a panel, it becomes impossible afterwards to unravel what would have happened had that member not participated. Where, however, the decision-making panel has not yet been assembled, the presumption will be that the member with the bias will not participate and, therefore, taint the others. That presumption can be rebutted if there is evidence to the contrary.

The applicant in the *Manning* case had three grounds for its argument that the new Commissioners should be disqualified: first, the notion of "corporate taint"; second, by virtue of the comments of the Chair of the Commission; and third, because the Commission defended an action brought against it by some of the same parties, in the *Ainsley* case (annonated below). We have already discussed the scope and limits of the doctrine of corporate taint. The comments of the Chair were held, on the facts, not to give rise to a legal disqualification. Finally, the Court accepted the common

sense proposition that one cannot commence litigation against a tribunal, as in Ainsley, and then argue, when it defends itself, that that defence constitutes a bias.

Conclusion

There is nothing wrong with a member of a tribunal having a disqualifying bias. The problems arise when the member participates, or attempts to participate in making a decision in relation to which he or she should be disqualified. Fact situations in which the decision-maker is tainted by a proprietary or pecuniary interest, or a family connection, are fairly simple and straight-forward, although there may be difficulty in borderline cases. However, speeches and policy pronouncements, which chairs and members of tribunals, and sometimes even staff members, are often called upon to make, may make tribunal decisions targets for accusations of bias. Had the Court in the *Manning* case imposed a judicial standard of conduct on the Chair, despite his different institutional duties, and, had the Court expanded the notion from that of the bias of one member tainting a panel to that of the bias of one member tainting an entire tribunal, the decision in the *Manning* case could have gone the other way. Fortunately, the Court did not lose sight of the difference between tribunals and courts, and unequivocally rejected the new "corporate taint" doctrine advocated by the appellant.

Andrew J. Roman [12]

Appeal from judgment reported at (1994), 3 C.C.L.S. 221, 17 O.S.C.B. 2339, 18 O.R. (3d) 97, 72 O.A.C. 34, 24 Admin. L.R. (2d) 283 (Div. Ct.), dismissing application for order prohibiting Ontario Securities Commission from proceeding with hearings.

The judgment of the court was delivered by *Dubin C.J.O.*:

1 The appellants, by leave, appeal from the judgment of the Divisional Court, now reported at (1994), 18 O.R. (3d) 97 [3 C.C.L.S. 221], dismissing their application for an order in the nature of prohibition to prevent the Ontario Securities Commission (the "Commission") from proceeding with two hearings relating to allegedly improper sales practices by the appellants. The appellants alleged actual bias, and a reasonable apprehension of bias, principally arising out of a Policy Statement issued by the Commission relating to the sales practices of securities dealers recommending investment in penny stocks.

2 The Divisional Court held that the Commissioners who participated in the formulation and adoption of the Policy Statement and the Chair of the Commission appointed after the formulation and adoption of that Statement were precluded from participating in the two hearings then pending. The Divisional Court held, however, that the Commissioners who had been appointed to the Commission after the adoption of the Policy Statement were not disqualified and could preside over the hearings, and that the two hearings could proceed if presided over by the new Commissioners. The application for prohibition was therefore dismissed.

Facts

3 The appellant, E.A. Manning Limited ("Manning"), is registered as a securities dealer under s. 98(9) of the Regulation (R.R.O. 1990, Reg. 1015, as amended) enacted pursuant to the Ontario *Securities Act*, R.S.O. 1990, c. S.5. The other appellants at the material times were directors, officers or salespersons of Manning. The respondent Commission has a two-tiered structure, consisting of an appointed statutory tribunal (the Commission proper, or "Commissioners") and the Commission staff. The Commission is defined by s. 2(2) of the *Securities Act* as comprising a Chair, and not more than ten or less than eight other members. Section 2(4) of the *Securities Act* provides that two Commissioners constitute a quorum for any hearing held pursuant to the provisions of the *Securities Act*.

4 The Policy Statement sets forth the Commission's conclusion that abusive and unfair sales practices existed among securities dealers involved in the trading of the low-cost shares known as penny stocks. The Policy Statement sought to remedy these abuses by requiring securities dealers to provide potential purchasers with a risk disclosure statement and to complete a suitability statement in respect of each purchase. Brokers and investment dealers were excluded from the Policy Statement's consideration, the Commission having satisfied it self that traders registered under those classifications were adequately policed by the Toronto Stock Exchange and the Investment Dealers Association, the self-governing bodies to which they were respectively required to belong pursuant to the Regulation passed under the *Securities Act*.

5 The purpose of the Policy Statement was set forth in the statement as follows:

> **Purpose Of This Policy**
>
> The Act and the regulations under the Act (the "Regulations") require, among other things, that registrants "know their clients" and deal "fairly, honestly and in good faith" with their customers and clients. *The Commission is concerned that securities dealers engaged in unfair sales practices like those mentioned above are not complying with these obligations and are recommending investments in penny stocks that are highly speculative and often are not appropriate for an investor given his/her personal circumstances, investment experience, investment objectives and financial means. The Commission is also concerned that as a result of the sales practices employed, investors often purchase penny stocks unaware of the risks involved and without adequate consideration being given to the suitability of the purchase. Losses of a significant portion of an investment in penny stocks are common. The Commission has concluded that these sales practices have a significant adverse impact on the fairness and integrity of the capital markets in Ontario*.
>
> The Commission is issuing this Policy as a guide to identify what the Commission believes are appropriate business practices to assist securities dealers and their employees in satisfying

> their obligations under the Act in connection with the marketing and sale of penny stocks. This Policy is intended to inform interested parties that the Commission will be guided by this Policy in exercising its public interest jurisdiction under subsection 27(1) of the Act and its general public interest jurisdiction to protect investors and promote and maintain fair, equitable and efficient capital markets in Ontario.
>
> The Commission believes that the business practices set out in this Policy should be adopted by securities dealers when selling penny stocks. The Commission believes that such practices are in the public interest to promote and maintain fair, equitable and efficient capital markets in Ontario and to protect investors from high pressure and other unfair sales practices employed in the marketing and sale of penny stocks and that these business practices are consistent with the duty of securities dealers and their officers, partners, salespersons and directors to deal fairly, honestly and in good faith with their customers and clients. Subsection 27(1) of the Act provides that the Commission, after giving a registrant an opportunity to be heard, may suspend, cancel, restrict or impose terms and conditions upon the registration of or reprimand a registrant where in its opinion such action is in the public interest. *In determining whether any failure to comply with this Policy constitutes grounds for the Commission taking action under subsection 27(1) of the Act or any other section of the Act, the Commission will continue to consider the particular facts and circumstances of each case*.

[Emphasis added.]

6 On September 15, 1992, about one month after the issuance of the Policy Statement in its draft form, Manning and other securities dealers commenced an action (the *Ainsley* action) against the Commission alleging that the Policy Statement was ultra vires the Commission, that the Commission had no basis upon which to formulate the policy, and that they were being harassed and discriminated against by the Commission. In May 1993, the plaintiffs in that case brought a motion for summary judgment on the issue whether Policy Statement 1.10 was ultra vires the Commission. On August 13, 1993, Blair J. held that the Policy Statement, including the requirements with respect to the future business conduct of the securities dealers, was beyond the jurisdiction of the Commission ([*Ainsley Financial Corp. v. Ontario (Securities Commission)*] (1993), 14 O.R. (3d) 280). The decision of Blair J. was appealed to this court by the Commission, and the appeal was dismissed, the reasons for judgment being delivered by Doherty J.A. ((1994), 21 O.R. (3d) 104). The other allegations in the *Ainsley* action have not as yet been resolved, and they are still outstanding.

7 On December 15, 1993, the Commission issued a notice of hearing (the "first notice of hearing") to determine whether under s. 27 of the *Securities Act*, it was in the public interest to suspend, restrict, or cancel the registrations of Manning and three of the other appellants and to determine whether certain exemptions should no longer apply to the appellants. The notice alleged that the appellants traded in securities of BelTeco Holdings Inc. and Torvalon Corporation, contrary

to the public interest by, inter alia, using high-pressure sales tactics, failing to disclose that they were selling securities as principal and not as agents, and failing to disclose that mark-ups were included in the purchase price and that shares were of limited marketability. The hearing was scheduled to commence on September 19, 1994. On February 4, 1994, the Commission issued a second notice of hearing against Manning and five of the other appellants, the primary purpose of which was to seek an order prohibiting the named parties from calling on residences to sell securities (the Commission staff having failed in its attempt two days earlier to obtain an ex parte order under s. 27(2) of the *Securities Act* for an interim suspension of the registration of Manning). Essentially, the allegations in the second notice echoed the allegations in the first notice, but did not relate to the trading in the shares of specific corporations.

8 Following the release of the Policy Statement, Mr. Edward Waitzer was appointed the new Chair of the Commission; Mr. John Arthur Geller, the Vice-Chair of the Commission; and Helen M. Meyer, a member. A second new Commissioner has now also been appointed.

9 On December 7, 1993, one week prior to the issuance of the first notice of hearing, an interview with Edward Waitzer was published in the *Dow Jones News*. Mr. Waitzer was quoted as saying that dealing with penny stock dealers was a "perennial priority" of the Commission. He added, "[t]here will always be marginal players in the securities industry .... Our task is to get these players into the self-regulatory system or get them out of the jurisdiction."

10 Montgomery J., writing for the Divisional Court, made the following findings:

> i) There was a reasonable apprehension of bias on the part of the Commissioners who were involved in the adoption of the Policy Statement, as in the process of formulating it they had closed their minds to the issue whether securities dealers, including Manning Ltd., were guilty of unfair sales practices. Moreover, the defence of the *Ainsley* case was also evidence of prejudgment in that the Commission went beyond merely defending its jurisdiction and strenuously sought to show that Manning Ltd. (among others) was guilty of the very offences which were the subject of the hearings;
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> ii) There was a reasonable apprehension of bias on the part of the new Chair, Waitzer, because of his public comments;
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> iii) There was no evidence or reasonable apprehension of bias on the part of the two other Commissioners appointed after the adoption of the Policy Statement;
>
> iv) New Commissioners would not be affected by "corporate taint", and indeed, there is no judicial authority for such a concept;
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> v) Even if the legal concept of "corporate taint" existed, the doctrine of necessity would apply to allow those Commissioners against whom no specific reasonable apprehension of bias was found to form a quorum for the hearings;

vi) That the hearings of the Commission could proceed only before a panel of Commissioners consisting of any two or more of Vice-Chair Geller and Commissioner Helen Meyer, or any Commissioner appointed after November 1, 1993. [A new Commissioner was appointed after the order of the Divisional Court.]

11 The appellants now appeal from the order of Montgomery J. dismissing their application for prohibition and submit that the Divisional Court erred in permitting the two hearings to proceed before the new Commissioners.

Issues

12 The appellants submitted that the Divisional Court erred in failing to give effect to their submissions that the conduct of the Commission in its formulation and adoption of the Policy Statement, its defence to the *Ainsley* action, and the comments of its Chair, Mr. Waitzer, had so tainted the entire Commission that even newly-appointed Commissioners should be excluded from sitting on the hearings to consider the allegations in the first and second notices of hearing. They also submitted that the Divisional Court erred in holding that even if the concept of corporate taint could be invoked to otherwise disqualify the new Commissioners, the doctrine of necessity would apply.

13 The respondent, although not conceding before the Divisional court that there was any basis for disqualification of any member of the Commission, did not seek to have any of the Commissioners who had participated in the formulation of the Policy Statement conduct the hearings. The respondent was content before the Divisional Court to have the hearings conducted by the new Commissioners. The respondent did not cross-appeal from the order of the Divisional Court.

14 On the appeal, the respondent submitted that the Divisional Court erred in holding that those Commissioners who participated in the formulation and adoption of the Policy Statement were disqualified to sit on the pending hearings, and that no case of bias had been made out against them. The respondent further submitted that the Divisional Court erred in holding that Mr. Waitzer, the Chair, was disqualified. It would follow that, under such circumstances, there would be no basis for questioning the qualification of the new Commissioners.

15 However, as has been noted, the respondent did not cross-appeal from the order of the Divisional Court and did not seek here, or in the Divisional Court, to have anyone other than the new Commissioners preside over the pending hearings. If the judgment under appeal permitting the new Commissioners to sit was dependent on the proposition that none of the Commissioners, nor the Chair, were disqualified, I would have to consider whether the Divisional Court was corrected in so holding. However, in my view, the status of the new Commissioners to conduct the hearings is not dependent upon the status of the others to do so. Assuming that the Divisional Court was

correct in disqualifying the Commissioners who had participated in and formulated the Policy Statement, it is only necessary to consider whether the new Commissioners are disqualified (1) on the doctrine of corporate taint, or (2) by reason of the comments of the Chair, or (3) by reason of the Commission's defence to the *Ainsley* action.

Overview

16 By statute, the Commission is given many independent responsibilities and duties, and, in considering issues of bias and reasonable apprehension of bias, regard must be had to the statutory framework within which the Commission functions.

17 Within that statutory framework, the Commission is, in disciplinary matters, the investigator, the prosecutor, and the judge. As a general principle, in the absence of statutory authority, this overlap would be held to be contrary to the principles of fairness. However, where such functions are authorized by statute, the overlapping of these functions, in itself, does not give rise to a reasonable apprehension of bias.

18 In this respect, Madam Justice L'Heureux-Dubé in *Barry v. Alberta (Securities Commission)*, [1989] 1 S.C.R. 301 [hereinafter referred to as *Brosseau v. Alberta (Securities Commision)*], observed as follows at pp. 313-314:

> Securities commissions, by their nature, undertake several different functions. They are involved in overseeing the filing of prospectuses, regulating the trade in securities, registering persons and companies who trade in securities, carrying out investigations and enforcing the provisions of the Act. By their nature, they will have repeated dealings with the same parties. The dealings could be in an administrative or adjudicative capacity. When a party is subjected to the enforcement proceedings contemplated by ss. 165 or 166 of the Act, that party is given an opportunity to present its case in a hearing before the Commission, as was done in this case. The Commission both orders the hearing and decides the matter. Given the circumstances, it is not enough for the appellant to merely claim bias because the Commission, in undertaking this preliminary internal review, did not act like a court. It is clear from its empowering legislation that, in such circumstances, the Commission is not meant to act like a court, and that certain activities which might otherwise be considered "biased" form an integral part of its operations.

19 In dealing with the issue of a reasonable apprehension of bias, Madam Justice L'Heureux-Dubé added at pp. 314-315:

> The particular structure and responsibilities of the Commission must be considered in assessing allegations of bias. Upon the appeal of *Latimer* to the Ontario Court of Appeal, Dubin J.A., for a unanimous Court, dismissed the complaint of bias. He acknowledged that

the Commission had a responsibility both to the public and to its registrants. He wrote at p. 135:

> ... I view the obligation of the Commission towards its registrants as analogous to a professional body dealing in disciplinary matters with its members. The duty imposed upon the Commission of protecting members of the public from the misconduct of its registrants is, of course, a principal object of the statute, but the obligation of the Commission to deal fairly with those whose livelihood is in its hands is also by statute clearly placed upon it, and nothing is to be gained, in my opinion, by placing a priority upon one of its functions over the other.

Dubin J.A. found that the structure of the Act whereby commissioners could be involved in both the investigatory and adjudicatory functions did not, by itself, give rise to a reasonable apprehension of bias.

I am in agreement with this proposition. So long as the Chairman did not act outside of his statutory authority, and so long as there is no evidence to show involvement above and beyond the mere fact of the Chairman's fulfilling his statutory duties, a "reasonable apprehension of bias" affecting the Commission as a whole cannot be said to exist.

20 In delivering the judgment of the Divisional Court, Montgomery J. stated as follows at p. 113:

> ... *W.D. Latimer Co. v. Bray* (1974), 6 O.R. (2d) 129 ... (C.A.), established the principle that evidence of prejudgment, even in the context of the unique statutory scheme established by the *Securities Act*, is a ground for disqualification. However, it recognized that mere knowledge by Commissioners of market conditions or even of grounds for a complaint to be heard by them do not produce any apprehension of bias in the particular circumstances of this tribunal. Dubin J.A. (as he then was) delivered the judgment of the court. He stated at pp. 140-141:
>
> > Where by statute the tribunal is authorized to perform tripartite functions, disqualification must be founded upon some act of the tribunal going beyond the performance of the duties imposed upon it by the enactment pursuant to which the proceedings are conducted. Mere advance information as to the nature of the complaint and the grounds for it are not sufficient to disqualify the tribunal from completing its task. *Evidence of prejudgment, however, is a ground for disqualification unless the statute specifically permits the tribunal to have arrived at a preliminary judgment before conducting an inquiry*.

[Emphasis added.]

Disqualification by Reason of Corporate Taint

21 As noted earlier, the appellants submitted that the Divisional Court erred in failing to prohibit the Commission from conducting the hearings pursuant to the two notices previously referred to. They submitted that the Divisional Court, having found that those Commissioners who had participated in the formulation and adoption of the Policy Statement had prejudged the matters to be considered, erred in failing to hold that this prejudgment tainted the entire Commission, including those members who were appointed after the formulation and adoption of the Policy Statement.

22 It should be noted that the Policy Statement was held to be beyond the jurisdiction of the Commission because it had crossed the line between a non-mandatory guideline, and a mandatory pronouncement having the same effect as a statutory instrument, without the appropriate statutory authority (Doherty J.A. in *Ainsley*, supra). However, there is no suggestion of bad faith.

23 For the reasons noted earlier, it is unnecessary to determine whether the Divisional Court was correct in finding that those Commissioners who had participated in the formulation and adoption of the Policy Statement were disqualified.

24 Assuming that the Divisional Court was correct in so finding, I agree with its conclusion that such a finding did not disqualify the new Commissioners. Montgomery J., at p. 116, stated, in part, as follows:

> It is argued by the applicant that there is a corporate taint affecting all those Commissioners subsequently appointed to the OSC. There is no judicial authority for this proposition. Bias is a lack of neutrality.
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> Blake in *Administrative Law in Canada* (Toronto: Butterworths, 1992), states at p. 92:
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> > Many tribunals are part of a larger administrative body. The fact that one branch of that administrative body is biased does not mean that another branch that has carriage of the matter is biased. Bias on the part of an employee of the tribunal or a member who is not on the panel hearing the matter usually does not give rise to a reasonable apprehension of bias on the part of the tribunal. Even bias on the part of the Minister in charge of the department does not necessarily make the adjudicator employed by the Ministry biased.

25 There was no evidence of prejudgment on the part of the new Commissioners. They were not involved in the consideration and adoption of the Policy Statement. Furthermore, none of the evidence which the staff of the Enforcement Branch proposed to adduce at the hearings was provided to them.

26 It should also be noted that the evidence to be adduced in connection with the second notice of hearing only came to the attention of Commission staff after final approval of the Policy Statement by the Commissioners. Furthermore, none of the details of the evidence proposed to be presented

to the Commissioners in connection with the first notice of hearing formed part of the staff report presented to those Commissioners who were present when the Policy Statement was adopted.

27 It is assumed, of course, that the new Commissioners would be familiar with the Policy Statement and the concerns of the Commission with respect to the trading in penny stocks.

28 Securities Commissions, by their very nature, are expert tribunals, the members of which are expected to have special knowledge of matters within their jurisdiction. They may have repeated dealings with the same parties in carrying out their statutory duties and obligations. It must be presumed, in the absence of any evidence to the contrary, that the Commissioners will act fairly and impartially in discharging their adjudicative responsibilities and will consider the particular facts and circumstances of each case.

29 As noted earlier, even advance information as to the nature of a complaint and the grounds for it, which are not present here, are not a basis for disqualification.

30 In *Brosseau*, supra, the fact that the Chairman of the Commission had received the investigative report and sat on the panel hearing the matter did not give rise to a finding of a reasonable apprehension of bias.

31 In *Bennett v. British Columbia (Securities Commission)* (1992), 69 B.C.L.R. (2d) 171 (C.A.), an allegation of bias against the Commission was made because the staff of the Commission had cooperated with Crown counsel in quasi-criminal proceedings against those who were subsequently to appear before the British Columbia Securities Commission.

32 In rejecting a motion to stay the proceedings before the Commission by reason of the participation of the staff in the quasi-criminal proceedings, the British Columbia Court of Appeal first referred to the following portion of the judgment at first instance, at p. 180:

> I have also indicated earlier in these reasons, as well, that the fact that employees of the commission swore the information used by the Crown to prosecute the Bennetts and Doman in the *quasi*-criminal trial and used their investigative capacity to provide the evidence, does not lead automatically to an inference of bias on the part of the commission, because of the very nature of the commission under the Securities Act. Indeed, I do not take an inference of bias from their having done so. Nor is there any other demonstrated evidence of bias in this case.

33 The British Columbia Court of Appeal went on as follows at pp. 180-181:

> We are fully in accord with these findings. In the absence of any evidence of bias we are unable to understand how it could be inferred that staff activities of the sort which occurred

> here could lead a reasonably informed person to apprehend that presently unknown hearing officers would not be able to act in an entirely impartial manner if the hearing proceeds...
>
> We wish to add one further observation and that is as to the target of a bias allegation. Bias is an attitude of mind unique to an individual. An allegation of bias must be directed against a particular individual alleged, because of the circumstances, to be unable to bring an impartial mind to bear. No individual is identified here. Rather, the effect of the submissions is that all of the members of the commission appointed pursuant to s. 4 of the *Securities Act*, regardless of who they may be, are so tainted by staff conduct that none will be able to be an impartial judge. Counsel were unable to refer us to a single reported case where an entire tribunal of unidentified members had been disqualified from carrying out statutory responsibilities by reason of real or apprehended bias. We think that not to be surprising. The very proposition is so unlikely that it does not warrant serious consideration.

34 A case very much in point is *Laws v. Australian Broadcasting Tribunal* (1990), 93 A.L.R. 435 (H.C.). In that case, three members of the Australian Broadcasting Tribunal, during the course of what was intended to be a preliminary investigation, concluded that the appellant (Laws) had breached broadcasting standards. Subsequently, the tribunal, as a whole, decided to hold a formal inquiry to consider whether it should exercise any of its regulatory powers against the appellant including the withdrawal of its licence. The appellant sought an order prohibiting the broadcasting tribunal from conducting such a hearing on the ground that the entire tribunal was tainted by reason of the prejudgment of three of its members. An employee of the tribunal, Ms. Paramore, the Director of its Programs Division, later gave an interview on behalf of the tribunal in which she repeated the conclusions made earlier by the three tribunal members. Mr. Laws submitted that this was a further ground for disqualification.

35 An action for defamation was commenced by Mr. Laws against the tribunal and Ms. Paramore arising from the radio interview. In defence, the tribunal pleaded justification. That also formed the basis of the appellant's application to prohibit the tribunal from proceeding with its formal inquiry. I find it convenient to deal with the impact of the lawsuit later.

36 At first instance, Morling J. concluded that the three members of the tribunal who had undertaken the preliminary investigation had gone much further and had made a positive finding that the appellant had violated broadcasting standards. He held that they were precluded from participating in the formal inquiry, but the appellant was not entitled to an order prohibiting the formal inquiry from continuing so long as it was conducted by other members of the tribunal who had not participated in the preliminary investigation. That conclusion was upheld by the full court and by the High Court of Australia.

37 With respect to the statements made by Ms. Paramore, the appellant contended that those statements reflected the corporate view of the members of the tribunal and thus formed the basis for an order of prohibition against the tribunal itself.

38 Morling J. held that there was no justification for attributing Ms. Paramore's views to the members of the tribunal who were to conduct a formal inquiry. That conclusion was upheld in the High Court of Australia. On that issue, Mason C.J. and Brennan J. stated at pp. 444-445:

> In order to examine this submission it is necessary to consider the interview given by Ms. Paramore. Although the Act did not authorise the publication of the findings of non-compliance by the appellant with RPS 3 [broadcasting standards], it was not disputed that Ms Paramore spoke for the tribunal when she gave an account of the vitiated decision of 24 November. The tribunal is constituted by the Act as a body corporate (s 7(1), (2)(a)) and it consists of a chairman, a vice-chairman and at least one other member but not more than six other members; s 8(1). There is nothing to identify the source of Ms. Paramore's authority to make the statements which she made in the interview on behalf of the tribunal. It is very likely that her authority arose from her responsibility as Director of the Programs Division; in other words, it was part of her general responsibility to publish and explain, by way of broadcast, interview and otherwise, decisions made by the tribunal. The fact that the decision which she sought to report and explain was vitiated, at least so far as it related to the appellant, did not deny to the interview the character of a corporate act performed in purported pursuance of s 17(1). *However, though it might be correct to regard the interview as a corporate act, it was not necessarily an act done on behalf of each of the individual members of the corporation. The circumstances are not such as to justify the drawing of an inference that each of the individual members of the tribunal authorised the interview or approved of its content. At best from the appellant's viewpoint, it might be inferred that the three members of the tribunal who made the decision of 24 November so authorised or approved the interview. Accordingly, the interview does not entitle the appellant to wider relief than that granted at first instance by Morling J.*

[Emphasis added.]

39 Although there may be circumstances where the conduct of a tribunal, or its members, could constitute institutional bias and preclude a tribunal from proceeding further, this is not such a case. This is not a case where the Commission has already passed judgment upon the very matters which are to be considered in the pending hearings by the new Commissioners and, in this respect, is distinguishable from the case of *Association des officiers de direction du service de police de Québec (ville) c. Québec (Commission de police)* (1994), 119 D.L.R. (4th) 484 (Que. C.A.), where that was the nature of the concern of the majority of the members of the court. In any event, and with respect, I prefer the dissenting reasons for judgment of Fish J.A.

Disqualification by Reason of the Comments of the Chair, Mr. Waitzer

40 In the reasons of the Divisional Court, Montgomery J. stated at p. 111 as follows:

> In a press interview, the Chair of the OSC, Mr. Waitzer, stated that dealing with penny stock dealers is a "perennial priority". "There will always be marginal players in the securities industry. Our task is to get these players into the self-regulatory system or get them out of the jurisdiction".
>
> I conclude that Mr. Waitzer cannot sit on either hearing because of a reasonable apprehension of bias.

Montgomery J. did not expand upon his reasons for arriving at that conclusion.

41 The appellants submitted that the statements of the Chair exhibited a bias against them which was reflective of the Commission as a whole, and, therefore, they could not get a fair hearing from any members of the Commission. They submitted that, having found Mr. Waitzer was disqualified by reason of a reasonable apprehension of bias, the Divisional Court erred in not prohibiting the hearings from proceeding.

42 Mr. Waitzer's comments were delivered in the context of a series of four articles published in the same issue of the *Dow Jones News*. They appeared under the titles: "OSC Chairman Sees Mandate To Improve Market Efficiency," "Growing Power of Institutions"; "Jurisdiction Debate Red Herring"; and "Market Transparency a Priority". In those articles, Mr. Waitzer discusses trends in the securities industry, and potential regulatory responses to them. He is quoted as saying that he sees as part of his job the removal of un necessary regulatory burdens from participants in Ontario capital markets, rather than the mere imposition of new measures. He also states that the Toronto Stock Exchange may well have to adapt to admit members who do not trade on the exchange. One of the articles notes his concern that the self-regulating agencies adapt to accommodate the trend to various proprietary trading systems:

> While Waitzer says he sees no immediate threat to the TSE, he says his concern is that the situation will evolve into one where "all of a sudden we have 20 trading systems and no self-regulatory system; we've got a real problem and it all lands in the Commission's lap."

In this context, Mr. Waitzer's comment about getting the penny stock dealers into the self-regulating system is clearly a reflection of what he sees as the ideal regulatory solution to the industry's problems. It is a solution he advocates for all players in the market, not just for the class of traders to which the appellants belong.

43 With respect, I fail to see how what was said by Mr. Waitzer could form any basis for concluding that there was a reasonable apprehension of bias if he were to sit on either of the pending hearings, let alone disqualify the other Commissioners from conducting the hearings. In making the comments complained of here, Mr. Waitzer was fulfilling his mandate as Chair of the Commission.

44 In this respect, what was stated by Doherty J.A. in *Ainsley Financial Corp. v. Ontario (Securities Commission)*, supra, at pp. 108-109, is apt:

> The authority of a regulator, like the Commission, to issue non-binding statements or guidelines intended to inform and guide those subject to regulation is well established in Canada. The *jurisprudence* clearly recognizes that regulators may, as a matter of sound administrative practice, and without any specific statutory authority for doing so, issue guidelines and other non-binding instruments: *Hopedale Developments Ltd. v. Oakville (Town)*, [1965] 1 O.R. 259 at p. 263, 47 D.L.R. (2d) 482 (C.A.); *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 at pp. 6-7; 137 D.L.R. (3d) 558; *Capital Cities Communications Inc. v. Canadian Radio-Television & Telecommunications Commission*, [1978] 2 S.C.R. 141 at p. 170, 81 D.L.R. (3d) 609 at p. 629; *Friends of Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at p. 35; 88 D.L.R. (4th) 1; *Pezim*, *supra*, at p. 596; Law Reform Commission of Canada, Report 26, *Report on Independent Administrative Agencies: Framework for Decision Making* (1985), at pp. 29-31.
>
> Non-statutory instruments, like guidelines, are not necessarily issued pursuant to any statutory grant of the power to issue such instruments. Rather, they are an administrative tool available to the regulator so that it can exercise its statutory authority and fulfil its regulatory mandate in a fairer, more open and more efficient manner. While there may be considerable merit in providing for resort to non-statutory instruments in the regulator's enabling statute, such a provision is not a prerequisite for the use of those instruments by the regulator. The case law provides ample support for the opinion expressed by the Ontario Task Force on Securities Regulation, *Responsibility and Responsiveness* (June 1994) at pp. 11-12:
>
> > A sound system of securities regulation is more than legislation and regulations. Policy statements, rulings, speeches, communiqués, and Staff notes are all valuable parts of a mature and sophisticated regulatory system. ...

45 Mr. Waitzer's comments did not in any way relate to the subject matter of the complaints made against the appellants in the pending proceedings, nor should they be viewed as a veiled threat against the appellants, as was contended.

46 However, even if statements by a regulator relate to the very matters which he or she is considering, that, in itself, is not a basis for concluding that the regulator has prejudged the matter.

47 In *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, Cory J. stated at p. 639:

> Further, a member of a board which performs a policy formation function should not be susceptible to a charge of bias simply because of the expression of strong opinions prior to

> the hearing. This does not of course mean that there are no limits to the conduct of board members. It is simply a confirmation of the principle that the courts must take a flexible approach to the problem so that the standard which is applied varies with the role and function of the Board which is being considered. In the end, however, commissioners must base their decision on the evidence which is before them. Although they may draw upon their relevant expertise and their background of knowledge and understanding, this must be applied to the evidence which has been adduced before the board.

48 Even if it could be said that the statements of the Chair exhibited bias against the appellants that, in itself, would not disqualify the other Commissioners from conducting the headings.

49 In *Van Rassel v. Royal Canadian Mounted Police*, (sub nom. *Van Rassel v. Canada (Commissioner of R.C.M.P.))* [1987] 1 F.C. 473 (T.D.), it was alleged that the Commissioner of the R.C.M.P. made a public comment strongly critical of the R.C.M.P. officer who faced a trial before the R.C.M.P. service tribunal. Joyal J. held that even if such a statement were made, it could not lead to a reasonable apprehension of bias against the whole tribunal, at p. 487:

> Assuming for the moment that the document is authentic and that the words were directed to the applicant, it would not on that basis constitute the kind of ground to justify my intervention at this time. The Commissioner of the RCM Police is not the tribunal. It is true that he has appointed the tribunal but once appointed, the tribunal is as independent and as seemingly impartial as any tribunal dealing with a service-related offence. One cannot reasonably conclude that the bias of the Commissioner, if bias there is, is the bias of the tribunal and that as a result the applicant would not get a fair trial.

50 As I indicated earlier, in my opinion, there was no merit in the contention that the new Commissioners were disqualified by reason of the comments made by the Chair.

Bias Resulting from Commission's Defence in the Ainsley Action

51 As noted earlier, the *Ainsley* action was an action commenced by several investment dealers, including the appellants, against the Commission.

52 In the judgment of the Divisional Court, Montgomery J. found that the Commission's defence of the *Ainsley* action offered further evidence of its prejudgment of the matters contained in the first and second notices of hearing. In part, he stated as follows at pp. 114-115:

> In the context of the litigation brought by the securities dealers, including the motion for judgment in the *Ainsley* case and the pending appeal, the OSC went beyond merely defending itself and its jurisdiction and adopted the role of advocate against them and strenuously sought to demonstrate that Manning Limited and others are guilty of the very conduct which is now the subject of the current notices of hearing.

53 Counsel for the appellants submitted that the Divisional Court, having come to that conclusion, erred in not holding that the Commission should be prohibited from proceeding with the two hearings even if such hearings were presided over by the new Commissioners.

54 In the action, the plaintiffs claimed, in part, that the Commission staff could neither establish the public interest basis for the Policy Statement, nor the truth of the conclusion reached in the staff report upon which it was based. The plaintiff's also alleged bad faith, harassment, intimidation, and intentional interference with their business interests and claimed damages in the amount of $1 million.

55 These were very serious allegations and certainly called for a vigorous defence. The Divisional Court did not detail the manner in which they felt that the Commission in its defence to the *Ainsley* action went beyond defending itself and its jurisdiction. It would be a strange result if a securities dealer, whose conduct is under investigation, could, by the institution of an action calling for a defence, prevent the Commission from taking proceedings against it.

56 However, it is unnecessary to determine whether the Divisional Court was correct in holding that the defence of the *Ainsley* action was a basis for disqualification of certain of the Commissioners.

57 It was the Commission staff, along with counsel, who were responsible for assembling the materials that formed the basis of the Commission's response to the plaintiffs' allegations in the *Ainsley* action. None of the Commissioners, with the exception of the former Chair, Robert Wright, participated in any way in assembling those materials, or preparing the Commission's response to the action.

58 In my opinion, it cannot be said tht the defence of the action was a basis to conclude that the new Commissioners had prejudged the complaints which were the subject matter of the notices of hearing, and, in this respect, I agree with the Divisional Court.

59 I agree with the way that this issue was dealt with in *Laws v. Australian Broadcasting Tribunal*, supra.

60 As noted above, in that case, an action for defamation had been commenced against the tribunal and one of its employees. The tribunal, in its defence, relied upon justification which, in effect, alleged that what the employee of the tribunal had stated was true, i.e., the Laws had violated the broadcasting standards. The High Court of Australia did not accede to the submission of the appellant in that case that the defence in the civil action demonstrated bias, or a reasonable apprehension of bias, on the part of all the members of the Commission, including those who had not participated in the preliminary investigation.

61 The court concluded that the defence in the defamation action did not preclude members of the tribunal who had not participated in the preliminary investigation from conducting the pending inquiry.

62 Mason C.J. and Brennan J., with respect to this matter, concluded as follows at pp. 447-448:

> We are left then with the suggestion that in the circumstances there is a reasonable apprehension of bias because the defences to the action for defamation give rise to a suspicion of prejudgment or because the members of the tribunal have a conflicting interest in defeating that action. *Granted that the existence of apprehended bias is a question of fact we are not persuaded that the appellant succeeds in making out such a case against members of the tribunal other than the chairman, vice-chairman and Ms Bailey, who participated in the decision of 24 November and may be taken to have approved the giving of the interview by Ms Paramore*.
>
> . . . . .
>
> *However, we do not consider that the inference drawn in the preceding paragraph, taken in conjunction with the other circumstances which we have described, would lead a fair-minded ob server to conclude that the members of the tribunal, apart from those who participated in the decision of 24 November, would bring other than an unprejudiced and impartial mind to the resolution of the issues which would properly arise in an inquiry to be held under s 17c; see Livesey v New South Wales Bar Association (CLR at 293-4)*.

[Emphasis added.]

63 Gaudron and McHugh JJ., concurring, added the following at pp. 457-458:

> In the present case, the most that can be said against those members of the tribunal who were parties to the filing of the defamation defences is that they believed that, upon the evidence then known to them, the assertions in the defences were true and that on that evidence they would probably have decided the s 17c issues adversely to the appellant. But to attribute that belief and that decision to them does not give rise to a reasonable fear that they would not fairly consider any evidence or arguments presented by the appellant at the s 17c inquiry or that they would not be prepared to change their views about the issues. When the defamation proceedings against the tribunal were commenced, the members of the tribunal were required to file the tribunal's defence on the evidence that they then had in their possession and without the benefit of evidence or argument from the appellant. When all the evidence is heard and the case argued, it may become apparent to them that the defences which the tribunal filed cannot succeed. However, there is no suggestion that the filing of the defences was itself an abuse of process or the product of prejudice. *To the contrary, the hypothesis is that the members of the tribunal believed that the assertions in the defences were true. But neither logic nor the evidence makes it reasonable to fear that because of that belief, the members of*

the tribunal will not decide the case impartially when they hear the evidence and arguments for the appellant at the s 17c inquiry.

[Emphasis added.]

64 As indicated earlier, I would reject the submission that the defence in the *Ainsley* action precluded the new Commissioners from presiding over the pending hearings.

Doctrine of Necessity

65 As noted earlier, the Divisional Court held that even if this were a case of "corporate taint," the doctrine of necessity could be invoked which would allow those Commissioners against whom no specific reasonable apprehension of bias was found to form a quorum for the hearings.

66 In the view that I take of the matter, it is not necessary to consider the doctrine of necessity.

Conclusion

67 I am indebted to counsel for their very thorough and able submissions.

68 In the result, I would dismiss the appeal with costs.

Appeal dismissed.

Footnotes

* Leave to appeal to the Supreme Court of Canada was denied (August 17, 1995), Doc. 24773, Lamer C.J.C., La Forest, and Major JJ. (S.C.C.).

1 *The Globe & Mail*, August 18, 1995, p. B.3.

2 The leading case in the area, which was not even referred to in the reasons of the Ontario Court of Appeal, is *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, 9 N.R. 115, 68 D.L.R. (3d) 716. The decision of the NEB in that case was overturned. However, the usual natural justice/fairness cases involve, primarily, allegations that for some reason the hearing itself was unfair.

3 For example, the writer was once asked by a judge as to whether he should disqualify himself on the ground that when he was an articling student (apparently at least 30 years earlier) he had worked on a file involving the parent company of the other party in the case.

4 Other examples might include professional disciplinary bodies, tribunals regulating prices of services, such as the CRTC for telephone rates, or issuing permits, such as the National Energy Board and numerous licensing bodies.

5 See the *R. v. Pickersgill*; *Ex parte Smith* (1970), 14 D.L.R. (3d) 717 (Man. Q.B.).

6 This was the central rule to emerge from the *Committee for Justice & Liberty* case, supra, at note 2, relying on the *PPG* case, ante, note 7.

7 See *Re Canada (Anti-dumping Tribunal)* (sub nom. *PPG Industries Canada Ltd. v. Canada (Attorney General)*), [1976] 2 S.C.R. 739, 7 N.R. 209, 65 D.L.R. (3d) 354, for a detailed discussion of this type of bias.

8 *Capital Cities Communications Inc. v. Canada (Canadian Radio-Television & Telecommunications Commission)*, [1978] 2 S.C.R. 141, 36 C.P.R. (2d) 1, 81 D.L.R. (3d) 609, 18 N.R. 181, at p. 629 (D.L.R.).

9 A rare, but clear example of this is found in the case of the consumer advocate who became a member of the tribunal in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissions of Public Utilities)*, [1992] 1 S.C.R. 623, 4 Admin. L.R. (2d) 121, 134 N.R. 241, 89 D.L.R. (4th) 289, 95 Nfld. & P.E.I.R. 271, 301 A.P.R. 271.

10 This was the situation in the *Committee for Justice & Liberty* case, supra, note 2, where only one member of the panel was found to have had a bias but the decision of the entire panel had been quashed by the Federal Court of Appeal.

11 The decision of the Supreme Court of Canada in *PPG*, supra, note 7, reversed the Federal Court of Appeal on a similar ground: although the Chair of the tribunal had a bias, he did not participate in making the decision.

12 Partner, Miller Thomson

2012 CAF 316, 2012 FCA 316
Federal Court of Appeal

Franke Kindred Canada Ltd. v. Gacor Kitchenware (Ningbo) Co.

2012 CarswellNat 4728, 2012 CarswellNat 5727, 2012 CAF 316, 2012 FCA 316, [2012] A.C.F. No. 1525, [2012] F.C.J. No. 1525, 224 A.C.W.S. (3d) 243

Franke Kindred Canada Limited, Applicant and Gacor Kitchenware (Ningbo) Co. Ltd., Jiangmen New Star Enterprise Ltd., Guangzhou Komodo Kitchen Technology Co. Ltd., Zhongshan Superte Kitchenware Co., Ltd., Guangdong Dongyuan Kitchenware Industrial Co., Ltd., Guangdong Yingao Kitchen Utensils Co., Ltd., Zoje Holding Group Co. Ltd., The Government of the People's Republic of China, and the Minister of Public Safety, Respondents

K. Sharlow J.A., Gauthier J.A., Mainville J.A.

Heard: November 29, 2012
Judgment: November 29, 2012
Docket: A-151-12

Counsel: Gregory Somers, for Applicant
Alexandre Kaufman, for Respondent

***K. Sharlow J.A.*:**

1 The Minister of Public Safety seeks an order quashing this application. The applicant Franke Kindred Canada Limited opposes the motion. Because the Minister's motion would, if successful, be a final disposition of this application, a three judge panel was convened to consider it (subsection 16(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7).

2 The application for judicial review states that it is made under paragraph 96.1(1)(*a*) of the *Special Import Measures Act*, R.S.C. 1985, c. S-15 (SIMA), which reads in relevant part as follows:

> **96.1** (1) Subject to section 77.012 or 77.12, an application may be made to the Federal Court of Appeal to review and set aside
>
> (*a*) a final determination of the President under paragraph 41(1)(*a*) [...].

498

> **96.1** (1) Sous réserve des articles 77.012 et 77.12, une demande de révision et d'annulation peut être présentée à la Cour d'appel fédérale relativement aux décisions, ordonnances ou conclusions suivantes:
>
> *a*) la décision définitive rendue par le président au titre de l'alinéa 41(1)*a*) [...].

3 It is the position of Franke Kindred that its application for judicial review challenges the final determination of the President dated April 24, 2012 under paragraph 41(1)(*a*) of SIMA in respect of certain stainless steel sinks originating in or exported from the People's Republic of China (CBSA Case Numbers AD/1392 and CV/129).

4 However, there is no allegation in the application for judicial review that there is any reviewable error in the President's final determination. Franke Kindred seeks the following relief:

> 1. an Order of this Court setting aside the President's decision pending disclosure to Counsel for [Franke Kindred] of the calculations and worksheets supporting the Final Decision;
>
> 2. an Order of this Court granting Counsel for [Franke Kindred] a reasonable period of time to review the calculations and worksheets supporting the Final Determination and an extension of time to seek any further review by this Court pursuant to section 96.1 of SIMA in connection with any errors disclosed by counsel's review of such calculations and worksheets;
>
> 3. an Order of this Court directing the President to disclose and grant counsel access to such calculations and worksheets as may be performed by the President in calculating future normal values, export prices, margins of dumping and amounts of subsidy in respect of reinvestigations of stainless steel sinks from the [People's Republic of China].

5 Having considered the application for judicial review in its entirety, and the written and oral submissions of Franke Kindred and the Minister, we are unable to conclude that the application challenges the final determination of the President. For that reason, the application is not within the scope of paragraph 96.1(1)(*a*) of SIMA. Accordingly, the motion of the Minister for an order quashing the application must be granted with costs.

6 The three other motions in this matter that have not yet been dealt with will be dismissed as moot. The Minister is entitled to his costs of those motions.

7 We emphasize that in granting the Minister's motion in this case, we are expressing no opinion on (a) any of the substantive issues that Franke Kindred sought to have determined in the application, (b) the standing of a complainant to challenge, by way of judicial review under paragraph 96.1(1)(*a*) of SIMA, the President's specification of the margin of dumping or the amount of subsidy, or (c) the right of a complainant to access the President's worksheets and calculations.

Guérin c. Canada (Procureur général), [2019] A.C.F. no 1246

Jugements de la Cour fédérale du Canada

Cour d'appel fédérale

Montréal (Québec)

Les juges J. Gauthier, Y. de Montigny et M. Rivoalen

Entendu : le 13 juin 2019.

Rendu : le 4 novembre 2019.

Dossier : A-75-18

[2019] A.C.F. no 1246 | 2019 CAF 272

Entre Jean Guérin, Jarrod Shook, James Druce, John Alkerton, Michael Flannigan, Jeff Ewert, appelants, et Le Procureur général du Canada, intimé

(71 paragr.)

Résumé

Droit criminel — Administration carcérale — Droits des détenus — Les appelants en appellent du jugement de la Cour fédérale rejetant leurs demandes de contrôle judiciaire — Ces demandes contestaient la légalité et la constitutionnalité de plusieurs directives du Commissaire du service correctionnel qui prévoient une augmentation des retenues sur la rétribution des détenus et l'élimination d'une rétribution incitative additionnelle — Le juge a eu raison de nourrir un doute sérieux quant au droit à la liberté qui serait nié en l'espèce — Même en adoptant une interprétation large du droit à la liberté et en reconnaissant aux détenus une liberté résiduelle, ce droit n'est pas illimité et n'entre en jeu que lorsque des contraintes ou des interdictions de l'État influent sur les choix importants et fondamentaux qu'une personne peut faire dans sa vie — Appel rejeté.

Les appelants en appellent du jugement de la Cour fédérale rejetant leurs demandes de contrôle judiciaire. Ces demandes contestaient la légalité et la constitutionnalité de plusieurs directives du Commissaire du service correctionnel qui prévoient une augmentation des retenues sur la rétribution des détenus et l'élimination d'une rétribution incitative additionnelle. Le présent appel soulève les quatre questions suivantes : a) La Cour fédérale a-t-elle correctement identifié les normes de contrôle applicables ? b) Les modifications apportées au règlement applicable et aux Directives contreviennent-elles à l'article 7 de la Charte ? c) Les modifications au règlement et aux directives sont-elles invalides parce qu'elles sont contraires à certains instruments du droit international du travail ? d) existe-t-il une relation employeur-employé entre les appelants et le Service correctionnel ?

DISPOSITIF : Appel rejeté.

Le juge a eu raison de nourrir un doute sérieux quant au droit à la liberté qui serait nié en l'espèce. Même en

adoptant une interprétation large du droit à la liberté et en reconnaissant aux détenus une liberté résiduelle, ce droit n'est pas illimité et n'entre en jeu que lorsque des contraintes ou des interdictions de l'État influent sur les choix importants et fondamentaux qu'une personne peut faire dans sa vie. En fait, les appelants ne recherchent pas l'invalidation d'une mesure étatique qui enfreindrait l'exercice d'un droit que leur garantit la Charte, mais cherchent à convaincre la Cour que la Charte impose un niveau de rétribution minimal pour les détenus. Or, les tribunaux canadiens ne sont jamais allés aussi loin et ont systématiquement refusé d'imposer ce genre d'obligations de nature économique à l'État. Le juge a eu raison de conclure que les appelants n'avaient pas démontré en quoi les mesures contestées allaient à l'encontre des principes de justice fondamentale. De plus, les appelants n'ont aucunement démontré que les instruments internationaux invoqués en l'espèce font partie du droit interne. Relativement à l'existence d'une relation employeur-employé entre les appelants et le Service, un inspecteur ou un arbitre désigné pour entendre l'appel aurait eu juridiction pour se prononcer sur-le-champ d'application du Code. La Cour fédérale n'était pas habilitée à traiter de cette question dans le cadre d'une demande de contrôle judiciaire.

Législation citée :

Charte canadienne des droits et libertés, art. 7, art. 12

Code canadien du travail, L.R.C. 1985, c. L-2, art. 167(1)(a), art. 167(1)(d), art. 240, art. 242, art. 249(1), art. 251(1), art. 251.1, art. 251.01, art. 251.01(1)(a), art. 251.05(1)(a) (i), art. 251.05(3), art. 251.05(4), art. 251.11(1), art. 251.12(1), art. 251.12(2), art. 251.12(4), art. 251.12(5)- 251.12(7), art. 251.101(1), art. 251.101(3)

Convention (no 29) sur le travail forcé de l'Organisation internationale du Travail

Loi sur la gestion des finances publiques, L.R.C. 1985, c. F-11, annexe I.1

Loi sur l'emploi dans la fonction publique, L.C. 2003, c. 22, art. 12 et 13, art. 29(1)

Loi sur les cours fédérales, L.R.C. 1985, c. F-7, art. 4, art. 17, art. 18, art. 18.1

Loi sur les relations de travail dans la fonction publique, L.R.C. 1985, c. P-35

Loi sur les relations de travail dans le secteur public fédéral, L.C. 2003, c. 22, art. 2

Loi sur le système correctionnel et la mise en liberté sous condition, L.C. 1992, c. 20, art. 15.1, art. 15.2, art. 76, art. 78, art. 78(1), art. 78(2), art. 78(2)(a), art. 78(2)(b), art. 96(z.2), art. 96(z.2.1)

Règlement modifiant le Règlement sur le système correctionnel et la mise en liberté sous condition, DORS/2013-181

Règlement sur le système correctionnel et la mise en liberté sous condition, DORS/92-

620, art. 104.1(1), art. 104.1(2), art. 104.1(2)(b), art. 104.1(4), art. 104.1(7)

Avocats

Marie-Claude Lacroix, Rita Magloé-Francis, Todd Sloan, pour les appelants.

Dominique Guimond, Marjolaine Breton, Gregory Tzemenakis, pour l'intimé.

MOTIFS DU JUGEMENT

Le jugement de la Cour a été rendu par

LE JUGE Y. de MONTIGNY

1 Jean Guérin *et al.* (les appelants) en appellent du jugement de la Cour fédérale (l'honorable juge Roy), rendu le 29 janvier 2018 (la Décision), rejetant leurs demandes de contrôle judiciaire. Ces demandes contestaient la légalité et la constitutionnalité de la *Directive du Commissaire du service correctionnel 730*, de la *Directive du Commissaire du service correctionnel 860* (respectivement la Directive 730, la Directive 860 ou les Directives), et de modifications apportées au *Règlement sur le système correctionnel et la mise en liberté sous condition*, DORS/92-620 (le Règlement), lesquelles prévoient une augmentation des retenues sur la rétribution des détenus et l'élimination d'une rétribution incitative additionnelle.

2 Pour les motifs qui suivent, je suis d'avis que l'appel devrait être rejeté, sans frais.

I. Contexte factuel et procédural

A. *Contexte législatif et factuel*

3 Les détenus des pénitenciers canadiens reçoivent depuis longtemps une rémunération pour leur travail, mais jusqu'en 1981 les montants qui leur étaient versés étaient considérés comme une récompense pour bonne conduite ("Régime de rémunération des détenus", Service correctionnel du Canada, avril 1981, p. 1; Dossier d'appel [DA], p. 861). Suite aux recommandations d'un sous-comité parlementaire, le Service correctionnel du Canada (le Service) a été autorisé en 1981 à verser des rétributions aux détenus et a choisi de se prévaloir de cette option. Cette rétribution visait à payer les détenus en fonction du travail qu'ils exécutaient. Les détenus qui participaient à un programme d'emploi comme le travail agricole, les services offerts à l'établissement, la production industrielle ou autres programmes reconnus étaient donc rémunérés en fonction de leur travail ("Régime de rémunération des détenus", ci-dessus, DA, p. 864). Les taux de rétribution s'établissaient en fonction du reliquat des fonds disponibles pour le travailleur canadien moyen payé au salaire minimum, non marié, qui

versait 85 % de son revenu en dépenses de première nécessité telles que sa nourriture, ses vêtements et son habitation. Le salaire minimum fédéral étant de 3,50 $ à cette époque, les niveaux de rétribution des détenus variaient de 3,15 $ à 7,55 $ par jour.

4 Lors de l'adoption de la *Loi sur le système correctionnel et la mise en liberté sous condition*, L.C. 1992, c. 20 (la Loi), le Parlement a choisi de modifier la philosophie relative à la rétribution des délinquants. L'article 76 de la Loi prévoit que le Service "doit offrir une gamme de programmes visant à répondre aux besoins des délinquants et à contribuer à leur réinsertion sociale". Les objectifs de chaque délinquant relativement à leur participation à ces programmes sont prévus à leurs plans correctionnels respectifs (art. 15.1 de la Loi). Le Service a également le pouvoir, en vertu de l'article 15.2 de la Loi, d'établir "des mesures incitatives pour encourager les délinquants à atteindre les objectifs de leur plan correctionnel". La rétribution des détenus est l'une de ces mesures. Le paragraphe 78(1) de la Loi prévoit maintenant que le Commissaire peut autoriser le versement d'une rétribution aux détenus "afin d'encourager leur participation aux programmes [...] ou de leur procurer une aide financière pour favoriser leur réinsertion sociale". Il est à noter que cet article ne prévoit pas le paiement de rétribution pour un "travail" exécuté.

5 Les taux de rétribution définis par le Conseil du Trésor sont actuellement de 6,90 $/jour au niveau A, de 6,35 $/jour au niveau B, de 5,80 $/jour au niveau C, et de 5,25 $/jour au niveau D. Des indemnités sont aussi versées aux détenus qui sont autorisés à s'absenter de leur programme ou qui ne peuvent y participer pour des raisons indépendantes de leur volonté, ou à ceux qui refusent toute affectation à un programme ou qui sont en isolement pour des motifs disciplinaires. La détermination du taux de rétribution applicable à un détenu est en outre fondée sur la réalisation des objectifs de réhabilitation de celui-ci (affidavit de Gregory Hall du 17 novembre 2014, au para. 8, DA, pp. 2937 et 2938; affidavit de Michael Bettman, aux paras. 39 à 43, DA, pp. 2348 et 2349; Directive 730, aux paras. 15 et 34 et Annexe B, DA, pp. 2957--2960, 2969 et 2970).

6 Depuis 1995, le paragraphe 78(2) de la Loi prévoit également que dans les cas où un détenu reçoit une rétribution ou tire un revenu d'une source réglementaire, le Service peut (a) effectuer des retenues en conformité avec les règlements, et (b) exiger du détenu qu'il verse à Sa Majesté jusqu'à concurrence de 30 % des montants qu'il reçoit à titre de rétribution ou revenu pour rembourser les frais engagés pour son hébergement et sa nourriture. Cette disposition se lit comme suit :

> 78(2) Dans le cas où un délinquant reçoit la rétribution mentionnée au paragraphe (1) ou tire un revenu d'une source réglementaire, le Service peut :
>
> *a*) effectuer des retenues en conformité avec les règlements d'application de l'alinéa 96z.2) et les directives du commissaire;
>
> *b*) exiger du délinquant, conformément aux règlements d'application de l'alinéa 96z.2.a), qu'il verse à Sa Majesté du chef du Canada, selon ce qui est fixé par directive du commissaire, jusqu'à trente pour cent de ses rétribution et revenu

bruts à titre de remboursement des frais engagés pour son hébergement et sa nourriture pendant la période où il reçoit la rétribution ou tire le revenu ainsi que pour les vêtements de travail que lui fournit le Service.

* * *

78(2) Where an offender receives a payment referred to in subsection (1) or income from a prescribed source, the Service may

(*a*) make deduction from that payment or income in accordance with regulations made under paragraph 96(z.2) and any Commissioner's Directive; and

(*b*) require that the offender pay to Her Majesty in right of Canada, in accordance with regulations made pursuant to paragraph 96(z.2.1) and as set out in a Commissioner's Directive, an amount, not exceeding thirty per cent of the gross payment referred to in subsection (1) or gross income, for reimbursement of the costs of the offender's food and accommodation incurred while the offender was receiving that income or payment, or for reimbursement of the costs of work-related clothing provided to the offender by the Service.

7 Les alinéas 96 z.2) et z.2.1) auxquels réfèrent le paragraphe 78(2) autorisent le gouverneur en conseil à prendre des règlements pour préciser, dans un premier temps, l'objet des retenues et fixer le plafond ou le montant, ou permettre au Commissaire de fixer ces derniers par directive et, dans un deuxième temps, prévoir les modalités de recouvrement. Conformément à ce pouvoir habilitant, le paragraphe 104.1(1) du Règlement énumère les sources de revenu pouvant faire l'objet de retenues en vertu du paragraphe 78(2) de la Loi :

104.1(1) Les sources de revenu visées pour l'application du paragraphe 78(2) de la Loi sont les suivantes :

a) un emploi dans la collectivité pendant que le délinquant bénéficie d'un placement à l'extérieur ou d'une mise en liberté sous condition;

b) un emploi dans un pénitencier fourni par un tiers;

c) une activité commerciale exercée par le délinquant;

d) un passe-temps ou un travail exécuté sur commande;

e) une pension versée par une entreprise privée ou une administration publique.

* * *

104.1(1) The following sources of income are prescribed for the purposes of subsection 78(2) of the Act :

a) employment in the community while on work release or conditional release;

b) employment in a penitentiary provided by a third

party;

c) a business operated by the offender;

d) hobby craft or custom work; and

e) a pension from a private or government source.

8 Le paragraphe 104.1(2) du Règlement énonce d'autre part les utilisations possibles de ces retenues. Plus précisément, il dispose que ces retenues peuvent servir à titre de remboursement :

a) des frais engagés pour l'hébergement et la nourriture du délinquant, ainsi que pour les vêtements de travail que lui fournit le Service;

b) des frais d'administration associés à l'accès aux services téléphoniques que fournit le Service au délinquant.

* * *

(a) the costs of food, accommodation and work-related clothing provided to the offender by the Service; and

(b) the administrative costs associated with the access to telephone services provided to the offender by the Service.

9 Le paragraphe 104.1(4) du Règlement prévoit que le Commissaire du Service "peut fixer, par directive, le plafond ou le montant des retenues visées à l'alinéa 78(2)*a*) de la Loi et le montant du versement -- en pourcentage ou autrement -- visé à l'alinéa 78(2)*b*) de la Loi".

10 Les détails du Régime de rémunération des détenus sont prévus à deux Directives du Commissaire, soit la Directive 730 intitulée "Affectations des détenus aux programmes et rétribution des détenus" et la Directive 860 intitulée "Argent des délinquants". Ces Directives, dont l'adoption est prévue aux articles 97 et 98 de la Loi, prévoient (1) les affectations des détenus aux programmes, (2) les taux de rétribution adoptés par le Conseil du Trésor, (3) les critères de détermination des taux de rétribution, qui incluent le rendement du détenu dans le cadre du programme ainsi que des critères plus généraux comme son comportement en établissement ou son affiliation à un groupe menaçant la sécurité, (4) les retenues sur la rétribution, et (5) les transferts d'argent des comptes courants et d'épargne des détenus.

11 Enfin, le paragraphe 104.1(7) de la Loi prévoit une exception discrétionnaire aux retenues :

> 104.1(7) Lorsque le directeur du pénitencier détermine, selon les renseignements fournis par le délinquant, que des retenues ou des versements prévus dans le présent article réduiront excessivement la capacité du délinquant d'atteindre les objectifs de son plan correctionnel, de répondre à des besoins essentiels ou de faire face à des responsabilités familiales ou parentales, il réduit les retenues ou

les remboursements ou y renonce pour permettre au délinquant d'atteindre ces objectifs, de répondre à ces besoins ou de faire face à ces responsabilités.

* * *

104.1(7) Where the institutional head determines, on the basis of information that is supplied by an offender, that a deduction or payment of an amount that is referred to in this section will unduly interfere with the ability of the offender to meet the objectives of the offender to meet the objectives of the offender's correctional plan or to meet basic needs or family or parental responsibilities, the institutional head shall reduce or waive the deduction or payment to allow the offender to meet those objectives, needs or responsibilities.

12 C'est ce Régime de rémunération des détenus, et plus particulièrement le Règlement et les Directives, qui font l'objet du présent appel.

13 Six demandes de contrôle judiciaire ont été présentées en Cour fédérale par neuf demandeurs, dont certains sont devant nous en appel. Ces contestations visent les modifications apportées au Règlement et aux Directives en octobre 2013, qui ont eu pour effet de réduire la rétribution disponible des détenus.

14 Plus précisément, le *Règlement modifiant le Règlement sur le système correctionnel et la mise en liberté sous condition* (DORS/2013-181) adopté le 9 octobre 2013 est venu ajouter la possibilité de retenue sur la rétribution payée aux détenus des frais d'administration afférents au système téléphonique pour les détenus (voir l'alinéa 104.1(2)*b*) reproduit plus haut). Suite à l'adoption de cette modification, la Directive 860 a été amendée le 24 octobre 2013 pour ajouter une retenue de 8 % pour les frais liés au service téléphonique. Or, le 1er octobre 2013, la Directive 860 avait déjà été amendée pour fixer la retenue à 22 % de la rétribution payée au titre de l'hébergement et de la nourriture, ce qui porte les retenues totales au maximum permis de 30 % fixé par la Loi.

15 D'autre part, la Directive 730 prévoyait que les détenus pouvaient recevoir une rétribution incitative supplémentaire pour leur participation aux programmes correctionnels de CORCAN, un organisme de service spécial au sein du Service qui offre en outre des formations professionnelles certifiées par des tierces parties dans des secteurs d'activités généralement en demande dans la communauté (contre-interrogatoire de Lynn Garrow, question 3, et ses documents constitutifs, DA, pp. 3858 et 3862--3973). Le 1er octobre 2013, la Directive 730 a été amendée pour éliminer la rétribution incitative supplémentaire.

16 Les demandeurs ont fait valoir quatre principaux motifs de révision à l'encontre de ces mesures. Ils soutiennent que le Règlement et les Directives seraient (i) *ultra vires* de la Loi, (ii) contraires aux articles 7 et 12 de la *Charte canadienne des droits et libertés*, partie I de la *Loi constitutionnelle de 1982*, constituant l'annexe B de la *Loi de 1982 sur le Canada* (R-U), 1982, c. 11 (la Charte), en plus d'être (iii) incompatibles avec divers instruments internationaux. De plus, il existerait (iv) une relation employeur-employé entre les détenus et le Service, et la diminution de leur rétribution constituerait donc un

"congédiement déguisé" au sens où l'entend le *Code canadien du travail*, L.R.C. 1985, c. L-2 (le Code).

B. *Décision de la Cour fédérale*

17 Le 29 janvier 2018, la Cour fédérale a rejeté les demandes de contrôle judiciaire sous-jacentes. Le juge a conclu que, dans la mesure où l'article 78 de la Loi n'est pas contesté, les textes réglementaires adoptés "en stricte conformité" avec cet article ne sauraient être *ultra vires* (Décision, au para. 138, ainsi qu'aux paras. 37--52). Le juge a pareillement rejeté les moyens fondés sur la Charte. D'une part, il a conclu que les paiements en cause -- et leur réduction -- ne constituaient pas un traitement cruel et inusité au sens de l'article 12 de la Charte (aux paras. 61--75). D'autre part, il a dit ne pas être convaincu que les mesures contestées engageaient un intérêt protégé par l'article 7 de la Charte, et encore moins que les principes de justice fondamentale auraient été violés (aux paras. 76--108). Les instruments internationaux invoqués par les appelants en l'espèce, écrit le juge, ne suffisaient pas à démontrer l'existence d'un tel principe (aux paras. 93--108). Enfin, le juge a écarté la thèse des appelants quant au congédiement déguisé, se fondant notamment sur le fait que l'alinéa 167(1)*d*) du Code exclut explicitement de son champ d'application les ministères au sens de la *Loi sur la gestion des finances publiques*, L.R.C. 1985, c. F-11 (la Loi sur la gestion des finances publiques); or, le Service est explicitement mentionné comme l'un des secteurs de l'administration publique fédérale auxquels réfère la définition de "ministère" dans cette loi.

18 Devant cette Cour, seules les conclusions du juge relativement à l'article 7 de la Charte, aux instruments internationaux, ainsi qu'à l'application du Code aux appelants sont contestées.

C. *Questions en litige*

19 Le présent appel soulève les quatre questions suivantes :

a) La Cour fédérale a-t-elle correctement identifié les normes de contrôle applicables?

b) Les modifications apportées au Règlement et aux Directives contreviennent-elles à l'article 7 de la Charte?

c) Les modifications au Règlement et aux Directives sont-elles invalides parce qu'elles sont contraires à l'article 76 de l'Ensemble de règles minima pour le traitement des détenus des Nations Unies et la Convention (no 29) sur le travail forcé de l'Organisation internationale du Travail?

d) Existe-t-il une relation employeur-employé entre les appelants et le Service?

20 Lors de l'examen de cette dernière question, je traiterai de la question préliminaire de

savoir si la Cour fédérale a juridiction quant à l'application du Code, et si elle peut entendre une action pour congédiement déguisé reposant sur une relation employeur-employé hors du cadre législatif fédéral. Ces deux questions ont fait l'objet d'une directive aux parties préalablement à l'audition, ainsi que de représentations écrites subséquentes à l'audition à la demande de la Cour.

II. Analyse

A. *La Cour fédérale a-t-elle correctement identifié les normes de contrôle applicables?*

21 Lorsque cette Cour siège en appel d'une décision de la Cour fédérale portant sur une demande de contrôle judiciaire contestant la légalité d'un règlement ou d'un autre type de législation déléguée, le cadre d'analyse applicable est celui de l'arrêt *Agraira c. Canada (Sécurité publique et Protection civile)*, 2013 CSC 36, [2013] 2 R.C.S. 559 [*Agraira*], et non celui de l'arrêt *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235 [*Housen*]. Comme le notait cette Cour dans l'affaire *Canada c. Conseil canadien pour les réfugiés*, 2008 CAF 229, [2008] A.C.F. no 1002 :

> [55] Jusqu'en 1990, la procédure de contestation de la légalité d'un règlement pris en vertu d'un pouvoir délégué était une action déclaratoire intentée au moyen d'une déclaration. Depuis ce temps (voir les modifications apportées à la *Loi sur la Cour fédérale* par L.C. 1990, ch. 8, art. 4), la procédure utilisée pour faire contrôler la légalité d'un texte réglementaire au motif qu'il excède le pouvoir conféré a été simplifiée et le contrôle judiciaire dont il est question à l'article 18 de la *Loi sur les Cours fédérales* (nommée ainsi en 2002) est devenu le moyen de faire contrôler les décisions rendues par les organismes administratifs ainsi que la légalité des textes réglementaires. [Références omises.]
>
> Voir aussi : *Canada (Procureur général) c. Mercier*, 2010 CAF 167, [2010] A.C.F. no 816, aux paras. 78--81.

22 C'est d'ailleurs ce cadre d'analyse, et non celui de l'arrêt *Housen*, que la Cour suprême a appliqué dans ses arrêts récents portant sur la légalité de l'exercice d'un pouvoir de législation délégué : voir notamment *West Fraser Mills Ltd. c. Colombie-Britannique (Workers' Compensation Appeal Tribunal)*, 2018 CSC 22, [2018] 1 R.C.S. 635; *Green c. Société du Barreau du Manitoba*, 2017 CSC 20, [2017] 1 R.C.S. 360. Par conséquent, cette Cour doit se demander si le juge de la Cour fédérale a identifié la bonne norme de contrôle en l'espèce, et s'il l'a appliquée de manière appropriée : *Agraira*, au para. 46.

23 En l'occurrence, la Cour fédérale ne s'est pas prononcée sur la norme de contrôle applicable, et il nous faut donc examiner cette question pour la première fois. Eu égard à la question de savoir si le Règlement et les Directives violent l'article 7 de la Charte, je suis d'avis que la norme de la décision correcte doit s'appliquer. Il est en effet bien établi que les questions de nature constitutionnelle doivent être examinées de façon

rigoureuse et sans aucune déférence dans le cadre d'un contrôle judiciaire : *Alberta (Information and Privacy Commissioner) c. Alberta Teachers' Association*, 2011 CSC 61, [2011] 3 R.C.S. 654, au para. 30; *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, au para. 58 [*Dunsmuir*]; *Tapambwa v. Canada (Citizenship and Immigration)*, 2019 FCA 34, [2019] F.C.J. No. 186, au para. 30; *Begum c. Canada (Citoyenneté et Immigration)*, 2018 CAF 181, [2018] A.C.F. no 1007, au para. 36, aut. d'appel à la CSC rejetée, 38439 (18 avril 2019), [2018] C.S.C.R. no 506 [*Begum*]; *Canada (Procureur général) c. Association des juristes de Justice*, 2016 CAF 92, [2016] A.C.F. no 304, au para. 23.

24 La même norme de la décision correcte s'applique à la question de savoir si le Règlement et les Directives violent le droit international. Ici encore, il s'agit d'une question se rapportant à la compétence même d'adopter les mesures contestées, et non seulement à leur raisonnabilité.

25 Eu égard à la dernière question, cette Cour doit d'abord déterminer si le juge pouvait se prononcer sans qu'un inspecteur ait d'abord été impliqué. La question se pose, dans la mesure où le Code prévoit qu'un inspecteur et, ultimement, un arbitre, doivent normalement se prononcer sur une demande de recouvrement de salaire. En décidant qu'elle pouvait intervenir sans que cette première étape ait été franchie, la Cour fédérale n'a pas exercé son pouvoir de révision judiciaire et sa décision ne fait donc pas intervenir la norme de contrôle. Il ne fait aucun doute que si un inspecteur avait tranché la question de savoir s'il existe une relation employeur-employé entre les appelants et le Service, sa décision aurait dû faire l'objet d'une grande déférence de la part du juge et de cette Cour : voir, notamment, *Déménagements Tremblay* au para. 15; *Alberta (Information and Privacy Commissioner) c. Alberta Teachers' Association*, 2011 CSC 61 au para. 34; *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9 au para. 54. Si l'on accepte par ailleurs que le juge pouvait examiner cette question sans qu'un inspecteur y ait préalablement répondu, c'est la norme applicable en appel de l'erreur manifeste et dominante qu'il faut plutôt appliquer.

B. *Les modifications apportées au Règlement et aux Directives contreviennent-elles à l'article 7 de la Charte?*

26 La détermination de l'existence d'une violation de l'article 7 de la Charte s'articule autour d'une analyse en deux temps. Il incombe au demandeur de démontrer (i) qu'une disposition porte atteinte à son droit à la vie, à la liberté ou à la sécurité de sa personne, et (ii) que cette atteinte n'est pas conforme aux principes de justice fondamentale (voir *Begum*, au para. 93; *Ewert c. Canada*, 2018 CSC 30, [2018] 2 R.C.S. 165, au para. 68).

27 À la première étape de cette analyse, le demandeur est tenu de démontrer qu'un des intérêts énumérés est en jeu et qu'il existe un lien de causalité suffisant entre le préjudice allégué et l'action étatique contestée (*Begum*, au para. 94). Comme le précisait la Cour suprême dans l'arrêt *Blencoe c. Colombie-Britannique (Human Rights*

Commission), 2000 CSC 44, [2000] 2 R.C.S. 307, au para 47 [*Blencoe*] :

> [...] avant même que l'on puisse se demander si les droits garantis à l'intimé par l'art. 7 ont fait l'objet d'une atteinte non conforme aux principes de justice fondamentale, il faut d'abord prouver que le droit visé par l'allégation de l'intimé relève de l'art. 7. [...]

28 À mon avis, le juge a eu raison de nourrir "un doute sérieux" quant au droit à la liberté qui serait frustré en l'espèce. Même en adoptant une interprétation large du droit à la liberté et en reconnaissant aux détenus une liberté résiduelle, ce droit n'est pas illimité et n'entre en jeu que lorsque "des contraintes ou des interdictions de l'État influent sur les choix importants et fondamentaux qu'une personne peut faire dans sa vie" (*Blencoe*, au para. 49). Seuls les choix pouvant être qualifiés de "fondamentalement ou d'essentiellement personnels" relèvent du droit à la liberté (*Godbout c. Longueuil (Ville)*, [1997] 3 R.C.S. 844, [1997] A.C.S. no 95, au para. 66).

29 Devant la Cour fédérale, les appelants avaient plaidé que leur droit à la liberté était engagé dans la mesure où leur refus de travailler engendrerait des limitations à leur liberté de mouvement au sein de l'établissement. Selon eux, le fait que les déplacements soient autorisés aux participants des programmes durant les heures d'activités, mais non aux autres, violerait l'article 7. Bien qu'il ait ultimement disposé de la question sur la base des principes de justice fondamentale, le juge a néanmoins exprimé certaines réserves quant à ces prétentions, avec raison à mon avis.

30 D'une part, comme le souligne l'intimé, ce n'est pas le niveau de rétribution des détenus qui entraîne le confinement cellulaire, mais plutôt le choix des détenus de ne pas participer aux programmes. Dans un contexte carcéral, les restrictions aux déplacements sont la règle. Lorsqu'il ne participe à aucune activité en fonction de son plan correctionnel, il n'est que normal que le détenu doive rester dans sa cellule. Il est vrai, comme le souligne le juge, que la liberté résiduelle d'un détenu sera affectée s'il est en quelque sorte mis en prison dans la prison, ou s'il est transféré dans une institution à sécurité plus élevée comme c'était le cas dans l'arrêt *Établissement de Mission c. Khela*, 2014 CSC 24, [2014] 1 R.C.S. 502 [*Khela*]. La preuve selon laquelle une telle conséquence puisse découler du refus de travailler était cependant "très ténue", comme l'a souligné le juge, et il était fondé à écarter cet argument. Les appelants n'ont d'ailleurs pas réitéré cet argument devant cette Cour, ni indiqué en quoi le juge avait erré à cet égard.

31 Ils soutiennent plutôt que le juge a erré en ne considérant que les restrictions à leur liberté de mouvement au sein de l'institution, dans l'hypothèse où ils refusent de travailler. Ils prétendent que le refus de travailler aura également un impact sur leur plan correctionnel, ce qui aura pour effet de les maintenir dans des conditions de détention plus restrictives du fait que leur déclassification sécuritaire s'en trouvera retardée et que les chances de se voir octroyer des élargissements en communauté (permission de sortie avec et sans escorte, semi-liberté et libération conditionnelle totale) seront

affectées. Par conséquent, leur refus de travailler viendra limiter la liberté résiduelle que leur a reconnue la Cour suprême dans l'arrêt Khela, au paragraphe 34. Les appelants font également valoir que les modifications apportées au régime de rétribution et de retenues feront en sorte qu'à leur libération, ils se retrouveront sans économies et avec des dettes, entraînant un préjudice psychologique grave qui ne peut que mettre en péril leur droit à la sécurité.

32 Aussi séduisante cette thèse puisse-t-elle paraître, force est de constater qu'elle ne repose sur aucune preuve permettant de l'étayer. Elle ne se fonde que sur des spéculations qui ne trouvent appui dans aucune donnée factuelle. Tout au plus les appelants réfèrent-ils, dans une note de bas de page, aux articles 15, 101 et 102 de la Loi, lesquels traitent respectivement de la confection d'un plan correctionnel et des principes guidant l'octroi d'une liberté conditionnelle. Or, ces dispositions ne font pas l'objet de contestation en l'espèce. Qui plus est, les appelants n'ont pas explicité comment ces dispositions, en tant que telles, étoffent cette thèse.

33 Lors de l'audition, les avocats des appelants nous ont référé aux allégations de deux d'entre eux telles que résumées par le juge à l'Annexe A de la Décision (aux pp. 81--82). L'un des appelants (M. Jarrod Shook) a indiqué avoir participé aux consultations sur les modifications salariales, disant "qu'elles auraient des incidences négatives sur son transfert dans un établissement d'un niveau de sécurité moins élevé et sa réinsertion", et "que certains avaient continué de travailler de peur de voir une incidence négative sur les transferts futurs dans des établissements d'un niveau de sécurité moins élevé ou les libérations". Un autre appelant (M. Michael Flannigan) a mentionné que sa demande au Directeur de réduire les retenues ou les remboursements en vertu du paragraphe 104.1(7) du Règlement avait été refusée, et qu'il avait été averti par un gestionnaire de l'impact négatif sur son plan correctionnel que pourrait avoir sa décision de quitter le travail en raison des réductions salariales.

34 Bien que ces allégations n'aient pas été contredites, elles ne sauraient suffire à elles seules pour permettre aux appelants de se décharger du fardeau qui leur incombe d'établir une violation de leur droit à la liberté. Ces allégations reposent essentiellement sur leurs perceptions et constituent parfois du ouï-dire, et les craintes dont ils témoignent ne sont aucunement corroborées par des éléments de preuve démontrant qu'elles étaient fondées. De fait, aucune preuve n'a été déposée permettant de faire un lien entre le refus de travailler et les conséquences négatives invoquées par les appelants. Sans douter de la bonne foi des appelants, leur témoignage ne répond pas aux exigences requises pour établir qu'ils ont subi une atteinte à leur droit.

35 S'agissant par ailleurs du droit à la sécurité, les appelants ont plaidé qu'ils ne sont plus en mesure de faire des économies et de payer leurs dettes suite aux coupures qui leur ont été imposées, et que la perspective d'être libéré dans une situation de précarité extrême leur cause un préjudice psychologique grave. S'appuyant sur l'arrêt *Blencoe*, ils soutiennent que leur droit à la sécurité s'en trouve compromis.

36 Il est vrai que dans cette dernière affaire, la Cour suprême a reconnu que la sécurité de la personne recouvre tant l'intégrité physique que psychologique d'une personne. La Cour suprême a toutefois précisé que la tension psychologique causée par l'État se doit d'être grave pour que l'article 7 puisse être invoqué :

> 57 Les atteintes de l'État à l'intégrité psychologique d'une personne ne font pas toutes intervenir l'art. 7. Lorsque l'intégrité psychologique d'une personne est en cause, la sécurité de la personne se limite à la "tension psychologique grave causée par l'État" [...] Selon l'expression "tension psychologique grave causée par l'État", deux conditions doivent être remplies pour que la sécurité de la personne soit en cause. Premièrement, le préjudice psychologique doit être causé par l'État, c'est-à-dire qu'il doit résulter d'un acte de l'État. Deuxièmement, le préjudice psychologique doit être grave. Les formes que prend le préjudice psychologique causé par le gouvernement n'entraînent pas toutes automatiquement des violations de l'art. 7. [...] [Souligné dans l'original.]

37 La preuve déposée par les appelants au soutien de leurs prétentions repose essentiellement sur leurs affidavits, dans lesquels certains d'entre eux affirment avoir perdu leur motivation à travailler, avoir de la difficulté à épargner pour leur libération et être anxieux quant à leur libération future en raison de leurs dettes. Bien que ces préoccupations puissent être réelles, elles ne me paraissent pas causer un préjudice psychologique grave de même nature que les interventions de l'État considérées comme portant atteinte au droit à la sécurité par la Cour suprême. Pour comprendre le degré de stress psychologique requis pour faire intervenir le droit à la sécurité et l'écart qui sépare ces situations de la présente affaire, il suffit de songer au stress et à l'angoisse causés par une intervention de l'État privant une femme du choix d'interrompre sa grossesse (*R. c. Morgentaler*, [1988] 1 R.C.S. 30, [1988] A.C.S. no 1), retirant la garde d'un enfant à ses parents (*Nouveau-Brunswick (Ministre de la Santé et des Services communautaires)* c. G.(J.), [1999] 3 R.C.S. 46, [1999] A.C.S. no 47) et empêchant une personne d'obtenir l'aide nécessaire pour mettre fin à ses jours lorsqu'elle n'est plus en mesure de le faire seule (*Rodriguez c. Colombie-Britannique*, [1993] 3 R.C.S. 519, [1993] A.C.S. no 94).

38 En fait, les appelants ne recherchent pas l'invalidation d'une mesure étatique qui enfreindrait l'exercice d'un droit que leur garantit la Charte, mais soutiennent plutôt que leur droit à la sécurité impose à l'État des obligations positives de nature économique. En d'autres termes, ils cherchent à convaincre cette Cour que la Charte impose un niveau de rétribution minimal pour les détenus. Or, les tribunaux canadiens ne sont jamais allés aussi loin et ont systématiquement refusé d'imposer ce genre d'obligations de nature économique à l'État.

39 Comme le note avec raison l'intimé, les appelants ne peuvent avoir gain de cause que dans l'hypothèse où cette Cour en arriverait à la conclusion que l'article 7 de la Charte impose une obligation positive à l'État d'accorder une rétribution minimale aux détenus pour le travail qu'ils effectuent ou les formations qu'ils suivent. Or, la

jurisprudence de la Cour suprême n'a jamais été aussi loin et sa décision dans *Gosselin c. Québec (Procureur général)*, 2002 CSC 84, [2002] 4 R.C.S. 429 [*Gosselin*] semble plutôt militer à l'encontre d'une obligation positive de l'État de pourvoir au maintien de la vie, de la liberté et de la sécurité de la personne par le biais de mesures économiques. Bien que la majorité dans cette affaire n'ait pas écarté une telle possibilité en d'autres circonstances dans le futur, les appelants ne m'ont pas convaincu que leur situation diffère suffisamment de celles des bénéficiaires d'aide sociale qui était en cause dans l'affaire *Gosselin* pour qu'il soit justifié d'en arriver à une autre conclusion : voir aussi *Flora c. Ontario Health Insurance Plan*, 2008 ONCA 538, 91 O.R. (3d) 412, aux paras. 101, 106 et 108.

40 Quoi qu'il en soit, j'estime que le juge a eu raison de conclure que les appelants n'avaient pas démontré en quoi les mesures contestées allaient à l'encontre des principes de justice fondamentale. En appel devant nous, les appelants ont soutenu pour la première fois que le Règlement et les Directives avaient une portée excessive et engendraient des conséquences disproportionnées, dans la mesure où il ne peut être porté atteinte à des droits fondamentaux pour des considérations d'ordre strictement budgétaire.

41 À mon avis, cet argument ne peut réussir. D'une part, il n'a pas été plaidé en première instance et n'a même pas été évoqué dans l'avis d'appel. Comme l'a noté le juge, les appelants n'avaient présenté dans leur mémoire aucun argument relatif à cette question et s'étaient contentés à l'audition de présenter *in extremis* un argumentaire fondé sur le droit international (Décision, aux paras. 90 et 92). Or, comme l'a rappelé la Cour suprême dans l'arrêt *Guindon c. Canada*, 2015 CSC 41, [2015] 3 R.C.S. 3 au para 22, "[l]e critère applicable pour décider de l'opportunité d'examiner une question nouvelle est strict". Les appelants n'ont démontré aucune raison impérieuse justifiant cette Cour d'examiner ce nouvel argument.

42 Qui plus est, les appelants n'ont même pas tenté d'expliquer en quoi les mesures en litige auraient une portée excessive ou entraîneraient des conséquences disproportionnées par rapport à leur objet. Il ne suffit pas, pour démontrer une atteinte aux principes de justice fondamentale, d'affirmer qu'il y a eu une telle violation; encore faut-il la prouver. Je vois mal comment le versement discrétionnaire d'un montant d'argent, quel qu'il soit, peut avoir une portée excessive ou des conséquences disproportionnées; en l'absence de toute obligation en ce sens de l'État, un tel versement ne peut s'analyser que comme un avantage économique pour la personne qui le reçoit. Je note enfin que les appelants ne contestent pas la conclusion du juge indiquant que les mesures contestées n'enfreignent pas l'article 12 de la Charte du fait qu'elles ne constituent pas des contraintes disproportionnées ou excessives incompatibles avec la dignité humaine. Puisque le degré de disproportion exagérée et excessive applicable sous l'article 12 de la Charte est le même que celui relatif aux principes de justice fondamentale suivant l'article 7 (*R. c. Malmo-Levine; R. c. Caine*, 2003 CSC 74, [2003] 3 R.C.S. 571, au para. 160), les appelants sont forclos d'invoquer cet argument devant nous.

43 Pour tous les motifs qui précèdent, je suis donc d'avis que l'argument des appelants fondé sur l'article 7 de la Charte doit être rejeté.

C. *Les modifications au Règlement et aux Directives sont-elles invalides parce qu'elles sont contraires à l'article 76 de l'Ensemble de règles minima pour le traitement des détenus des Nations Unies et la Convention (no 29) sur le travail forcé de l'Organisation internationale du Travail?*

44 Les appelants prétendent que le juge a erré en rejetant leurs arguments fondés sur le droit international public. Ils soutiennent essentiellement que les règles constituant l'*Ensemble de règles minima pour le traitement des détenus* des Nations Unies (les Règles minima) ont été mises en oeuvre par le Canada, et que même dans l'hypothèse où elles ne l'ont pas été, elles constituent des autorités persuasives dans l'interprétation du droit interne au même titre que la *Convention (no 29) sur le travail forcé* de l'Organisation internationale du Travail (la Convention sur le travail forcé).

45 Encore une fois, c'est à bon droit que le juge a rejeté ces prétentions. D'une part, comme il l'a indiqué, les Règles minima prévoient tout au plus que le travail des personnes détenues doit être rémunéré de façon "équitable" sans plus de précision, n'imposent aucune obligation aux pays signataires et ne comportent pas de mécanisme de contrainte. Les appelants ont d'ailleurs admis en première instance que cet instrument ne fait qu'exprimer des "aspirations", ce qui est bien insuffisant pour créer une norme de droit international coutumier. Quant à la Convention sur le travail forcé, elle me semble difficilement applicable à la situation des appelants puisqu'elle exclut "tout travail ou service exigé d'un individu comme conséquence d'une condamnation prononcée par une décision judiciaire". Au surplus, il n'a pas été démontré que le travail effectué par les détenus est obligatoire ou forcé; la preuve au dossier révèle plutôt que la seule conséquence découlant du refus de travailler consiste à ne pas être rétribué.

46 D'autre part, il est bien établi en droit canadien que les instruments internationaux n'ont aucune force exécutoire en l'absence d'une loi de mise en oeuvre. Comme le rappelait la Cour suprême dans l'arrêt *Kazemi (Succession) c. République islamique d'Iran*, 2014 CSC 62, [2014] 3 R.C.S. 176 au para 149 [*Kazemi*] :

> [...] Le Canada continue à posséder un système dualiste au chapitre des traités et du droit conventionnel. En conséquence, à moins qu'une disposition d'un traité n'exprime une règle du droit international coutumier ou une norme impérative, cette disposition ne deviendra exécutoire en droit canadien que s'il lui est donné effet par l'intermédiaire du processus d'élaboration des lois du Canada. Les appelants n'ont pas prétendu -- et encore moins établi -- que leur interprétation de l'art. 14 correspond au droit international coutumier ou qu'elle a été intégrée au droit canadien par voie législative. [Références omises.]
>
> Voir aussi : *Sin c. Canada*, 2016 CAF 16, [2016] A.C.F. no 61, au para. 14.

47 Or, les appelants n'ont aucunement démontré que les instruments internationaux invoqués en l'espèce font partie du droit interne. Le simple fait que les Règles minima soient mentionnées dans une publication du Service ("Régime de rémunération des détenus", ci-dessus, DA, p. 863) ne saurait suffire pour que celles-ci puissent être considérées avoir été incorporées en droit canadien.

48 Quant à l'argument des appelants fondé sur la présomption de conformité d'une loi aux obligations internationales du Canada, il ne peut non plus être retenu. La présomption ne trouve tout simplement pas application dans le présent contexte. Tel que le soulignait la Cour suprême dans l'arrêt *Kazemi* au para 60 :

> [...] On ne saurait utiliser le droit international pour étayer une interprétation à laquelle fait obstacle le texte de la loi. De même, la présomption de conformité ne permet pas d'écarter l'intention claire du législateur. De fait, la présomption voulant que la loi respecte le droit international ne demeure que cela -- une simple présomption. Or, selon la Cour, celle-ci peut être réfutée par les termes clairs de la loi en cause. [...] L'ordre juridique interne du Canada, tel qu'instauré par le Parlement, prévaut. [Références omises]
>
> Voir aussi : *Tapambwa v. Canada (Citizenship and Immigration)*, 2019 FCA 34, [2019] F.C.J. No. 186, au para. 44.

49 Le texte du paragraphe 78(2) de la Loi, dont la constitutionnalité n'est d'ailleurs pas contestée par les appelants, est on ne peut plus clair. Il y est explicitement reconnu que des retenues allant jusqu'à 30 % peuvent être effectuées sur toute rétribution accordée aux détenus. Ce texte ne souffre d'aucune ambiguïté et les instruments internationaux ne sont donc d'aucune utilité pour en préciser le sens et encore moins pour en modifier la portée.

50 Bref, j'estime que ce moyen d'appel doit être rejeté.

D. *Existe-t-il une relation employeur-employé entre les appelants et le Service?*

51 Les appelants prétendent que la Cour fédérale a erré en concluant qu'ils n'étaient pas couverts par la Partie III du Code du fait que l'alinéa 167(1)*d*) exclut les ministères au sens de la *Loi sur la gestion des finances publiques*. S'ils ne peuvent se réclamer de la protection du Code parce que le Service est un ministère au terme de l'Annexe I.1 de la *Loi sur la gestion des finances publiques* et qu'ils ne peuvent davantage se prévaloir du régime juridique applicable aux fonctionnaires de l'État parce qu'ils ne sont pas dans une relation d'emploi avec un ministère, les détenus se retrouveraient dans une espèce de vide juridique. Pour éviter cette situation, soutiennent-ils, les détenus doivent donc être considérés comme étant à l'emploi d'une "entreprise fédérale" conformément à l'alinéa 167(1)*a*) du Code.

52 Avant d'examiner cette question, il convient de se demander si la Cour fédérale avait

la compétence requise pour en traiter. Bien que les parties n'aient pas abordé cette question en première instance, cette Cour estime qu'elle ne saurait être passée sous silence. C'est précisément pour cette raison que les parties ont été invitées à faire des représentations à ce sujet devant nous.

53 À mon avis, un inspecteur désigné en vertu du paragraphe 249(1) du Code et, le cas échéant, un arbitre désigné en vertu du paragraphe 251.12(1) du Code pour entendre l'appel, auraient eu juridiction pour se prononcer sur-le-champ d'application du Code. Rien n'indique que le Parlement entendait exclure cette question de la compétence de l'inspecteur.

54 En effet, l'alinéa 251.01(1)*a*) du Code prévoit qu'un employé peut déposer une plainte auprès d'un inspecteur s'il croit que l'employeur a contrevenu à une disposition de la Partie III. Une telle plainte peut être rejetée si l'inspecteur est convaincu que la plainte ne relève pas de sa compétence (sous-alinéa 251.05(1)*a*)(i)). Dans un tel cas, le plaignant peut demander au ministre de réviser la décision de l'inspecteur (paragraphe 251.05(3)), et il revient alors au ministre de confirmer la décision de l'inspecteur ou l'annuler et de charger un inspecteur d'examiner la plainte (paragraphe 251.05(4)).

55 En ce qui a trait spécifiquement aux demandes de recouvrement de salaire, le paragraphe 251.101(1) du Code prévoit qu'une décision d'un inspecteur ordonnant le paiement des sommes réclamées ou concluant au caractère non fondé de la plainte peut être révisée par le ministre sur demande d'une des parties. La décision du ministre à cet égard, rendue en vertu du paragraphe 251.101(3) peut quant à elle faire l'objet d'un appel sur une question de droit ou de compétence (paragraphe 251.11(1) du Code). Selon le paragraphe 251.12(1), le ministre ainsi saisi d'un appel désigne en qualité d'arbitre la personne qu'il juge qualifiée pour entendre et trancher l'appel et lui transmet la décision faisant l'objet de l'appel et la demande d'appel. L'arbitre a de larges pouvoirs d'enquête et il peut rendre toute ordonnance nécessaire à la décision (paragraphe 251.12(2) et (4) du Code). La décision rendue est alors protégée par une clause privative (paragraphe 251.12(5) à (7)).

56 Dans l'éventualité où l'une des parties n'est pas satisfaite de la décision finale de l'arbitre à cet égard, il lui est possible d'en demander le contrôle judiciaire. C'est notamment ce qui est advenu dans *Déménagements Tremblay Express Ltée c. Gauthier*, 2018 CF 584, [2018] A.C.F. no 595. Dans ce récent dossier, l'arbitre s'était dit compétent pour entendre la plainte. Il avait conclu que l'employeur n'avait pas versé à l'employé le salaire auquel celui-ci avait droit en vertu de la Partie III du Code, avait déterminé la différence entre le montant exigible et celui qui avait été versé (paragraphe 251(1) du Code), et avait ultimement adressé un ordre de paiement à l'employeur (article 251.1 du Code). Le recours en contrôle judiciaire de cette décision a finalement été rejeté.

57 À mon avis, c'est cette voie qu'auraient dû emprunter les appelants en l'espèce (voir notamment : *Services Maritimes Desgagnés Inc. c. Dufour*, 2011 CF 1020, [2011] A.C.F.

no 1257; *Canada (Procureur général) c. Schwark*, 2011 CF 211, [2011] A.C.F. no 359; *Guérin c. Autocar Connaisseur Inc.*, [2000] A.C.F. no 819, 2000 CanLII 15623; *Tokmakjian Inc. c. Achorn*, 2017 CF 1057, [2017] A.C.F. no 1117). Il convient d'ailleurs de noter, à cet égard, que la question de savoir si une personne est un "employé" aux termes d'une autre partie du Code -- la Partie I -- est également confiée à un décideur administratif spécialisé, soit le Conseil canadien des relations industrielles : voir notamment *Conseil de la Nation Innu Matimekush-Lac John c. Association des employés du nord québécois (CSQ)*, 2017 CAF 212, [2017] A.C.F. no 997; *Syndicat des agents de sécurité Garda, Section CPI-CSN c. Corporation de sécurité Garda Canada*, 2011 CAF 302, [2011] A.C.F. no 1546. De même, la détermination du champ d'application des dispositions de la Partie III du Code relatives au congédiement injuste est confiée à un inspecteur ou un arbitre nommé par le ministre en vertu des articles 240 et 242 : voir, par exemple, *Riverin c. Conseil des Innus de Pessamit*, [2016] D.A.T.C. no 124, 2016 CanLII 35702, inf. par 2017 CF 934, [2017] A.C.F. no 970, inf. par 2019 CAF 68, [2019] A.C.F. no 389; *Waldman c. Conseil de Bande d'Eskasoni*, [2001] A.C.F. no 1228; *Beothuk Data Systems Ltd., Seawatch Division v. Dean*, [1997] F.C.J. No. 1117; *Norway House Indian Band v. Canada (T.D.)*, [1994] 3 F.C. 376, [1994] F.C.J. No. 328.

58 Dans les représentations écrites qu'ils ont déposées à la Cour suite à l'audition, les appelants ont fait valoir que nous devrions exercer notre discrétion et nous prononcer sur cette question même si elle n'a pas été préalablement soumise aux décideurs administratifs (inspecteur et arbitre), parce que l'expertise de ces derniers pour trancher la question en litige n'est pas adéquate. Cette affirmation n'est cependant pas étayée et ne repose sur aucune démonstration. Au demeurant, d'autres décideurs administratifs spécialisés ont déjà tranché des questions similaires. Ainsi, le Conseil canadien des relations industrielles a déjà eu à déterminer si la Partie I du Code s'appliquait aux détenus travaillant pour le même organisme du Service (le CORCAN), auquel sont rattachés les appelants dans la présente affaire, et s'ils pouvaient donc se prévaloir du régime d'accréditation et de négociation collective du Code : voir *Canadian Prisoners' Labour Confederation c. Service correctionnel du Canada*, 2015 CCRI 779 (*Canadian Prisoners' Labour Confederation*). Dans la même veine, la question de savoir si des détenus pouvaient être considérés comme des "employés" au sens de la *Loi sur les relations de travail dans la fonction publique*, L.R.C. 1985, c. P-35 (maintenant la *Loi sur les relations de travail dans le secteur public fédéral*, L.C. 2003, c. 22, art. 2) a été tranchée par la Commission des relations de travail dans la fonction publique : voir *Jolivet c. Conseil du trésor (Service correctionnel du Canada)*, [2013] C.P.S.L.R.B. No. 1, 2013 CRTFP 1. Une demande de contrôle judiciaire de cette décision a été rejetée par cette Cour dans *Jolivet c. Conseil du trésor (Service correctionnel du Canada)*, 2014 CAF 1, [2014] A.C.F. no 11.

59 Compte tenu de ce qui précède, je suis d'avis que la Cour fédérale aurait dû refuser de se prononcer sur la question de l'application du Code, étant donné que les appelants n'avaient pas épuisé leurs recours administratifs. Le caractère inapproprié du recours apparaît d'autant plus flagrant lorsque l'on considère le remède que recherche les appelants, à savoir que cette Cour ordonne au Service "de redresser rétroactivement les

traitements" versés aux détenus (Mémoire des appelants, au para. 93). En supposant même que le Code puisse recevoir application, c'est plutôt au moyen d'une plainte en recouvrement de salaire soumise à un inspecteur en vertu des articles 251.01 et 251.1 que cette demande aurait dû être faite.

60 En tout état de cause, et par souci d'exhaustivité, j'ajouterais que l'argument des appelants doit être rejeté sur le fond. Comme le note avec raison l'intimé, le vice fondamental de la thèse des appelants tient au fait que ceux-ci n'identifient pas l'"entreprise fédérale" dont ils seraient les employés en vertu de l'alinéa 167(1)*a*) du Code. Dans leurs représentations écrites, les appelants se contentent de référer à CORCAN. Il ne s'agit cependant pas là d'une entreprise fédérale, mais plutôt d'un programme au sein du Service. Dans ses motifs, le juge a décrit ce programme de la façon suivante :

> [20] CORCAN n'est rien d'autre qu'un programme au sein du Service Correctionnel du Canada visant la réhabilitation des détenus (affidavit de Lynn Garrow, Présidente directeur-général). Il est organisé en organisme de service spécial au sein du SCC, ce qui est une désignation dans l'appareil gouvernemental qui permet d'être soustrait à certaines politiques gouvernementales pour favoriser un mode de gestion axé davantage sur un modèle d'entreprise pour financer ses opérations. Cet organisme de service spécial reste au sein du SCC; sa vocation est la production de biens et services vendus à des ministères fédéraux (e.g. des meubles de bureau, textiles) d'abord, mais aussi à d'autres organismes.

61 Cette description est conforme à la preuve au dossier (voir affidavit de Lynn Garrow, DA vol. 14, p. 3720), ainsi qu'à la conclusion à laquelle en est arrivé le Conseil canadien des relations industrielles dans l'affaire *Canadian Prisoners' Labour Confederation* (aux paras. 17 et 25). Par conséquent, le juge a eu raison de conclure que les appelants, même dans la mesure où ils pourraient être considérés comme des employés, sont exclus de la Partie III du Code. CORCAN n'étant qu'un programme au sein du Service, il n'échappe pas à la définition de "ministère" à l'alinéa 2 a.1) et à l'Annexe I.1 de la *Loi sur la gestion des finances publiques*.

62 Reste la question de savoir si les appelants peuvent être considérés comme ayant une relation employeur-employé en vertu de la common law, plutôt que dans le cadre législatif fédéral. Encore une fois, il importe de déterminer si la Cour fédérale avait la compétence requise pour se prononcer sur cette question avant même d'examiner au mérite la prétention des appelants voulant qu'ils ont été l'objet d'un congédiement déguisé.

63 À mon avis, la question soulevée par les appelants relève davantage d'une relation de droit privé plutôt que de l'exercice par l'État de son autorité publique. De ce fait, les appelants auraient dû procéder par voie d'action en vertu de l'article 17 de la *Loi sur les*

cours fédérales, L.R.C. 1985, c. F-7, plutôt qu'au moyen d'une demande de contrôle judiciaire sous l'article 18.1 de la même loi.

64 Dans l'arrêt *Dunsmuir*, la Cour suprême a clairement réaffirmé le principe selon lequel la relation de la Couronne avec ses employés est régie par le droit des contrats. Lorsque la Couronne agit en tant qu'employeur, écrit la Cour, elle "ne fait qu'exercer ses droits privés à titre d'employeur" (au paragraphe 103). La Cour précise aussi, à cet égard que :

> [105] [...] lorsque l'employeur du secteur public agit de mauvaise foi ou de manière inéquitable, le droit privé offre un type de recours plus approprié, et il n'y a pas lieu de le traiter différemment de l'employeur du secteur privé qui agit de même.
>
> [106] Un organisme public doit évidemment respecter les limites légales fixées à l'exercice de son pouvoir discrétionnaire à titre d'employeur, quelles que soient les conditions du contrat d'emploi, faute de quoi il s'expose à un recours en droit public. Il ne peut se soustraire par contrat à ses obligations légales. Cependant, lorsqu'il prend la décision de congédier une personne conformément à ses pouvoirs et à un contrat d'emploi, nulle considération supérieure du droit public ne justifie l'imposition d'une obligation d'équité.

65 Ce principe a récemment été réitéré par la Cour suprême dans *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) c. Wall*, 2018 CSC 26, [2018] 1 R.C.S. 750 :

> [14] Ce ne sont pas toutes les décisions qui sont susceptibles de contrôle judiciaire en vertu du pouvoir de surveillance d'une cour supérieure. Un tel recours est possible uniquement lorsqu'un pouvoir étatique a été exercé et que l'exercice de ce pouvoir présente une nature suffisamment publique. En effet, même les organismes publics prennent des décisions de nature privée -- par exemple pour louer des locaux ou pour embaucher du personnel -- et de telles décisions ne sont pas assujetties au pouvoir de contrôle des tribunaux : *Air Canada c. Administration portuaire de Toronto*, 2011 CAF 347 [...], par. 52. L'organisme public qui prend des décisions de nature contractuelle "n'exerce pas un pouvoir central à la mission administrative que lui a attribuée le législateur", mais plutôt un pouvoir de nature privée (*ibid.*). Des décisions de la sorte ne soulèvent pas de préoccupations relatives à la primauté du droit, car, pour que cela soit le cas, il faut être en présence de l'exercice d'un pouvoir délégué.

66 Par conséquent, je suis d'avis que la Cour fédérale n'était pas habilitée à traiter de cette question dans le cadre d'une demande de contrôle judiciaire et cette Cour ne peut remédier, à ce stade des procédures, au fait que les appelants n'ont pas engagé cette partie de leur demande à titre d'action en vertu de l'article 17. Je note d'ailleurs que les appelants, dans les brèves représentations écrites qu'ils ont déposées à la Cour suite à l'audition, reconnaissent qu'une demande de contrôle judiciaire [TRADUCTION] "n'est

possiblement pas la meilleure approche pour établir des droits dans le contexte de la common law".

67 J'ajouterai néanmoins, encore une fois par souci d'exhaustivité, que les appelants n'ont pas démontré qu'ils étaient dans une relation employeur-employé avec le Service. Comme le note l'intimé, les relations de travail dans l'administration publique ne s'apprécient pas à la lumière des faits ou de l'application des critères usuels de la common law. Le juge a eu raison de conclure que le pouvoir de faire des nominations à la fonction publique est conféré de façon exclusive à la Commission de la fonction publique en vertu du paragraphe 29(1) de la *Loi sur l'emploi dans la fonction publique*, L.C. 2003, c. 22, art. 12 et 13 (*Loi sur l'emploi dans la fonction publique*) (Décision, aux paras. 117 et 127).

68 La décision de la Cour suprême dans *Canada (procureur général) c. Alliance de la fonction publique du Canada*, [1991] 1 R.C.S. 614, confirmant [1989] 2 C.F. 633 (C.A.F.), [1989] A.C.F. no 56, établit que la notion de fonctionnaire "de fait" n'existe pas en droit fédéral. Comme le notait le juge Sopinka, au nom de la majorité, "il n'y a tout bonnement pas de place pour une espèce de fonctionnaire de fait qui ne serait ni chair ni poisson" dans le régime des relations de travail fédéral (à la p. 633). Conformément à cette logique et au texte du paragraphe 29(1) de la *Loi sur l'emploi dans la fonction publique*, la participation à un programme offert aux détenus ne saurait constituer une nomination à un poste dans la fonction publique; les appelants n'ont d'ailleurs pas prétendu que la participation à l'un des programmes offerts par le Service constitue une nomination dans un ministère, et donc dans la fonction publique.

69 D'autre part, le juge a conclu à bon droit que l'objet véritable des programmes offerts par le Service est la réhabilitation et non l'emploi (Décision, au para. 134). Le paragraphe 78(1) de la Loi ne permet d'ailleurs au Commissaire de rétribuer les détenus que pour encourager leur participation aux programmes offerts par le Service ou leur procurer une aide financière pour favoriser leur réinsertion sociale. On ne trouve nulle mention d'une compensation pour un travail effectué. La preuve révèle d'ailleurs que les détenus qui refusent de participer aux programmes ont aussi droit à une indemnité, quoique moindre (voir affidavit de Michael Bettman, au para. 43; ci-dessus). Au surplus, le niveau de rétribution d'un détenu est fondé sur des critères qui diffèrent de ceux qui sous-tendent le salaire normalement versé à un travailleur (p. ex., la participation d'un détenu à son plan correctionnel, le comportement général en établissement ou l'affiliation ou non à un groupe menaçant la sécurité) : voir Décision, au para. 132; Directive 730, aux paras. 34, 35 ci-dessus; affidavit de Michael Bettman, au para. 39, ci-dessus.

70 Bref, les appelants ne m'ont pas démontré que le juge avait erré en concluant qu'ils n'avaient pas établi une relation employeur-employé découlant de leur participation aux programmes mis à leur disposition par le Service. Ceci étant, il ne m'est donc pas nécessaire de me pencher sur la question du congédiement déguisé.

III. Conclusion

71 Pour tous les motifs qui précèdent, je suis donc d'avis que l'appel devrait être rejeté. L'intimé n'ayant pas réclamé ses dépens, il n'en sera pas octroyé.

LA JUGE J. GAUTHIER
LE JUGE Y. de MONTIGNY :-- Je suis d'accord.
LA JUGE M. RIVOALEN :-- Je suis d'accord.

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2018 SCC 26, 2018 CSC 26
Supreme Court of Canada

Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall

2018 CarswellAlta 1044, 2018 CarswellAlta 1045, 2018 SCC 26, 2018 CSC 26, [2018] 1 S.C.R. 750, [2018] 6 W.W.R. 427, [2018] A.W.L.D. 2281, [2018] A.W.L.D. 2375, 16 C.P.C. (8th) 223, 291 A.C.W.S. (3d) 685, 33 Admin. L.R. (6th) 175, 421 D.L.R. (4th) 381, 68 Alta. L.R. (6th) 1

Judicial Committee of the Highwood Congregation of Jehovah's Witnesses (Vaughn Lee - Chairman and Elders James Scott Lang and Joe Gurney) and Highwood Congregation of Jehovah's Witnesses (Appellants) and Randy Wall (Respondent) and Canadian Council of Christian Charities, Association for Reformed Political Action Canada, Canadian Constitution Foundation, Evangelical Fellowship of Canada, Catholic Civil Rights League, Christian Legal Fellowship, World Sikh Organization of Canada, Seventh-day Adventist Church in Canada, Justice Centre for Constitutional Freedoms, Church of Jesus Christ of Latter-day Saints in Canada, British Columbia Civil Liberties Association and Canadian Muslim Lawyers Association (Interveners)

McLachlin C.J.C., Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown, Rowe JJ.

Heard: November 2, 2017
Judgment: May 31, 2018
Docket: 37273

Proceedings: reversing *Wall v. Highwood Congregation of Jehovah's Witnesses (Judicial Committee)* (2016), 365 C.R.R. (2d) 40, 2016 CarswellAlta 1669, 12 Admin. L.R. (6th) 302, 2016 ABCA 255, [2017] 2 W.W.R. 641, 404 D.L.R. (4th) 48, 43 Alta. L.R. (6th) 33, Marina Paperny J.A., Patricia Rowbotham J.A., Thomas W. Wakeling J.A. (Alta. C.A.)

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John Sikkema, André Schutten, for Intervener, Association, for Reformed Political Action Canada
Mark Gelowtiz, Karin Sachar, for Intervener, Canadian Constitution Foundation

Albertos Polizogopoulos, for Interveners, Evangelical Fellowship of Canada and the Catholic Civil Rights League
Derek Ross, Deina Warren, for Intervener, Christian Legal Fellowship
Balpreet Singh Boparai, Avnish Nanda, for Intervener, World Sikh Organization of Canada
Gerald Chipeur, Q.C., Jonathan Martin, for Interveners, Seventh-day Adventist Church in Canada and the Church of Jesus Christ of Latter-day Saints in Canada
Jay Cameron, for Intervener, Justice Centre, for Constitutional Freedoms
Roy Millen, Ariel Solose, for Intervener, British Columbia Civil Liberties Association
Shahzad Siddiqui, Yavar Hameed, for Intervener, Canadian Muslim Lawyers Association

Rowe J. **(McLachlin C.J.C. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ. concurring):**

I. Overview

1 The central question in this appeal is when, if ever, courts have jurisdiction to review the decisions of religious organizations where there are concerns about procedural fairness. In 2014, the appellant, the Judicial Committee of the Highwood Congregation of Jehovah's Witnesses, disfellowshipped the respondent, Randy Wall, after he admitted that he had engaged in sinful behaviour and was considered to be insufficiently repentant. The Judicial Committee's decision was confirmed by an Appeal Committee. Mr. Wall brought an originating application for judicial review of the decision to disfellowship him before the Alberta Court of Queen's Bench. The court first dealt with the issue of whether it had jurisdiction to decide the matter. Both the chambers judge and a majority of the Court of Appeal concluded that the courts had jurisdiction and could proceed to consider the merits of Mr. Wall's application.

2 For the reasons that follow, I would allow the appeal. Mr. Wall sought to have the Judicial Committee's decision reviewed on the basis that the decision was procedurally unfair. There are several reasons why this argument must fail. First, judicial review is limited to public decision makers, which the Judicial Committee is not. Second, there is no free-standing right to have such decisions reviewed on the basis of procedural fairness. In light of the foregoing, Mr. Wall has no cause of action, and, accordingly, the Court of Queen's Bench has no jurisdiction to set aside the Judicial Committee's membership decision. Finally, the ecclesiastical issues raised by Mr. Wall are not justiciable.

II. Facts and Judicial History

3 The Highwood Congregation of Jehovah's Witnesses ("Congregation") is an association of about one hundred Jehovah's Witnesses living in Calgary, Alberta. The Congregation is a voluntary association. It is not incorporated and has no articles of association or by-laws. It has no statutory foundation. It does not own property. No member of the Congregation receives any salary or

pecuniary benefit from membership. Congregational activities and spiritual guidance are provided on a volunteer basis by a group of elders.

4 To become a member of the Congregation, a person must be baptized and must satisfy the elders that he or she possesses a sufficient understanding of relevant scriptural teachings and is living according to accepted standards of conduct and morality. Where a member deviates from these scriptural standards, elders meet and encourage the member to repent. If the member persists in the behaviour, he or she is asked to appear before a committee of at least three elders of the Congregation.

5 The committee proceedings are not adversarial, but are meant to restore the member to the Congregation. If the elders determine that the member does not exhibit genuine repentance for his or her sins, the member is "disfellowshipped" from the Congregation. Disfellowshipped members may still attend congregational meetings, but within the Congregation they may speak only to their immediate family and limit discussions to non-spiritual matters.

6 Randy Wall became a member of the Congregation in 1980. He remained a member of the Congregation until he was disfellowshipped by the Judicial Committee.

7 Mr. Wall unsuccessfully appealed the Judicial Committee's decision to elders of neighbouring congregations (Appeal Committee) and to the Watch Tower Bible and Tract Society of Canada. After the Congregation was informed that the disfellowship was confirmed, Mr. Wall filed an originating application for judicial review pursuant to Rule 3.15 of the *Alberta Rules of Court*, Alta. Reg. 124/2010, seeking an order of *certiorari* quashing and declaring void the Judicial Committee's decision. In his application, Mr. Wall claimed that the Judicial Committee breached the principles of natural justice and the duty of fairness, and that the decision to disfellowship him affected his work as a realtor as his Jehovah's Witness clients declined to work with him.

8 An initial hearing was held to determine whether the Court of Queen's Bench had jurisdiction. The chambers judge found that the court did have jurisdiction as Mr. Wall's civil rights might have been affected by the Judicial Committee's decision: File No. 1401-10225, April 16, 2015. The judge also noted that expert evidence could be heard regarding the interpretation by Jehovah's Witnesses of Christian scripture as to what is sinful and the scriptural criteria used by elders to determine whether someone said to have sinned has sufficiently repented.

9 The majority of the Court of Appeal of Alberta dismissed the Congregation's appeal, affirming that the Court of Queen's Bench had jurisdiction to hear Mr. Wall's originating application for judicial review: 2016 ABCA 255, 43 Alta. L.R. (6th) 33 (Alta. C.A.). The majority held that the courts may intervene in decisions of voluntary organizations concerning membership where property or civil rights are at issue. The majority also held that even where no property or civil rights are engaged, courts may intervene in the decisions of voluntary associations where there is

a breach of the rules of natural justice or where the complainant has exhausted internal dispute resolution processes.

10 The dissenting judge would have allowed the Congregation's appeal on the basis that the Judicial Committee is a private actor, and as such is not subject to judicial review, and that in any event, Mr. Wall's challenge of the Judicial Committee's decision did not raise a justiciable issue.

III. Question on Appeal

11 This appeal requires the Court to determine whether it has jurisdiction to judicially review the disfellowship decision for procedural fairness concerns.

IV. Analysis

12 Courts are not strangers to the review of decision making on the basis of procedural fairness. However, the ability of courts to conduct such a review is subject to certain limits. These reasons address three ways in which the review on the basis of procedural fairness is limited. First, judicial review is reserved for state action. In this case, the Congregation's Judicial Committee was not exercising statutory authority. Second, there is no free-standing right to procedural fairness. Courts may only interfere to address the procedural fairness concerns related to the decisions of religious groups or other voluntary associations if legal rights are at stake. Third, even where review is available, the courts will consider only those issues that are justiciable. Issues of theology are not justiciable.

A. The Availability of Judicial Review

13 The purpose of judicial review is to ensure the legality of state decision making: see *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 (S.C.C.), at paras. 24 and 26; *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220 (S.C.C.), at pp. 237-38; *Knox v. Conservative Party of Canada*, 2007 ABCA 295, 422 A.R. 29 (Alta. C.A.), at paras. 14-15. Judicial review is a public law concept that allows s. 96 courts to "engage in surveillance of lower tribunals" in order to ensure that these tribunals respect the rule of law: *Knox*, at para. 14; *Constitution Act, 1867*, s. 96. The state's decisions can be reviewed on the basis of procedural fairness or on their substance. The parties in this appeal appropriately conceded that judicial review primarily concerns the relationship between the administrative state and the courts. Private parties cannot seek judicial review to solve disputes that may arise between them; rather, their claims must be founded on a valid cause of action, for example, contract, tort or restitution.

14 Not all decisions are amenable to judicial review under a superior court's supervisory jurisdiction. Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character. Even public bodies make some decisions that are private in nature — such as renting premises and hiring staff — and such decisions are not

subject to judicial review: *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605 (F.C.A.), at para. 52. In making these contractual decisions, the public body is not exercising "a power central to the administrative mandate given to it by Parliament", but is rather exercising a private power (*ibid.*). Such decisions do not involve concerns about the rule of law insofar as this refers to the exercise of delegated authority.

15 Further, while the private law remedies of declaration or injunction may be sought in an application for judicial review (see, for example, *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 2(2)(b); *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 2(1)2; *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, ss. 2 and 3(3)), this does not make the reverse true. Public law remedies such as *certiorari* may not be granted in litigation relating to contractual or property rights between private parties: *Knox*, at para. 17. *Certiorari* is only available where the decision-making power at issue has a sufficiently public character: D. J. M. Brown and J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), at topic 1:2252.

16 The Attorney General has a right to be heard on an originating application for judicial review, and must be served notice where an application has been filed: *Alberta Rules of Court*, Rules 3.15 and 3.17. Other originating applications have no such requirements: *ibid.*, Rule 3.9. This suggests that judicial review is properly directed at public decision making.

17 Although the public law remedy of judicial review is aimed at government decision makers, some Canadian courts, including the courts below, have continued to find that judicial review is available with respect to decisions by churches and other voluntary associations. These decisions can be grouped in two categories according to the arguments relied on in support of the availability of judicial review. Neither line of argument should be taken as authority for the broad proposition that private bodies are subject to judicial review. Both lines of cases fail to recognize that judicial review is about the legality of state decision making.

18 The first line of cases relies on the misconception that incorporation by a private Act operates as a statutory grant of authority to churches so constituted: *Lindenburger v. United Church of Canada* (1985), 10 O.A.C. 191 (Ont. Div. Ct.), at para. 21; *Davis v. United Church of Canada* (1991), 8 O.R. (3d) 75 (Ont. Gen. Div.), at p. 78. The purpose of a private Act is to "confer special powers or benefits upon one or more persons or body of persons, or to exclude one or more persons or body of persons from the general application of the law": Canada, Parliament, House of Commons, *House of Commons Procedure and Practice* (2nd ed. 2009), by A. O'Brien and M. Bosc, at p. 1177. Thus, by its nature, a private Act is not a law of general application and its effect can be quite limited. The federal *Interpretation Act*, R.S.C. 1985, c. I-21, s. 9, states that "[n]o provision in a private Act affects the rights of any person, except only as therein mentioned and referred to." For instance, *The United Church of Canada Act* (1924), 14 & 15 Geo. 5, c. 100, gives effect to an agreement regarding the transfer of property rights (from the Methodist,

Congregationalist and certain Presbyterian churches) upon the creation of the United Church of Canada; it is not a grant of statutory authority.

19 A second line of cases that allows for judicial review of the decisions of voluntary associations that are not incorporated by any Act (public or private) looks only at whether the association or the decision in question is sufficiently public in nature: *Graff v. New Democratic Party*, 2017 ONSC 3578 (Ont. Div. Ct.), at para. 18; *Erin Mills Soccer Club v. Ontario Soccer Assn.*, 2016 ONSC 7718, 15 Admin. L.R. (6th) 138 (Ont. S.C.J.), at para. 60; *West Toronto United Football Club v. Ontario Soccer Assn.*, 2014 ONSC 5881, 327 O.A.C. 29 (Ont. Div. Ct.), at paras. 17-18. These cases find their basis in the Ontario Court of Appeal's decision in *Setia v. Appleby College*, 2013 ONCA 753, 118 O.R. (3d) 481 (Ont. C.A.). The court in *Setia* found that judicial review was not available since the matter did not have a sufficient public dimension despite some indicators to the contrary (such as the existence of a private Act setting up the school) (para. 41).

20 In my view, these cases do not make judicial review available for private bodies. Courts have questioned how a private Act — like that for the United Church of Canada — that does not confer statutory authority can attract judicial review: see *Greaves v. United Church of God Canada*, 2003 BCSC 1365, 27 C.C.E.L. (3d) 46 (B.C. S.C.), at para. 29; *Setia*, at para. 36. The problem with the cases that rely on *Setia* is that they hold that where a decision has a broad public impact, the decision is of a sufficient public character and is therefore reviewable: *Graff*, at para. 18; *West Toronto United Football Club*, at para. 24. These cases fail to distinguish between "public" in a generic sense and "public" in a public law sense. In my view, a decision will be considered to be public where it involves questions about the rule of law and the limits of an administrative decision maker's exercise of power. Simply because a decision impacts a broad segment of the public does not mean that it is public in the administrative law sense of the term. Again, judicial review is about the legality of state decision making.

21 Part of the confusion seems to have arisen from the courts' reliance on *Air Canada* to determine the "public" nature of the matter at hand. But, what *Air Canada* actually dealt with was the question of whether certain public entities were acting as a federal board, commission or tribunal such that the judicial review jurisdiction of the Federal Court was engaged. The proposition that private decisions of a public body will not be subject to judicial review does not make the inverse true. Thus it does not follow that "public" decisions of a private body — in the sense that they have some broad import — will be reviewable. The relevant inquiry is whether the legality of state decision making is at issue.

22 The present case raises no issues about the rule of law. The Congregation has no constating private Act and the Congregation in no way is exercising state authority.

23 Finally, Mr. Wall submitted before this Court that he was not seeking judicial review, but in his originating application for judicial review this is what he does. In his application, he seeks

an order of *certiorari* that would quash the disfellowship decision. I recognize that Mr. Wall was unrepresented at the time he filed his application. These comments do not reflect that the basis for my disposition of the appeal is a matter of form alone or is related to semantic errors in the application. However, the implications of granting an appeal must still be considered. This appeal considers only the question of the court's jurisdiction; it is not clear what other remedy would be sought if the case were returned to the Court of Queen's Bench for a hearing on the merits. However, as I indicate above, judicial review is not available.

B. The Ability of Courts to Review Decisions of Voluntary Associations for Procedural Fairness

24 Even if Mr. Wall had filed a standard action by way of statement of claim, his mere membership in a religious organization — where no civil or property right is granted by virtue of such membership — should remain free from court intervention. Indeed, there is no free-standing right to procedural fairness with respect to decisions taken by voluntary associations. Jurisdiction cannot be established on the sole basis that there is an alleged breach of natural justice or that the complainant has exhausted the organization's internal processes. Jurisdiction depends on the presence of a legal right which a party seeks to have vindicated. Only where this is so can the courts consider an association's adherence to its own procedures and (in certain circumstances) the fairness of those procedures.

25 The majority in the Court of Appeal held that there was such a free-standing right to procedural fairness. However, the cases on which they relied on do not stand for such a proposition. Almost all of them were cases involving an underlying legal right, such as wrongful dismissal (*McCaw v. United Church of Canada* (1991), 4 O.R. (3d) 481 (Ont. C.A.); *Pedersen v. Fulton* [1994 CarswellOnt 814 (Ont. Gen. Div.)], 1994 CanLII 7483, or a statutory cause of action (*Lutz v. Faith Lutheran Church of Kelowna*, 2009 BCSC 59 (B.C. S.C.)). Another claim was dismissed on the basis that it was not justiciable as the dispute was ecclesiastical in nature: *Hart v. Roman Catholic Episcopal Corp. of the Diocese of Kingston*, 2011 ONCA 728, 285 O.A.C. 354 (Ont. C.A.).

26 In addition, it is clear that the English jurisprudence cited by Mr. Wall similarly requires the presence of an underlying legal right. In *Shergill v. Khaira*, [2014] UKSC 33, [2015] A.C. 359 (U.K. S.C.), at paras. 46-48, and *Lee v. Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175 (Eng. C.A.), the English courts found that the voluntary associations at issue were governed by contract. I do not view *Shergill* as standing for the proposition that there is a free-standing right to procedural fairness as regards the decisions of religious or other voluntary organizations in the absence of an underlying legal right. Rather, in *Shergill*, requiring procedural fairness is simply a way of enforcing a contract (para. 48). Similarly, in *Lee*, Lord Denning held that "[t]he jurisdiction of a domestic tribunal, such as the committee of the Showmen's Guild, must be founded on a contract, express or implied" (p. 1180).

27 Mr. Wall argued before this Court that *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165 (S.C.C.), could be read as permitting courts to review the decisions of voluntary organizations for procedural fairness concerns where the issues raised were "sufficiently important", even where no property or contractual right is in issue. This is a misreading of *Lakeside Colony*. What is required is that a *legal right* of sufficient importance — such as a property or contractual right — be at stake: see also *Ukrainian Greek Orthodox Church v. Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress*, [1940] S.C.R. 586 (S.C.C.). It is not enough that a matter be of "sufficient importance" in some abstract sense. As Gonthier J. pointed out in *Lakeside Colony*, the legal right at issue was of a different nature depending on the perspective from which it was examined: from the colony's standpoint the dispute involved a property right, while from the members' standpoint the dispute was contractual in nature. Either way, the criterion of "sufficient importance" was never contemplated as a basis to give jurisdiction to courts absent the determination of legal rights.

28 Mr. Wall argues that a contractual right (or something resembling a contractual right) exists between himself and the Congregation. There was no such finding by the chambers judge. No basis has been shown that Mr. Wall and the Congregation intended to create legal relations. Unlike many other organizations, such as professional associations, the Congregation does not have a written constitution, by-laws or rules that would entitle members to have those agreements enforced in accordance with their terms. In *Zebroski v. Jehovah's Witnesses* (1988), 87 A.R. 229 (Alta. C.A.), at paras. 22-25, the Court of Appeal of Alberta ruled that membership in a similarly constituted congregation did not grant any contractual right in and of itself. The appeal can therefore be distinguished from *Hofer v. Hofer*, [1970] S.C.R. 958 (S.C.C.), at pp. 961 and 963, *Senez c. Montreal Real Estate Board*, [1980] 2 S.C.R. 555 (S.C.C.), at pp. 566 and 568, and *Lakeside Colony*, at p. 174. In all of these cases, the Court concluded that the terms of these voluntary associations were contractually binding.

29 Moreover, *mere* membership in a religious organization, where no civil or property right is formally granted by virtue of membership, should remain outside the scope of the *Lakeside Colony* criteria. Otherwise, it would be devoid of its meaning and purpose. In fact, members of a congregation may not think of themselves as entering into a legally enforceable contract by merely adhering to a religious organization, since "[a] religious contract is based on norms that are often faith-based and deeply held": R. Moon, "*Bruker v. Marcovitz*: Divorce and the Marriage of Law and Religion" (2008), 42 *S.C.L.R.* (2d) 37, at p. 45. Where one party alleges that a contract exists, they would have to show that there was an intention to form contractual relations. While this may be more difficult to show in the religious context, the general principles of contract law would apply.

30 Before the chambers judge, Mr. Wall also argued his rights are at stake because the Judicial Committee's decision damaged his economic interests in interfering with his client base. On this point, I would again part ways with the courts below. Mr. Wall had no property right in maintaining

his client base. As Justice Wakeling held in dissent in the court below, Mr. Wall does not have a right to the business of the members of the Congregation: Court of Appeal reasons, at para. 139. For an illustration of this, see *Mott-Trille v. Steed*, [1998] O.J. No. 3583 (Ont. Gen. Div.), at paras. 14 and 45, rev'd on other grounds, 1999 CanLII 2618 [1999 CarswellOnt 4143 (Ont. C.A.)].

31 Had Mr. Wall been able to show that he suffered some detriment or prejudice to his legal rights arising from the Congregation's membership decision, he could have sought redress under appropriate private law remedies. This is not to say that the Congregation's actions had no impact on Mr. Wall; I accept his testimony that it did. Rather, the point is that in the circumstances of this case, the negative impact does not give rise to an actionable claim. As such there is no basis for the courts to intervene in the Congregation's decision-making process; in other words, the matters in issue fall outside the courts' jurisdiction.

C. Justiciability

32 This appeal may be allowed for the reasons given above. However, I also offer some supplementary comments on justiciability, given that it was an issue raised by the parties and dealt with at the Court of Appeal. In addition to questions of jurisdiction, justiciability limits the extent to which courts may engage with decisions by voluntary associations even when the intervention is sought only on the basis of procedural fairness. Justiciability relates to the subject matter of a dispute. The general question is this: Is the issue one that is appropriate for a court to decide?

33 Lorne M. Sossin defines justiciability as

> a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life. In short, if a subject-matter is held to be suitable for judicial determination, it is said to be justiciable; if a subject-matter is held not to be suitable for judicial determination, it is said to be non-justiciable.
>
> (*Boundaries of Judicial Review: The Law of Justiciability in Canada* (2nd ed. 2012), at p. 7)

Put more simply, "[j]usticiability is about deciding whether to decide a matter in the courts": *ibid.*, at p. 1.

34 There is no single set of rules delineating the scope of justiciability. Indeed, justiciability depends to some degree on context, and the proper approach to determining justiciability must be flexible. The court should ask whether it has the institutional capacity and legitimacy to adjudicate the matter: see Sossin, at p. 294. In determining this, courts should consider "that the matter before the court would be an economical and efficient investment of judicial resources to resolve, that there is a sufficient factual and evidentiary basis for the claim, that there would be an adequate adversarial presentation of the parties' positions and that no other administrative or political body has been given prior jurisdiction of the matter by statute" (*ibid.*).

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35 By way of example, the courts may not have the legitimacy to assist in resolving a dispute about the greatest hockey player of all time, about a bridge player who is left out of his regular weekly game night, or about a cousin who thinks she should have been invited to a wedding: Court of Appeal reasons, at paras. 82-84, per Wakeling J.A.

36 This Court has considered the relevance of religion to the question of justiciability. In *Marcovitz v. Bruker*, 2007 SCC 54, [2007] 3 S.C.R. 607 (S.C.C.), at para. 41, Justice Abella stated: "The fact that a dispute has a religious aspect does not by itself make it non-justiciable." That being said, courts should not decide matters of religious dogma. As this Court noted in *Syndicat Northcrest c. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551 (S.C.C.), at para. 50: "Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion." The courts have neither legitimacy nor institutional capacity to deal with such issues, and have repeatedly declined to consider them: see *Demiris v. Hellenic Community of Vancouver*, 2000 BCSC 733 (B.C. S.C. [In Chambers]), at para. 33; *Amselem*, at paras. 49-51.

37 In *Lakeside Colony*, this Court held (at p. 175 (emphasis added)):

> In deciding the membership or residence status of the defendants, the court must determine whether they have been validly expelled from the colony. It is not incumbent on the court to review the merits of the decision to expel. It is, however, called upon to determine whether the purported expulsion was carried out according to the applicable rules, with regard to the principles of natural justice, and without *mala fides*. This standard goes back at least to this statement by Stirling J. in *Baird v. Wells* (1890), 44 Ch. D. 661, at p. 670:
>
> > The only questions which this Court can entertain are: first, whether the rules of the club have been observed; secondly, whether anything has been done contrary to natural justice; and, thirdly, whether the decision complained of has been come to *bona fide*.

The foregoing passage makes clear that the courts will not consider the merits of a religious tenet; such matters are not justiciable.

38 In addition, sometimes even the procedural rules of a particular religious group may involve the interpretation of religious doctrine. For instance, the *Organized to Do Jehovah's Will* handbook (2005) outlines the procedure to be followed in cases of serious wrongdoing: "After taking the steps outlined at Matthew 18:15, 16, some individual brothers or sisters may report to the elders cases of unresolved serious wrongdoing" (p. 151). The courts lack the legitimacy and institutional capacity to determine whether the steps outlined in Matthew have been followed. These types of procedural issues are also not justiciable. That being said, courts may still review procedural rules where they are based on a contract between two parties, even where the contract is meant to give

effect to doctrinal religious principles: *Marcovitz*, at para. 47. But here, Mr. Wall has not shown that his legal rights were at stake.

39 Justiciability was raised in another way. Both the Congregation and Mr. Wall argued that their freedom of religion and freedom of association should inform this Court's decision. The dissenting justice in the Court of Appeal made comments on this basis and suggested that religious matters were not justiciable due in part to the protection of freedom of religion in s. 2(*a*) of the *Canadian Charter of Rights and Freedoms*. As this Court held in *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, [1986] 2 S.C.R. 573 (S.C.C.), at p. 603, the *Charter* does not apply to private litigation. Section 32 specifies that the *Charter* applies to the legislative, executive and administrative branches of government: *ibid.*, at pp. 603-4. The *Charter* does not directly apply to this dispute as no state action is being challenged, although the *Charter* may inform the development of the common law: *ibid.*, at p. 603. In the end, religious groups are free to determine their own membership and rules; courts will not intervene in such matters save where it is necessary to resolve an underlying legal dispute.

V. Disposition

40 I would allow the appeal and quash the originating application for judicial review filed by Mr. Wall. As the appellants requested that no costs be awarded, I award none.

Appeal allowed.

Pourvoi accueilli.

2009 CAF 116, 2009 FCA 116
Federal Court of Appeal

Irving Shipbuilding Inc. v. Canada (Attorney General)

2009 CarswellNat 5610, 2009 CarswellNat 920, 2009 CAF 116, 2009 FCA 116, [2009] F.C.J. No. 449, [2010] 2 F.C.R. 488, 183 A.C.W.S. (3d) 975, 314 D.L.R. (4th) 340, 389 N.R. 72, 98 Admin. L.R. (4th) 51

Irving Shipbuilding Inc. and Fleetway Inc., Appellants and The Attorney General of Canada and CSMG Inc., Respondents

J. Richard C.J., J.M. Evans, C.M. Ryer JJ.A.

Heard: February 24-25, 2009
Judgment: April 16, 2009 *
Docket: A-547-08

Proceedings: affirming *Irving Shipbuilding Inc. v. Canada (Attorney General)* (2008), 2008 CarswellNat 3930, 2008 FC 1102, 336 F.T.R. 208 (Eng.) (F.C.)

Counsel: J. Bruce Carr-Harris, David Sherriff-Scott, Vincent DeRose, for Appellants
Michael Ciavaglia, Alexander Gay, for Respondent, Attorney General of Canada
Lawrence E. Thacker, for Respondent, CSMG Inc.

***J.M. Evans J.A.*:**

A. Introduction

1 Public contracts lie at the intersection of public law and private law. The question raised in this appeal is whether a subcontractor of an unsuccessful bidder for a government procurement contract may apply for judicial review to challenge the fairness of the process for awarding the contract when the unsuccessful bidder decides not to litigate.

2 This is an appeal from a decision of the Federal Court in which Justice Harrington ("Applications Judge") dismissed an application for judicial review by Irving Shipbuilding Inc. and Fleetway Inc. ("appellants") to set aside a contract awarded by the Minister of Public Works and Government Services Canada ("PWGSC") to CSMG Inc. ("CSMG"), a company formed by Devonport Management Limited and Weir Canada Inc. ("Weir") for the purpose of bidding on this contract.

3 The appellants were subcontractors to BAE Systems (Canada) Inc., the unsuccessful bidder on a contract to provide in-service support to Canada's Victoria Class submarines ("the submarine contract"). If the submarine contract had been awarded to BAE, which is not a party to this litigation, the appellants' contract with BAE would have entitled them to 50% of the revenue and 50% of the work from the submarine contract. The potential total value of the submarine contract is said to be approximately $1.5 billion over 15 years.

4 The Applications Judge held that, unlike BAE, the primary bidder, the appellants were not "directly affected" by the award of the contract to CSMG and hence lacked standing under subsection 18.1(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, to make an application for judicial review. Nonetheless, he went on to consider the application on its merits. The Applications Judge rejected the appellants' argument that the award of the contract to CSMG was vitiated by procedural unfairness, namely, conflict of interest and reasonable apprehension of bias. The decision is reported as *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2008 FC 1102 (F.C.).

5 The appellants say that the Applications Judge erred in law by construing too narrowly the words "anyone directly affected" in subsection 18.1(1). Since the termination of their rights under the subcontract to perform work and to receive remuneration was, the appellants argued, the inevitable and foreseen consequence of the Minister's award of the contract to CSMG, they had standing to challenge the fairness of the procurement process. The appellants' essential complaint about the process is that the Minister failed to ensure that no bidder had an unfair advantage over others. More particularly, they allege, an employee of Weir, one of the companies that formed CSMG, gained an insight into the "mindset", or preferences, of the Department of National Defence ("DND") officials who evaluated the bids as a result of having worked, in another capacity, with those officials in developing the solicitation documents.

6 In my view, the appellants have failed to establish that PWGSC owed them a duty of fairness. Since they did not tender to PWGSC's request for proposals ("RFP"), they cannot claim that the duty was contractual. Nor can they point to legislation which confers on subcontractors a statutory right to procedural fairness. While a broad right to procedural fairness is afforded by the common law to those whose rights, interests or privileges are adversely affected by administrative action, this public law right has little application, if any, to an essentially commercial relationship governed for the most part by the law of contract. Accordingly, I would dismiss the appeal.

B. Factual Background

7 On March 30, 2004, PWGSC solicited letters of interest for the submarine contract and received requests for information from, among others, Peacock Inc. (which later became Weir), Irving, Fleetway, and BAE. Irving and Fleetway are affiliated.

8 Weir administered, through its marine engineering services division, the Naval Engineering Test Establishment ("NETE") which is a government-owned, but privately operated organization. NETE provides independent and impartial test and evaluation services to the Canadian Navy. When Weir was awarded the contract to manage NETE in 1999, it undertook to take steps to ensure that it would not gain any real or perceived unfair competitive advantage in its other dealings with DND as a result of its management of NETE.

9 In March 2005, PWGSC issued an industry solicitation requesting feedback on the proposed Statement of Work ("SOW"), developed by NETE, which was to be incorporated into the RFP for the submarine services. In the following months, the SOW was discussed at both public and closed-door meetings with the interested companies, as a result of which changes were made to the SOW.

10 On September 22, 2005, PWGSC issued its first RFP soliciting bids for the submarine contract. Bids were submitted by three parties, including CSMG and BAE. As already noted, CSMG was formed for the purpose of bidding on the submarine contract and Weir was one of its two shareholders.

11 Rather than form a new corporation or enter into a joint venture, BAE acted as the sole primary bidder and prepared its bid with the cooperation of subcontractors; collectively they referred to themselves as "Team Victoria". The appellants and other subcontractors entered into agreements with BAE, which they called the "teaming agreements". The appellants' teaming agreement provided, among other things, for the creation of a steering committee, through which the appellants would have a 50% say in any management decisions taken in the preparation of the bid and, if successful, the execution of the submarine contract. The teaming agreement also explicitly stated that Team Victoria was not a joint venture between the appellants and BAE, which remained the sole primary bidder on the submarine contract.

12 Before submitting the Team Victoria bid, BAE raised concerns with PWGSC about Weir's role in developing the SOW and requested that it ensure that no conflict of interest arose. In response, PWGSC assured BAE that it had taken all necessary steps and informed it that any bid submitted would constitute an acknowledgment of this. Team Victoria submitted a bid.

13 On June 1, 2006, PWGSC informed BAE that the bidding process was cancelled as none of the bidders met all the mandatory requirements. On July 21, 2006, a second RFP was issued, and both CSMG and BAE again submitted bids. On January 10, 2007, PWGSC informed BAE that, although its bid was compliant, CSMG would be awarded the submarine contract because it had received a higher score for the technical aspects of the bid.

14 The appellants brought an application for judicial review in the Federal Court to challenge the validity of the award of the contract to CSMG. Since the contract concerns national security, the Canadian International Trade Tribunal has no jurisdiction over complaints arising from its award.

C. Decision of the Federal Court

15 The Applications Judge held that the appellants had no standing to seek judicial review because, as subcontractors of the unsuccessful bidder, they were not "directly affected" by the award of the contract to CSMG within the meaning of subsection 18.1(1) of the *Federal Courts Act*. Relying by way of analogy on actions in tort for purely economic loss, he held (at para. 22) that "direct" means "without intermediaries", and that, as the primary bidder on the submarine contract, BAE was an "intermediary". He relied also (at para. 28) on *Design Services Ltd. v. R.*, 2008 SCC 22, [2008] 1 S.C.R. 737 (S.C.C.) ("*Design Services*"), where subcontractors of an unsuccessful bidder failed to establish that PWGSC owed them a duty of care in tort not to award a contract to a noncompliant bidder.

16 Finally, the Applications Judge held (at paras. 52-54) that, even if the appellants had the requisite standing, he would have dismissed their claim on its merits, because they had only established a "possibility of mischief", and not a "probability of mischief", as a result of any failure by PWGSC to prevent CSMG from benefiting from an unfair advantage based on Weir's involvement in the development of the RFP. The facts of this case, the Applications Judge concluded, did not give rise to a reasonable apprehension that PWGSC was biased in its evaluation of the bids.

17 Accordingly, the Applications Judge dismissed the appellants' application for judicial review.

D. Issues and Analysis

(i) Jurisdiction

18 The parties do not dispute that the award of the submarine contract can be the subject of an application for judicial review as an exercise of power conferred by an Act of Parliament on a federal board, commission or other tribunal. I agree with the parties for the following reasons.

19 The relevant provisions of the *Federal Courts Act* provide as follows.

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. "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	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. « 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

order made pursuant to a prerogative of the Crown, ...;

par une ordonnance prise en vertu d'une prérogative royale, ...

20 The Minister of Public Works and Government Services Canada has broad statutory responsibilities for the acquisition of goods and services for the Government of Canada. The following statutory provisions are of particular relevance to the present case.

Department of Public Works and Government Services Act, S.C. 1996, c. 16

6. The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to	6. Les pouvoirs et fonctions du ministre s'étendent d'une façon générale à tous les domaines de compétence du Parlement non attribués de droit à d'autres ministères ou organismes fédéraux et liés à:
(a) the acquisition and provision of articles, supplies, machinery, equipment and other materiel for departments;	a) l'acquisition et la fourniture d'articles, d'approvisionnements, d'outillage, d'équipements et autre matériel pour les ministères;
(b) the acquisition and provision of services for departments;	b) l'acquisition et la fourniture de services pour les ministères;
. . .	. . .
(e) the construction, maintenance and repair of public works, federal real property and federal immovables;	e) la construction, l'entretien et la réparation des ouvrages publics et des immeubles fédéraux et des biens réels fédéraux;
[...]	[...]

Defence Production Act, R.S.C. 1985 c. D-1

16. The Minister may, on behalf of Her Majesty and subject to this Act,	16. Le ministre peut, au nom de Sa Majesté et sous réserve des autres dispositions de la présente loi:
(a) buy or otherwise acquire, utilize, store, transport, sell, exchange or otherwise dispose of defence supplies;	a) acheter ou acquérir par tout autre moyen, utiliser, entreposer ou transporter du matériel de défense, ou en disposer, notamment par vente ou échange;
[...]	[...]

In my view, these provisions include a power to contract for the maintenance and servicing of submarines for the DND.

21 The fact that the power of the Minister, a public official, to award the contract is statutory, and that this large contract for the maintenance and servicing of the Canadian Navy's submarines is a matter of public interest, indicate that it can be the subject of an application for judicial review under section 18.1, a public law proceeding to challenge the exercise of public power. However, the fact that the Minister's broad statutory power is a delegation of the contractual capacity of the Crown as a corporation sole, and that its exercise by the Minister involves considerable discretion and is governed in large part by the private law of contract, may limit the circumstances in which the Court should grant relief on an application for judicial review challenging the legality of the award of a contract.

22 This Court reached a similar conclusion in *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works & Government Services)*, [1995] 2 F.C. 694 (Fed. C.A.) at paras. 7-17 ("*Gestion Complexe*"). The Court held that the exercise by a Minister of a statutory power to call for tenders and to enter into contracts for the lease of land by the Crown could be the subject of judicial review under the former paragraph 18(1)(*a*) of the *Federal Court Act* as a decision of "a federal board, commission or other tribunal".

23 Although not addressing the particular issue in dispute in the present case, Justice Décary, writing for the Court, also emphasized the difficulties facing an applicant in establishing a ground of review that would warrant the Court's intervention in the procurement process through its judicial review jurisdiction. Thus, he said (at para. 20):

> As by definition the focus of judicial review is on the legality of the federal government's actions, and the tendering procedure was not subject to any legislative or regulatory requirements as to form or substance, it will not be easy, in a situation where the bid documents do not impose strict limitations on the exercise by the Minister of his freedom of choice, to show the nature of the illegality committed by the Minister when in the normal course of events he compares the bids received, decides whether a bid is consistent with the documents or accepts one bid rather than another.

24 This view of the Court's jurisdiction is consistent with that generally adopted by other courts in Canada: see Paul Emanuelli, *Government Procurement*, 2nd ed. (Markham, Ontario: LEXISNEXIS, 2008) at 697-706, who concludes (at 698):

> As a general rule, the closer the connection between a procurement process and the exercise of a statutory power, the greater the likelihood that the activity can be subject to judicial review. Conversely, to the extent that the procurement falls outside the scope of a statutory power and within the exercise of government's residual executive power, the less likely that the procurement will be subject to judicial review.

English authorities on public contracts and judicial review are considered in Harry Woolf, Jeffrey Jowell and Andrew Le Sueur, *de Smith's Judicial Review*, 6th ed. (London: Sweet & Maxwell Ltd., 2007), 138-45, where courts generally require an "additional public element" before concluding that the exercise by a public authority of its contractual power is subject to judicial review, even when the power is statutory.

25 Consequently, on the basis of both authority and principle, I agree that the award of the submarine contract by the Minister of PWGSC is reviewable under section 18.1 of the *Federal Courts Act* as a decision of a "federal board, commission or other tribunal" made in the exercise of "powers conferred by or under an Act of Parliament" (section 2).

(ii) Standard of review

26 The principal issue that I need to decide in order to dispose of this appeal is whether the appellants had a right to procedural fairness in the process by which PWGSC awarded the submarine contract to CSMG. This is a question of law to be determined on a standard of correctness: *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.) ("*Dunsmuir*"), at para. 129.

Issue 1: Are the appellants "directly affected" by the award of the submarine contract to CSMG?

27 The parties made lengthy submissions on the question of whether the appellants had standing to challenge the award of the submarine contract to CSMG as a result of the loss of both their contractual rights as subcontractors and significant potential revenue from the work to be performed under that contract. In particular, the argument focussed on whether the appellants' losses made them "directly affected" by PWGSC's decision to award the submarine contract to CSMG so as to enable them to make this application for judicial review under subsection 18.1(1) of the *Federal Courts Act*.

28 In my view, the question of the appellants' standing should be answered, not in the abstract, but in the context of the ground of review on which they rely, namely, breach of the duty of procedural fairness. Thus, if the appellants have a right to procedural fairness, they must also have the right to bring the matter to the Court in order to attempt to establish that the process by which the submarine contract was awarded to CSMG violated their procedural rights. If PWGSC owed the appellants a duty of fairness and awarded the contract to CSMG in breach of that duty, they would be "directly affected" by the impugned decision. If they do not have a right to procedural fairness, that should normally conclude the matter. While I do not find it necessary to conduct an independent standing analysis, I shall briefly address two issues that arose from the parties' submissions.

29 First, I do not accept the respondents' contention that, in providing in subsection 18.1(1) of the *Federal Courts Act* that "anyone directly affected by the matter in respect of which relief is sought" may make an application for judicial review, Parliament intended litigants challenging federal administrative action to have more limited access to the Federal Courts than that typically available to those challenging in provincial superior courts administrative action taken by provincial statutory authorities.

30 Indeed, prior to the 1992 amendments to what was then the *Federal Court Act*, the words "directly affected" only applied to standing to bring an application for judicial review in the Appellate Division of the Federal Court of Canada under the former section 28 with respect to a decision or order of a tribunal to which that section applied. Since standing to bring judicial review proceedings in the Trial Division was left undefined, it was determined on the basis of the common law. As a result of the 1992 amendments, the statutory application for judicial review was

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extended to the administrative law jurisdiction of both Federal Courts. It seems to me implausible that, by retaining the words "directly affected" in subsection 18.1(1), Parliament thereby intended to narrow litigants' access to the Federal Court from that which litigants previously had to the Trial Division of the Federal Court.

31 The principal purpose of the administrative law aspects of the *Federal Court Act* when enacted in 1970 was to transfer from the superior courts of the provinces to the Federal Court of Canada an almost exclusive supervisory jurisdiction over federal administrative action: *Khosa v. Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12 (S.C.C.) ("*Khosa*") at para. 34. Indeed, far from restricting judicial review, former paragraphs 28(1)(*b*) and (*c*) of the Act expanded it somewhat, by removing the common law requirement that any error of law by the tribunal must be apparent on the face of its record, and by including error of fact as a discrete ground of review, even when it could not be said to have been based on "no evidence". The 1992 extension of the application for judicial review as the procedural vehicle for challenging federal administrative action in both Federal Courts was designed to modernize and facilitate judicial review not to restrict access to the Federal Court.

32 To attach the significance urged by the respondents to Parliament's choice of the words "directly affected", rather than any of the common law standing requirements ("person aggrieved" or "specially affected", for example) would, in my view, ignore the context and purpose of the statutory language of subsection 18.1(1). As the Supreme Court of Canada said recently in *Khosa* (at para. 19*)*:

> ... most if not all judicial review statutes are drafted against the background of the common law of judicial review. Even the more comprehensive among them ... can only sensibly be interpreted in the common law context ...

33 Moreover, since all these terms are somewhat indeterminate, Parliament's choice of one rather than another should be regarded as of relatively little importance. See also Thomas A Cromwell, Locus Standi: *A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986) at 163-64 ("*Locus Standi*"), especially his apt description (at 163) of the "semantic wasteland" to be traversed by a court in attempting to apply the various "tests" for standing, both statutory and common law. Although directed at differences between the French and English texts of subsection 18.1(4) of the *Federal Courts Act*, the following statement in *Khosa* (at para. 39) seems equally apt in the interpretation of the words "directly affected" in subsection 18.1(1):

> A blinkered focus on the textual variations might lead to an interpretation at odds with the modern rule [of statutory interpretation] because, standing alone, linguistic considerations ought not to elevate an argument about text above the relevant context, purpose and objectives of the legislative scheme.

34 The interpretation of the standing requirement in subsection 18.1(1) was addressed by this Court in *Sunshine Village Corp. v. Superintendent of Banff National Park* (1996), 202 N.R. 132 (Fed. C.A.) at paras. 66-8. Writing for the Court, Desjardins J.A. concluded that it was not intended to preclude the Court from granting public interest standing to persons who were not directly affected. The appellants in the present case do not rely on public interest standing.

35 Second, I do not necessarily agree with the appellants' argument that standing is determined by the quantum of an applicant's loss. Attempting to determine whether a loss is big enough to confer standing would tend to be arbitrary and productive of undue uncertainty, although a *de minimis* loss may be regarded as no loss at all. At least as important as the quantity of any loss sustained by an applicant for judicial review is its relationship to the administrative action impugned, and whether it falls within the range of interests protected by the enabling legislation.

Issue 2: Did the appellants have a right to procedural fairness?

36 The appellants argue that the Applications Judge was "distracted" by the "contractual matrix" of this litigation. They say that he should have applied the test for the application of the duty of fairness used with respect to administrative action taken pursuant to the exercise of a statutory power, namely, whether it affects the rights, privileges or interests of individuals: see, for example, *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 (S.C.C.), at 653.

37 I do not agree. In my view, the fact that this case involves the award of a contract provides the essential context in which it must be determined if a duty of fairness is owed to the appellants. On the facts of this case, a duty of fairness may arise in one of three ways: contract, legislation, and the common law.

(i) contract

38 A tender in response to an RFP creates a contract ("contract *A*") governing the conduct of the party calling for tenders: *R. v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111 (S.C.C.). The terms of contract *A* may include a promise, express or implied, that the contract for which tenders were requested ("contract *B*") will be awarded in a procedurally fair manner and bidders will be treated equally: *Martel Building Ltd. v. R.*, 2000 SCC 60, [2000] 2 S.C.R. 860 (S.C.C.), at para. 88.

39 In the present case, BAE could have relied upon contract *A* with PWGSC to allege that contract *B* was awarded to CSMG in breach of the duty of fairness implicit in contract *A*. Whether BAE would have succeeded, either on an application for judicial review or in an action for damages for breach of contract, is, of course, another question.

40 However, BAE has elected not to initiate judicial review proceedings, or an action for breach of contract, in order to establish that the contract was awarded to CSMG in breach of the duty of fairness and should be set aside for procedural unfairness or PWGSC should pay damages for breach of contract *A*. As subcontractors of BAE who have no contractual relationship with PWGSC, the appellants may not rely on contract *A* between BAE and PWGSC as the source of any legal duty owed to them.

41 It would have been different if the appellants had entered into a joint venture with BAE to bid for the submarine contract or, together, they had formed a company for the purpose of bidding on the contract. In either of these events, the appellants would have had the benefit of contract *A* with PWGSC. However, having elected to be subcontractors of BAE, and thus not to expose themselves to potential contractual liability to PWGSC, the appellants cannot now claim the benefit of contract *A* between PWGSC and BAE because they were not a party to it.

(ii) statute

42 In the course of oral argument, counsel for the appellants submitted that legislation conferred on them rights to procedural fairness. Counsel relied on the following provisions.

Financial Administration Act, R.S.C. 1985. c. F-11	
40.1 The Government of Canada is committed to taking appropriate measures to promote fairness, openness and transparency in the bidding process for contracts with Her Majesty for the performance of work, the supply of goods or the rendering of services.	40.1 Le gouvernement fédéral s'engage à prendre les mesures indiquées pour favoriser l'équité, l'ouverture et la transparence du processus d'appel d'offres en vue de la passation avec Sa Majesté de marchés de fournitures, de marchés de services ou de marchés de travaux.

43 Legislation may, of course, impose a duty of fairness on PWGSC in its conduct of the procurement process, and specify its content. However, I am not persuaded that the above provision assists the appellants. The phrase "The Government of Canada is committed to taking *appropriate* measures to *promote* the fairness ... of the bidding process..." is not sufficiently precise to impose an immediate legal duty of procedural fairness enforceable by a bidder, let alone by a subcontractor. Rather, it sets a goal and only commits the Government to take future, unspecified steps to ensure that the procurement process is fair.

(iii) common law

44 The appellants argue that, as persons adversely affected by the award of the submarine contract to CSMG, they are entitled to challenge the fairness of the process by which it was awarded. They say that their right to procedural fairness arises from the common law in respect

of administrative action, namely, the award of the contract to CSMG, because it ended their legal rights under their contract with BAE and caused them substantial financial loss. I do not agree.

45 The common law duty of fairness is not free-standing, but is imposed in connection with the particular scheme in which the impugned administrative decision has been taken. In my opinion, it cannot be assumed that a duty imposed on the exercise of administrative action taken in the performance of a statutory, governmental function applies in the case of a decision to purchase goods and services where the legal relations of the parties are largely governed by the law of contract.

46 The context of the present dispute is essentially commercial, despite the fact that the Government is the purchaser. PWGSC has made the contract pursuant to a statutory power and the goods and services purchased are related to national defence. In my view, it will normally be inappropriate to import into a predominantly commercial relationship, governed by contract, a public law duty developed in the context of the performance of governmental functions pursuant to powers derived solely from statute.

47 First, judicially imposed procedural duties in favour of subcontractors would undermine the right of a bidder for a procurement contract to determine what, if any, steps it should take in the event of an apparent breach of contract *A*. The law should normally not override the decision of an unsuccessful bidder to do nothing because, for example, of a fear that the institution of litigation would jeopardise its prospects of obtaining a contract in the future, or of its desire not to be involved in costly and time-consuming litigation. See also *Locus Standi*, at 171, where Justice Cromwell notes that the law generally defers to the decision of "the more obvious plaintiff" not to institute legal proceedings and therefore does not confer standing on a person less affected by the impugned administrative action.

48 Second, while also serving the public interest in good government, procedural rights are, to a large extent, personal to those whose substantive rights or interests they protect. For example, in most cases, a person who has waived a right to procedural fairness may not subsequently challenge an administrative decision on the ground that it was made in breach of the duty of fairness: for the relevant authorities, see Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing) at 11:5500.

49 The decision in *Sanders v. Chester (District) Municipal School Board* (1979), 102 D.L.R. (3d) 486 (N.S. T.D.) is anomalous in conferring standing on a ratepayers' group challenging the dismissal of a school principal on the ground that he had not been afforded a fair hearing, even though he himself had not litigated the matter: see David J. Mullan and Andrew J. Roman, "*Minister of Justice of Canada v. Borowski*: The Extent of the Citizen's Right to Litigate the Lawfulness of Government Action" (1984), 4 *Windsor Y.B. Access to Just*. 303 at 339-41 and 349.

50 Third, the logic of the appellants' argument that they are entitled to procedural fairness opens the alarming possibility of a cascading array of potential procedural rights-holders. What, for example, of employees of unsuccessful bidders or their subcontractors who lose their employment as the result of the award of the contract to another bidder? The adverse impact on such employees may be just as serious to them as the loss of the subcontract is to the appellants. It would be unduly formalistic to say that the appellants' position is distinguishable because their contract provided that their right to share the revenue terminated if the submarine contract was not awarded to BAE.

51 Fourth, the appellants say that to confer upon them a right to procedural fairness would advance the public's interest in obtaining value for money by protecting the fairness of the procurement process; an unfair process may discourage bidders from tendering to future RFPs. However, since those who bid in response to an RFP have contractual rights to ensure that their tenders are evaluated accurately and fairly, the protection of the public interest in the integrity of the process does not require a judicial extension of procedural rights to subcontractors. Moreover, if a free-standing right to procedural fairness existed it would not have been necessary for the courts to have implied it as a term of contract *A*.

52 Fifth, the public interest in the efficiency of the tendering process may well be compromised by an extension of the right to procedural fairness in the manner urged by the appellants. To extend the right to procedural fairness to subcontractors and, possibly, to others who have been adversely affected by a contract award, can only complicate the procurement process and introduce new levels of uncertainty into essentially commercial relationships.

53 To supplement the contractual safeguards with the common law duty of fairness would thus frustrate the parties' expectations. A duty of fairness based on the common law would presumably also include a right for subcontractors, and others, to participate in the procurement process by making representations before the contract was awarded. As already noted, the appellants could have brought themselves within the protection of contract *A* if they had so chosen, including any duty of fairness arising from it.

54 Sixth, once a contract has been awarded, the public has an interest in the avoidance of undue delays in its performance, and in ensuring that government is able promptly to acquire the goods and services that it needs for the discharge of its responsibilities. The normal remedy for breach of contract is a simple award of damages, which does not delay the performance of the contract by the winning bidder. In contrast, the more intrusive public law remedy sought by the appellants is that the contract awarded to CSMG be set aside, so that the tendering process can start again. Governments' recent resort to funding "shovel-ready" infrastructure projects as part of a strategy for promoting economic recovery vividly illustrates that delays in getting publicly financed work underway may be detrimental to the public interest.

55 Two recent decisions of the Supreme Court of Canada support the conclusion that a duty of fairness was not owed to the appellants with respect to the procurement process: *Design Services* and *Dunsmuir*.

56 The facts of *Design Services* are similar to those of the present case. The appellants were the subcontractors of an unsuccessful bidder on a government contract. As in our case, the appellants in *Design Services* could have entered into a joint venture with the unsuccessful bidder, but did not. The subcontractors and the unsuccessful bidder sued the Government for damages on the ground that it had awarded the contract to a non-compliant bidder. However, on settling its claim, the unsuccessful bidder discontinued its action.

57 The question for the Court was whether the subcontractor had an action in negligence against the Government for awarding the contract to a non-compliant bidder. In giving the judgment of the Court dismissing the appeal, Justice Rothstein said (at para. 56):

> ... In essence, the appellants are attempting, after the fact, to substitute a claim in tort law for their inability to claim under "Contract A". After all, the obligations the appellants seek to enforce through tort exist only because of "Contract A" to which the appellants are not parties. In my view, the observation of Professor Lewis N. Klar (*Tort Law* (3rd ed. 2003), at p. 201) — that the ordering of commercial relationships is usually in the bailiwick of the law of contract — is particularly apt in this type of case. To conclude that an action in tort is appropriate when commercial parties have deliberately arranged their affairs in contract would be to allow for an unjustifiable encroachment of tort law into the realm of contract.

58 The appellants argue that *Design Services* is distinguishable because the concern of the Court in that case was that the imposition of a duty of care would increase the Crown's exposure to potential financial liability far beyond the contractual arrangements: paras. 59-66. But in the present case, they say, no claim for damages is being made and, once granted, the remedy sought, namely the quashing of the award of the contract, can only be granted once. In my view, however, this is too narrow a reading of *Design Services*.

59 In *Dunsmuir* the Court considered (at paras. 102-17) the appropriateness of imposing a duty of fairness prior to the dismissal of a Crown employee and office holder. The Court decided that, as a general rule, a duty of procedural fairness, and remedies other than damages for breach of contract, have no place in the legal relationship between the Crown on the one hand, and office holders and employees on the other, when their relationship is rooted essentially in contract.

60 Admittedly, the facts of our case are different from those in *Dunsmuir* because the appellants have no contractual rights against PWGSC. Nonetheless, the broader point made by both *Design Services* and *Dunsmuir* is that when the Crown enters into a contract, its rights and duties, and the available remedies, are generally to be determined by the law of contract.

61 Finally, if a case arose where the misconduct of government officials was so egregious that the public interest in maintaining the essential integrity of the procurement process was engaged, I would not want to exclude the possibility of judicial intervention at the instance of a subcontractor. However, given the powerful reasons for leaving procurement disputes to the law of contract, it will only be in the most extraordinary situations that subcontractors should be permitted to bring judicial review proceedings to challenge the fairness of the process.

62 In my view, the facts of this case fall far short of the kind of extraordinary circumstances in which the Court might intervene at the instance of a subcontractor. The appellants do not allege, for example, fraud, bribery, corruption or other kinds of grave misconduct which, if proved, would undermine public confidence in the essential integrity of the process. Indeed, in careful reasons, the Applications Judge explained why he was not persuaded that, even if the appellants had standing, they had established a breach of the duty of fairness, including a reasonable apprehension of bias, on the part of PWGSC in its conduct of the procurement process.

E. Conclusions

63 For these reasons, I would dismiss the appeal with costs.

***J. Richard C.J.*:**

I agree

***C.M. Ryer J.A.*:**

I agree.

Appeal dismissed.

Footnotes

∗ Leave to appeal denied at *Irving Shipbuilding Inc. v. Canada (Attorney General)* (2009), 2009 CarswellNat 3243, 2009 CarswellNat 3244 (S.C.C.).

2013 CAF 250, 2013 FCA 250
Federal Court of Appeal

JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue

2013 CarswellNat 3822, 2013 CarswellNat 6109, 2013 CAF 250, 2013 FCA 250, [2013] F.C.J. No. 1155, [2014] 2 C.T.C. 99, 2014 D.T.C. 5001 (Eng.), 235 A.C.W.S. (3d) 288, 367 D.L.R. (4th) 525, 450 N.R. 91, 62 Admin. L.R. (5th) 76

The Minister of National Revenue and Canada Revenue Agency, Appellants and JP Morgan Asset Management (Canada) Inc., Respondent

K. Sharlow, David Stratas, D.G. Near JJ.A.

Heard: September 18, 2013
Judgment: October 24, 2013
Docket: A-532-12

Proceedings: reversing *JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue* (2012), 2012 CarswellNat 5000, 2012 FC 1366 (F.C.)

Counsel: Naomi Goldstein, Laurent Bartleman, for Appellants
Gerald L.R. Ranking, for Respondent

***David 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 (F.C.). 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 (F.C.).

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
>
> (a) the amount of refund, if any, to which the taxpayer may be entitled by virtue of section 129, 131, 132 or 133 for the year; or
>
> (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.
>
> **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) le montant du remboursement éventuel auquel il a droit en vertu des articles 129, 131, 132 ou 133, pour l'année;
>
> 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

550

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,

(a) a management or administration fee or charge;

212. (1) Toute personne nonrésidente 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) 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 nonrésidente, 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 nonresident 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 person to the non-resident person or otherwise recover from the nonresident person any amount paid by that person as tax under this Part on behalf thereof.

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 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

(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,

(b) subsection 237.1(7.4) or (7.5) or 237.3(8) by a person or partnership,

(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

(d) Part XIII by a person resident in Canada,

and, where the Minister sends a notice of assessment to that person or partnership, Divisions I and J of Part I apply with any modifications that the circumstances require.

227. (10) Le ministre peut, en tout temps, établir une cotisation pour les montants suivants:

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) 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) 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) un montant payable en vertu de la partie XIII par une personne qui réside au Canada.

Les sections I et J de la partie I s'appliquent, avec les modifications 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

(a) the Minister has confirmed the assessment or reassessed, or

(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,

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 under section 165 that the Minister has confirmed the assessment or reassessed.

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) après que le ministre a ratifié la cotisation ou procédé à une nouvelle cotisation;

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;

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 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

(a) dismissing it; or

(b) allowing it and

(i) vacating the assessment,

(ii) varying the assessment, or

(iii) referring the assessment back to the Minister for reconsideration and reassessment.

171. (1) La Cour canadienne de l'impôt peut statuer sur un appel:

a) en le rejetant;

b) en l'admettant et en:

(i) annulant la cotisation,

(ii) modifiant la cotisation,

(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,
>
> "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...
>
> **2.** (1) Les définitions qui suivent s'appliquent à la présente loi.
>
> « 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
>
> (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 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.

(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 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.

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

> (a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or
>
> (b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

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

> (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
>
> (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
>
> (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
>
> (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
>
> (e) acted, or failed to act, by reason of fraud or perjured evidence; or

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

(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.

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

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

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

(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) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une 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.

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

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

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

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

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

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

c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

f) a agi de toute autre façon contraire à la loi.

(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 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.

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 procédures, cette décision ou cette ordonnance ne peut, dans la mesure où elle est susceptible d'un tel appel, faire

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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: *Addison & Leyen Ltd. v. Canada*, 2007 SCC 33, [2007] 2 S.C.R. 793 (S.C.C.). 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 (T.C.C. [General Procedure]) (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. Quebec (Attorney General)*, [1981] 2 S.C.R. 220 (S.C.C.)), 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 *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.) 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 wellconsidered 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.*, *Assn. of Universities & Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22, 428 N.R. 297 (F.C.A.)).

(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 (F.C.A.) at paragraph 34; *Astrazeneca Canada Inc. v. Novopharm Ltd.*, 2010 FCA 112 (F.C.A.) 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": *Pharmacia Inc. v. Canada (Minister of*

National Health & Welfare) (1994), [1995] 1 F.C. 588 (Fed. C.A.) at page 600. There must be a "show stopper" or a "knockout punch" — an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Canada (Public Service Labour Relations Board)*, 2013 FCA 117 (F.C.A.) at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286 (F.C.A.) at paragraph 6; *cf.*. *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.).

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; *Minister of National Revenue v. RBC Life Insurance Co.*, 2013 FCA 50 (F.C.A.). 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: *Domtar Inc. v. Canada*, 2009 FCA 218 (F.C.A.) at paragraph 28; *Roitman v. R.*, 2006 FCA 266 (F.C.A.) at paragraph 16; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 (S.C.C.) 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 (F.C.) at paragraph 20, aff'd on appeal, 2008 FC 1049 (F.C.). 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 (S.C.C.).

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 (F.C.A.) (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 (S.C.C.); *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": *Ministre du Revenu national c. Derakhshani*, 2009 FCA 190 (F.C.A.) 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 (S.C.C.) 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: *Werbeski v. Ontario (Director of Disability Support Program, Ministry of Community & Social Services)*, 2006 SCC 14, [2006] 1 S.C.R. 513 (S.C.C.) 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 *Collavino Brothers Construction Co., Re* (1978), [1979] 1 S.C.R. 495 (S.C.C.); *Martineau v. Matsqui Institution (No. 2)* (1979), [1980] 1 S.C.R. 602 (S.C.C.); *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 (S.C.C.). 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 & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) 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*; *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.). 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 (S.C.C.) at paragraphs 17-18 and 23; *Khosa v. Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.) at paragraph 59; *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2013 FCA 75 (F.C.A.) 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, decisionmaking for a purpose not authorized by the statute: *Multi-Malls Inc. v. Ontario (Minister of Transportation & Communications)* (1976), 14 O.R. (2d) 49 (Ont. C.A.); *Doctors Hospital v. Ontario (Minister of Health)* (1976), 12 O.R. (2d) 164 (Ont. Div. Ct.); *Padfield v. Minister of Agriculture, Fisheries & Food*, [1968] A.C. 997 (U.K. H.L.); and see also *Roncarelli v. Duplessis*, [1959] S.C.R. 121 (S.C.C.).

• Fettering of discretion or acting under the dictation of someone not authorized to make the decision: *e.g.*, *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 (S.C.C.); *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299 (F.C.A.) (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 & Immigration)*, 2007 FCA 198, [2008] 1 F.C.R. 385 (F.C.A.). 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; *Q. v. College of Physicians & Surgeons (British Columbia)*, 2003 SCC 19, [2003] 1 S.C.R. 226 (S.C.C.) 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 (Ministry of Transportation)*, 2013 SCC 13 (S.C.C.) 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 decisionmaker 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 (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 (S.C.C.) at paragraph 97; *Reference re Canada Assistance Plan (Canada)*, [1991] 2 S.C.R. 525 (S.C.C.); *St. Ann's Island Shooting & Fishing Club Ltd. v. R.*, [1950] S.C.R. 211 (S.C.C.), *per* Rand J., at page 220 ("there can be no estoppel in the face of an express provision of a statute"); *R. v. Dominion of Canada Postage Stamp Vending Co.*, [1930] S.C.R. 500 (S.C.C.); *South Yukon Forest Corp. v. R.*, 2012 FCA 165 (F.C.A.) at paragraph 79. In the tax context, see *Minister of National Revenue v. Inland Industries Ltd.* (1971), [1974] S.C.R. 514 (S.C.C.); *Louis Sheff (1984) Inc. v. R.*, 2003 TCC 589 (T.C.C. [General Procedure]) 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. R.* (1977), [1978] 1 F.C. 247 (Fed. 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 & Oceans)*, [1997] 1 S.C.R. 12 (S.C.C.). 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 c. R.*, [1991] 3 F.C. 663 (Fed. C.A.) at page 674; *Minister of National Revenue v. Stickel*, [1972] F.C. 672 (Fed. T.D.) at page 685.

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 (Fed. C.A.) at page 602 ("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": *Ludco Enterprises Ltd./Entreprises Ludco Ltée v. R.* (1994), [1995] 2 F.C. 3 (Fed. C.A.) at page 17; *Harris v. R.*, [2000] 4 F.C. 37 (Fed. C.A.) at paragraph 36. This Court cannot stop the Minister from carrying out this duty: *Tele-Mobile Co. Partnership v. Canada Revenue Agency*, 2011 FCA 89 (F.C.A.) 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. R.*, [1980] C.T.C. 318, 80 D.T.C. 6250 (Fed. C.A.);

Harris, *supra* at paragraph 37; *CIBC World Markets Inc. v. R.*, 2012 FCA 3 (F.C.A.); *Longley v. Minister of National Revenue* (1992), 66 B.C.L.R. (2d) 238 (B.C. C.A.) at paragraph 19.

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 (Fed. C.A.); *Khan v. Minister of National Revenue* (1984), [1985] 1 C.T.C. 192, 85 D.T.C. 5140 (Fed. C.A.); *Bechthold Resources Ltd. v. Minister of National Revenue*, [1986] 3 F.C. 116 (Fed. T.D.) at page 122; *Optical Recording Corp. v. Canada* (1990), [1991] 1 F.C. 309 (Fed. C.A.) at pages 320-321; *Brydges v. Kinsman* (1992), 61 F.T.R. 240 (note) (Fed. C.A.); *Devor v. Minister of National Revenue* (1993), 60 F.T.R. 321 (Fed. C.A.); *Water's*

Edge Village Estates (Phase II) Ltd. v. R. (1994), 74 F.T.R. 197 (Fed. T.D.); *Webster v. R.*, 2003 FCA 388 (F.C.A.); *Walker v. R.*, 2005 FCA 393 (F.C.A.) at paragraph 15; *Sokolowska v. R.*, 2005 FCA 29 (F.C.A.); *Angell c. Ministre du Revenu national*, 2005 FC 782 (F.C.); *Heckendorn v. Canada*, 2005 FC 802 (F.C.); *Walsh v. Minister of National Revenue*, 2006 FC 56 (F.C.); *Roitman*, *supra* at paragraph 20; *Smith v. Canada*, 2006 BCCA 237 (B.C. C.A.). 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. Minister of National Revenue*, 2008 SCC 46, [2008] 2 S.C.R. 643 (S.C.C.) 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. R.*, [1998] 4 F.C. 180 (Fed. 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. R.*, [1999] 1 C.T.C. 139, 99 D.T.C. 5133 (Fed. C.A.); *R. v. Guindon*, 2013 FCA 153 (F.C.A.) 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. R.*, 2004 FCA 403 (F.C.A.) at paragraph 7; *Webster*, *supra* at paragraph 20; *Consumers' Gas Co. v. R.* (1986), [1987] 2 F.C. 60 (Fed. C.A.) at page 67. 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] 1 S.C.R. 330 (S.C.C.); *King v. University of Saskatchewan*, [1969] S.C.R. 678 (S.C.C.) at page 689; *Taiga Works Wilderness Equipment Ltd., Re*, 2010 BCCA 97 (B.C. C.A.) at paragraph 28; *Histed v. Law Society (Manitoba)*, 2006 MBCA 89, 274 D.L.R. (4th) 326 (Man.

C.A.); *McNamara v. Ontario Racing Commission* (1998), 164 D.L.R. (4th) 99, 111 O.A.C. 375 (Ont. 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: *R. v. Ereiser*, 2013 FCA 20 (F.C.A.) at paragraph 38; *Roitman*, *supra* at paragraph 21; *Main Rehabilitation Co. Ltd.*, *supra* at paragraph 6; *Bolton v. R.*, [1996] 3 C.T.C. 3, 96 D.T.C. 6413 (Fed. C.A.); *Ginsberg v. R.*, [1996] 3 F.C. 334 (Fed. C.A.); *Burrows v. R.*, 2005 TCC 761 (T.C.C. [General Procedure]); *Hardtke v. R.*, 2005 TCC 263 (T.C.C. [General Procedure]). 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 (S.C.C.); *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 (S.C.C.); *Peepeekisis Band v. Canada (Minister of Indian Affairs and Northern Development)*, 2013 FCA 191 (F.C.A.) at paragraphs 59-62; *Assoc. des Compagnies de Téléphone du Québec Inc. v. Canada (Attorney General)*, 2012 FCA 203 (F.C.A.) at paragraph 26; *Torres v. T.W.U.*, 2012 FCA 69 (F.C.A.) at paragraphs 22-41. This is subject to unusual or exceptional circumstances supportable in the case law: see, *e.g.*, *C.B. Powell Ltd. c. Canada (Agence des services frontaliers)*, 2010 FCA 61 (F.C.A.), *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* (1974), [1975] 1 S.C.R. 87 (S.C.C.) at page 90; *Eli Lilly & Co. v. Apotex Inc.* (2000), 266 N.R. 339 (Fed. C.A.) at paragraph 9; *Kingsbury v. Heighton*, 2003 NSCA 80 (N.S. C.A.) 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 (S.C.C.) at paragraph 36; *C.B. Powell*, *supra* at paragraphs 28 and 32; *Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541 (Ont. C.A.) 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. R.*, 2004 FCA 316 (F.C.A.); *Leroux v. Canada Revenue Agency*, 2012 BCCA 63 (B.C. C.A.) at paragraph 22; *Gardner v. Canada (Attorney General)*, 2012 ONSC 1837 (Ont. S.C.J.), rev'd on another point 2013 ONCA 423 (Ont. C.A.); *McCreight v. Canada (Attorney General)*, 2013 ONCA 483 (Ont. C.A.). 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 (Fed. C.A.) (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*,

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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. Minister of National Revenue*, 2011 FCA 181 (F.C.A.) 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]actspecific 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: *Lebon v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FCA 55 (F.C.A.) (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 & Co.* (1998), [1999] 1 F.C. 515 (Fed. 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*, *supra*), and conduct during collection matters that is not acceptable or defensible on the facts and the law (*Walker*, *supra*; *Pintendre Autos Inc. c. R.*, 2003 TCC 818 (T.C.C. [General Procedure])).

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": *B.M.W.E. v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495 (S.C.C.) 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 in the 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)* (1990), [1991] 1 F.C. 619 (Fed. T.D.); *Bajwa v. Canada (Minister of Citizenship & Immigration)*, 2012 FC 864 (F.C.) 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.

***K. Sharlow J.A.*:**

I agree

***D.G. Near J.A.*:**

I agree

Appeal allowed.

2019 SCC 20, 2019 CSC 20
Supreme Court of Canada

J.W. v. Canada (Attorney General)

2019 CarswellMan 363, 2019 CarswellMan 364, 2019 SCC 20, 2019 CSC 20, [2019] 2 S.C.R. 224, [2019] 7 W.W.R. 1, 303 A.C.W.S. (3d) 677, 33 C.P.C. (8th) 259, 431 D.L.R. (4th) 579, 54 Admin. L.R. (6th) 171

J.W. and REO Law Corporation (Appellants) and Attorney General of Canada, Chief Adjudicator of the Indian Residential Schools Adjudication Secretariat and Assembly of First Nations (Respondents) and Independent Counsel and K.B. (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe JJ.

Heard: October 10, 2018
Judgment: April 12, 2019
Docket: 37725

Proceedings: reversing *The Attorney General of Canada v. JW and Reo Law Corporation et al* (2017), 2017 MBCA 54, 2017 CarswellMan 247, 413 D.L.R. (4th) 521, [2017] 10 W.W.R. 754, (sub nom. *Fontaine v. Canada (Attorney General)*) [2017] 3 C.N.L.R. 85, Holly C. Beard J.A., Janice L. leMaistre J.A., Michel A. Monnin J.A. (Man. C.A.); reversing *Fontaine v. Canada (Attorney General)* (2016), 2016 MBQB 159, 2016 CarswellMan 303, Edmond J. (Man. Q.B.)

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Karim Ramji, for Intervener, K.B.

Abella J. **(Wagner C.J. and Karakatsanis J. concurring):**

1 The years of sustained abuse committed in Residential Schools represent a profoundly shameful era in Canada's history. The legacy of the harms committed there consists of deep wounds not only to those who were forced to attend, but also to our national psyche. The recovery process, when it is possible, is slow and painful. But at least there is a process, one that pays respectful

tribute to the enduring character of the harm and the need to address it. The *Indian Residential Schools Settlement Agreement* (2006) is part of that healing process.

2 When J.W. was a young boy at a Residential School a nun touched his genitals over his clothing. He was standing in line waiting for a shower. He was wearing what he described as a "little apron".

3 In 2014, J.W. brought a claim for compensation in accordance with the Independent Assessment Process (IAP), the adjudicative component of the Agreement, alleging that this incident fell within the following category of abuse:

> Any touching of a student, including touching with an object, by an adult employee or other adult lawfully on the premises which exceeds recognized parental contact and violates the sexual integrity of the student.
>
> [art. II]

4 J.W.'s claim proceeded in Manitoba. The Hearing Adjudicator concluded that the "sexual" intent of the nun was an element that had to be shown by the claimant. Despite the fact that she accepted that the incident had occurred as J.W. described, the Hearing Adjudicator denied his claim because he was unable to prove the nun's sexual intent.

5 The issue in this appeal is whether J.W. was entitled to judicial recourse.

Background

6 The Agreement represents the negotiated settlement of thousands of individual and class action suits filed against a number of defendants, including the Government of Canada and various churches, relating to the operation of Residential Schools.

7 The Agreement includes a procedure for settling individual claims through an adjudicative process; provides for support services for former students; sets out a national procedure for healing, education and reconciliation through the Truth and Reconciliation Commission; and creates a scheme for the general implementation of public programs to recognize and commemorate the significant and lasting harms caused by the Residential Schools system.

8 While not admitting liability, the defendants acknowledged that harms and abuses were committed against Indigenous children at these schools. The individuals in the various classes of plaintiffs and potential claimants could opt out of the Agreement and pursue their own litigation through the courts, but they could not take this route if they accepted compensation pursuant to the Agreement.

9 Two avenues to compensation are available under the Agreement: the "common experience" payment received by all eligible former students, and individual payments awarded to claimants who establish specific compensable harms. These individual claims are adjudicated through the IAP. The rules governing these adjudications are set out in Schedule D to the Agreement.

10 The Schedule describes which harms are compensable, what must be established by the claimant, and sets out a compensation scale. It includes both standard and complex track claims. Certain complex track claims may be referred to the courts by the Chief Adjudicator of the Indian Residential Schools Adjudication Secretariat who is generally responsible for guiding, training and assisting the adjudicators. This is the only category of claims which provides a mechanism for court access.

11 There is a system of internal reviews. If the alleged error in an adjudicative decision is a palpable and overriding factual one, the scheme allows for one level of internal review. If the error alleged is a failure to apply the IAP Model to the facts, there are two levels of internal review available.

12 J.W.'s claim is a standard track claim. That entitled him to an in-person hearing and the possibility of two levels of internal review. There is, however, no right of appeal to the courts.

13 Because the Agreement constitutes the settlement of ongoing actions, judicial approval was required. The parties brought the proposed settlement to the superior courts for approval, and between December 2006 and January 2007, nine provincial and territorial superior courts approved the Agreement through Approval Orders.

14 Ontario was the first jurisdiction to approve the Agreement, subject to certain conditions, in December 2006. In *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (Ont. S.C.J.), the decision accompanying the first Approval Order, Winkler R.S.J. emphasized the enduring, harmful legacy of Residential Schools which ultimately led to the Agreement:

> For over 100 years, Canada pursued a policy of requiring the attendance of Aboriginal children at residential schools, which were largely operated by religious organizations under the supervision of the federal government. The children were required to reside at these institutions, in isolation from their families and communities, for varying periods of time. This policy was finally terminated in 1996 with the closing of the last of the residential schools and has now been widely acknowledged as a seriously flawed failure. *In its attempts to address the damage inflicted by, or as a result of, this long-standing policy, the settlement is intended to offer a measure of closure for the former residents of the schools and their families*.
>
> The flaws and failures of the policy and its implementation are at the root of the allegations of harm suffered by the class members. Upon review by the Royal Commission on Aboriginal

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> Peoples, it was found that the children were removed from their families and communities to serve the purpose of carrying out a "concerted campaign to obliterate" the "habits and associations" of "Aboriginal languages, traditions and beliefs", in order to accomplish "a radical re-socialization" aimed at instilling the children instead with the values of Euro-centric civilization. *The proposed settlement represents an effort to provide a measure of closure and, accordingly, has incorporated elements which provide both compensation to individuals and broader relief intended to address the harm suffered by the Aboriginal community at large*. [Emphasis added; paras. 2-3.]

15 As Winkler R.S.J. emphasized, given the goals of the Agreement, significant and ongoing judicial supervision was necessary. As he said, supervising courts must "ensur[e] that the administration and implementation of the settlement are done in a manner that delivers the promised benefits to the class members .... Once the court is engaged, it cannot abdicate its responsibilities" (*Baxter*, at para. 12). Additionally, "the court must be in a position to effectively evaluate the administration and the performance of the administrator and, further, be empowered to effect any changes that it finds necessary to ensure that the benefits promised under the settlement are being delivered" (para. 51).

16 Winkler R.S.J. stressed that, as in all class actions, the courts must strive to protect the class members and ensure that the benefits they agreed to are actually delivered. In order to deliver efficient, coordinated judicial supervision of the multi-jurisdictional Agreement, he suggested that each supervising court approve a Court Administration Protocol.

17 The Approval Orders in all other provinces were substantially similar, and stated that superior court judges were entitled to hear "Requests for Directions" with respect to the ongoing administration and implementation of the Agreement. Paragraph 31 of the Manitoba Approval Order, for example, states:

> **THIS COURT DECLARES** that the Representative Plaintiffs, Defendants, Released Church Organizations, Class Counsel, the National Administration Committee, or the Trustee, or such other person or entity as this Court may allow, *after fully exhausting the dispute resolution mechanisms contemplated in the Agreement, may apply to the Court for directions in respect of the implementation, administration or amendment of the Agreement* or the implementation of this judgment on notice to all affected parties, all in conformity with the terms of the Agreement. [Emphasis added.]

The inclusion of the Requests for Directions provision in the Approval Orders contemplates that recourse to the courts is possible in circumstances where all internal mechanisms have been exhausted and directions are needed about the implementation of the Agreement.

18 The effect of the Approval Orders in the provinces was the certification of the actions as a class proceeding, subject to certain changes being made to the Agreement.

19 By March 2007, all nine provincial and territorial jurisdictions implicated by the Agreement took the next step and implemented the Agreement by court orders. These Implementation Orders incorporated the Agreement and addressed issues relating to its administration.

20 Notably, the Manitoba Implementation Order concludes by stating that "the Courts shall supervise the implementation of the Agreement and this order and, without limiting the generality of the foregoing, may issue such further and ancillary orders, from time to time, as are necessary to implement and enforce the provisions of the Agreement" (para. 23).

21 As proposed by Winkler R.S.J. in *Baxter*, a Court Administration Protocol was appended to each province's Implementation Order, stating that two Administrative Judges would be appointed to work in conjunction with the Supervising Judges from each province to oversee the administration and implementation of the Agreement. The Protocol stated that each Request for Directions brought by a party would be first made to one of the two Administrative Judges, who would then direct it to a Supervising Judge for a hearing if necessary.

22 Supplemented by the applicable class proceedings regime in each affected province and territory, and the inherent jurisdiction of the superior courts, the Approval and Implementation Orders gave the courts broad supervisory and administrative authority in overseeing the application and implementation of the Agreement. This authority was integral to the Agreement's goal of addressing the serious harms caused by Residential Schools and was a fundamental precondition to judicial endorsement. Ongoing judicial supervision was seen to be necessary to ensure that the benefits promised to the claimants — benefits for which they relinquished their litigation rights — were delivered in accordance with the terms of the Agreement (*Baxter*, at paras. 12 and 51).

23 This history demonstrates the foundational link between judicial supervision and the Agreement. The existence of the Agreement was contingent on judicial approval, and judicial approval, in turn, was contingent on ongoing judicial supervision.

24 The Ontario Court of Appeal explained how this ongoing judicial supervision should be exercised in *Fontaine v. Canada (Attorney General)* (2012), 111 O.R. (3d) 461 (Ont. C.A.) (*Schachter*). The decision concerned a legal fee dispute, which came to the courts by way of a Request for Directions. While concluding that judicial review in the administrative law sense was unavailable, the Court of Appeal described the appropriate scope of judicial recourse. Rouleau J.A. acknowledged that adjudicators "cannot ignore" the provisions of the Implementation Orders, and that they must apply the relevant factors in the Agreement. But in his view, "[i]n the perhaps unlikely event that the final decision of the Chief Adjudicator reflects a failure to consider the terms of the [Agreement] and implementation orders ... then, in my view, the parties to the [Agreement] intended that there be some judicial recourse" (para. 53). He found that this judicial recourse was necessary to ensure that the bargain the parties agreed to was respected, a critical consideration given the vulnerability of the claimants. However, he held that judicial recourse was limited to

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"very exceptional circumstances" because the parties intended that the implementation of the Agreement be expeditious and the Agreement aimed to achieve finality.

25 The Ontario Court of Appeal returned to the scope of the courts' supervisory jurisdiction in *Fontaine v. Canada (Attorney General)* (2017), 137 O.R. (3d) 90 (Ont. C.A.), and concluded that the "exceptional circumstances" threshold applied to IAP adjudicative decisions. Writing for the court, Sharpe J.A. held that Supervising Judges should not conduct "a detailed review of the factual findings made by the adjudicator" because that would allow judges to usurp the role of IAP review adjudicators (para. 55). Disagreement with the result reached does not amount to a failure to apply or enforce the Agreement.

26 The British Columbia Court of Appeal also adopted the "exceptional circumstances" threshold in *N.N. v. Canada (Attorney General)* (2018), 6 B.C.L.R. (6th) 335 (B.C. C.A.). In that case, the majority concluded that exceptional circumstances exist if there is a "gap" in the Agreement. The inability of adjudicators to reopen concluded claims in circumstances where there was new, material evidence was one such "gap", and therefore an "exceptional circumstance" warranting judicial intervention.

27 The appellate authorities in Ontario and British Columbia have thus indicated that courts may intervene in relation to IAP adjudications when exceptional circumstances are present, a threshold which is met if there is either a failure to apply the terms of the Agreement, including the Approval and Implementation Orders, or if there is a "gap" in the Agreement.

28 I agree that there are compelling reasons for setting a high bar for judicial intervention in the IAP context. The parties went to significant lengths to make the Agreement a "complete code", with specialized training for adjudicators, levels of internal review, the creation of an IAP Oversight Committee responsible for monitoring the implementation of the IAP and the absence of any provision granting court access in the context of standard track IAP decisions.

29 On the other hand, the necessity of ongoing judicial supervision was recognized when the Agreement was approved, as noted by Winkler R.S.J. in *Baxter*.

30 Without ongoing judicial supervision, the Agreement would not have been recognized. In overseeing the administration and implementation of the Agreement, therefore, courts have a duty to ensure that the claimants receive the benefits they bargained for. The provisions of the Approval and Implementation Orders contemplate ongoing recourse to the courts, with judges supervising the Agreement to ensure that the implementation and administration of the Agreement take place in the way the parties agreed.

31 While the parties do not have a broad right to judicial intervention, they do have a right to the implementation of the terms of the settlement they bargained for. Judicial supervision plays a critical role in ensuring that the claimants receive the benefits that they were promised.

The obligations in the Agreement must be read in light of the Agreement's spirit — to address the "damage inflicted by, or as a result of, [Canada's] long-standing [Residential Schools] policy" (*Baxter*, at para. 2).

Analysis

32 The question in this appeal is when judges, exercising their supervisory role, should intervene in an IAP adjudication. *Schachter* provides a useful starting point — judges should intervene when there is a failure to apply or implement the terms of the Agreement. Unauthorized modifications of the Agreement are encompassed by this threshold. If an adjudicator changes the terms or requirements of the plain language of the Agreement, this will amount to a failure to apply or implement the terms of the Agreement. [1] Courts have a *duty* to ensure that the Agreement is implemented in accordance with the intentions of the parties as reflected in the Agreement's terms. In determining whether an adjudicative decision rises to this threshold, Supervising Judges should be guided by the plain language of the Agreement, viewed in light of its remedial, benefit-conferring objectives.

33 Given the purposes of the Agreement and the ongoing supervisory powers built into the settlement, I do not, with respect, agree with the Manitoba Court of Appeal's decision in this case that so long as the adjudicator *refers* to the relevant sections of the IAP, there is no basis upon which a Supervising Judge can intervene, regardless of *how* these sections are interpreted or applied. Reading "apply" and "implement" so narrowly prevents any *meaningful* judicial supervision of IAP decisions. In light of the purposes of the Agreement, which include achieving "a fair, comprehensive and lasting resolution of the legacy of Indian Residential Schools" and a "promotion of healing, education, truth and reconciliation and commemoration" [2] , such an approach reduces judicial supervision to a search for ensuring that the right section of the IAP is applied, rather than ensuring that the rights promised by the section are being delivered.

34 While finality and expediency are important goals, it is also crucial to recognize that claimants agreed to forfeit their litigation rights by not opting out of the Agreement. Given this trade-off, it is paramount that the agreed-upon terms of the IAP Model are applied and implemented in a way that is consistent with the parties' intentions. The courts' supervisory power must permit intervention when it is necessary to ensure that the benefits promised are delivered.

35 Judges, in short, have an ongoing duty to supervise the administration and implementation of the Agreement, including the IAP. In exercising this supervisory role in the Requests for Directions context, judges can intervene if there has been a failure to apply and implement the terms of the Agreement. In determining whether this failure exists, Supervising Judges will focus on the words of the Agreement, so that the benefits promised to the class members are delivered.

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36 In this case, J.W.'s claim fell under the IAP category "SL1.4", which is defined in the Agreement as:

> Any touching of a student, including touching with an object, by an adult employee or other adult lawfully on the premises which exceeds recognized parental contact and violates the sexual integrity of the student.

37 J.W.'s claim was rejected by the Hearing Adjudicator because, despite the fact that she believed J.W.'s account of what transpired, she was not satisfied on a balance of probabilities that the perpetrator acted with a sexual purpose when committing the act in question. This was fatal to J.W.'s case because IAP adjudicators "must be satisfied in regard to any allegation of sexual abuse that what took place was done for a sexual purpose" (para. 24). In so holding, the Hearing Adjudicator relied on this Court's decision in *R. v. Chase*, [1987] 2 S.C.R. 293 (S.C.C.). Sexual purpose, she held, was a technical requirement of SL1.4.

38 J.W. applied for a review of the Hearing Adjudicator's decision. The Review Adjudicator concluded that the Hearing Adjudicator did not misapply SL1.4 by requiring J.W. to establish the perpetrator's sexual purpose. J.W.'s request for re-review was similarly unsuccessful. The Re-Review Adjudicator held that the Review Adjudicator had not misapplied the IAP Model. Having exhausted his internal remedies, J.W. brought a Request for Directions to the Supervising Judge, Edmond J.

39 The Supervising Judge, Edmond J. described his role in the following terms:

> ... I have the power to review the decision of the Re-Review Adjudicator to determine whether she failed to apply the terms of the [Agreement] and specifically the IAP Compensation Rules. I accept that this is a limited form of curial review, reserved for exceptional cases, and that I must ensure that I do not engage in rewriting the [Agreement] by effectively giving the Requestors a right of appeal and/or review for which they did not bargain. [para. 35]

Edmond J. went on to describe the standard of review for a Request for Directions as "ensuring that the Re-Review Adjudicator did not endorse a legal interpretation that is so unreasonable that it amounts to a failure to properly apply the IAP to the facts of a particular case" (para. 40).

40 Edmond J. found three errors warranting judicial intervention: the Hearing Adjudicator replaced the words "any touching" in SL1.4 with the words "sexual touching"; the Hearing Adjudicator imported a requirement of sexual intent on the part of the perpetrator, contrary to the plain language of SL1.4; and, the Hearing Adjudicator incorrectly interpreted this Court's decision in *Chase* as requiring a sexual purpose as a necessary element of proving an act of sexual abuse.

41 The Hearing Adjudicator described the question before her as "whether or not the incident was *sexual* touching which exceeded recognized parental conduct". As Edmond J. correctly noted, there is no requirement for the impugned touching to be "sexual" in SL1.4. He also properly noted that the formulation relied upon by the Hearing Adjudicator leads to the illogical proposition that there could be sexual touching which does *not* exceed the parameters of recognized parental conduct.

42 I agree with Edmond J. that the Hearing Adjudicator's added requirement of "sexual" touching amounted to an unauthorized amendment to the IAP, and the improper addition of a new threshold in the language of SL1.4. This constituted a failure to apply and implement the Agreement.

43 In describing what J.W. needed to establish in order to demonstrate that the touching violated the sexual integrity of the student, the Hearing Adjudicator also stated that "[i]n this process an adjudicator must be satisfied in regard to any allegations of sexual abuse that what took place was done for a sexual purpose". As Edmond J. observed, nothing in the plain language of SL1.4 indicates that the sexual intent of the perpetrator is relevant and that "[c]learly, and on a simple plain-language analysis, a child's sexual integrity can be violated without a perpetrator having any sexual intent whatsoever" (para. 48).

44 The effect of these two errors is the same: the Hearing Adjudicator's decision constituted an unauthorized modification of SL1.4. By substituting the phrase "any touching" with "sexual touching" and by adding a requirement of sexual intent unsupported by the language of the provision, the Hearing Adjudicator relied on additional requirements that were not agreed to by the parties. The unauthorized modifications of the IAP Model amounted to a failure to apply or implement the terms of the Agreement, warranting judicial supervisory intervention to ensure that the benefits promised in the Agreement were delivered.

45 These errors were compounded by the Hearing Adjudicator's misinterpretation of this Court's decision in *Chase*, the third and final error identified by Edmond J. *Chase* dealt with the meaning of "sexual assault" in the *Criminal Code*, R.S.C. 1985, c. C-46. The Court stated that "[s]exual assault is an assault ... which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated" (p. 302).

46 The facts of *Chase* were as follows. The accused was a neighbour of the complainant, a 15-year-old girl. He entered the complainant's home, where she was playing pool with her 11-year-old brother, grabbed her around her shoulders and arms, and grabbed her breasts. Eventually, the complainant and her brother were able to call another neighbour for help.

47 The accused was convicted of sexual assault in Provincial Court. His appeal to the Court of Appeal of New Brunswick was dismissed, but a conviction of common assault was substituted for the sexual assault conviction. In making this substitution, the Court of Appeal held that the

word "sexual" in sexual assault should be understood as referring to specific parts of the body — genitalia in particular. Body parts with "secondary sexual characteristics" — like breasts — were not encompassed by this definition.

48 McIntyre J., writing for this Court, rejected the view that sexual assault was confined to "contact with specific areas of the human anatomy" and concluded that the test for sexual assault should be objective:

> Applying these principles and the authorities cited, I would make the following observations. Sexual assault is an assault within any one of the definitions of that concept in s. 244(1) of the *Criminal Code* which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. *The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one*: "Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer" (*Taylor*, *supra*, *per* Laycraft C.J.A., at p. 269). The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant (see S. J. Usprich, "A New Crime in Old Battles: Definitional Problems with Sexual Assault" (1987), 29 *Crim. L.Q.* 200, at p. 204.) The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence, it may be a factor in determining whether the conduct is sexual. It must be emphasized, however, that the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances. [Emphasis added; p. 302.]

49 Applied to the facts of the case, McIntyre J. concluded that there was ample evidence upon which the trial judge could have concluded that a sexual assault was committed: "[v]iewed objectively in light of all the circumstances, it is clear that the conduct of [Mr. Chase] in grabbing the complainant's breasts constituted an assault of a sexual nature" (p. 303).

50 *Chase*, therefore, stands for the proposition that the sexual nature of the assault is determined *objectively*. The Crown is not required to prove the accused had any *mens rea* with respect to the sexual nature of his or her behaviour (see also *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 (S.C.C.), at para. 25, per Major J.). The Hearing Adjudicator in J.W.'s case, however, improperly interpreted *Chase* as requiring the complainant to prove sexual intent. She relied upon *Chase* to read in a *mens rea* requirement that does not exist in either *Chase* or in the SL1.4 category of the IAP.

51 I agree with Edmond J. that case law may be helpful, but it is the plain language of the Agreement that must guide an adjudicator's reasoning process. Case law cannot be used to modify the language of the IAP, as the Hearing Adjudicator did in this case. The Hearing Adjudicator's

inaccurate interpretation of *Chase* thereby contributed to an unauthorized modification of the IAP Model. As former Chief Adjudicator Ish rightly concluded in another IAP adjudication review decision, "there is no requirement in the IAP that the actor possessed a sexual intent before liability can be found for a sexual assault".

52 The Agreement was entered into to address the abuses caused by the Residential Schools system and the courts' ongoing supervision of the settlement must allow judges to intervene where necessary so as to ensure that the benefits promised by the settlement are actually delivered. In my view, Edmond J. properly identified a failure to apply the IAP Model in the adjudication of J.W.'s claim. These failures were confirmed on review and re-review. In intervening, Edmond J. did not usurp the role assigned to IAP adjudicators by re-weighing factual findings. Instead, in the face of a failure to apply the terms of the Agreement as agreed to by the parties, he intervened, remitting J.W.'s claim for re-adjudication. As such, I respectfully disagree that recourse to a "gap" in the Agreement is necessary in this case. Rather, judicial intervention was necessary in the face of an unauthorized modification of the Agreement, contrary to the intentions of the parties.

53 The nun's conduct in touching J.W.'s genitals not only objectively "violates the sexual integrity of the student", contrary to the definition of sexual abuse in category SL1.4 of the Agreement, it "exceeds recognized parental contact". J.W.'s claim is therefore compensable within the meaning of SL1.4. This is the only tenable conclusion in light of the factual findings made by the Hearing Adjudicator. I note that the same conclusion was reached by a Reconsideration Adjudicator who re-heard — and allowed — J.W.'s claim before the Manitoba Court of Appeal's decision was made.

54 J.W.'s is precisely the type of compensable claim contemplated by the parties to the Agreement. Failure to correct the Hearing Adjudicator's interpretation in this case would unacceptably undermine the whole purpose of the Agreement.

55 I would allow the appeal with costs and reinstate the decision of the Reconsideration Adjudicator allowing J.W.'s claim, plus interest.

Côté J. **(Moldaver J. concurring):**

I. Introduction

56 Between the 1860s and the 1990s, more than 150,000 First Nations, Inuit and Métis children attended Indian Residential Schools operated by religious organizations and funded by the Government of Canada. As Canada acknowledged in its official apology, this system was intended to "remove and isolate children from the influence of their homes, families, traditions and cultures" ("Statement of Apology to former students of Indian Residential Schools" of the Right Honourable Stephen Harper on behalf of Canada, June 11, 2008 (online)). Thousands of these children experienced physical, emotional, and sexual abuse while at residential schools (*Canada*

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(Attorney General) v. Fontaine, 2017 SCC 47, [2017] 2 S.C.R. 205 (S.C.C.) ("*SCC Records Decision*"), at para. 1).

57 The *Indian Residential Schools Settlement Agreement* ("IRSSA")[3] was signed on May 8, 2006. It settled numerous class actions brought by former students against the Government of Canada and various religious organizations for the harms suffered at residential schools. Its purpose was to achieve a "fair, comprehensive and lasting resolution of the legacy of Indian Residential Schools" (IRSSA, preamble). In 2006 and 2007, the IRSSA was approved by courts in nine provinces and territories, which issued Approval and Implementation Orders providing for ongoing court supervision of its implementation and administration.

58 The IRSSA is a multifaceted agreement. In addition to provisions intended to further healing, education, and reconciliation, it includes an Independent Assessment Process ("IAP") to settle individual claims through specialized adjudication that takes place outside of the court system. Although the IAP Model contains an internal review mechanism, it does not provide a right of appeal to the courts from the decisions of IAP adjudicators.

59 This appeal concerns the ability of the courts to review final decisions of adjudicators under the IAP Model. J.W.'s claim was denied by the initial IAP Hearing Adjudicator, and that decision was upheld at two levels of internal review. However, the supervising judge tasked with responding to a Request for Direction ("RFD") arising from the IAP decision on J.W.'s claim disagreed with the adjudicators' conclusions, substituted his own interpretation of the IAP Model, and remitted the matter to a first-level adjudicator for reconsideration. The Manitoba Court of Appeal overturned that decision, finding that judicial review of IAP decisions is not available and that recourse to the supervising courts is available only where there has been a failure to apply the terms of the IAP Model. J.W. and his counsel (collectively the "appellants") now appeal that result to this Court. They are asking this Court to find that decisions of IAP adjudicators are subject to judicial review pursuant to the principles of administrative law. In the alternative, they submit that the courts' supervisory power over the implementation of the IRSSA includes the jurisdiction to review IAP decisions, and that this jurisdiction extends to the interpretation of the IAP.

60 I would allow the appeal and reinstate the supervising judge's order remitting J.W.'s claim for reconsideration (and I would reinstate the Reconsideration Adjudicator's decision allowing J.W.'s claim and awarding him compensation), but for reasons that differ from those relied upon by the supervising judge. Indeed, I disagree with the supervising judge's decision to substitute his own interpretation of the IAP Model for that of the IAP adjudicators, and I would therefore endorse the Manitoba Court of Appeal's approach in limiting the scope of judicial recourse in respect of IAP decisions. While the courts' supervisory jurisdiction over the implementation of the IRSSA requires them to ensure that IAP adjudicators make decisions in accordance with the terms of the IAP, the parties clearly intended the interpretation of those terms to fall within the

adjudicators' exclusive jurisdiction. Judges cannot take on the role the parties have assigned to those adjudicators.

61 This case involves a unique situation for which the IRSSA makes no provision. The Chief Adjudicator, Indian Residential Schools Adjudication Secretariat ("Chief Adjudicator"), concedes that J.W.'s claim was wrongly decided and that the decisions made by the adjudicators in this case are "aberrant". Despite the fact that the Chief Adjudicator represents the final level of review under the IAP scheme, he is unable to reopen the claim himself and fulfill his role under the IRSSA of ensuring consistency in the application of the IAP. It is therefore appropriate for this Court to step in, not to provide its own interpretation of the IAP Model, but to fill this procedural gap and ensure a fair outcome for J.W. that is in keeping with the purpose of the IRSSA.

II. Context

A. Overview of the IRSSA

(1) Indian Residential Schools Settlement Agreement

62 The IRSSA provides for two compensation schemes: the Common Experience Payment ("CEP") and the Independent Assessment Process. The CEP is a compensatory payment available to all eligible former students based on the number of years they attended an Indian Residential School ("IRS"). Compensation under the CEP process does not require proof of physical, sexual, or emotional harm (IRSSA, art. 5). The IAP, by contrast, is an adjudicative process created to resolve "continuing claims" for serious proven physical or sexual abuse, or other wrongful acts committed against individual students of an IRS (IRSSA, art. 6 and Sch. D; R.F. (Attorney General), at para. 9).

(2) Independent Assessment Process

63 Schedule D of the IRSSA sets out the IAP Model. There are three categories of compensable continuing claims under the IAP: (1) sexual and physical assaults committed by adult employees of the government or a church entity that operated the residential school or other adults lawfully on school premises; (2) sexual or physical assaults committed by one student against another on school premises; and (3) any other wrongful act or acts committed by adult employees or other adults lawfully on school premises (Sch. D, art. I). Continuing claims are dealt with in detail in the IAP's Compensation Rules (art. II) and Instructions for Adjudicators (App. IX). Adjudicators are bound by the standards for compensable wrongs and for the assessment of compensation defined for the IAP (art. III). SL1.4, the provision under which J.W. brought his claim, is the first level of sexual assault under the IAP compensatory structure (art. II).

64 IAP claims can proceed within either the standard track or the complex issues track, and all claimants are entitled to a hearing before a specially trained adjudicator (art. III(n) and (s); see

also App. V). The hearing takes place in a location of the claimant's choice, and costs are paid so that the claimant can bring a support person. Counselling services are available, and cultural ceremonies are incorporated at the claimant's request (art. III(c)). These features, among others, distinguish the IAP adjudication process from a court hearing.

65 In *Fontaine v. Canada (Attorney General)*, 2016 BCSC 2218, [2017] 1 C.N.L.R. 104 (B.C. S.C.) ("*Bundled RFD*"), at para. 11, Brown J., the supervising judge for British Columbia, aptly described the IAP as: "(a) a post-litigation claims assessment process, (b) a contractual component of the IRSSA, arising from the parties' negotiations, and (c) a closed adjudicative process, operating under the purview of independent adjudicators without any rights of appeal or judicial review".

(3) Role of IAP Adjudicators

66 The IAP is intended to be an inquisitorial process, requiring adjudicators to manage the hearing, draw out and test the evidence of witnesses, caucus with the parties on proposed lines of questioning, and make any factual and legal findings necessary to resolve the claim. Only adjudicators can ask claimants questions and test evidence where necessary (art. III(e)). They are empowered to make binding findings on credibility, determine whether a claim has been proven, and award compensation where appropriate (art. III(a)). The IAP Model sets out in detail the procedures to be followed by adjudicators, claimants, and counsel (art. III(e) to (g)). Adjudicators are required to render a decision within 30 days for standard track hearings and within 45 days for complex track hearings. The decision must have a specific format, which is set out in App. XII of Sch. D; in particular, it must outline key factual findings and provide a rationale for the adjudicator's findings and for the compensation assessed, if any (Sch. D., art. III).

67 Adjudicators are chosen by the unanimous agreement of a selection board appointed by the IAP Oversight Committee and composed of one representative of each of former students, plaintiffs' counsel, church entities and government (App. XIII). Recognizing that the role of adjudicator requires a unique combination of skills, the parties to the IRSSA agreed that all adjudicators must have a law degree or a combination of related training and significant experience, knowledge of and sensitivity to Aboriginal culture and history, and sexual and physical abuse issues, the ability to work with staff and participants from diverse backgrounds, knowledge of personal injury law and damages assessment, as well as a variety of competencies generally required of decision makers in adjudicative and administrative contexts (App. V; *Bundled RFD*, at para. 17). Adjudicators receive training approved by the IAP Oversight Committee and ongoing mentoring by the Chief Adjudicator and other senior adjudicators (Sch. D., art. III(s); R.F. (Chief Adjudicator), at para. 22).

68 In addressing matters arising from the IAP, supervising and appellate courts have commented extensively on the expertise of IAP adjudicators. As the Ontario Court of Appeal observed in

Fontaine v. Canada (Attorney General), 2016 ONCA 241, 130 O.R. (3d) 1 (Ont. C.A.), at p. 15, "[a]djudicators are specially trained to conduct the hearing in a way that is respectful to the claimant and conducive to obtaining a full description of his or her experience". In *Fontaine v. Canada (Attorney General)*, 2012 ONCA 471, 111 O.R. (3d) 461 (Ont. C.A.), ("*Schachter*"), the Ontario Court of Appeal recognized the Chief Adjudicator's "broad discretion" and "relative expertise" in overseeing the IAP (paras. 54 and 78). Brown J. held in *Bundled RFD* that the IAP creates "exclusive jurisdiction for independent adjudicators to manage IAP hearings, find facts, and assess IAP claims, which in turn fosters their considerable expertise" (para. 20). I would agree with Perell J., the Eastern Administrative Judge, that "[u]nder the IRSSA, the adjudicators are — as their name suggests — exercising a judicial function in accordance with the terms of the IRSSA" (*Fontaine v. Canada (Attorney General)*, 2014 ONSC 4024, [2014] 4 C.N.L.R. 67 (Ont. S.C.J.), at para. 15).

(4) Internal Review of IAP Decisions

69 Schedule D of the IRSSA provides that a party who is dissatisfied with an IAP adjudicator's decision is entitled to a review on two grounds (see art. III(1)). First, the party may seek a review on the basis that the IAP adjudicator's decision contains a palpable and overriding error. While claimants may seek a review on this ground in respect of decisions made in either the standard track or the complex issues track, defendants may seek such a review only in respect of those made in the complex issues track. Second, any party may ask the Chief Adjudicator or his designate to determine whether an adjudicator's decision (in either track) properly applied the IAP Model.

70 A second level of review ("re-review") is also available on the latter ground and is to be conducted by the Chief Adjudicator or his designate. The adjudicators who conduct this type of review are designated and approved by the IAP Oversight Committee, on the recommendation of the Chief Adjudicator, "to exercise the Chief Adjudicator's review authority" (Sch. D., art. III(r)(iii)). All such reviews are conducted on the record and without oral submissions (art. III; R.F. (Chief Adjudicator), at paras. 27-30).

71 Neither Sch. D nor any other part of the IRSSA provides for an appeal to the courts from IAP decisions. This is in contrast with certain provisions of the IRSSA that specifically contemplate access to the courts:

- Article 4.11 provides for the creation and mandate of the National Administration Committee ("NAC"):
  - in the event of any dispute related to the appointment or service of a member of the NAC, the affected group or individual may apply to a supervising court for directions (art. 4.11(6);
  - in the event that a majority of five members of the NAC cannot be reached to resolve a dispute, the dispute may be referred by the NAC to a supervising court (art. 4.11(9));

• the NAC may refer references from the Truth and Reconciliation Commission ("TRC") to a supervising court for a determination (art. 4.11(12)(j));

• the NAC must apply to one of the supervising courts for a determination with respect to a refusal to add an institution as set out in art. 12.01 (arts. 4.11(12)(l) and 12.01);

• the NAC must apply to the supervising courts for orders modifying the IAP as set out in art. 6.03(3) (arts. 4.11(12)(q) and 6.03(3)); and

• where there is a disagreement between the Trustee under the IRSSA and the NAC with respect to the terms of the Approval Orders, the NAC or the Trustee may refer the dispute to a supervising court (art. 4.11(13)).

• Article 5.09 provides for the appeal procedure for CEP applications:

• in the event that the NAC denies an appeal from a decision on a CEP application, the applicant may apply to a supervising court for a determination (art. 5.09(2)); and

• in exceptional circumstances, the NAC may apply to a supervising court for an order that the costs of an appeal be borne by Canada (art. 5.09(3)).

• Article 6.03 deals with the resources to be provided to the IAP:

• in the event that continuing claims are not processed within the timeframes set out in art. 6.03(1), the NAC may apply to the supervising courts for the necessary orders to meet those timeframes (art. 6.03(3)).

• Article 7.01 pertains to truth and reconciliation:

• where the NAC makes a decision on a dispute arising in respect of the TRC, either or both the implicated church organization and Canada may apply to a supervising court for a hearing *de novo* (art. 7.01(3)).

• Article 13.08 pertains to legal fees:

• in the event of a disagreement as to disbursement amounts, the Federal Representative must refer the matter to a supervising court (art. 13.08(4)).

72 Clearly, the parties did intend that there be access to the courts in specific circumstances. It is particularly noteworthy that the IRSSA provides for appeals from determinations made on CEP applications, but not from decisions under the IAP Model.

73 The IRSSA does, however, permit IAP claimants to have their claims resolved by the courts in limited circumstances. The IAP Model provides as follows:

> At the request of a Claimant, access to the courts to resolve a continuing claim may be granted by the Chief Adjudicator where he or she is satisfied that:
>
> • there is sufficient evidence that the claim is one where the actual income loss or consequential loss of opportunity may exceed the maximum permitted by this IAP;
>
> • there is sufficient evidence that the Claimant suffered catastrophic physical harms such that compensation available through the courts may exceed the maximum permitted by this IAP; or,
>
> • in an other wrongful act claim, the evidence required to address the alleged harms is so complex and extensive that recourse to the courts is the more appropriate procedural approach.
>
> In such cases, the Approval Orders will exempt the continuing claims from the deemed release, and thereafter the matter shall be addressed by the courts according to their own standards, rules and processes.
>
> (Sch. D, art. III(b)(iii))

74 It is important to note that this provision of the IRSSA does not allow the courts to intervene in decisions of IAP adjudicators. Rather, a claimant may opt to have his or her claim resolved by the courts *instead of* through the IAP adjudication process where the claim is particularly complex or merits compensation exceeding the maximum permitted by the IAP.

75 In sum, the IAP creates a closed process for the determination of claims, with one in-person hearing and two levels of internal review (*Bundled RFD*, at para. 23; *N.N. v. Canada (Attorney General)*, 2018 BCCA 105, 6 B.C.L.R. (6th) 335 (B.C. C.A.), at para. 78; *Fontaine v. Canada (Attorney General)*, 2017 ONCA 26, 137 O.R. (3d) 90 (Ont. C.A.), ("*Spanish IRS C.A.*"), at para. 53).

(5) Oversight of the IAP

76 While the parties to the IRSSA did not provide for appeals from IAP decisions to the supervising courts, they did agree that guidance on the interpretation and application of the IAP Model can be provided by the parties themselves through the IAP Oversight Committee (R.F. (Chief Adjudicator), at para. 32). The Committee is established under Sch. D and consists of a chairperson and eight other members, including former students (designated by the Assembly of First Nations and the Inuit Representatives), plaintiffs' counsel, church entities, and government. The Committee considers proposed instructions provided by the Chief Adjudicator, prepares its own instructions, monitors the implementation of the IAP, and makes recommendations to the

594 NAC on changes to the IAP as necessary. Instructions are subject to approval by the NAC prior to publication (IRSSA, art. 1.01; Sch. D, art. III(r)).

77 The Chief Adjudicator is also tasked with overseeing the administration of the IAP. He is appointed by the IAP Oversight Committee, and the appointment is approved by court order. The full list of the Chief Adjudicator's duties can be found in art. III(s) of Sch. D and includes assisting in the selection of adjudicators, ensuring consistency among IAP decisions by implementing training programs and administrative measures, and preparing proposed instructions for consideration by the IAP Oversight Committee to better give effect to the provisions of the IAP (art. III(s)). The Chief Adjudicator possesses broad discretion and "relative expertise" under the IAP Model and is monitored and guided by the IAP Oversight Committee (*Schachter*, at paras. 54 and 78; *Bundled RFD*, at para. 19; *N.N.*, at para. 81).

(6) Current Status of the IAP

78 As of October 31, 2018, 26,669 IAP hearings had been held, or 99.95 percent of all anticipated hearings. Of the more than 38,000 claims filed, 99 percent had been resolved. There were still 199 claims in progress, with 36 hearings scheduled for a later date, 1 hearing remaining to be scheduled, 34 claims expected to be resolved through other means and 128 claims awaiting decision. Over $3.1 billion had been paid to successful claimants, and close to 90 percent of IAP claims that had gone to hearing or been settled had resulted in an award in favour of the claimant (Indian Residential Schools Adjudication Secretariat, *Independent Assessment Process (IAP) Statistics* (online)).

(7) Role of the Supervising Courts

79 In December 2006, courts in nine provinces and territories concurrently issued reasons to certify a single national class action arising out of the residential schools system and to approve the IRSSA as a proposed settlement. The provincial and territorial superior court judges who certified the class action were designated as supervising judges. In 2007, Approval and Implementation Orders were entered in each of the nine supervising courts to give effect to the settlement (A.R., vol. I, at pp. 85-97 ("Schulman Approval Order"); A.R., vol. I, at pp. 98-107 ("Schulman Implementation Order")). The Approval Orders incorporate by reference the terms of the IRSSA and provide that the applicable provincial and territorial class proceedings law shall apply to the supervision, operation, and implementation of the IRSSA. They further provide that the courts will supervise the implementation of the IRSSA and "may issue such orders as are necessary to implement and enforce the provisions of the Agreement and this judgment" (Schulman Approval Order, at para. 13). The Implementation Orders incorporate a Court Administration Protocol, under which an RFD may be made to a supervising court in respect of the implementation, administration, or amendment of the IRSSA or the implementation of the orders (Schulman Implementation Order, Sch. A).

80 As this Court held in *SCC Records Decision*, the broad powers of supervising judges are both administrative and supervisory in nature and are supported by class action legislation, which provides the courts with "generous discretion to make orders and impose terms as necessary to ensure a fair and expeditious resolution of class actions" (paras. 31-32).

B. Facts

81 The facts that gave rise to J.W.'s claim are not contested. In 2014, J.W. applied for compensation pursuant to the IAP, alleging that when he was a student at an IRS, a nun had touched his genitals over his clothing while he was waiting in line to take a shower. He argued that this incident fell within category SL1.4 of the IAP, which provides compensation for harm caused by:

> Any touching of a student, including touching with an object, by an adult employee or other adult lawfully on the premises which exceeds recognized parental contact and violates the sexual integrity of the student.
>
> (Sch. D, art. II)

III. IAP Adjudication and Judicial History

A. Decision of the Hearing Adjudicator

82 J.W.'s claim was heard on May 26, 2014, and the Hearing Adjudicator rendered her decision on April 7, 2015. While she accepted J.W.'s testimony and found that the incident had happened as described, she denied the claim as she was not satisfied on a balance of probabilities that the nun had acted with a "sexual purpose" when committing the act in question (A.R., vol. I, at p. 4). She found that IAP adjudicators "must be satisfied in regard to any allegations of sexual abuse that what took place was done for a sexual purpose" (*ibid.*), relying on *R. v. Chase*, [1987] 2 S.C.R. 293 (S.C.C.). In that case, which involved an accused charged with sexual assault for grabbing a girl's breasts, this Court identified the following factors to consider in determining whether the impugned conduct has the requisite sexual nature:

> Sexual assault is an assault ... which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: "Viewed in the light of all of the circumstances, is the sexual or carnal context of assault visible to a reasonable observer". The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force would be relevant. [Emphasis added; pp. 293-94.]

83 In applying *Chase*, the Hearing Adjudicator acknowledged that the penis is a sexual organ but was not satisfied on a balance of probabilities that there was a sexual purpose associated with the nun's conduct, given the context in which the touching had occurred and J.W.'s failure to point to any evidence or circumstance to suggest such a purpose (A.R., vol. I, at pp. 4-5). Ultimately, she interpreted SL1.4 as including sexual purpose as one of its "technical requirements" and found that J.W. had not met the burden of proof in this regard (p. 5).

B. Decision of the Review Adjudicator

84 The appellants applied for a review of the Hearing Adjudicator's decision. In a decision dated July 5, 2015, the Review Adjudicator concluded that the Hearing Adjudicator had not misapplied the IAP by requiring J.W. to prove sexual purpose and that the decision therefore fell within a range of reasonable outcomes (A.R., vol. I, at p. 11). In his analysis, the Review Adjudicator purported to apply the decision rendered by former Chief Adjudicator Ish in another similar IAP claim, which I shall refer to as the "B" decision and which is considered to be a seminal decision in the IAP context (Transcript, at pp. 74, 76 and 82). In applying that decision, the Review Adjudicator stated that "the former Chief Adjudicator determined that both of these categories of SL1 abuse require an objective analysis of the effect on the victim ... *and* an objective analysis of the intent of the actor to commit a sexual assault" (A.R., vol. I, at p. 9 (emphasis in original)). Viewing the claim through this lens, the Review Adjudicator found that the Hearing Adjudicator had properly applied the *Chase* factors and had not misapplied the IAP Model by evaluating the perpetrator's sexual motivation or lack thereof (p. 10).

C. Decision of the Re-Review Adjudicator

85 The appellants sought a review of the Review Adjudicator's decision. On November 22, 2015, the Re-Review Adjudicator upheld the review decision, finding that the Review Adjudicator had conducted his review correctly and had not misapplied the IAP Model (A.R., vol. I, at p. 18). She found that the Review Adjudicator had properly considered the question of whether sexual purpose should be taken into consideration when assessing claims under SL1.4: "[t]he Reviewing Adjudicator correctly noted that former Chief Adjudicator Ish found that both the first and fourth categories of SL1 abuse require an objective analysis of the effect of the touching upon the victim and as well as an objective analysis of the intent of the perpetrator" (p. 16 (footnote omitted)). She ultimately found no fault with the Review Adjudicator's application of the IAP Model, concluding that he had completed a "thorough and thoughtful review" of the Hearing Adjudicator's decision (p. 18).

D. Manitoba Court of Queen's Bench (Edmond J.), 2016 MBQB 159, [2016] 4 C.N.L.R. 23 (Man. Q.B.)

86 The appellants subsequently filed an RFD with the Manitoba supervising court under the IRSSA Court Administration Protocol, taking the position that "J.W. was wrongly denied compensation in the IAP as a result of the failure of adjudicators in the IAP to enforce the provisions of the [IRSSA]" (A.R., vol. II, at p. 2).

87 Faced with the appellants' RFD, Edmond J., the supervising judge for Manitoba, observed that his ongoing supervisory jurisdiction over IAP adjudication decisions was based on: (1) the inherent jurisdiction of a superior court; (2) Manitoba's class proceedings legislation; (3) the Manitoba Court of Queen's Bench's Approval Order and Implementation Order of March 2007; and (4) the express terms of the IRSSA itself (Man. Q.B. Reasons, at para. 25). Edmond J. also accepted that the principles laid down by the Ontario Court of Appeal in *Schachter* were the starting point in considering the jurisdiction of the courts to review decisions of re-review adjudicators under the IAP.

88 After discussing *Schachter* and subsequent jurisprudence dealing with the scope of the review powers afforded to supervising courts, Edmond J. concluded that IAP adjudicators "have a duty to enforce the terms of the IRSSA and in doing so, they do not have jurisdiction to apply an unreasonable interpretation to the terms of the IRSSA in determining whether a compensable claim has been made out" (para. 33). He considered *Fontaine v. Canada (Attorney General)*, 2014 MBQB 200, 311 Man. R. (2d) 15 (Man. Q.B.), *Fontaine v. Canada (Attorney General)*, 2015 ABQB 225, [2015] 4 C.N.L.R. 69 (Alta. Q.B.), and *Fontaine v. Canada (Attorney General)*, 2016 ONSC 4326, [2016] 4 C.N.L.R. 40 (Ont. S.C.J.) ("*Spanish IRS S.C.*"), and came to the following conclusion regarding his jurisdiction to review IAP decisions (at para. 35):

> ... I have the power to review the decision of the Re-Review Adjudicator to determine whether she failed to apply the terms of the IRSSA and specifically the IAP Compensation Rules. I accept that this is a limited form of curial review, reserved for exceptional cases, and that I must ensure that I do not engage in rewriting the IRSSA by effectively giving the Requestors a right of appeal and/or review for which they did not bargain.

89 Edmond J. identified the standard of review on an RFD concerning an IAP decision as "ensuring that the Re-Review Adjudicator did not endorse a legal interpretation that is so unreasonable that it amounts to a failure to properly apply the IAP to the facts of a particular case" (para. 40). In applying this standard, Edmond J. determined that, in this case, "the fact finding process used by the Adjudicator involved a failure to apply the IRSSA's terms and those of the IAP" and that thereafter there had been "a failure to correct that non-compliance through review or re-review" (para. 42). In his view, the Hearing Adjudicator's interpretation of the compensable sexual abuse provision in the IRSSA was "fundamentally inconsistent" with the plain language of the provision and with the general criminal law jurisprudence regarding sexual assault, and the Review Adjudicator and Re-Review Adjudicator had erred in upholding that interpretation. Thus,

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Edmond J. found that the interpretation was "simply not reasonable", for three reasons (para. 44). First, the Hearing Adjudicator had replaced the words "any touching" in SL1.4 with the words "sexual touching", which was not a reasonable formulation of the test to be applied (para. 45). Second, she had imported a requirement of sexual purpose on the part of the perpetrator, contrary to the plain language of SL1.4 (para. 46). Finally, she had incorrectly interpreted *Chase* as requiring a sexual purpose as a necessary element of proving an act of sexual abuse (para. 47).

90 As a result, Edmond J. ordered that J.W.'s claim be sent back to a first-level IAP adjudicator for reconsideration.

E. Decision of the Reconsideration Adjudicator

91 On September 30, 2016, the Reconsideration Adjudicator decided in J.W.'s favour (A.R., vol. II, at pp. 143-61). In evaluating J.W.'s claim, she relied on the decision rendered by Adjudicator Ross in File No. T-12783, a claim involving similar facts. She stated the following, at para. 46:

> ... [Adjudicator Ross] correctly pointed out that in *Chase*, the test was determined to be an objective one which considers general intent. That is, while a perpetrator's sexual gratification may be taken into account, neither carnal intent or sexual gratification are necessary criteria in order to prove the sexual assault ...

92 The Reconsideration Adjudicator also referred to Chief Adjudicator Ish's "B" decision mentioned earlier, particularly his conclusion that "both fondling and violation of sexual integrity categories of SL1 are measured on an objective basis and may not rely on the subjective feelings of the claimant or the subjective intent of the perpetrator" (A.R., vol. II, at p. 153, fn. 12). After considering the *Chase* factors and the analysis conducted by Adjudicator Ross in her decision in File No. T-12783 (including her reliance on Chief Adjudicator Ish's decision), the Reconsideration Adjudicator found that J.W. had proven on a balance of probabilities that the requirements of SL1.4 had been met, and awarded him $12,720 in compensation (p. 161).

93 Before the reconsideration decision was implemented, the Attorney General of Canada ("Attorney General") appealed the supervising judge's decision to the Manitoba Court of Appeal, and obtained an order from the supervising judge staying the original order sending J.W.'s claim back for reconsideration (A.R., vol. II, at p. 162).

F. Manitoba Court of Appeal (Monnin, Beard and leMaistre JJ.A.), 2017 MBCA 54, 413 D.L.R. (4th) 521 (Man. C.A.)

94 The Manitoba Court of Appeal unanimously allowed the Attorney General's appeal on the basis that the supervising judge had exceeded his jurisdiction under the IRSSA. Beard J.A. began by noting that the issue of the supervising judge's jurisdiction over J.W.'s RFD was a question of law to be reviewed on a correctness standard (para. 24). She endorsed the approach taken in

Schachter and affirmed that there is no right to appeal or to seek judicial review of IAP decisions. Judicial recourse in relation to the IAP is available only in "very exceptional circumstances" (paras. 36-37). She emphasized the distinction between failure to apply the terms of the IRSSA or the Implementation Orders, on the one hand, and the incorrect or unreasonable interpretation or application of those terms, on the other (para. 42). Only the former falls within those "very limited circumstances in which a party can have recourse to the courts" (*ibid.*).

95 Beard J.A. went on to find that a supervising judge is not entitled to assume the role of a review adjudicator (para. 43). The mere fact that a supervising judge disagrees with an adjudicator's decision does not mean that the adjudicator failed to enforce the IRSSA or apply the IAP Model, and as such does not allow the judge to intervene. This reasoning applies regardless of whether there is disagreement with an adjudicator's findings of fact, interpretation of the terms of the IAP or application of those terms to the facts (*ibid.*). Overall, Beard J.A. agreed with the Attorney General's position that the IRSSA is a "complete code" that "limits access to the courts", with no right of appeal or judicial review of any re-review adjudication decision (para. 48).

96 Applying these principles to J.W.'s claim, Beard J.A. held that the supervising judge in the present case had erred in modifying the scope of the courts' jurisdiction as set out in *Schachter* by finding that he had jurisdiction to consider whether the Hearing Adjudicator had erred in her interpretation of the terms of the IAP. While adjudicators cannot refuse or fail to apply the terms of the IRSSA, they are entitled to interpret those terms, which is part of their adjudicative role. Interpreting those terms, "even if unreasonably, does not constitute a failure to consider the IRSSA and the IAP model within the [*Schachter*] parameters of jurisdiction" (para. 51). The supervising judge had erred in carrying out the same function that would be carried out on an appeal from an IAP decision and in focusing on the adjudicator's interpretation of the IAP rather than on whether the adjudicator had considered the correct terms (paras. 52-53). His interpretation of the supervising courts' jurisdiction would make judicial intervention available in many, rather than limited or exceptional, cases. Moreover, such an approach would undermine the IRSSA's objective of ensuring the timely resolution of disputes (para. 62).

97 Beard J.A. found that the supervising judge's jurisdiction was limited to determining whether the Hearing Adjudicator had implemented the provisions of the IAP in the narrow sense of determining whether she had considered the correct terms. Once it was determined that the Hearing Adjudicator had considered category SL1.4, Edmond J.'s jurisdiction ended and he should have dismissed the RFD (para. 72). As a result, his order was set aside and the Re-Review Adjudicator's decision was reinstated (A.R., vol. I, at p. 83).

IV. Issues

98 While the appellants have raised several interrelated questions, the appeal ultimately turns on the following two issues:

1. Is judicial review of the decisions of IAP adjudicators available?

2. If judicial review is not available, what is the scope of the judicial recourse available to parties seeking intervention by the supervising courts in decisions rendered under the IAP?

V. Analysis

99 To be clear, I would emphasize that there is a distinction between the availability of judicial *review* based on the principles of administrative law and the availability of judicial *recourse* as a result of the courts' ongoing supervisory jurisdiction over the implementation and administration of the IRSSA.

A. Availability of Judicial Review

100 The appellants submit that the availability of judicial review of IAP decisions is grounded in the court orders approving the IRSSA, the class proceedings statutes applicable to the IRSSA, and the inherent jurisdiction of the superior courts. In my view, these arguments misapprehend the nature of judicial review. I would therefore agree with the respondents, the Attorney General and the Chief Adjudicator, that judicial review under an administrative law analysis is not applicable to IAP decisions.

101 Judicial review is the means by which the courts "supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), at para. 28). This Court recently set out the factors to be applied in determining the availability of judicial review in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750 (S.C.C.). As the purpose of judicial review is to ensure the legality of state decision making, it is available only where there is "an exercise of state authority" that is "of a sufficiently public character" (para. 14).

102 The appellants submit that the IAP is a creature of statute (namely provincial class proceedings legislation), agreement and court order (A.F., at paras. 33-35). Respectfully, I disagree. As this Court found in *SCC Records Decision*, the IRSSA is, at its root, a contract (para. 35). It was not created by any act of the executive or the legislature, but is a contractual settlement of private law tort claims, to which effect has been given by court orders. IAP adjudicators exercise powers granted by contract and have no statutory authority. Their appointment and functions are determined by the parties to the contract, and they apply the Compensation Rules agreed to by the parties. The Chief Adjudicator's authority derives from the parties' agreement, and he does not exercise any statutory decision-making power or any power granted by the executive. The distinct roles of the courts and IAP adjudicators under the IRSSA are determined not by the division between the legislative or executive and judicial branches, but rather by the intentions of the parties (R.F. (Chief Adjudicator), at paras. 53, 60 and 62).

103 The appellants err in suggesting that the courts' supervisory powers include an obligation to ensure that class members receive the promised benefits of the IRSSA and that this entitles the courts to judicially review IAP decisions (A.F., at paras. 41-44). This argument misconstrues the benefits that the parties intended the IRSSA to confer. What the IRSSA and the Implementation Orders promise to individual claimants is "a contractual right to have compensable claims adjudicated under the negotiated IAP" (*N.N.*, at para. 83). The courts' general supervisory jurisdiction allows them to ensure that this contractual commitment is fulfilled, but this does not mean that IAP adjudicators are state actors (R.F. (Chief Adjudicator), at para. 65; R.F. (Attorney General), at para. 86).

104 As the Chief Adjudicator points out in his written submissions, this analysis does not change just because Canada is one of the parties to the IRSSA. If Canada's participation as a contracting party were enough to trigger judicial review, then any arbitration decision involving Canada would be equally subject to judicial review. The availability of judicial review depends on the *source* of the decision maker's authority, not the *identity* of the parties (R.F. (Chief Adjudicator), at para. 61). In this case, the IAP adjudicators' authority was conferred on them by the parties to the IRSSA, not by an act of the legislature or the exercise of prerogative powers.

105 Moreover, the fact that the contract was approved by court order does not transform the operation of this private settlement into a public act. Rather, the settlement is the result of lengthy and complex negotiations between private parties, and as the Manitoba Court of Appeal observed in this case, it encompasses "a compensation package that is beyond the jurisdiction of any court to create" (Man. C.A. Reasons, at para. 60). Further, and contrary to the appellants' submissions, the fact that the courts have authority to supervise the implementation of the IRSSA under class proceedings legislation is not relevant to the question of whether judicial review is available. The critical factor is not the source of the courts' authority, but rather the source of the authority of the adjudicators whose decisions are at issue (R.F. (Chief Adjudicator), at para. 63).

106 This conclusion is consistent with the Ontario Court of Appeal's decision in *Schachter*, in which Rouleau J.A. said the following about whether a legal fee review decision by the Chief Adjudicator is subject to judicial review:

> The Administrative Judge also correctly concluded that there is no right to seek judicial review from a legal fee review decision of the Chief Adjudicator. The court's jurisdiction to issue a declaration under s. 2(1)2 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 (the "JRPA") relates only to "the exercise, refusal to exercise or proposed or purported exercise of a statutory power". As the Administrative Judge explained, the Chief Adjudicator is not exercising a statutory power of decision, but rather renders his fee review appeal decision pursuant to the authority derived from the implementation orders, as approved by the relevant provincial and territorial superior courts.

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> The appellant further contends that the office of the Chief Adjudicator is a quasi-judicial public body that is subject to judicial review proceedings by way of an application for an order in the nature of *mandamus* or *certiorari* under s. 2(1)2 of the *JRPA*. I do not agree with this assertion. Judicial review is not available to review the exercise of authority by a judicially created body, which has been given certain duties as provided by the terms of the S.A. and the implementation orders. The office of the Chief Adjudicator was created by order of the courts in approving the negotiated terms of settlement of class action litigation. The authority of that office is exercised in relation to those class members who have elected to advance claims through the IAP and their counsel. The terms of the S.A. and the implementation orders set out the process for reviewing decisions of the IAP Adjudicators. Recourse to the courts is only available if it is provided for in the S.A. or the implementation orders. [Emphasis added; paras. 51-52.]

107 Supervising and appellate courts have followed this reasoning in affirming that judicial review of decisions of IAP adjudicators is not available (see R.F. (Chief Adjudicator), at para. 56, for a list of over 20 cases). The British Columbia Court of Appeal most recently reiterated this principle in *N.N.* (at para. 214). Both the supervising judge (at para. 28) and the Manitoba Court of Appeal (at para. 48) in the instant case correctly held that judicial review was not available to J.W.

108 Because the purpose of judicial review is to ensure the legality of state decision making (*Highwood Congregation*, at para. 13) and because the powers of IAP adjudicators are not conferred by the state, but are instead derived from a contract, judicial review of IAP decisions is not available.

B. Availability of Judicial Recourse

109 The parties are in agreement that the standard of review applicable to the question of whether judicial recourse is available is correctness. I am of the same view.

110 The issue on appeal relates to the jurisdiction of a supervising judge in hearing and deciding an RFD. In finding that the correctness standard applies, Beard J.A. compared the IAP to a standard form contract. While individual claimants could opt out of the IAP scheme and have their claim determined by the courts, if they failed to opt out within the mandated time period, they were bound by the terms of the IRSSA and could not negotiate an alternative resolution (Man. C.A. Reasons, at para. 22). Beard J.A. properly applied this Court's decision in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23 (S.C.C.). In that case, Wagner J. (as he then was) found that in reviewing the interpretation of standard form contracts, appellate courts are tasked with "ensuring the consistency of the law" (see also *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.), at para. 51). Where a court's interpretation of a standard form contract has precedential value beyond the parties to the dispute,

that interpretation should be reviewed for correctness (*Ledcor Construction Ltd.*, at para. 39). He concluded as follows (at para. 46):

> ... Where, like here, the appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix specific to the particular parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review.

111 The question of the supervising courts' jurisdiction to assess IAP decisions will have precedential value beyond the present case, as it extends to all claims under the IAP. Further, Beard J.A. correctly found that there is no meaningful factual matrix specific to J.W.'s claim that would assist in interpreting the IRSSA to determine the jurisdiction of the supervising courts (Man. C.A. Reasons, at para. 23). While this issue has arisen in the course of the adjudication and review of J.W.'s claim, the facts of the claim have no bearing on the issue.

112 This case can be distinguished from *SCC Records Decision*, in which this Court found that the standard of review applicable to a supervising judge's interpretation of the IRSSA was whether there was a palpable and overriding error in the decision under review. In that case, the palpable and overriding error standard was applied to the supervising judge's interpretation of the IRSSA to determine whether it allowed for the destruction of IAP documents, not to the question of his jurisdiction to make a destruction order. In the present case, the Court is not reviewing Edmond J.'s interpretation of the IAP Model and its application to the facts of J.W.'s claim. Rather, it is determining whether Edmond J. had the jurisdiction to arrive at his own interpretation of the IRSSA and substitute it for that of the IAP adjudicators. For this reason, the standard of review is correctness.

(1) Sources of the Supervising Courts' Authority

113 While it is clear that the parties do not have the option of seeking judicial review of IAP decisions, they can file RFDs with the supervising courts to resolve issues relating to the implementation and administration of the IRSSA. Indeed, after fully exhausting the mechanisms provided for in the IRSSA, certain groups or individuals may apply to the supervising courts for directions in respect of the implementation, administration, or amendment of the IRSSA. Applications are made in accordance with the Court Administration Protocol, which provides that all matters that require orders or directions must be the subject of an RFD (A.R., vol. I, at pp. 93 and 96; R.F. (Attorney General), at paras. 27-28). This Court is tasked with determining the scope of the supervising courts' jurisdiction when responding to RFDs arising from IAP decisions.

114 Authority for recourse to the supervising courts can be found in the IRSSA, the Approval and Implementation Orders, and provincial class proceedings legislation. I will address each of these sources in turn.

115 While the IRSSA provides for a comprehensive multi-level process for the resolution of IAP claims, it does contemplate recourse to the supervising courts in certain specific circumstances. As stated above, none of these avenues for judicial recourse would allow the courts to intervene in IAP decisions, and the only provision in the IAP Model under which access to the courts may be granted (that is, where losses may exceed the maximum compensation available under the IAP or where the evidence is overly complex) creates an alternative avenue for dealing with claims that would otherwise be heard by IAP adjudicators. It does not permit the courts to intervene in IAP decisions (Sch. D., art. III(b); see, for example, *Fontaine v. Canada (Attorney General)*, 2014 MBCA 93, 310 Man. R. (2d) 162 (Man. C.A.)).

116 The supervising courts' jurisdiction is also grounded in the Approval and Implementation Orders. Paragraph 13 of the Schulman Approval Order for Manitoba[4] provides:

> **THIS COURT ORDERS AND DECLARES** that this Court shall supervise the implementation of the Agreement and this judgment and, without limiting the generality of the foregoing, may issue such orders as are necessary to implement and enforce the provisions of the Agreement and this judgment. [Emphasis added.]
>
> (A.R., vol. I, at p. 93)

Paragraph 23 of the Schulman Implementation Order similarly provides:

> **THIS COURT ORDERS** that the Courts shall supervise the implementation of the Agreement and this order and, without limiting the generality of the foregoing, may issue such further and ancillary orders, from time to time, as are necessary to implement and enforce the provisions of the Agreement, the judgment dated December 15, 2006 and this order. [Emphasis added.]
>
> (A.R., vol. I, at p. 104)

117 These broad supervisory powers conferred by the orders are in stark contrast to the limited recourse to the courts provided for in the IRSSA. While the IRSSA contemplates a few narrow avenues of recourse to the supervising courts, the orders state the courts' powers in much broader terms. In *SCC Records Decision*, this Court described the supervising courts as playing a "vital role" under the IRSSA, as they exercise both administrative and supervisory jurisdiction pursuant to the orders (para. 31).

118 The final source of the courts' jurisdiction in overseeing the implementation of the IRSSA is provincial class proceedings legislation. Section 12 of Manitoba's *Class Proceedings Act*, C.C.S.M., c. C130, provides as follows:

> The court may at any time make any order that it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

119 This provision grants broad supervisory jurisdiction to ensure that a class action proceeds in a fair and efficient manner (*Fontaine v. Canada (Attorney General)*, 2014 ONSC 283, [2014] 2 C.N.L.R. 86 (Ont. S.C.J.) ("*Fontaine 283*")). This Court has observed that class proceedings legislation supports the broad powers conferred on supervising courts by the Approval and Implementation Orders, and that courts must have "generous discretion" to make orders as necessary to ensure a fair and expeditious resolution of class actions (*SCC Records Decision*, at para. 32).

120 In the abstract, there is an apparent tension between the narrow availability of judicial recourse under the IRSSA, on the one hand, and the broader jurisdiction conferred on the courts by the Approval and Implementation Orders and class proceedings legislation, on the other. However, these broader conferrals of authority are given form and content by the facts of particular class proceedings. In the context of the supervision of a settlement agreement, the terms of the agreement are determinative. While supervising judges are not free to approve an agreement that fully ousts their supervisory jurisdiction, their authority is limited and shaped by the terms of the agreement, once it is approved and determined to be fair, reasonable and in the best interests of the class.

121 My colleague Abella J. emphasizes that, in the case of the IRSSA, the RFD process arose as a condition of settlement approval, suggesting that the terms of the agreement on their own are not determinative in ascertaining the jurisdiction of a supervising judge in relation to a particular IAP decision (Abella J. Reasons, at para. 17). However, one should be mindful of the reasons why conditions were imposed when considering their impact. The concerns regarding the IRSSA and the IAP raised by Winkler J. in the decision approving the IRSSA in Ontario, *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (Ont. S.C.J.), did not relate to the specific terms under which claims were to be adjudicated, reviewed and resolved, but to whether there would be independence in the executive oversight of the settlement and whether sufficient resources would be committed to ensure that the claims would be resolved in a timely manner, as promised to an aging class. I would also note that Winkler J. stated that "[t]he changes the court requires to the settlement are neither material nor substantial in the context of its scope and complexity" (*Baxter*, at para. 85). As no conditions were imposed or recommended with respect to the specific mechanics of the claims resolution procedures, those procedures should be understood to have the approval of the courts.

122 While it is clear that the courts retain broad supervisory powers pursuant to the Approval and Implementation Orders and class proceedings legislation, a distinction must be drawn between providing directions respecting the implementation and administration of the IRSSA, on the one

hand, and reviewing adjudicators' interpretations of the IAP Model, on the other. As I explain in further detail below, only the former falls within the jurisdiction of the courts.

(2) Judicial Recourse Is Available Only Where the Adjudicator Failed to Apply the Terms of the IAP

123 On the question of the supervising courts' jurisdiction to consider errors in the interpretation of the IAP, I would affirm the approach taken by the Manitoba Court of Appeal. Parties may seek judicial recourse only in cases where the IAP adjudicator failed to apply the terms of the IRSSA, as this constitutes a failure to comply with the IRSSA and the IAP Model (Man. C.A. Reasons, at para. 51; *Schachter*, at paras. 53 and 57; *Bundled RFD*, at para. 183). While an adjudicator's decision is reviewable where he or she applied an inapplicable term or failed to apply an applicable term, the interpretation of the terms falls squarely within the adjudicator's adjudicative role (Sch. D, art. III(a)(v) and App. X).

124 Put another way, as long as it can be said that an adjudicator has turned his or her mind to the compensation category raised by the claimant, then the adjudicator has applied the terms of the IRSSA. Since the parties have expressed a clear intention to grant IAP adjudicators exclusive jurisdiction to interpret the terms of the IRSSA and the IAP, it must be accepted that an adjudicator who has interpreted these terms, even if a court considers the interpretation unreasonable, has not failed to apply the terms (Man. C.A. Reasons, at para. 51).

125 The weight of the authorities supports a high jurisdictional threshold for supervising courts considering IAP decisions. I find the following cases to be instructive on this point.

126 In *Schachter*, the Ontario Court of Appeal heard an appeal from a supervising judge's decision on an RFD concerning the provisions of the IAP and the Implementation Order relating to legal fees. Rouleau J.A. stated that the IRSSA confers neither a right to appeal nor a right to seek judicial review of IAP decisions (at paras. 50-52), and provided the following explanation of the parties' right to obtain directions from the supervising courts:

> ... The terms of the S.A. and the implementation orders set out the process for reviewing decisions of the IAP Adjudicators. Recourse to the courts is only available if it is provided for in the S.A. or the implementation orders.
>
> I turn now to whether a process, other than an appeal or judicial review, is available to review a decision by the Chief Adjudicator. The Administrative Judge properly confirmed that the IAP Adjudicators "cannot ignore" the provisions of the implementation orders and that "it remains necessary for Adjudicators to apply the required factors" when conducting a legal fee review at first instance. In the perhaps unlikely event that the final decision of the Chief Adjudicator reflects a failure to consider the terms of the S.A. and implementation orders, including the factors set out in para. 18 of the implementation orders, then, in my view, the parties to the S.A. intended that there be some judicial recourse. Having said that, I emphasize my agreement

> with the Administrative Judge's comment, at para. 22 of his reasons, that "there is no implicit right to appeal each determination made within the context of the claims administration or assessment process as an incident of the judicial oversight function". As I will go on to explain, the right to seek judicial recourse is limited to very exceptional circumstances.
>
> The parties intended that implementation of the S.A. be expeditious and not mired in delay and procedural disputes. As noted by the Chief Adjudicator, there are already many checks and balances in place to ensure that the process is administered fairly and in accordance with the terms of the S.A. The Chief Adjudicator is granted broad discretion by the terms of the S.A. [Emphasis added; paras. 52-54.]

127 The "very limited circumstances" in which judicial recourse is available would include cases in which the Chief Adjudicator upholds an adjudicator's decision as fair and reasonable even though the adjudicator failed to apply the appropriate factors under the IRSSA in arriving at the decision (paras. 57, 66 and 78). Such an approach attempts to reconcile the "conflicting purposes" of the IRSSA and the IAP:

> Before leaving this issue, I note that I agree with the Chief Adjudicator's submission that allowing a party to request directions when it is *alleged* that the Chief Adjudicator's decision reflects a failure to apply the terms of the implementation orders raises concerns about finality, efficiency and has the potential to overburden the Administrative Judges. However, I am satisfied that these concerns are alleviated by the clear limits on when such a request is available. Moreover, the Administrative Judges who hear such requests are well aware of the concerns that led to the adoption of the implementation orders, namely, the need to protect vulnerable claimants and the need for timely resolution of disputes in light of the advanced age of many claimants: see *Baxter*, at paras. 74 and 85. [Emphasis added; para. 58.]

128 The Ontario Court of Appeal similarly found in *Spanish IRS C.A.* that the supervising judge had exceeded the limits of his authority by overturning findings of fact and by awarding compensation and costs to the claimant rather than remitting the matter to the Chief Adjudicator. Sharpe J.A. found that a supervising judge who engages in "a detailed review of the factual findings made by the adjudicator" assumes "a role the IAP specifically assigns to the review adjudicator" (para. 55). He rejected the idea that *Schachter* created a "general curial jurisdiction" in relation to the IAP (para. 52). He further held that "disagreement with the result reached does not equate to a failure to enforce the IRSSA agreement or to apply the IAP model, thereby justifying judicial intervention. If it did, all IAP decisions would be appealable to the courts, the very thing *Schachter* forbids" (para. 55).

129 In *Bundled RFD*, Brown J. heard RFDs from five claimants dissatisfied with the results of their IAP claims. She confirmed that the appropriate test for judicial recourse is that set out in *Schachter* (at para. 7) and explained the rationale behind this hands-off approach to IAP fact finding: "[d]espite my years of administering the IRSSA, it would be impossible for me to know

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better than those who have been immersed in the IAP ... The Courts are simply not well-placed to make findings of fact" (para. 180). In another case, she stated the following about the availability of judicial recourse:

> The principles governing RFDs ... from IAP decisions have been coalesced in a number of recent court decisions. These decisions are the progeny of the Ontario Court of Appeal's decision in *Fontaine v. Duboff Edwards Haight and Schachter*, 2012 ONCA 471. They all reinforce the view that the IAP was intended by the parties to be a "complete code". Allowing ready access to the courts for appeal or judicial review would seriously compromise the finality of the IAP and fail to pay appropriate heed to the expertise of IAP adjudicators. As such, judicial recourse is restricted to "very exceptional" cases, where the IAP decision in question reflects a "patent disregard" of the IAP Model.
>
> At the risk of stating the obvious, this is a very onerous standard. This high threshold reflects at least two factors. The first is a realization of the jurisdictional limitations of the court when dealing with an IAP decision. As I noted in the so-called "Bundled RFD" decision, fundamentally, the IRSSA is a contract. It is outside of the purview of the court to create another level of review of these decisions that is not captured by the language of that agreement. The court must respect the parties' intention to create an adjudicative process with a sense of finality.
>
> The second factor is a policy preference (that was formalized into the terms of IRSSA and the IAP process itself) for granting deference to the IAP Adjudicators. This policy is the same as that which encourages deference to trial judges and administrative tribunals. Simply put, these bodies which make decisions at first instance are best positioned to make certain determinations and have an expertise that a reviewing court may lack. ... [Emphasis added; footnotes omitted.]
>
> (*Fontaine v. Canada (Attorney General)*, 2017 BCSC 946 (B.C. S.C.), at paras. 65-67)

130 These cases highlight several reasons why access to judicial recourse in respect of IAP decisions should be construed narrowly. First, this approach honours the intentions of the parties to the IRSSA. The parties went to great lengths to ensure that the IAP would be a complete code. The IAP Model clearly sets out the roles and responsibilities of adjudicators and parties, the procedures they must follow and the expertise and competencies required of adjudicators. Adjudicators must undergo specialized training and are empowered to make binding and final findings on credibility, liability, and compensation. The parties provided for a clear and comprehensive internal review mechanism and made no provision for appeals to the supervising courts. These actions clearly demonstrate their intent to retain control over this specialized process and to grant adjudicators exclusive jurisdiction to interpret the terms of the IAP (R.F. (Chief Adjudicator), at para. 39). As Brown J. observed in *Bundled RFD* (at para. 178):

> ... Fundamentally, the IRSSA is a contract. The IAP is a negotiated process, and a complete code. To put it plainly, when the IAP Model was negotiated, the parties called "Done!" at re-review by the Chief Adjudicator or his or her delegate. The court must honour the parties' intentions. By limiting access to the courts, finality is preserved and the expertise of the Chief Adjudicator and those under his supervision is recognized.

131 Because the IAP is a closed process, any disagreement with respect to the interpretation of its terms should be dealt with internally. The parties foresaw the need to resolve such disputes by providing for the creation of the IAP Oversight Committee, which is specifically designed to monitor the implementation of the IAP and make changes to the process as necessary, subject to the NAC's approval. Should interpretive direction be required, the parties entrusted this function to the IAP Oversight Committee, not to the supervising courts.

132 Second, in entering into the IRSSA, claimants relinquished their right to have their claims resolved by the courts in favour of a process with various compensatory and non-compensatory benefits. Claimants are entitled to closed hearings at a location of their choice, attendance costs for both themselves and a support person, the incorporation of cultural traditions, and access to counselling (Man. C.A. Reasons, at para. 47; *Bundled RFD*, at para. 14). As Beard J.A. observed, there are also litigation benefits for claimants, including having an inquisitorial rather than an adversarial hearing, which avoids cross-examination, and having the alleged perpetrator excluded while they are testifying. Should an adjudicator decide a claim without considering the terms of the IAP scheme, the claimant would be denied the benefit of the IRSSA. However, disagreement with the conclusions reached by adjudicators, whether on matters of fact or on the interpretation of the terms of the IAP, should be addressed through the review procedures provided for in the IAP and, if necessary, by approving binding instructions to adjudicators as set out in Sch. D (R.F. (Chief Adjudicator), at para. 115). These are the features of the IAP Model for which the parties bargained.

133 Third, none of the parties to the IRSSA can argue that the scheme should be, to use the word employed by counsel for the Chief Adjudicator, "infallible" (transcript, at p. 83). As Winkler J. stated in *Baxter*, at para. 21:

> ... Although not perfect in every respect, or perhaps in any respect, perfection is not the standard by which the settlement must be measured. Settlements represent a compromise between the parties and it is to be expected that the result will not be entirely satisfactory to any party or class member ....

134 Fourth, to open IAP decisions to intervention by the courts would be contrary to the objective of efficient and timely resolution of disputes with finality (Man. C.A. Reasons, at para. 63; *Spanish IRS C.A.*, at paras. 51, 53 and 60; *Bundled RFD*, at para. 12 and 178; *Schachter*, at para. 58). More than 150,000 students attended an IRS. As of 2008, approximately 80,000 were still

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living. Several years of negotiations preceded the finalization of the IRSSA. Many of the students were elderly by that time and passed away prior to receiving their settlements (Man C.A. Reasons, at para. 62). To use J.W.'s case as an example, the IAP adjudication process began in 2014 and the Hearing Adjudicator's decision was not released until April 2015. It took a further 7.5 months for the claim to make its way through the review and re-review processes. It is now 2019, and the outcome of J.W.'s claim has remained uncertain as the IAP decisions are subjected to continued scrutiny by the courts. This type of delay cannot be what the parties intended when they carefully negotiated the IAP (*Bundled RFD*, at paras. 3, 10 and 12).

135 Moreover, the statistics cited above clearly indicate that the IAP Model has been largely successful in resolving these claims in a timely and efficient manner, with over 99% of claims resolved and close to 90% of admitted claims resulting in compensation for survivors. The IRSSA is the largest and most complex class action settlement in Canada and can serve as a model for future class litigants (*Bundled RFD*, at para. 3). Overriding the parties' intentions in negotiating the IAP could have a chilling effect on the potential for future class action settlements of this nature (R.F. (Attorney General), at para. 71).

136 Fifth, a broad right to judicial recourse in respect of IAP decisions would allow Canada, and not only claimants, to challenge adjudicators' conclusions with which it disagreed. This would further undermine the efficiency and finality of the IAP, and place an additional burden on claimants by requiring them to battle Canada through multiple levels of court to confirm their right to compensation (R.F. (Chief Adjudicator), at para. 3). This would surely be contrary to the intentions of the parties in creating a non-adversarial process to resolve IAP claims.

137 Beard J.A. put it well when she stated the following (Man C.A. Reasons, at para. 64):

> When the objective of providing compensation to individual claimants is considered in light of the entire IRSSA, the very extensive and specialized adjudication and two-step review process under the IAP, and the objective of having an expeditious process for resolving the claims, I am of the view that the limited right to judicial recourse as described in [*Schachter*] and the Perell appeal should continue to be interpreted narrowly.

138 Sixth, if this Court were to accept the appellants' interpretation of the judicial oversight function, supervising judges would be engaging in the same exercise as reviewing adjudicators acting under the IAP's review provisions, resulting in an additional layer of review outside what the parties clearly intended to be a closed process. For this reason, a supervising judge should not substitute his or her own decision for that of an IAP adjudicator. Even if a court were to find that an IAP adjudicator made a decision without regard to the terms of the IAP, the appropriate remedy would be to set aside the decision and send it back for reconsideration in accordance with the criteria set out in the IAP (R.F. (Chief Adjudicator), at para. 39).

139 The courts' broad supervisory authority would, however, allow a supervising judge to order remedies that lie outside the exclusive jurisdiction of IAP adjudicators should they be necessary to ensure that the IAP is administered fairly. For example, in *N.N.*, which will be discussed in greater detail below, the British Columbia Court of Appeal held that because the IRSSA is silent as to the admission of new evidence after a claim has been heard, the supervising court had the jurisdiction to reopen the claim and order that the evidence be admitted and considered by the Chief Adjudicator (para. 195).

140 Before moving on, I pause for a moment to discuss the concept of "exceptional circumstances". At various points in both the written and the oral submissions, the phrase "exceptional circumstances" has been referred to as a "threshold" or "test". I would note that the phrase appears only once in *Schachter*, at para. 53: "... the right to seek judicial recourse is limited to very exceptional circumstances." In making this statement, the Ontario Court of Appeal was not setting out a test for judicial recourse under the IAP. Rather, Rouleau J.A. was simply clarifying that cases in which judicial intervention is warranted will be rare. It is not helpful to employ the idea of "exceptional circumstances" as a test, threshold, or standard, as it merely describes the limited nature of judicial recourse in respect of IAP decisions. To reiterate, I would adopt the test for judicial recourse articulated by the Manitoba Court of Appeal in this case, namely failure by the IAP adjudicator to apply the terms of the IAP Model, which amounts to failure to enforce the IRSSA (Man. C.A. Reasons, at paras. 42 and 51; *Schachter*, at para. 53; *Spanish IRS C.A.*, at paras. 55 and 59-60).

(3) Where the IRSSA Provides No Internal Remedy, Recourse Can Be Sought From the Supervising Courts to Fill This Gap

141 While the parties' intentions in creating the IRSSA and the IAP must be honoured, it must also be acknowledged that circumstances will inevitably arise that were not foreseen by the parties and are therefore not provided for in their agreement. As the Chief Adjudicator observes, the parties did anticipate that court involvement might be necessary, not to interpret the IAP Model, but to ensure that adjudicators can in fact implement the IAP to achieve the intended results (R.F. (Chief Adjudicator), at para. 100). As stated above, the parties have clearly turned their minds to the question of whether a right to appeal or to seek review of IAP decisions is available. However, should a situation arise which was not contemplated by the parties, courts must have the power to intervene to ensure that the parties receive the benefits of the agreement, i.e., what they bargained for.

142 A clear example of the courts' supervisory authority being utilized to fill a gap in the IRSSA arose recently in *N.N.*, a decision of the British Columbia Court of Appeal. In that case, one of the claimants requested a re-review after her claim was denied by the initial adjudicator and that decision was upheld on review. After filing a request for re-review, counsel for the claimant

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became aware of new information relating to the claim and provided that evidence to the re-review adjudicator. The re-review adjudicator found that while the information might have resulted in a favourable decision for the claimant had it been available at the hearing, all reviews are conducted on the record and no new evidence is permitted. As he found that he lacked the authority to address this issue, he stated that the claimant should apply to the supervising court for directions, since supervising courts have the authority to reopen claims on a case-by-case basis (*N.N.*, at paras. 122-26). The claimant subsequently filed an RFD with the supervising court. The supervising judge found that the new information was not sufficient to warrant judicial recourse, but her decision was overturned by the British Columbia Court of Appeal.

143 While reaffirming that courts should not be engaging in detailed reviews of findings of fact made by IAP adjudicators, MacKenzie J.A. found that where new information comes to a court's attention, it will be necessary for that court to determine whether the claim must be remitted for reconsideration (*N.N.*, at para. 157). This approach is consistent with the objectives of the IRSSA:

> ... I note that in *Schachter* at para. 57, Justice Rouleau described an exceptional circumstance as being "*where the final decision of the Chief Adjudicator reflects a failure to comply with the terms of the [IRSSA]* or the implementation orders" (emphasis added). ...
>
> Any consideration of an exceptional circumstance must include a consideration of the objectives of the negotiated IRSSA, reflected in the preamble, to achieve a "fair, comprehensive and lasting resolution of the legacy of Indian Residential Schools" that seeks to promote "healing, education, truth and reconciliation and commemoration".
>
> In my view, it may be necessary for a court on judicial recourse to consider new information, and to determine whether a claim must be remitted to the Chief Adjudicator for reconsideration, but this will only be appropriate in very rare and exceptional cases. [Emphasis in original; paras. 155-57.]

144 MacKenzie J.A. adopted the approach taken in *Fontaine 283* by Perell J., who found that supervising courts have the jurisdiction to direct the reopening of settled IAP claims on a case-by-case basis (*N.N.*, at para. 164; *Fontaine 283*, at para. 225). Though Perell J. made the following statements in the context of a breach of Canada's disclosure obligations, I would adopt his reasoning as well:

> ... the Applicants' RFD raises the question of whether the court may direct the re-opening of settled IAP claims on the grounds of Canada's breach of its disclosure obligations.
>
> In my opinion, the answer to this question is yes. The court does have the jurisdiction to re-open settled claims but that jurisdiction must be exercised on a case-by-case basis.
>
> If truth and reconciliation is to be achieved and if nous le regrettons, we are sorry, nimitataynan, niminchinowesamin, mamiattugut, is to be a genuine expression of Canada's

> request for forgiveness for failing our Aboriginal peoples so profoundly, the justness of the system for the compensation for the victims must be protected. The substantive and procedural access to justice of the IRSSA, like any class action, must also be protected and vouched safe. The court has the jurisdiction to ensure that the IRSSA provides both procedural and substantive access to justice.
>
> . . . . .
>
> Thus, I conclude that the court does have the jurisdiction to re-open a settled IAP claim but whether a claim should be re-opened will depend upon the circumstances of each particular case. [Emphasis added; paras. 224-32.]

145 Should a situation arise which is not provided for in the IRSSA and which might affect the outcome of a claim, it would be inconsistent with the purpose of the settlement to deny relief to the claimant. This was clearly the case in *N.N.*, where the IAP Model did not provide any procedure for the admission of new evidence on review, and the evidence in question could have had an impact on the result.

146 This is not to say that parties will automatically be entitled to have a claim reopened if they are able to point to a procedural gap in the IAP Model or provide new information that was not before the IAP adjudicator(s). A case-by-case analysis is required, and a variety of factors may have to be considered, including whether some prejudice to the party requesting judicial intervention has been shown (*Fontaine 283*, at para. 228). Cases in which a claim can be reopened will be rare. In *N.N.*, for example, MacKenzie J.A. undertook a detailed review of the new evidence and its significance and took into consideration the fact that the claimant was not at fault for the late disclosure, nor was she seeking additional compensation as a result (paras. 171-87).

147 In his factum, the Chief Adjudicator acknowledges the need for supervising courts to "fill in the gaps" left by IAP provisions and states that this would be an appropriate use of the courts' supervisory authority (para. 95). The outcome in *N.N.* did not hinge on the supervising judge assuming the role of adjudicator or embarking on an interpretive exercise with respect to the provisions of the IRSSA or the IAP. The British Columbia Court of Appeal saw its role as determining whether the claim should be reopened in light of new information, not whether the adjudicator had committed a palpable and overriding error (*N.N.*, at para. 152).

148 Ultimately, a balance must be struck between resolving claims efficiently and obtaining some sense of finality for the parties, on the one hand, and ensuring fair and just outcomes, on the other (*N.N.*, at para. 167). This approach gives effect to the parties' intention that the IRSSA promote a "fair, comprehensive and lasting resolution of the legacy of Indian Residential Schools" by ensuring compliance with the rules of natural justice.

C. Application to the Instant Case

(1) The Supervising Judge Erred in Substituting His Own Interpretation of SL1.4

149 As noted above, Edmond J. stated that his jurisdiction was limited to "ensuring that the Re-Review Adjudicator did not endorse a legal interpretation that is so unreasonable that it amounts to a failure to properly apply the IAP to the facts of a particular case" (Man. Q.B. Reasons, at para. 40). He went on to conduct a detailed review of the Hearing Adjudicator's decision, identifying what he interpreted to be errors in her analysis of SL1.4. After finding that these errors were unreasonable, he held that the failure of the Review Adjudicator and the Re-Review Adjudicator to correct them was a sufficient basis for setting aside the re-review decision and ordering a reconsideration of the claim.

150 I agree with the Manitoba Court of Appeal that Edmond J. erred in scrutinizing the Hearing Adjudicator's interpretation of SL1.4 and substituting his own. Edmond J. could not concern himself with the proper interpretation of SL1.4, but was entitled only to determine whether the Hearing Adjudicator had considered the correct terms. Instead, he engaged in the same analysis that the parties assigned to IAP adjudicators and came to a different result (R.F. (Chief Adjudicator), at para. 107). In *Spanish IRS C.A.*, the supervising judge, Perell J., undertook a similar exercise in reviewing an IAP decision. The appellants and the Assembly of First Nations rely on the approach taken by Perell J. in that case. However, the Ontario Court of Appeal overturned his decision, and Sharpe J.A. made the following comments:

> The administrative judge appears to have taken the view that if, in his judgment, M.F. was entitled to compensation, any other conclusion necessarily reflected a failure to apply the IAP model. In my respectful opinion, that approach reflects a failure to follow the strictures imposed in *Schachter* on recourse to the courts from IAP decisions, and one that, if accepted, could significantly undermine the finality and integrity of the IAP.
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> (*Spanish IRS C.A.*, at para. 60)

151 My colleague Abella J. correctly observes that the Hearing Adjudicator described the question before her as "whether or not the incident was *sexual* touching which exceeded recognized parental conduct" and that SL1.4 uses the phrase "any touching", without the word "sexual" (paras. 36 and 41 (emphasis in original)). She argues that the addition of a requirement that the touching be sexual constituted a failure to apply and implement the IRSSA. Respectfully, I disagree. The Hearing Adjudicator turned her mind to the requirements of SL1.4, as evidenced in her detailed analysis. While she interpreted the category differently than Edmond J., this does not amount to a failure to apply SL1.4. Moreover, the RFD arose from the Re-Review Adjudicator's decision, which correctly referred to SL1.4 as requiring "any touching" and did not add the word "sexual" (A.R., vol. I, at pp. 14 and 16). The Re-Review Adjudicator expressly agreed with the assessment carried out by the Review Adjudicator in finding that the Hearing Adjudicator had correctly applied the IAP Model, demonstrating that the choice to deny J.W.'s claim was based on a deliberate interpretation of and engagement with the SL1.4 category (p. 18).

152 The Hearing Adjudicator in the instant case had regard to and applied the factors in the SL1.4 category, and her decision was upheld by the Review Adjudicator and the Re-Review Adjudicator, in keeping with the mechanism contained in the IAP Model. While the supervising judge may have disagreed with the outcome, this was not a basis for finding that the adjudicators had failed to apply the terms of the IRSSA. Once he determined that the adjudicators had applied the appropriate terms and provisions of the IAP (i.e., SL1.4), and once he agreed that the Hearing Adjudicator was "entitled to give context and interpretation to the language used in the IAP" (para. 56), his jurisdiction ended, and he ought not to have ruled on whether the Hearing Adjudicator's interpretation was reasonable. As Beard J.A. of the Manitoba Court of Appeal concluded in this case, Edmond J. exceeded his jurisdiction by substituting his own interpretation of SL1.4 and directing that the claim be reconsidered in accordance with that interpretation.

(2) The Chief Adjudicator Concedes That J.W. Is Entitled to Relief, But He Lacks a Remedy Under the IRSSA

153 While I am in agreement with the Manitoba Court of Appeal that the supervising judge erred in his analysis, I believe this to be an exceptional case in which reconsideration is appropriate. I am not basing this conclusion on Edmond J.'s reasoning, which would require the courts to reinterpret the IAP. Rather, J.W.'s claim has given rise to a unique dilemma for which the IRSSA provides no internal recourse, and which therefore requires this Court to craft a remedy. Certain concessions made by the Chief Adjudicator at the hearing before this Court have exposed a gap in the IRSSA's provisions. Specifically, the Chief Adjudicator has no authority to reopen J.W.'s claim despite his conclusion that the decisions on the claim are "aberrant". The Chief Adjudicator's inability to remedy such an error in IAP decisions is clearly inconsistent with the role conferred upon him by the parties of ensuring consistency in the application of the IAP. This is certainly a situation in which the courts can step in to provide a remedy that is consistent with the IRSSA's objective of promoting a "fair, comprehensive and lasting resolution of the legacy of Indian Residential Schools" (see B in the recitals of the IRSSA).

154 To reach this conclusion, it is necessary to consider the sequence of events that revealed this gap in the IRSSA.

155 In their written submissions, neither the Attorney General nor the Chief Adjudicator directly addressed the substance of the IAP adjudicators' decisions or the proper interpretation of SL1.4. Rather, each of them argued that courts should not weigh in on the interpretation of the IAP's terms, as the parties intended this task to be within the exclusive jurisdiction of IAP adjudicators. At the hearing, however, the Attorney General appeared to defend the merits of the Hearing Adjudicator's decision, arguing that her interpretation of SL1.4 fell within the range of possible outcomes. The Attorney General relied on former Chief Adjudicator Ish's "B" decision in another similar IAP

claim discussed earlier, arguing that it supports the position that sexual purpose should be taken into consideration (transcript, at pp. 55-58; Condensed Book (Attorney General), at pp. ii-iii).

156 In response to these submissions, the Chief Adjudicator directed the Court to former Chief Adjudicator Ish's decision, which states: "I find that there is *no requirement* in the IAP that the actor possessed a sexual intent before liability can be found for a sexual assault" (A.R., vol. II, at p. 70 (emphasis added)). At the hearing before this Court, the Chief Adjudicator expressed the view that the decisions of the Hearing Adjudicator, the Review Adjudicator and the Re-Review Adjudicator in this case are "aberrant" and that their interpretation of SL1.4 does not reflect a systemic problem within the IAP:

> **Mr. Arvay, Q.C.:** These decisions are aberrant.
>
> **Madam Justice Karakatsanis:** Are there other aberrant decisions? ...
>
> . . . . .
>
> **Mr. Arvay, Q.C.:** The best I can answer is this way. After Justice Edmond's decision there was a reconsideration decision and it went the other way. And that of course that decision was stayed when it went to the Court of Appeal. To our knowledge there has never been another decision like this one here in the future because it has been — the reconsideration decision recognized the correctness, the proper interpretation as set out by Mr. Ish.
>
> **Madam Justice Karakatsanis:** So there aren't other claimants out there who have been denied for the same reason, the same interpretation, that you are aware of? ...
>
> **Mr. Arvay, Q.C.:** There are seven other [outstanding] claimants who fall within the category SL1.4. To our knowledge — or to my knowledge anyway — none of those involve in this particular issue.
>
> (Transcript, at pp. 76-77)

157 I would also highlight the following exchange, in which the Chief Adjudicator agreed that there is no mechanism in the IRSSA that enables him to reopen a matter where he disagrees with the outcome:

> **Madam Justice Karakatsanis:** I accept that, but the Chief Adjudicator, once something comes to the Chief Adjudicator's attention. And my question to you is, there is a responsibility under the schedule to try and ensure consistency, is there no recourse for the Chief Adjudicator? Can you not go to the committee and get an interpretation? Is there nothing the Chief Adjudicator can do to ensure that claimants who are entitled to compensation under the terms they agreed to get it?
>
> **Mr. Arvay, Q.C.:** It's all future looking, Justice Karakatsanis.
>
> . . . . .

Mr. Justice Moldaver: It's even more egregious, it seems to me, when you are sitting there conceding that this man's case should have been heard and now you are telling us they got no remedy.

Mr. Arvay, Q.C.: Right ... That happens. In a scheme that allows for 38,000 adjudications, mistakes may be made for which there is no remedy.

(transcript, at pp. 83-87)

158 The Chief Adjudicator also agreed that where the IRSSA contains no internal remedy, the courts may intervene to fill the gap:

Mr. Justice Moldaver: ... If as a result of working [the interpretative problems] out [within the four corners of the agreement] we reach — we have a hiatus, we have a gap, we have an inability to do justice in a particular case —

Mr. Arvay, Q.C.: Yes.

Mr. Justice Moldaver: — then you should be able to go to the court to fill that gap.

Mr. Arvay, Q.C.: I agree.

(transcript, at p. 92; see also, R.F. (Chief Adjudicator), at para. 95)

159 Given the Chief Adjudicator's role within the IAP scheme, I attach significant weight to these statements. As set out above, the Chief Adjudicator is tasked under the IRSSA with ensuring consistency among the decisions of adjudicators in the interpretation and application of the IAP Model by implementing training programs and administrative measures (Sch. D, art. III(m)). He can also propose instructions to the IAP Oversight Committee in order to better give effect to the provisions of the IAP (Sch. D, art. III(r)).

160 In addition to these "future looking" mechanisms, the Chief Adjudicator ensures consistency in the application of the IAP through his role in the internal review process. As stated above, the final level of review (re-review) is conducted by the Chief Adjudicator or his designate. While in this case the re-review was conducted by a designate and not by the Chief Adjudicator himself, "designates" are identified in the scheme as being approved by the IAP Oversight Committee to exercise what the IAP refers to as "the Chief Adjudicator's review authority". It is evident that the scheme places the Chief Adjudicator at the apex of the review process and gives him the authority to ensure that adjudicators are properly applying the IAP Model.

161 The Chief Adjudicator has conceded that the decisions of the adjudicators in this case were "aberrant" and did not reflect the direction provided by former Chief Adjudicator Ish. As my colleague Brown J. observes, the Chief Adjudicator did not go so far as to concede that there is a gap in this case that would warrant intervention by the courts (Brown J. Reasons, at paras.

194-95). This is, however, not determinative of the appeal. In light of the Chief Adjudicator's role and responsibilities under the IAP scheme, his statement that the re-review resulted in an "aberrant" decision is a significant concession. It indicates that the scheme has broken down such that the Chief Adjudicator was not able to ensure that the terms of the IAP were properly applied in this case.

162 Furthermore, the Chief Adjudicator is not actually a party to the IRSSA or the IAP, but is instead, as my colleague Brown J. observes, a creation of that scheme (para. 190). Therefore, while the Chief Adjudicator's concession that an IAP claim was wrongly decided has great significance, the Chief Adjudicator's opinion as to whether this results in a "gap" has no bearing on the Court's interpretation of the parties' intentions in this regard. As my colleague Abella J. points out, courts have a duty to ensure that the claimants receive the benefits they bargained for (Abella J. Reasons, at para. 30). In my view, the sequence of events in this case has exposed a gap in the IRSSA, and it is the role of this Court to step in to fill that gap.

163 The "gap" in this case does not arise as a result of a finding by this Court that J.W. is entitled to compensation based on its own interpretation of the IAP. Rather, the gap arises as a result of the parties' intention that adjudicators decide which claimants receive compensation and that the Chief Adjudicator should represent the final level of review in order to ensure consistency across all IAP decisions. The precise unfairness which this Court must address stems from the fact that, despite the Chief Adjudicator's opinion that an error has been made on this final review, there is no mechanism for reopening a claim or otherwise providing relief to a claimant.

164 Given that the IAP dictates that the Chief Adjudicator should have the final word under the review mechanism, the practical effect of this situation is that J.W. did not receive the benefits bargained for. As there is no remedy within the four corners of the agreement that is available to either J.W. or the Chief Adjudicator, the courts must step in to fill this gap. It is particularly appropriate that this Court intervene in light of the fact that the IRSSA is a settlement of a class action, and it can be assumed that all similarly situated individuals are entitled to the same treatment under the scheme. It is clearly consistent with the scheme to find that there is unfairness when the Chief Adjudicator concedes before this Court that a claimant was improperly denied a claim based on "aberrant" decisions or an isolated error by the adjudicators.

165 This conclusion is not, as my colleague Brown J. would find, inconsistent with the provision stating that *stare decisis* does not apply to the IAP (Sch. D, App. X, s. 5; Brown J. Reasons, at para. 185). The initial hearing adjudicator in any claim is not prevented from declining to follow a prior decision and adopting his or her own interpretation of the IAP, and it is open to the Chief Adjudicator to agree or disagree with the adjudicator's conclusion on re-review. In this way, the IAP scheme allows IAP adjudicators to come to an independent conclusion and see that justice is done in each case, while at the same time allowing the Chief Adjudicator to carry out his mandate to ensure consistency across all IAP decisions. The problem in this case stems not from the fact

that the adjudicators did not follow precedent, but from the Chief Adjudicator's admission that J.W. was wrongly denied compensation at the final level of review in what the Chief Adjudicator conceded was an "aberrant" decision.

166 As was the case in *N.N.*, this gap in the IRSSA has caused significant prejudice to J.W. He was denied any compensation, despite the Chief Adjudicator's acknowledgment at the hearing before this Court that this result is inconsistent with the proper application of the IAP Model. I recognize that neither the supervising judge nor the Manitoba Court of Appeal had the benefit of the concessions made by the Chief Adjudicator in his oral submissions before this Court. It is unfortunate that this acknowledgment came about only at the hearing before this Court. Had the Chief Adjudicator expressed his disagreement with the Re-Review Adjudicator's decision on J.W.'s claim at an earlier stage of the proceedings and perhaps sought a remedy from the supervising judge, J.W. might have been spared the significant delay and the hardship associated with litigating this issue through multiple levels of court. However, to deny a remedy for J.W. in the face of these circumstances would result in a clear injustice, and this Court must therefore intervene.

167 I would clarify that while I find that J.W.'s claim should be remitted for reconsideration, I would not do so on the basis on which the supervising judge made his order. Edmond J. erred in applying his own interpretation of the IAP Model.

VI. Remedy

168 For the reasons stated above, I would reinstate the order made by Edmond J. on August 3, 2016 that J.W.'s claim be sent back to a first-level IAP adjudicator for reconsideration (A.R., vol. I, at pp. 48-51).

169 Given that J.W.'s claim has already been reconsidered and that the Chief Adjudicator is satisfied that the Reconsideration Adjudicator properly applied the IAP Model, I would give effect to the Reconsideration Adjudicator's decision (A.R., vol. II, at pp. 143-61). The compensation award of $12,720 is reinstated, with interest calculated from the date of the Reconsideration Adjudicator's decision. The appropriate interest rate is to be determined in accordance with the applicable provincial rules, which in this case are to be found in Part XIV of Manitoba's *Court of Queen's Bench Act*, C.C.S.M., c. C280.

VII. Costs

170 I would award costs to J.W. per the usual rule. However, I note that J.W. seeks costs on a solicitor-client basis in this Court and in the courts below. He submits that this case raises issues of public interest relating to the implementation of the IRSSA. The Attorney General submits that costs should be awarded to the appellants but opposes the request for costs on a solicitor-client basis, arguing that the appellants have not established any reason to deviate from the normal rule as to party-party costs.

171 In *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331 (S.C.C.), this Court identified two considerations that can help guide the exercise of a judge's discretion on a motion for special costs in a case involving the public interest:

> ... First, the case must involve matters of public interest that are truly exceptional. It is not enough that the issues raised have not previously been resolved or that they transcend the individual interests of the successful litigant: they must also have a significant and widespread societal impact. Second, in addition to showing that they have no personal, proprietary or pecuniary interest in the litigation that would justify the proceedings on economic grounds, the plaintiffs must show that it would not have been possible to effectively pursue the litigation in question with private funding. In those rare cases, it will be contrary to the interests of justice to ask the individual litigants (or, more likely, pro bono counsel) to bear the majority of the financial burden associated with pursuing the claim. [Emphasis added; para. 140.]

172 In my view, neither of these considerations supports the awarding of special costs to J.W. First, the issue raised in this appeal is not "truly exceptional". While the issues relating to the implementation of the IRSSA will have an impact on the parties to that agreement and the courts tasked with supervising its implementation, they do not have a sufficiently significant and widespread societal impact to justify granting solicitor-client costs. Given the *sui generis* nature of the IRSSA, the guidance provided by this Court regarding the scope of judicial oversight of the IAP will have little impact outside of this narrow context. With respect to the second consideration, J.W. clearly has a "personal, proprietary or pecuniary interest in the litigation that would justify the proceedings on economic grounds", as his entitlement to compensation under the IAP is at the core of these proceedings.

173 I am therefore not persuaded that it would be appropriate to grant J.W.'s request for solicitor-client costs.

VIII. Conclusion

174 For these reasons, I would allow the appeal and reinstate the Reconsideration Adjudicator's award of $12,270, with interest calculated in accordance with Part XIV of Manitoba's *Court of Queen's Bench Act*, and with costs to J.W. per the usual rule.

***Brown J.* (dissenting) (Rowe J. concurring):**

175 I would dismiss the appeal. Paragraphs 56-138, 140 and 149-52 of the reasons of my colleague Côté J. correctly state the law for a majority of this Court with respect to the jurisdiction of the supervising courts. I therefore concur with my colleague on this point, and would find that Edmond J. erred in scrutinizing the interpretation of SL1.4 (*Indian Residential Schools Settlement Agreement* (2006) ("IRSSA"), Sch. D, art. II) undertaken by the Hearing Adjudicator

and substituting his own (Côté J. Reasons, at para. 150). I do not, however, agree that any "gap" exists in the IRSSA to allow this Court to remit J.W.'s claim for reconsideration. While my colleague Côté J. has striven admirably to justify landing where she does, the parties to the IRSSA did not agree to a particular interpretation of a contractual term, but to a particular *process*, which my colleague's reasons undermine by her disposition of this appeal.

176 The IRSSA expressly precludes our intervention in the Independent Assessment Process ("IAP"), even where we might be of the view that it has been incorrectly interpreted and applied. It is "'a complete code' that limits access to the courts, preserves the finality of the IAP process and respects the expertise of IAP adjudicators" (*Fontaine v. Canada (Attorney General)*, 2017 ONCA 26, 137 O.R. (3d) 90 (Ont. C.A.), ("*Spanish IRS C.A.*"), at para. 53). Straining to find a "gap" in the IRSSA so as to pry open a little space for judicial recourse where the parties clearly intended to preclude it defeats the intentions of the parties and — I repeat — undermines the integrity of the process that they settled upon.

177 To support having found this supposed gap, Côté J. points to the Chief Adjudicator's concession that (1) J.W.'s claim was wrongly decided by the Hearing Adjudicator ("aberrant") and wrongly confirmed by two review adjudicators, and (2) that he has no authority to reopen J.W.'s claim (para. 153). It follows, my colleague says, that courts may step in to furnish a remedy. As I explain below, however, the Chief Adjudicator's concession does not expose any "gap" in the IRSSA, much less any basis for judicial intervention to fill it — such judicial intervention being contrary to the express intentions of the parties. My colleague simply has no basis for rewriting the terms of the IRSSA.

I. Rewriting the Terms of the IRSSA

178 The IRSSA is a contract (*Canada (Attorney General) v. Fontaine*, 2017 SCC 47, [2017] 2 S.C.R. 205 (S.C.C.) ("*SCC Records Decision*"), at para. 35). Interpreting its terms therefore requires a court to discern the contracting parties' intentions, and to enforce the bargain to which they committed (G. R. Hall, *Canadian Contractual Interpretation Law* (3rd ed. 2016), at p. 174; *SCC Records Decision*, at para. 35).

179 It is of course true that, where the parties have failed in their contract to address a particular situation arising in the course of their relationship, a court may imply a contractual term (*M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 (S.C.C.), at para. 27, citing *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711 (S.C.C.), at p. 775). This is not, however, an unlimited power. More to the point, it does not permit a court to rewrite a contract or to imply a term which is contrary to the clearly expressed intentions of the parties (Hall, at pp.180-83; *M.J.B. Enterprises*, at para. 29; and *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085 (S.C.C.), at p. 1097).

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180 A degree of circumspection in implying a term permitting judicial recourse is particularly important here. Given the finality promised by the IAP, it is easy to appreciate why the parties might have seen prolonged litigation of IAP claims in the courts to be undesirable (see *Spanish IRS C.A.* at paras. 51, 53 and 60; Côté J. Reasons, at para. 134). It is therefore worth scrutinizing where my colleague Côté J. sees her opening for prolonging this litigation: in the absence of any authority for the Chief Adjudicator under the terms of the IRSSA to reopen J.W.'s claim, despite his conclusion that J.W.'s claim resulted in an error which is "aberrant". But merely because the IRSSA does not contain certain terms does not mean that there is a "gap" waiting to be filled by judges (see A. Swan, J. Adamski and A. Y. Na, *Canadian Contract Law* (4th ed. 2018), at p. 793). It depends on why the terms were not included. There is a difference between *failing* to grant authority that the parties would have granted (a true "gap"), and *deciding not* to grant such authority. And, in my respectful view, a review of the terms of the IRSSA reveals that the absence of a term authorizing the Chief Adjudicator to reopen claims clearly represents an instance of the latter.

181 The IAP is intended to be a "closed adjudicative process, operating under the purview of independent adjudicators *without any rights of appeal or judicial review*" (Côté J. Reasons, at para. 65, citing *Fontaine v. Canada (Attorney General)*, 2016 BCSC 2218, [2017] 1 C.N.L.R. 104 (Ont. C.A.), at para. 11 (emphasis added)). As a result, the adjudication of IAP claims is limited to one in-person hearing and two levels of internal review *without any judicial recourse* (Sch. D, art. III(l); Côté J. Reasons, at paras. 69 and 75). This can be contrasted with the Common Experience Payment review process, which clearly provides for judicial recourse where a claim has been denied (IRSSA, art. 5.09).

182 Nor is the IRSSA silent on the circumstances in which recourse *can* be had to the courts under the IAP. It provides that the Chief Adjudicator may permit the claimant to access the courts where the value of the harm or loss exceeds the compensation limits, or where the evidence is overly complex (Sch. D, art. III(b)(iii); Côté J. Reasons, at paras. 73-74). The internal mechanisms of review in the IRSSA have clearly been designed to allow for judicial recourse in specific situations, which do not include incorrect interpretations of the IAP.

183 That it was the parties' intention that the Chief Adjudicator *not* have the authority to respond to incorrect interpretations of the IAP by reopening claims is also demonstrated by how the IRSSA *does* empower the Chief Adjudicator to respond to incorrect interpretations. Although the Chief Adjudicator cannot reopen claims where there has been an incorrect interpretation of the IAP, he (or his designate) does have, as Côté J. acknowledges, a right of final review of IAP decisions (Côté J. Reasons, at paras. 69-70 and 160). This final "review authority" empowers the Chief Adjudicator to correct an interpretative error in applying the IAP made by either the hearing or review adjudicator. As stated in Sch. D to the IRSSA:

> ...[A]ny party may ask the Chief Adjudicator or designate to determine whether an adjudicator's, or reviewing adjudicator's, decision properly applied the IAP Model to the facts as found by the adjudicator, and if not, to correct the decision, and the Chief Adjudicator or designate may do so.
>
> (Emphasis added; art. III(l)(i).)

184 Further, and even where the Chief Adjudicator or his designate has (as here) failed to exercise his final review authority to correct an error in interpreting the IAP, he is empowered to remedy *on a prospective basis* such incorrect interpretations of the IAP as are brought to his attention. Specifically, he is authorized to prepare instructions for the IAP Oversight Committee's consideration with the goal of assisting adjudicators in better giving effect to the provisions of the IRSSA (Sch. D, art. III(s)). While, as I say, this operates only prospectively in that any resulting instructions will bind only those participants who have had at least two weeks' notice of the instructions before their hearing (Sch. D, art. III(r)(iii)), this power, coupled with the Chief Adjudicator's final review authority, nonetheless affirms that the parties to the IRSSA had turned their minds to the powers of the Chief Adjudicator in respect of incorrect interpretations of the IAP. And, in so doing, they declined to confer those powers which my colleague Côté J. would now in effect bestow.

185 Further, by providing that *stare decisis* does not apply to IAP decisions (Sch. D, App. X, item 5), the IRSSA clearly contemplates that the various IAP adjudicators will provide inconsistent and even incorrect interpretations of the IAP. As the Chief Adjudicator observed before this Court, the parties to the IRSSA did not bargain for an infallible scheme. With 38,000 adjudications and 80,000 applicants, "no one would have imagined that the scheme was going to result in error-free decisions" (transcript, at p. 83).

186 Both my colleagues Abella J. (at paras. 26-27) and Côté J. (at paras. 139 and 141-48) point to the majority decision at the British Columbia Court of Appeal in *N.N. v. Canada (Attorney General)*, 2018 BCCA 105, 6 B.C.L.R. (6th) 335 (B.C. C.A.), at paras. 83-85, in support of the proposition that courts can intervene to fill in "gaps" where the IRSSA is silent. With great respect, and putting aside his use of the threshold of "exceptional circumstances" (in respect of which I agree with the reasons of Côté J., at para. 140), I prefer the dissenting reasons given in that appeal by Hunter J.A., who stated (at para. 227):

> ...[J]udicial intervention by a supervising judge may occur only in very exceptional circumstances when there has been a failure by the Chief Adjudicator or his designate to apply the terms of the IRSSA or the implementation orders. The purpose of such intervention is not to review the merits of the underlying decision, but rather to ensure that the dispute resolution process agreed upon by the parties is followed.

187 My colleague Côté J. leans heavily (at paras. 144-46), as did the majority in *N.N.*, on the decision of Perell J. of the Ontario Superior Court of Justice in *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283, [2014] 2 C.N.L.R. 86 (Ont. S.C.J.), as suggesting that settled claims can be reopened on a "case-by-case" basis. But as Hunter J.A. points out (at para. 260 of *N.N.*), Perell J. later acknowledged, in *Fontaine v. Canada (Attorney General)*, 2018 ONSC 103 (Ont. S.C.J.), at paras. 51 and 170, that "much of what I said about reopening IAP claims was overruled three years later in [*Spanish IRS C.A.*]" and that "judicial recourse is available only where a decision of the Chief Adjudicator or his designate reflects a patent failure to apply the IAP Model." More particularly, Perell J. acknowledged (at para. 170) that "[s]upervising [j]udges do not have jurisdiction to perform an appellate or error correcting function in respect of IAP decisions."

188 It is therefore clear that, by imposing a process to which the parties did not agree (and which — going by what they *did* include in the IRSSA — they would have rejected), my colleague Côté J. is rewriting the IRSSA. Clear textual and contextual direction that she cannot do so is met with invocations of "natural justice" (para. 148) without explaining just how it is implicated here — except to say that denying a remedy to J.W. would result in "clear injustice" such that "this Court must ... intervene" (para. 166). But I reject the premise that my colleague is remedying "injustice". Remedying injustice — that is, doing justice — does not mean arriving at the most palatable result. In this case, justice is served by respecting and enforcing the terms of a voluntary agreement between the parties, including the procedural and substantive rules and the jurisdictional boundaries upon which they agreed (*Spanish IRS C.A.*, at para. 63).

II. The Chief Adjudicator's Concession

189 I now turn to the concession which my colleague Côté J. seizes upon as grounds for rewriting the parties' contract. In oral argument, counsel to the Chief Adjudicator noted that the Hearing Adjudicator and review adjudicators interpreted SL1.4 in a manner that contradicted a previous decision made by former Chief Adjudicator Ish. Counsel for the Chief Adjudicator stated that this was "aberrant" — that is, as an error that departed from an accepted interpretation of SL1.4. As I have already canvassed, this leads my colleague to her "gap", since the Chief Adjudicator has no authority under the IRSSA to provide a remedy for claimants where he discovers an error in the final review (Côté J. Reasons, at para. 163).

190 I observe, preliminarily, that the Chief Adjudicator is not a party to the IRSSA, but rather a creation of it (Sch. D, art. III(s)). Any concession on his part as to the scope of his authority is therefore of limited value to a judicial determination of what *the parties* intended that power to be.

191 Further, and as I have already recounted, the Chief Adjudicator *does* have authority to respond to incorrect interpretations of the IAP by exercise of his final review authority. I grant that he did not catch the error here, because his designates failed to notice the Hearing Adjudicator's erroneous interpretation of SL1.4. What this signifies, however, is *not* that the denial

of compensation to J.W. was the upshot of any "gap" or "break-down" in the agreement which required judicial recourse so as to reopen the claim (Côté J. Reasons, at paras. 161-62), but that it resulted from the Chief Adjudicator failing to properly discharge his final review obligations under the IRSSA.

192 That this is so is made plain by the Chief Adjudicator's submission before this Court that the courts *could not* provide a remedy in this case, despite the aberrant interpretation of the IAP:

> **Mr. Arvay, Q.C.:** ...We reject that approach. We reject any approach that will allow a supervising court to set aside a decision of an adjudicator when the point of disagreement is on a matter of interpretation of a provision in the IAP. That doesn't constitute exceptional circumstances that warrants judicial recourse. And I agree with Justice Rowe that that is actually a rather question begging sort of statement.
>
> But we [will] seize on the idea that this judicial recourse should be rare and it should really be limited to cases where, in the words of the Manitoba court of Appeal, there wasn't even a consideration of the terms. Not that there was a bad interpretation or an unreasonable interpretation, or so unreasonable interpretation, or patent disregard interpretation, it's just that there was no consideration. ... [Emphasis added; pp. 80-81.]

193 I recognize that, in response to questions from the hearing panel, the Chief Adjudicator went further. The exchange proceeded as follows:

> **Mr. Justice Moldaver:** Why are you taking such a technical position on that when you say if it's fresh evidence, you know, we can go back to the court, even though the proceedings are complete. But if it's a fresh view and a right view of the interpretation that would have allowed this man to get his claim off the ground you can't do it.
>
> **Mr. Arvay, Q.C.:** Okay.
>
> **Mr. Justice Moldaver:** Really, with respect, that's an absurd position.
>
> **Mr. Arvay, Q.C.:** Okay. So then maybe I'm wrong. Maybe I'm wrong. Maybe that would allow — that might be allowed, I don't know. That hasn't been done.
>
> . . . . .
>
> **Mr. Justice Moldaver:** — and now you are saying nothing can be done. You just backed off of that a little bit and said, "Well, maybe something can be done", which would be going back to the Supervising Judge to get an order, I suppose, to reopen this case.
>
> Are you going to concede that that would be a reasonable solution to the problem?
>
> **Mr. Arvay, Q.C.:** Well, you can tell I seem to be of mixed minds on it.

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> My first impression, my first reaction was that that just seems to bring back the reasonableness interpretation. I take your point, it might be different. It might be different.
>
> . . . . .
>
> **Mr. Justice Moldaver:** ...If as a result of working [the interpretative problems] out [within the four corners of the agreement] we reach — we have a hiatus, we have a gap, we have an inability to do justice in a particular case —
>
> **Mr. Arvay, Q.C.:** Yes.
>
> **Mr. Justice Moldaver:** — then you should be able to go to the court to fill that gap.
>
> **Mr. Arvay, Q.C.:** I agree. [Emphasis added; pp. 87-89 and 92.]

194 In short, the Chief Adjudicator acknowledged that "maybe [he is] wrong", and that he was "of mixed minds". He also agreed that *where there is a "gap"*, a court might fill it. As to that last proposition, and subject to what I have said about doing so in accordance with the parties' intentions, I agree. But the Chief Adjudicator did *not* clearly agree that such a gap existed *here*. And, when asked about whether a court could reopen J.W.'s claim to correct the Hearing Adjudicator's interpretation of SL1.4, the Chief Adjudicator replied that, although such a result might be possible, he was unsure if it was allowed on the terms of the IRSSA.

195 If this exchange could tenably be said to have left open the possibility of a gap, such possibility was closed immediately thereafter when the Chief Adjudicator appeared to *recoil* from that very suggestion in responding to the next line of questioning from the hearing panel:

> **Mr. Justice Rowe:** ...[T]he circumstances which we are now faced with in this case may constitute exceptional circumstances such that a supervising judge could deal with a highly problematic — a fundamentally troubling application of the agreement that warrants reconsideration, but the only means to bring it back before an adjudicator is through the intervention of a supervising judge?
>
> **Mr. Arvay, Q.C.:** But the difference between what I think you are positing is — that's not what happened here, right. What I think you are positing is what Justice Moldaver is saying maybe should have happened, which is that there should have been an RFD brought by the Chief Adjudicator or somebody else bringing to the attention of the court that there was, you know, this...
>
> So so I think that's not what happened. What Justice Edmond did, he just re-interpreted himself, he didn't rely on Mr. Ish's decision.
>
> **Mr. Justice Rowe:** So therefore you disagree with his general approach, which is substituting his view, although you seem to be saying that it would be — it would serve the ends of justice if this matter were to be sent back for re-adjudication.

Mr. Arvay, Q.C.: Well, I don't know if I would go that far. As Justice Sharpe says, you know, justice in this particular case is following the processes, the boundaries, the terms of this agreement.

Mr. Justice Brown: So we have to go back — just to be clear, we are back to the bright line then?

Mr. Arvay, Q.C.: We are back to the bright line then. [Emphasis added; pp. 94-95.]

III. Conclusion

196 My colleague Côté J. has simply gone too far, with too little. A concession by the Chief Adjudicator that J.W.'s claim was wrongly decided does not support a judicial rewrite of the terms of a complex settlement agreement reflecting the common intentions of the parties, particularly where his concession accompanies a submission that that the IRSSA does not allow for judicial recourse in such circumstances. I appreciate that the plainly incorrect interpretation of SL1.4 adopted by the Hearing Adjudicator and (somehow) affirmed by two review adjudicators is difficult to let pass, but that is the result compelled by law, even if it obliges us to avert our nostrils (*Spencer v. Continental Insurance Co.*, [1945] 4 D.L.R. 593 (B.C. S.C.), at p. 609, per Wilson J. (as he then was)).

Appeal allowed.

Pourvoi accueilli.

Appendix

CEP	Common Experience Payment
IAP	Independent Assessment Process
IRS	Indian Residential School
IRSSA	Indian Residential Schools Settlement Agreement
NAC	National Administration Committee
RFD	Request for Direction
TRC	Truth and Reconciliation Commission

Footnotes

1 Adjudicators are bound by the standard for compensable wrongs and for the assessment of compensation as defined in the IAP (art. II).

2 See B and C in the recitals of the Agreement.

3 A complete list of all acronyms used in these reasons can be found in the attached Appendix.

4 Similar or identical wording can be found in the Approval and Implementation Orders made by all nine supervising courts.

2007 ABCA 295
Alberta Court of Appeal

Knox v. Conservative Party of Canada

2007 CarswellAlta 1397, 2007 ABCA 295, [2007] A.W.L.D. 4061, [2007] A.W.L.D. 4065, [2007] A.W.L.D. 4124, [2007] A.W.L.D. 4125, [2007] A.J. No. 1046, [2008] 3 W.W.R. 588, 160 A.C.W.S. (3d) 645, 286 D.L.R. (4th) 129, 415 W.A.C. 29, 422 A.R. 29, 49 C.P.C. (6th) 216, 65 Admin. L.R. (4th) 167, 85 Alta. L.R. (4th) 34

John Knox, John Stewart-Smith, Jim Hawkes, Roy Thurm, Gerald Radke, Nelson Meyers, R.W. (Bert) Sparrow, Ronald W. Jones, Norma Sparrow, Lindsay Blackett, and Francois Aubin (Respondents / Appellants on Cross-Appeal) and Conservative Party of Canada and the Calgary West Conservative Association (Appellants / Respondents on Cross-Appeal) and Rob Anders (Intervener)

R. Berger, J. Watson, F. Slatter JJ.A.

Heard: June 14, 2007
Judgment: September 21, 2007 *
Docket: Calgary Appeal 0701-0071-AC, 0701-0091-AC

Proceedings: reversing in part *Knox v. Conservative Party of Canada* (2007), 2007 CarswellAlta 351, [2007] 6 W.W.R. 551, 72 Alta. L.R. (4th) 25, 2007 ABQB 180, 57 Admin. L.R. (4th) 143 (Alta. Q.B.)

Counsel: D.R. Haigh, Q.C., S.A. Morgan, for Appellants / Respondents on Cross-Appeal
R.J. Hawkes, E. Aspinall, for Respondents / Appellants on Cross-Appeal
A.D. Hunter, Q.C., D.H. de Vlieger, for Intervener

***Per curiam*:**

1 This appeal calls upon the Court to determine whether decisions taken by political parties are subject to judicial review.

2 The factual underpinnings are fully canvassed in the decision under appeal: *Knox v. Conservative Party of Canada*, [2007] A.J. No. 303, 2007 ABQB 180, 72 Alta. L.R. (4th) 25, [2007] 6 W.W.R. 551 (Alta. Q.B.). They may be summarized as follows. The Respondents are members of both the Conservative Party of Canada (the "Party") and the Calgary West

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Conservative Association (the "Association") who object to the way the nomination process, and the acclamation of Robert Anders (the sitting Member of Parliament for the Riding), proceeded in Calgary West between June and August, 2006. Three days after Mr. Anders was acclaimed, they sought judicial review of the nomination process (the "first judicial review"), applying to quash the decisions setting the date for the nomination meeting, to set aside the acclamation, and to replace the Committee Chair. In a second application made several weeks later (the "second judicial review"), the Respondents also sought judicial review of a decision of the Party's Arbitration Panel on related matters. The Arbitration Panel's decision found that the nomination process had not met the requirements of the Party's Candidate Nomination Rules and Procedures (the "Rules"), but that the variations were acceptable because the Director of Political Operations had appropriately exercised his discretion to vary those Rules.

3 The Appellants unsuccessfully sought to strike the first application for judicial review, a decision which was upheld by this Court: *Knox v. Conservative Party of Canada*, 2006 ABCA 342 (Alta. C.A.). Subsequently, Hawco, J. heard both judicial review applications at the same time. He dismissed the first because there was an adequate alternate remedy available through the Party's arbitration procedure. The Respondents have cross-appealed that portion of his decision. The Party submits that arbitration was not an "alternate" remedy but was the only remedy immediately available to the members. Hawco, J. allowed the second application on the basis that the Party had failed to follow its own Rules. His decision with respect to the second judicial review forms the subject of the appeal brought by the Appellants.

Detailed Factual Underpinnings

4 The following are the central factual underpinnings:

1. September 2, 2006 was initially fixed as the nomination date for the Calgary West Electoral District; the nomination date was later changed to August 31, 2006.

2. Nominations closed August 16, 2006, nine days after notice was given. Two people were nominated: Mr. Anders and Mr. Wakula. Mr. Wakula was disqualified by the National Candidates Selection Committee on August 17, 2006 for reasons which have not been publicly disclosed. Mr. Wakula appealed his disqualification to the National Council.

3. The next day, twelve members of the Calgary West Conservative Association brought a petition pursuant to s. 19.1 of the Conservative Party of Canada Constitution. The petition initiated the dispute resolution processes set out in the Constitution and the Rules.

4. The Appellants concede that not all of the nomination procedures set out in the Rules were followed to the letter. By way of illustration, the campaign period was less than thirty days and the notice provided to the members did not contain all of the requisite information. The

Appellants maintain, however, that all deviations were authorized by the Director of Political Operations in accordance with Rules 4(a) and 7(a).

5. On August 26, 2006, the National Council rejected Mr. Wakula's appeal of his disqualification and Mr. Anders, being the only remaining candidate, was considered acclaimed.

6. Notwithstanding the acclamation, the dispute resolution procedures set out in the Constitution and the Rules were followed. The Secretary of the Committee decided not to intervene in the dispute and the matters set out in the petition were accordingly deemed to be referred to an Arbitration Panel pursuant to Article 19.3 and Rule 9(b).

7. On October 17, 2006, the Arbitration Panel ruled as follows:

(a) The nomination procedures did not comply with the Rules in several respects.

(b) The Rules may be altered or abridged by the Director of Political Operations in consultation with the President of the National Council, where necessary, to ensure a fair and effective candidate recruitment and selection, and

(c) In this case, the Rules were altered, abridged and suspended by the Director in consultation with the President of the National Council to ensure a fair and effective candidate recruitment selection.

8. The panel also dealt with a further issue, holding that Ms. Mason was not biased and did not need to be removed as Chair of the Nominating Committee.

9. The Arbitration Panel's decision was communicated to the members on October 17, 2006.

10. The members applied for judicial review of the Arbitration Panel's final decision on November 24, 2006 - more than thirty days after the final decision was rendered.

11. The chambers judge concluded that the Arbitration Panel had erred in holding that the Appellants had not breached the Party's Rules and Constitution through the abbreviated nomination process. The chambers judge set aside the panel's decision, set aside Mr. Anders' acclamation, ordered the removal of the Committee Chair and directed that a new nomination process and meeting be held.

Is the Appeal Moot?

5 The order under appeal was filed March 22, 2007. On April 18, 2007, Hawco, J. directed that the nomination process proceed and be completed no later than June 30, 2007. The National Council of the Conservative Party of Canada adopted new Candidate Nomination Rules and Procedures designed specifically for the Federal Riding of Calgary West. The deadline for nominations was Tuesday, June 5, 2007. The intervener, Robert Anders, was acclaimed as the

632 Conservative candidate under the new rules. The Respondents and Cross-Appellants brought a Notice of Motion returnable before this Court seeking a declaration that the issues before this Court are moot.

6 On March 16, 2007, the Appellants applied to stay the order under appeal pending that appeal. Hawco, J. dismissed the application. The Appellants then sought a stay of the order before Hunt, J.A. That application was dismissed on April 18, 2007. In rendering her decision on the Party's stay application, Hunt, J.A. addressed, in part, the issue of mootness. She stated:

> I do agree, however, that if a stay is not granted, at least part of the appeal could, in certain circumstances, become nugatory. A number of unpredictable things would have to occur for that to be the case. It would require that, as a result of the nomination process, someone other than Anders was selected and then ran in a federal election, all before the Court of Appeal determined the appeal. I emphasize that, even in this possible confluence of several events, only part of the appeal would become nugatory, because, subject to possible mootness arguments, the appellants' interest in broader issues such as the role of courts in overseeing political parties, the effect of the *Election Act* and the *Arbitration Act*, and the interpretation of the Party's Rules, would remain live issues. ...
>
> [emphasis added]
>
> *Knox v. Conservative Party of Canada*, 2007 ABCA 143, 404 A.R. 383, 39 C.P.C. (6th) 242 (Alta. C.A.) at para. 16

7 We respectfully concur. In our opinion, the issues have not become academic. There remains a live controversy: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (S.C.C.) at paras. 16-17. We agree with the Appellants that significant issues are still extant. They include:

> a) Whether the dispute resolution procedures under the Conservative Party of Canada Constitution are obligatory.
>
> b) Whether those procedures result in final and binding resolution of all disputes.
>
> c) The finality or otherwise of the Arbitration Panel's decisions.
>
> d) The jurisdiction of the courts to superintend a political party's nomination process.

8 We conclude, accordingly, that the appeal is not moot.

Issues on Appeal

9 The Appellants raise the following issues:

a. Did the chambers judge err in finding that s. 44 of the *Arbitration Act* does not govern the review of the Arbitration Panel's decision?

b. Did the chambers judge err in finding that the decision of the Arbitration Panel was subject to judicial review?

c. Did the chambers judge err in finding that the standard of review applicable to the Arbitration Panel's decision was correctness?

d. Did the chambers judge err in finding that the Arbitration Panel's decision should be overturned?

Relevant Provisions of the Conservative Party of Canada Constitution

10 Articles 19.1, 19.3 and 19.6 read as follows:

Dispute Resolution

19.1 Except for any dispute related to the leadership selection process, any ten (10) members of an electoral district association or affiliated organization may give notice in writing to the National Council of a dispute as to whether the requirements of the Constitution, a by-law or any rules and procedures are being met by the electoral district association or affiliated organization or any committee thereof.

19.3 If the members appointed pursuant to Article 19.2 decide not to intervene or are unsuccessful in resolving the dispute, National Council shall, in writing, refer the matter to the Arbitration Committee.

19.6 The decision of an Arbitration Committee panel is final and binding and there shall be no appeal or review on any ground whatsoever.

Relevant Provisions of the Conservative Party of Canada's Candidate Nomination Rules and Procedures

11 Rules 4(a), 7(a) and 9(b) read as follows:

4(a) Except where otherwise provided by the Director of Political Operations, Electoral District Associations must meet the following criteria to start the candidate nomination process;

. . .

7(a) Where necessary to ensure fair and effective candidate recruitment and selection, the Director of Political Operations in consultation with the President of National Council may

alter, abridge or suspend any of the requirements in these Rules except section 9 in particular circumstance set out by National Council or, where so authorized by National Council, in such circumstances as he sees fit.

. . .

9(b) Where the Secretariat Committee decides not to intervene or is unsuccessful in resolving a dispute described in section 9a and the dispute remains outstanding, the Secretary shall forthwith report same to the Chair of the Arbitration Committee at which time the matter shall be deemed to stand referred to the Arbitration Committee pursuant to Article 19.3 for adjudication by a panel.

Relevant Provisions of the Arbitration Act, RSA 2000, c. A-43

12 Sections 3, 4, 11, 13, 37, 44(1), (2) & (3), 45 and 46(1)(a), (b) and (c) read as follows:

3 The parties to an arbitration agreement may agree, expressly or by implication, to vary or exclude any provision of this Act except sections 5(2), 19, 39, 44(2), 45, 47 and 49.

4 A party to an arbitration who is aware of a non-compliance with a provision of this Act, except with a provision referred to in section 3, or with the arbitration agreement and who does not object to the noncompliance within the time limit provided or, if none is provided, within a reasonable time, is deemed to have waived the right to object.

. . .

11(1) An arbitrator shall be independent of the parties and impartial as between the parties.

(2) Before accepting an appointment as arbitrator, a person shall disclose to all parties to the arbitration any circumstances of which that person is aware that may give rise to a reasonable apprehension of bias.

(3) An arbitrator who, during an arbitration, becomes aware of circumstances that may give rise to a reasonable apprehension of bias shall promptly disclose the circumstances to all the parties.

. . .

13(1) A party may challenge an arbitrator only on one of the following grounds:

(a) circumstances exist that may give rise to a reasonable apprehension of bias;

(b) the arbitrator does not possess qualifications that the parties have agreed are necessary.

(2) A party who appointed an arbitrator or participated in the arbitrator's appointment may challenge the arbitrator only on grounds of which the party was unaware at the time of the appointment.

(3) A party who wishes to challenge an arbitrator shall send the arbitral tribunal a statement of the grounds for the challenge within 15 days after becoming aware of them.

(4) The other parties may agree to remove the arbitrator who is being challenged, or the arbitrator may resign.

(5) If the arbitrator is not removed by the parties or does not resign, the arbitral tribunal, including the arbitrator who is being challenged, shall decide the issue and shall notify the parties of its decision.

(6) Within 10 days after being notified of the arbitral tribunal's decision, a party may make an application to the court to decide the issue.

(7) While an application is pending, the arbitral tribunal, including the arbitrator who is being challenged, may continue the arbitration and make an award, unless the court orders otherwise.

. . .

37 An award binds the parties unless it is set aside or varied under section 44 or 45.

. . .

44(1) If the arbitration agreement so provides, a party may appeal an award to the court on a question of law, on a question of fact or on a question of mixed law and fact.

(2) If the arbitration agreement does not provide that the parties may appeal an award to the court on a question of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that

(a) the importance to the parties of the matters at stake in the arbitration justifies an appeal, and

(b) determination of the question of law at issue will significantly affect the rights of the parties.

(3) Notwithstanding subsections (1) and (2), a party may not appeal an award to the court on a question of law that the parties expressly referred to the arbitral tribunal for decision.

. . .

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45(1) On a party's application, the court may set aside an award on any of the following grounds:

(a) a party entered into the arbitration agreement while under a legal incapacity;

(b) the arbitration agreement is invalid or has ceased to exist;

(c) the award deals with a matter in dispute that the arbitration agreement does not cover or contains a decision on a matter in dispute that is beyond the scope of the agreement.

(d) the composition of the arbitral tribunal was not in accordance with the arbitration agreement or, if the agreement did not deal with the matter, was not in accordance with this Act;

(e) the subject-matter of the arbitration is not capable of being the subject of arbitration under Alberta law;

(f) the applicant was treated manifestly unfairly and unequally, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator;

(g) the procedures followed in the arbitration did not comply with this Act or the arbitration agreement;

(h) an arbitrator has committed a corrupt or fraudulent act or there is a reasonable apprehension of bias;

(i) the award was obtained by fraud.

(2) If subsection (1)(c) applies and it is reasonable to separate the decisions on matters covered by the arbitration agreement from the impugned ones, the court shall set aside the impugned decisions and allow the others to stand.

(3) The court shall not set aside an award on grounds referred to in subsection (1)(c) if the applicant has agreed to the inclusion of the matter in dispute, waived the right to object to its inclusion or agreed that the arbitral tribunal has power to decide what matters in dispute have been referred to it.

(4) The court shall not set aside an award on grounds referred to in subsection (1)(h) if the applicant had an opportunity to challenge the arbitrator on those grounds under section 13 before the award was made and did not do so or if those grounds were the subject of an unsuccessful challenge.

(5) The court shall not set aside an award on a ground to which the applicant is deemed under section 4 to have waived the right to object.

(6) If the ground alleged for setting aside the award could have been raised as an objection to the arbitral tribunal's jurisdiction to conduct the arbitration, the court may set the award aside on that ground if it considers the applicant's failure to make an objection in accordance with section 17 justified.

(7) When the court sets aside an award, it may remove an arbitrator or the arbitral tribunal and may give directions about the conduct of the arbitration.

(8) Instead of setting aside an award, the court may remit it to the arbitral tribunal and give directions about the conduct of the arbitration.

46(1) The following must be commenced within 30 days after the appellant or applicant received the award, correction, explanation, change or statement of reasons on which the appeal or application is based:

(a) an appeal under section 44(1);

(b) an application for leave to appeal under section 44(2);

(c) an application to set aside an award under section 45.

Analysis

13 The rulings below require this Court to consider whether the disaffected members of the Association properly invoked judicial review to challenge the nomination process. The relevant inquiry is whether the decisions of the Party are subject to the public law remedy of judicial review, or whether the decisions of the Party are only subject to review by the Court of Queen's Bench pursuant to the provisions of the *Arbitration Act*.

14 Judicial review is a feature of public law whereby the superior courts under s. 96 of the *Constitution Act 1867* engage in surveillance of lower tribunals to ensure that the fundamentals of legality and jurisdiction are respected by those tribunals. The tribunals which are subject to judicial review are, for the most part, those which are court-like in their nature, or administer a function for the benefit of the public on behalf of a level of government. Those which are empowered by legislation to supervise and regulate a trade, profession, industry or employment, those which are empowered by legislation to supervise an element of commerce, business, finance, property or legal rights for the benefit of the public generally, or which set standards for the benefit of the public may also be subject to judicial review. Issues of contractual or property rights as between individuals or as between individuals and organizations, are generally addressed through ordinary

court processes at common law, or by statute or through arbitration or alternative dispute resolution as agreed by the parties.

15 The difficult question is deciding whether a particular body is public or private. The distinction between a public and a private tribunal is whether the tribunal exercises powers and duties of a public nature: *Martineau v. Matsqui Institution (No. 2)* (1979), [1980] 1 S.C.R. 602 (S.C.C.), at pp. 617, 622-3, 628; *Reynolds v. Ontario (Registrar, Information & Privacy Commissioner)* (2006), 217 O.A.C. 146, 27 M.P.L.R. (4th) 24 (Ont. Div. Ct.) at para. 33; *R. v. Panel on Take-overs & Mergers*, [1987] Q.B. 815 (Eng. C.A.); *R. v. Disciplinary Committee of the Jockey Club Ex p. Aga Khan* (1992), [1993] 1 W.L.R. 909 (Eng. C.A.).

16 History may explain part of the confusion over whether a tribunal is a public body subject to public law remedies, or only a consensual tribunal subject to private law remedies. Judicial review was originally done through the prerogative writs: *certiorari, mandamus*, prohibition, *habeus corpus*, and *quo warranto*. These were clearly public law remedies, and were not available to review privately created tribunals. The private law remedies of injunction and declaration were not originally available as public law remedies. This was because both injunctions and declarations developed in the court of Chancery, whereas judicial review was always done by the Court of Queen's Bench.

17 Upon the merger of the courts of equity and the common law courts, it quickly became apparent that the declaration and the injunction might be useful public law remedies as well, and they came to be used for that purpose. The situation was then that private law remedies could be used in public law, but the opposite was not true: the prerogative writs were not available for private disputes.

18 A procedural impediment still existed, namely the rule that neither a declaration nor an injunction could be applied for in the same proceeding as a prerogative remedy. This procedural obstacle was removed in 1987, when the *Rules of Court* were amended to provide that prerogative relief, injunctions and declarations could be applied for in the same proceeding: see Rule 753.04. At this point the distinction between the review of a private tribunal and a public tribunal came to be blurred, because in some cases a declaration and injunction could be used for both. The confusion was exacerbated because the same document (an originating notice of motion) was used for judicial review, as well as the review under Rule 410 of disputes that did not involve any unsettled facts, and depended primarily on the interpretation of documents.

19 The whole situation became further confused by the proliferation of tribunals, some of which were quite difficult to characterize as either public or private. In some instances later cases misinterpreted and misapplied earlier cases, resulting in what were essentially private tribunals being subject to "judicial review" in the technical sense.

20 It follows that if a tribunal is exercising powers that do not accrue to private organizations, and that are only vested on the tribunal by statute for the benefit of the public, then it is subject to judicial review. Otherwise it is a private consensual tribunal and *prima facie* subject only to private law remedies.

21 An examination of the *Pushpanathan* test, which is used to set the standard of judicial review, shows that it is largely inapplicable to private consensual tribunals. The first part of the test is the existence of a privative clause, which is purely a matter of statute. The second part of the test is the expertise of the tribunal. However, where the parties have consented to a particular dispute resolution mechanism, it hardly lies in their mouths to say that the tribunal that they have selected themselves lacks expertise. The third factor, the intention of the statute as a whole, also does not apply to private tribunals. While analogies to each of these factors can undoubtedly be found when the Court is asked to adjudicate on the activities of a private tribunal, the absence of any public dimension to those activities undermines the *raison d'etre* of the *Pushpanathan* test.

22 In some instances a tribunal may have both public and private powers. The tribunal is generally only subject to judicial review when and to the extent that its public powers are in question. When it exercises its private powers, only private remedies are generally available.

23 There are some tribunals that have traditionally been regarded as exercising public powers. For example, Chiefs of Police are considered to be public officials. Professional disciplinary bodies fall into the same category, although in most cases statutes now provide a direct appeal from the decisions of those bodies, leaving judicial review as a residual remedy only. The appointment and removal of public officers is subject to judicial review because they exercise public powers and functions, whereas the employment of ordinary employees, generally, is not: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 (S.C.C.). An illustration of the outer boundaries of what is a public body subject to judicial review is found in *Kaplan v. Canadian Institute of Actuaries* (1994), 25 Alta. L.R. (3d) 108, 161 A.R. 321 (Alta. Q.B.) affm'd (1997), 151 D.L.R. (4th) 481, 56 Alta. L.R. (3d) 205, 206 A.R. 268 (Alta. C.A.). The Canadian Institute of Actuaries was created by statute, but did not have the exclusive right to decide who could practice as an actuary. There were, however, a number of statutes that required certificates by an actuary who was registered with the Institute, meaning that non-membership in the Institute was a significant detriment to practising as an actuary. Kaplan in fact practised in such an area, and his discipline by the Institute therefore had a public aspect to it, making its decisions subject to judicial review.

24 Labour arbitrators have traditionally been treated as being subject to judicial review because arbitration is mandatory under the various labour statutes. As such it has been held that labour arbitrators exercise powers of a public nature.

25 It should be noted that the mere fact that a tribunal or an organization is incorporated is not decisive. There is no such thing as a common law corporation, and all corporations therefore

originate through statute. There are, however, a great many private corporations and their internal workings and decisions are not subject to judicial review. As said, the corporation must be discharging public duties or exercising powers of a public nature before it is subject to judicial review. Merely because a corporation is expressly or implicitly authorized by statute to retain staff or engage in other business does not make its decisions subject to judicial review.

26 Neither constituency associations nor political parties are given any public powers under the *Canada Elections Act*, S.C. 2000, c. 9. They are essentially private organizations. It is true that their financial affairs are regulated: they may only give tax receipts in certain circumstances, and they may only spend the money they raise in certain ways. However, merely because an organization is subject to public regulation does not make it a public body subject to judicial review. The fact that the organization may require or may hold a licence or permit of some kind is also not sufficient, nor is the fact that the organization may receive public money. Many organizations are subject to public regulation. For example, all charities must be registered in order to issue charitable receipts, but that does not mean that they are exercising public functions and therefore are subject to judicial review.

27 It is argued that the democratic process, elections, and the activities of political parties are of great public importance. That is undoubtedly true, but public importance is not the test for whether a tribunal is subject to judicial review. When arranging for the nomination of their candidate in Calgary West, the Party and the Association were essentially engaged in private activities, and their actions, in this case, are not subject to judicial review. They are, however, subject to private law remedies that may be engaged. Like many private organizations, the Appellants in this case have constitutions, bylaws and rules. Members are entitled to have those documents enforced in accordance with their terms and the proper interpretation of those terms. The remedies available are, however, private law remedies.

28 In adjudicating on the activities of a private tribunal, the first step is to see whether the constitution itself defines the remedies to which the members are entitled, and the procedures that are to be used to obtain those remedies. In this case, the Constitution and Rules of the Party and of the Association incorporate a system which provides for the internal arbitration of disputes, such as disputes arising from the nomination of the Party's candidate for that constituency for the next Federal Election. That detailed dispute resolution mechanism was engaged by the parties.

29 Indeed (albeit with respect to the first judicial review application), the chambers judge found that the parties had submitted their dispute to arbitration and that the Court should be reluctant to intervene in such circumstances:

> ... [A]s stated by my colleague Justice Hart in *G. v. G.*, (2000) 264 A.R. 22 at para. 23:

> ... once the parties have agreed to submit their differences to arbitration the court should intervene to relieve the parties of their contractual obligation only in the clearest of circumstances.
>
> The parties have, pursuant to the Rules, agreed to submit the matter to arbitration. ... (A.B. Digest, F16)

We agree with the Appellant that once this finding was made, the chambers judge was bound to apply the provisions of the *Arbitration Act*. We see no jurisdictional distinction between the two applications for judicial review. Instead of limiting his review to the provisions of the *Arbitration Act*, the chambers judge applied an administrative law analysis in the second judicial review to the Arbitration Panel's decision. This was an error of law: the Court cannot modify the language of the Act to add grounds of review beyond those permitted in s. 37.

30 It is not necessary for us to consider what would happen if the Constitution itself provided no internal dispute resolution mechanism, or rules of procedure. In such cases, the Court might be prepared to infer certain basic procedural protections, and in the absence of any specific remedial procedure, the courts would undoubtedly use their general jurisdiction to provide the relief to which the parties are entitled.

31 In this case, however, the Constitution specifically provides for arbitration, and says that the result of the arbitration will be final and binding. We need not decide whether this wording precludes an application for leave to appeal on a question of law, as provided for in s. 44(2) of the *Arbitration Act*, because no such application was brought within the limitation period in s. 46. Since judicial review is not available, and a timely application for leave to appeal was not filed, any rights of the members to challenge the decision of the arbitration panel have expired.

32 Likewise, s. 13 of the *Arbitration Act* provides a specific procedure for challenging the tribunal for bias. This was not a prototypical arbitration panel, where the arbitrators are completely independent from the parties in dispute. Here the parties have covenanted to select their arbitration panel "in house", something they are perfectly entitled to do. The provisions on impartiality of the arbitral board under s. 11 of the Act can be contracted away under s. 3 or waived under s. 4. Section 13(3) provides that within 15 days after becoming aware of the grounds for a challenge based on bias, a statement of those grounds must be sent to the arbitral tribunal. Within 10 days of the arbitrator's decision whether to resign or not, a party must make any application to the Court to decide the issue. No such application was brought in the case at bar within that period.

33 The Respondents argue that the dispute was never properly placed before the panel. We note, however, that the letter dated September 1, 2006 from the Conservative Party of Canada to the Respondents (A.B. Vol. II, p. 111) that referred the matter to arbitration, made reference to the letter of August 17, 2006 from the Respondents (A.B. Vol. II, p. 101). The August 17th letter was

six pages long and raised every complaint about the nomination process that formed the basis of the applications for judicial review. Those matters were all resolved by the arbitral panel and the result is final and binding.

34 In the result, we conclude that:

a) judicial review (a public law remedy) is not available in this case.

b) the parties had selected their own private law dispute resolution mechanism (arbitration).

c) the private law resolution was final and binding, and in any event other remedies were not engaged in a timely way.

35 For these reasons, the appeal with respect to the second judicial review is allowed. The judgment below is set aside; the decision of the Arbitration Panel is restored. Mindful of these reasons, the cross-appeal is dismissed.

Appeal allowed; cross-appeal dismissed.

Footnotes

* Leave to appeal refused at *Knox v. Conservative Party of Canada* (2008), 2008 CarswellAlta 278, 2008 CarswellAlta 279 (S.C.C.).

1999 CarswellNat 211
Federal Court of Canada — Appeal Division

Krause v. Canada

1999 CarswellNat 1850, 1999 CarswellNat 211, [1999] 2 F.C. 476, [1999] F.C.J. No. 179, 160 F.T.R. 214 (note), 19 C.C.P.B. 183, 236 N.R. 317, 86 A.C.W.S. (3d) 4

In the matter of an application, pursuant to sections 18(1) and 18.1 of the Federal Court Act, R.S.C. 1985, c. F-7, as amended

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'exécutif 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) and Her Majesty The Queen in Right of Canada, Respondent (Respondent)

Stone, Linden, Sexton JJ.A.

Heard: January 19, 1999
Judgment: February 8, 1999 *
Docket: A-135-98

Proceedings: reversing (1998), 143 F.T.R. 143, 18 C.C.P.B. 19 (Federal Court of Canada — Appeal Division)

Counsel: *Mr. Peter Englemann*, for the Appellant.
Mr. Edward R. Sojonky, Q.C., and *Mr. Jan Brongers*, for the Respondent.

Subject: Corporate and Commercial

APPEAL by applicant from order in judgment, reported at (1998), 18 C.C.P.B. 19, 143 F.T.R. 143, granting respondent's motion to strike originating notice of motion.

The judgment of the court was delivered by *Stone J.A.*:

1 This appeal is from an order of the Trial Division of February 25, 1998 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 and 18.1 of the *Federal Court Act* 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) of the *PSSA* and subsection 55(1) of 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.

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.

44.(1) Lors de chaque exercice, sont portés au crédit du compte de pension de retraite:

a) pour chaque mois, un montant égal à la somme des montants suivants:

(i) le montant correspondant à la somme globale que le ministre estime avoir été versée au compte au cours du mois sous la forme de contributions à l'égard du service en cours autre que le service en cours auprès d'un organisme de la fonction publique ou autre organisme défini à l'article 37,

(ii) le montant additionnel qui, selon le ministre, est nécessaire pour couvrir le coût des prestations acquises pour ce mois relativement au service en cours et qui deviendront imputables au compte;

b) pour chaque mois, le montant que le ministre détermine en fonction de la somme globale versée au compte pendant le mois précédent sous forme de contributions à l'égard d'un service passé;

c) le montant qui représente l'intérêt sur le solde figurant au crédit du compte, calculé de la manière et selon les taux et porté au crédit aux moments fixés par règlements. Toutefois, le taux applicable à un trimestre donné au cours d'un exercice doit être au moins égal à celui qui serait obtenu pour le même trimestre par la méthode de calcul prévue à l'article 46 du *Règlement sur la pension de la fonction publique*, dans sa version du 31 mars 1991.

55.(1) Lors de chaque exercice, sont portés au crédit du compte de pension de retraite:

a) pour chaque mois, le montant que le président du Conseil du Trésor estime nécessaire pour couvrir le coût des prestations acquises pour ce mois et qui deviendront imputables au compte;

b) le montant qui représente l'intérêt sur le solde figurant au crédit du compte, calculé de la manière et selon les taux et porté au crédit aux moments que peuvent fixer les règlements. Toutefois, le taux applicable à un trimestre donné au cours d'un exercice doit être au moins égal à celui qui serait obtenu pour le même trimestre par la méthode de calcul prévue à l'article 36 du *Règlement sur la pension de retraite des Forces canadiennes*, dans sa version du 31 mars 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 *Canaidian Forces Superannuation 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 1993-94 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 6 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 1993-94 fiscal year were recommended by the Canadian Institute of Chartered Accountants in 1988 and had their genesis in the respondent's decision in the 1989-90 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 1993-94 fiscal year.

8 Concern with this accounting treatment of the amounts required to be credited in the 1993-94 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 thirty 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 and to join the proper persons as respondents. Faced with that motion, the appellants proceeded to file the cross-motion seeking, *inter alia*, 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) 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 1989-90 fiscal year, and that even if the practice of amortizing surpluses in each fiscal year constituted a "decision" such practice commenced in the 1993-94 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 thirty 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 1996-97 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 subsection 18.1(1)-(3) of the *Federal Court Act* which read:

18.(1) Subject to section 28, the Trial Division has exclusive original jurisdiction

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

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

(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) 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.

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

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

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

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

18.(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) 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 de sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Section de première instance peut, avant ou après l'expiration de ces trente jours, fixes ou accorder.

(3) Sur présentation d'une demande de contrôle judiciaire, la Section de première instance peut:

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

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

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 that the Ministers in question may have decided as early as the 1989-90 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 *Inland Revenue Commissioners v. National Federation of Self-Employed & Small Businesses Ltd.* [9], Lord Diplock, commenting upon the decision of Lord Denning M.R. in *R. v. Greater London Council*, [1976] 3 All E.R. 184 (Eng. C.A.), stated:

> 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 court *in their discretion* can grant whatever remedy is appropriate. (The italics in this quotation are my own.)
>
> 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 unauthorized 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 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 thirty 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 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 an act or thing it has unlawfully failed or refused to do." 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" 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 1993-94 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 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 *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 Rule 1602(4) required that it 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 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."

Appeal allowed.

Footnotes

* A corrigendum issued by the court on March 2, 1998 has been incorporated herein.

1 R.S.C. 1985, c. P-36.

2 R.S.C. 1985, c. C-17.

3 Appeal Book, Vol. 1, at pp. 34-5.

4 R.S.C. 1985, c. F-11.

5 Appeal Book, Vol. 1, at pp. 264-65.

6 *R. v. Barker* (1762), 3 Burr. 1265 (Eng. K.B.) at p. 1267.

7 *Rochester (City) v. R.* (1858), 120 E.R. 791 (Eng. Ex. Ch.).

8 W. Wade & C. Forsyth, *Administrative Law*, 7th ed. (Oxford: Clarendon Press, 1994), at p. 643.

9 (1981), [1982] A.C. 617 (U.K. H.L.) at p. 641.

10 B.J. MacKinnon, "Prohibition, Certiorari and Quo Warranto," Law Society of Upper Canada Special Lectures (1961), at p. 290.

11 W. Wade & C. Forsyth, *supra*, note 8, at p. 626.

12 *Ibid.*, at pp. 633-4.

13 *Ibid.*, at p. 593.

14 See e.g. *Broughton v. Commissioner of Stamp Duties*, [1899] A.C. 251 (New South Wales 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 and Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing, 1998), at para. 2:4410 for a discussion of subsection 18.1(3).

17 (1997), 146 F.T.R. 19 (Fed. T.D.), reversed on other grounds (December 1, 1998), Doc. A-191-98 (Fed. C.A.).

18 *McCaffrey v. R.* (1992), 59 F.T.R. 12 (Fed. T.D.). See also *LeBlanc v. National Bank of Canada* (1993), [1994] 1 F.C. 81 (Fed. T.D.); *Atlantic Oil Workers Union v. Canada (Director of Investigation & Research)*, [1996] 3 F.C. 539 (Fed. T.D.).

2002 FCT 750
Federal Court of Canada — Trial Division

Larny Holdings Ltd. v. Canada (Minister of Health)

2002 CarswellNat 1689, 2002 CarswellNat 4556, 2002 FCT 750, [2003] 1 F.C. 541, 115 A.C.W.S. (3d) 354, 216 D.L.R. (4th) 230, 222 F.T.R. 29, 43 Admin. L.R. (3d) 264

Larny Holdings Limited carrying on business as Quickie Convenience Stores, Applicant and Canada (Minister of Health) and John T. Zawilinski, Manager, Tobacco Enforcement Unit, Health Canada, Respondents

Nadon J.

Heard: January 14, 2002
Judgment: July 5, 2002
Docket: T-1716-00

Counsel: *Stephen Victor* and *Jane M. Bachynski*, for applicant
R. Jeff Anderson, for respondents

Subject: Public; Corporate and Commercial; Constitutional

APPLICATION by convenience store company for judicial review of decision of Minister of Health and public servant regarding alleged "cash rebate" for purchase of tobacco products.

***Nadon J.*:**

1 This is an application for judicial review of a "direction," [1] issued by the respondent, John T. Zawilinski, acting in his capacity of Manager, Tobacco Enforcement Unit, Ontario Region, Health Protection Branch, Health Canada, received by the applicant on May 30, 2000. The direction reads a follows:

> The purpose of this letter is to inform you of Health Canada's position on cash rebates offered on the purchase of multiple packs of cigarettes or other tobacco products, in order to assist you in complying with section 29 of the *Tobacco Act*.
>
> The purpose of the *Tobacco Act* is to protect the health of Canadians, particularly youth, from the harmful effects of tobacco use. Given that promoting tobacco products is one of the main ways of influencing consumer attitudes, restricting promotion is an essential part of the Act. The Act restricts the promotion of tobacco products, including sales promotion such as cash

rebate, while allowing tobacco manufacturers and retailers sufficient leeway to exercise their freedom of commercial expression.

Health Canada has observed that some retailers offer cash rebates on the purchase of multiple units of tobacco products. For example, a retailer offers one pack of cigarettes for $4, but 3 packs for $10. Health Canada is of the view that this practice contravenes section 29 of the *Tobacco Act*.

Paragraph 29(a) states that no manufacturer or retailer shall:

- offer or provide any consideration, direct or indirect, for the purchase of a tobacco product, including a gift to a purchaser or a third party, bonus, premium, *cash rebate* or right to participate in a game, lottery or contest.

Therefore, retailers must make sure they do not offer a cash rebate on the purchase of more than one unit of tobacco product. The selling price of multiple packs of cigarettes must be the same as if the packs were sold individually, that is to say the sum of the selling price of each of the packs (e.g., $4 per pack, thus $12 for 3 packs).

Please note that the "unit" to be used in determining the base price is the intact, finished, packaged product. Thus, an unopened carton of cigarettes is one unit of tobacco product; a pack of cigarettes is also one unit of tobacco product.

Retailers are completely free to set the selling price of their tobacco products. Accordingly, the price of a carton or pack of cigarettes is at the retailer's discretion. The above-mentioned section 29 restriction applies only to cash rebates for multiple-unit sales.

Please note that as of May 1, 2000, Health Canada will be issuing warning letters to retailers who contravene this provision. Any subsequent offence may lead to prosecution.

Any retailer who contravenes section 29, is guilty of an offence and liable on summary conviction, for a first offence to a fine not exceeding $3,000 and for a subsequent offence, to a fine not exceeding $50,000. Please take the necessary steps to avoid contravening this Act.

2 It should be noted that the applicant initially filed its application before the Ontario Superior Court of Justice. However, following discussion and correspondence with the respondents, the applicant abandoned those proceedings and, on October 11, 2000, filed the present application. Leading up to the applicant abandoning its application in the Ontario Court was a letter dated August 4, 2000, sent by the respondents to the applicant, which reads in part as follows:

As I indicated in our telephone conversation on August 2, in our view, the Ontario Court has no jurisdiction to deal with this Application. The applicant is seeking relief against a person exercising powers under an Act of Parliament. By virtue of s. 18 of the *Federal Court Act*, the

Federal Court of Canada has exclusive jurisdiction to issue the relief your client is seeking. We would therefore be grateful if could abandon the Application in the Ontario Court.

3 On August 5, 2000, Blais J., with the consent of the respondents, allowed the applicant's motion for an extension of time to commence and file the present proceedings.

4 The applicant, Larny Holdings Ltd., operates as Quickie Convenience Stores in Ontario and Quebec ("Quickie") and in the course of its business sells cigarettes. At the material time, Quickie offered for sale to its customers a single pack of cigarettes for $4.31 plus tax and offered for sale a carton of cigarettes (8 packs) for $28.49 plus tax. Quickie also offered two packs ("multi-pack") of cigarettes for $7.99 plus tax.

5 Therefore, the price per cigarette pack, if bought individually, was $4.31. If a customer bought a multi-pack, the price per pack was $4.00, and if the customer purchased a carton, the price per pack was $3.56. Offering two packs of cigarettes at a per pack price slightly under the per pack price if sold individually was a pricing strategy that Quickie had used for approximately ten years. Quickie's pricing strategy was adopted in response to the highly competitive cigarette sales environment, which resulted from the introduction of self-serve gasoline stations and independent convenience stores in the Ontario market. The multi-pack offer was not offered in any pre-packaged container, wrapping or special package. The applicant simply advertised that it would sell two packs at a per pack price slightly inferior to that of an individual pack of cigarettes.

6 The respondents, the Minister of Health and John T. Zawilinski, who are responsible for the administration and enforcement of the *Tobacco Act*, S.C. 1997, c. 13 (the "TA"), are of the view that selling the multiple-pack at a price inferior to the per-pack price, if sold individually, violates the TA.

7 As a result of receiving two somewhat coercive letters from the respondents, advising it that selling the multi-packs at a reduced price was illegal, the applicant ceased the sale thereof.

8 On March 19, 2000, the Tobacco Enforcement Unit, Health Canada, delivered by way of a letter, a Notice to Establishments Selling Tobacco Products, which included the applicant. The letter stated that it was Health Canada's view that selling multiple packs of cigarettes for a per unit price inferior to that charged on the sale of single packs of cigarettes if sold individually, constituted a "cash rebate" and as such contravened s. 29 of the TA. I note, in passing, that selling a carton of 8 packs of cigarettes, at a much greater reduced price per pack, is not, according to the respondents, illegal.

9 The letter also advised the applicant and the other retailers that after May 1, 2000, Health Canada would be sending warning letters to retailers who, in their view, continued to violate s. 29 of the TA, and that any subsequent impugned conduct might lead to prosecution. The letter further stated that any retailer who contravened s. 29 of the TA was guilty of an offence and liable

on summary conviction, for a first offence, to a fine not exceeding $3,000, and for a subsequent offence, to a fine not exceeding $50,000. The letter concluded by advising retailers to "please take the necessary steps to avoid contravening the Act." This form letter was not signed nor addressed to anyone in particular.

10 On May 30, 2000, the applicant received a warning letter signed by Mr. John Zawilinski, which, *inter alia*, outlined Health Canada's position with respect to the meaning of s. 29 of the TA. The content of this letter was identical to that of the form letter sent earlier by the respondents, save for two minor changes. Firstly, the letter was addressed to the applicant personally. Secondly, the letter was signed by Mr. Zawilinski.

11 On May 30, 2000, under threat of prosecution, the applicant stopped offering the multi-pack prices. Thus, the second letter had its intended effect - at least on the applicant - i.e., convincing retailers to stop selling multi-packs for a per pack price inferior to the price of one pack sold individually, without having to lay a charge. As a result, the applicant's tobacco sales revenue has declined by 1%. Hence, the applicant has lost approximately $6,500 per week. In addition, the applicant has seen a decline in customer traffic of approximately 2,100 customers per week across its 38 locations.

12 The applicant argues that the act of sending out coercive letters threatening prosecution and fines upon conviction of up to $50,000 interfered with its internal pricing strategies. Moreover, the applicant argues that the letter is, in effect, a direction from Health Canada ordering the applicant to cease and desist from some of its marketing and pricing strategies. Thus, the applicant seeks judicial review of the letter which it characterizes as a direction. The applicant asks this Court for the following relief:

> 1. A declaration that the direction issued by Mr. Zawilinski to the applicant is invalid and/or unlawful;
>
> 2. An order quashing or setting aside the direction;
>
> 3. An interim permanent order and/or injunction prohibiting and restraining Mr. Zawilinski and Health Canada generally from restricting the pricing and sale by the applicant of multi-packs of cigarettes at a lesser or reduced per pack price when compared to the applicant's per price pack if sold on a single pack basis.

13 As appears from the above, the applicant seeks, *inter alia*, a declaration that selling multiple packs at a price inferior to that charged on the sale of single packs of cigarettes sold individually, does not constitute a "cash rebate" for the purposes of s. 29 of the TA.

14 Before addressing the merits of the application, I must address a number of jurisdictional issue raised by the respondents. The first issue arises from the respondents' submission that Mr.

Zawilinski has made no decision capable of being reviewed and that, in any event, he cannot be considered as a "federal board, commission or other tribunal" as that expression is defined in s. 2 of the *Federal Court Act*, R.S.C. 1985, c. F-7 (the "Act"). In the respondents' submission, since no legal consequences flow from Mr. Zawilinski's decision/letter, it cannot be viewed as a reviewable "decision or order" under s. 18.1 of the Act. The respondents' submission on this issue appears at paras. 6 to 9 of their Memorandum of Fact of Law, which read as follows:

> 6. Section 2 of the *Federal Court Act*, in defining "Federal Board, Commission or other Tribunal" does not contemplate every act of omission of a Minister or servant of the Crown, as being a decision of a Federal Board, Commission or other Tribunal. The decision must be made pursuant to or under authority of an Act of Parliament or there must, at the very least, be a threat of future use of such authority. That is, there must concrete legal consequences flowing from the action/decision of the board. No such consequences flow directly from the Respondent's opinion in this case [authorities omitted].
>
> 7. In addition, an activity involving the provision of a non-binding opinion as to how provisions of a statute are perceived to apply do not fall within the types of decision of a federal board, commission of other tribunal which can be open to review [authorities omitted].
>
> 8. A recommendation to charge or the laying of an information [sic] be the subject of a judicial review any more than a Minister's recommendation to the Governor in Council concerning certain proposed legislative amendments [sic] be open to review [authorities omitted].
>
> 9. The Respondents have no direct power to enforce the impugned opinion. They cannot levy any sanction, revoke a license, or otherwise directly affect the Applicant in respect in respect of what it might perceive to be a violation of s. 29 of the *Act*. The most that can be done, as discussed below, is the laying of an information to initiate a charge against the applicant. Thereafter, the prosecutor and ultimately the Court will have the final say as to whether or not there has been a contravention and the appropriate penalty to be imposed thereon.

15 For the reasons that follow, I am of the view that the respondents' position is incorrect. I begin with the remarks of Décary J.A. in *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works & Government Services)*, [1995] 2 F.C. 694 (Fed. C.A.), where, at pp. 700 to 705, he states in unequivocal terms that judicial review under s. 18 of the Act is intended to be broad in scope and "readily available" to applicants:

The phrase "powers conferred by or under an Act of Parliament" found in the definition of a "federal board, commission or other tribunal" is particularly broad and is not subject to the limitation suggested by the Minister.

. . . . .

It should be borne in mind that what is at issue here is determining whether a litigant has access to this Court's power of review in connection with a legislative provision - paragraph 18(1)(a) of the *Federal Court Act* - by which Parliament sought to make the federal government subject to the Court's superintending and reforming power. As I see it, there is no reason to try and distort the usual meaning of the words or strive to divest them of all practical meaning by resort to fine distinctions suited to constitutional analysis, which would have a sterilizing effect contrary to the intent of Parliament.

When it amended paragraph 18(1)(a) of the *Federal Court Act* in 1990 to henceforward permit judicial review of decisions made in the exercise of a royal prerogative, Parliament unquestionably made a considerable concession to the judicial power and inflicted a significant setback on the Crown as the executive power, if one may characterize making the government still further subject to the judiciary as a setback. What appears from this important amendment is that Parliament did not simply make the "federal government" in the tradition sense subject to the judiciary, *but intended that henceforth very little would be beyond the scope of judicial review*. That being so, I must say I have some difficulty giving to s. 18(1)(a) an interpretation which places Ministers beyond the scope of such review when they exercise the most everyday administrative powers of the Crown, though these are also codified by legislation and regulation.

With respect, that would be to take an outmoded view of supervision of the operations of government. The "legality" of such acts done by the government, which is the very subject of judicial review, does not depend solely on whether such acts comply with the stated requirements of legislation and regulations.

. . . . .

This liberal approach to the wording of paragraph 18(1)(a) is not new to this Court. It is readily understanding, if one only considers the litigant's viewpoint and takes account of the tendency shown by Parliament itself to make government increasingly accountable for its actions.

. . . . .

In recent years, Parliament has made a considerable effort to adapt the jurisdiction of this Court to present-day conditions and to eliminate jurisdictional problems which had significantly tarnished this Court's image. *As between an interpretation tending to make judicial review more readily available and providing a firm and uniform basis for the Court's jurisdiction and an interpretation which limits access to judicial review, carves up the Court's jurisdiction by uncertain and unworkable criteria and inevitably would lead to an avalanche of preliminary litigation, the choice is clear*. [Footnotes omitted.] [Emphasis added.]

16 Under para. 18(1)(a) of the Act, the Trial Division of this Court has jurisdiction to, *inter alia*, grant declaratory relief against any "federal board, commission or other tribunal." Section 18 of the Act must be read in conjunction with para. 18.1(3)(b), which confers on the Trial Division the following powers:

> 18.1(3) On an application for judicial review, the Trial Division may
>
> . . . . .
>
> (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.
>
> . . . . .
>
> 18.1(3) Sur présentation d'une demande de contrôle judiciaire, la Section de première instance peut :
>
> . . . . .
>
> 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 national.

17 On a reading of the above paragraph, it is clear that not only are decisions and orders of a federal board subject to judicial review, but also all acts or proceedings thereof. The meaning of the words "decision, order, act or proceeding" of a federal board was examined by the Federal Court of Appeal in *Morneault v. Canada (Attorney General)* (2000), [2001] 1 F.C. 30 (Fed. C.A.). At issue in that case, *inter alia*, was whether findings of individual misconduct against named individuals made by the commission of inquiry into the deployment in 1992 of Canadian Forces to Somalia constituted reviewable decisions under para. 18.1(4)(d) of the Act. In addressing that issue, Stone J.A., for the Court of Appeal, opined as follows, at pp. 61 to 64:

> [40] The issue, in my view, resolves itself into one of statutory construction. It is not clear, however, that similarities in procedure by itself affords a reliable basis for concluding that the findings in issue are "decisions" reviewable under paragraph 18.1(4)(d). This Court has been called upon on many occasions to construe the phrase "decision or order . . . required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal" in section 28 of this Act as it read prior to the 1990 amendments. As has been pointed out in D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf ed. (Toronto: Canvasback Publishing, 1998), at paragraph 2:4420, note 376, "initially the Court restricted the term to "final" decisions or orders, and to those that the tribunal was expressly charged by its enabling legislation to make" but, subsequently, the scope of section 28 was "broadened to include a decision that was fully determinative of the substantive rights of the party, even though it may not be the

ultimate decision of the tribunal". Indeed, a recommendation to a Minister of the Crown by an investigative tribunal which by reasonable expectation would lead to a deportation, has been considered reviewable . . . [Authority omitted.]

[41] [. . .] I must, however, acknowledge the force of the argument the other way, that the review of findings like those in issue is available on the ground afforded by paragraph 18.1(4)(d) *despite their nature as non-binding opinions, because of the serious harm that might be caused to reputation by findings that lack support in the record*. [Emphasis added.]

[42] If a ground for granting relief is not available under that paragraph, I have the view that the findings are yet reviewable under the section. Judicial review under section 18.1 is not limited to a "decision or order". This is clear from subsection 18.1(1) which enables the Attorney General of Canada and "anyone directly affected by the matter" to seek judicial review. It is plain from the section as a while that, while a decision or order is a "matter" that may be reviewed, a "matter" other than a decision or order may also be reviewed. This Court's decision in *Krause v. Canada*, [1999] 2 F.C. 476 (C.A.) illustrates the point. It there held that an application for judicial review pursuant to section 18.1 for a remedy by way of *mandamus*, prohibition and declaration provided for in section 18 [as am. by S.C. 1990, c. 8, s. 4] of the Act were "matters" over which the Court had jurisdiction and that the Court could grant appropriate relief pursuant to paragraphs 18.1(3)(a) 18.1(3)(b). [Further authorities omitted.] I am also satisfied that the respondent is directly affected by the findings and that they are amenable to review under section 18.1. The findings are exceptionally important to the respondent because of the impact of his reputation. The Court must be in a position to determine whether, as alleged, the findings are not supported by the evidence.

[43] To be reviewable under section 18.1 a "matter" must yet emanate from "a federal board, commission or other tribunal". Such was the case in *Krause*, *supra*. The phrase "a federal board, commission or other tribunal" is defined in subsection 2(1) of the Act to mean "any body or any person having, exercising or purporting to exercise jurisdiction or power conferred by or under an Act of Parliament. In my view, the Commission falls within the scope of the definition, for it derived its mandate from the March 20, 1995 Order in Council as subsequently amended and its detailed investigatory powers and power to make findings of misconduct from the *Inquiries Act* [Authority omitted.]

18 Mr. Justice Stone's remarks in *Morneault*, *supra*, like those of Décary J.A. in *Gestion Complexe*, *supra*, are to the effect that judicial review under s. 18 of the Act must be given a broad and liberal interpretation, as a result of which a wide range of administrative actions will fall within the Court's judicial review mandate. It is also clear that judicial review is no longer restricted to decisions or orders that a decision-maker was expressly charged to make under the enabling legislation. Rather, judicial review will extend to decisions or orders that determine a party's rights, even if the decision at issue is not the ultimate decision. It also follows from the Court of Appeal's decision in *Morneault*, *supra*, that the word "matter" found in s. 18.1 of the Act

is not restricted to "decisions or orders," but encompasses any matter in regard to which a remedy might be available under s. 18 or subs. 18.1(3).

19 In *Moumdjian v. Canada (Security Intelligence Review Committee)*, [1999] 4 F.C. 624 (Fed. C.A.), Robertson J.A. concluded that a decision in the form of a recommendation or advice to a Minister or to the Governor in Council, and which was intended to be acted upon, must necessarily be reviewable "if only because the consequences which flow from a flawed decision or a flawed process are invariably of fundamental significance to those who are adversely affected by it." He then concluded, following a careful review of the relevant jurisprudence, that the expression "decision or order" had no fixed or precise meaning, but that its meaning depended upon the statutory context in which the advisory decision was made, "having regard to the effect which such decision has on the rights and liberties of those seeking judicial review."

20 I will refer to one last case on this issue. In *Markevich v. Canada*, [1999] 3 F.C. 28 (Fed. T.D.), Evans J. (as he then was), at paras. 9 to 13 (pp. 36 to 38), makes the following remarks:

> [9] The respondent made a preliminary objection to the Court's jurisdiction to entertain this proceeding. The argument was that only a "decision or order" may be the subject of an application for judicial review under section 18.1 of the *Federal Court Act*. The letter written on behalf of the Minister, which is identified in the applicant's originating notice of motion as the subject of the application for judicial review, was simply informative in nature and did not purport to determine or otherwise affect any legal rights or duties of the applicant. It was not a "decision or order", and was therefore unreviewable by this Court. Indeed, on very similar facts to those at bar, this was the conclusion reached by Teitelbaum J. in *Fuchs v. R.*, [1997] 2 C.T.C. 246 (F.C.T.D.).
>
> [10] With all respect, I do not share this rather limited view of the scope of the subject-matter of this Court's judicial review jurisdiction. The words "decision or order" are found in subsection 18.1(2) of the *Federal Court Act*, which provides that an application for judicial review of a "decision or order" must be made within 30 days after the time that the decision or order was first communicated by the decision maker. In my opinion, this subsection simply provides a limitation period within which an application for judicial review of a decision or order must normally be made. It does not say that only decisions or orders may be the subject of an application for judicial review, nor does it say that administrative action other than decisions or orders are subject to the 30-days limitation period: *Krause v. Canada*, [1999] 2 F.C. 476 (C.A.).
>
> [11] It seems to me that the permitted subject-matter of an application for judicial review is contained in subjection 18.1(3), which provides that on an application for judicial review the Trial Division may order a federal agency to do any act or thing that it has unlawfully failed or refused to do, or declare invalid or set aside and refer back, prohibit or restrain "a decision, order, *act* or proceeding of a federal board, commission or other tribunal". The words "act

or proceeding" are clearly broad in scope and may include a diverse range of administrative action that does not amount to a "decision or order", such as subordinate legislation, reports or recommendations made pursuant to statutory powers, policy statements, guidelines and operating manuals, or any of the myriad forms that administrative action may take in the delivery by a statutory agency of a public program: see *Krause v. Canada*, *supra*.

[12] However, in order to qualify as an "act or proceeding" that is subject to judicial review, the administrative action impugned must be an "act or proceeding" of a "federal board, commission or other tribunal", that is a body or person "having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament" (subsection 2(1) [as am. by S.C. 1990, c. 8, s. 1] of the *Federal Court Act*). While the letter written on the Minister's behalf to the applicant that is the subject-matter of this application for judicial review was not an act or proceeding by a federal body in the *exercise* of any statutory power, the Minister, of course, is a person *having* statutory powers under the *Income Tax Act*.

[13] *Even though not taken in the exercise of a statutory power, administrative action by a person having statutory powers may be reviewable as an "act or proceeding" under paragraph 18.1(3)(b) if it affects the rights or interests of individuals. The letter in question here contained no decision made pursuant to a statutory power, nor did it explicitly purport adversely to affect any right or interes of the applicant*. However, it is a reasonable inference from both the letter, and the applicant's communications with Ms. Kara, the writer of the letter, that it signified that Revenue Canada had made a decision to try to collect the unpaid tax and intended to take measures to attempt to recover the previously "written off" tax debt. And, as is apparent from the requirements to pay that was subsequently issued, this was indeed the case. [Emphasis added.]

21 The facts in *Markevich*, *supra*, were that the applicant owed back taxes which were subsequently "written off" by Revenue Canada because there appeared to be no realistic chance of collecting the debt in the foreseeable future. As a result, his 1993 Statement of Account with Revenue Canada showed a nil balance. However, in 1998, a Ms Kara of the Richmond, B.C., Office of Revenue Canada, sent the applicant a letter advising him that he owed over $770,000 in back taxes. Ms Kara, written on behalf of the Minister, stated in her letter that Revenue Canada had decided to try to collect the unpaid taxes and intended to take measures to recover the previously "written off" debt.

22 Evans J. concluded that, notwithstanding the fact that the letter contained "no decision made pursuant to a statutory power, nor did it explicitly purport adversely to affect the rights or interests of individuals," the letter still constituted an act capable of review by this Court.

23 With the above jurisprudence in mind, I now turn to the specifics of the case before me. I agree wholeheartedly with the applicant that the respondents' direction cannot be characterized in the way that the respondents suggest, i.e., as an opinion or warning letter: (i) not issued pursuant to

any specific legislative authority, but rather as a courtesy to inform the applicant of the respondents' position as to the effect of s. 29 of the TA; (ii) from which no legal consequences flow to the applicant; (iii) a "non binding opinion" with respect to the interpretation of s. 29 of the TA; and (iv) a "recommendation" to charge the applicant with an offence under the TA.

24 The direction sent by the respondents is, in my view, coercive, in that the purpose thereof is to threaten the applicant to immediately stop selling the multi-packs, failing which a charge would be laid and criminal prosecution might be commenced. I have no doubt that what the respondents hoped for was what in fact happened, i.e., that the applicant would stop selling multi-packs so as to avoid criminal prosecution. As I have already indicated, the applicant's decision to stop selling multi-packs has resulted in financial loss.

25 I am therefore of the view that the letter sent by Mr. Zawilinski is a "decision, order, act or proceeding" and is reviewable by this Court. I also have no hesitation in concluding that in sending the direction, Mr. Zawilinski was a "federal board, commission or other tribunal" within the meaning of subs. 2(1) of the Act, which defines that expression in the following terms:

> 2.(1)
>
> . . . . .
>
> "federal board, commission or other tribunal" means any body or any 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, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*;
>
> . . . . .
>
> 2.(1)
>
> . . . . .
>
> « 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, à l'exclusion d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la *Loi constitutionnelle de 1867*.

26 In their *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing, 1998, looseleaf edition), the learned authors Donald J.M. Brown, Q.C., and The Honourable John M. Evans make, at para. 2-45, the following remarks concerning the meaning of the words "federal board, commission or other tribunal" found at subs. 2(1) of the Act:

> In the result, the *source* of a tribunal's authority, and not the *nature* of either the power exercised or the body exercising it, is the primary determinant of whether it falls within the definition. The test is simply whether the body is empowered by or under federal legislation or by an order made pursuant to a prerogative power of the federal Crown. [. . .]

Footnote 250, which also appears under para. 2-45 is also relevant:

> [250] Note that, because federal board is defined to include a body or person "*having*, exercising or purporting to exercise jurisdiction or powers conferred by or under" federal legislation, it may not be necessary to establish that the administrative action being reviewed was made in the exercise of a statutory power. [. . .]

27 I agree entirely with the view of these authors. How can it be said in the present matter that Mr. Zawilinski was not a person "having, exercising or purporting to exercise jurisdiction or powers conferred by or under" an act of Parliament? If Mr. Zawilinski was not, at the very least, purporting to exercise jurisdiction under the TA, what, one may ask, was he doing?

28 While it may be true that no provision of the TA specifically conferred authority on Mr. Zawilinski to send the letter at issue to the applicant, this does not, in my view, signify that Mr. Zawilinski was not a "federal board, commission or other tribunal." In my view, Mr. Zawilinski was, at the very least, purporting to exercise jurisdiction or powers conferred by or under the TA.

29 The respondents raise two other jurisdictional issues. Firstly, they submit that the Federal Court, Trial Division, is not the proper forum to determine the meaning of s. 29 of the TA, the proper forum being the Provincial Court, with summary conviction jurisdiction. They also argue that the application brought by the applicant is premature, in that there is no *lis* between the parties, and that until such time as the applicant is charged with an offence under the TA, the application is premature. The respondents assert that the applicant can only obtain a judicial declaration regarding the meaning of s. 29 of the TA from the court, which has jurisdiction in regard to the summary conviction process. Since no charge has been laid against the applicant, that process has yet to be commenced.

30 If the applicant followed the respondents' logic, it would have put itself to the risk and expense of criminal prosecution in order to obtain a declaration concerning the meaning of s. 29 of the TA and, more particularly, whether the sale of multi-packs constitutes a "cash rebate" under the section. In other words, the applicant would have to engage in conduct that allegedly breached the statute, wait for a charge, suffer the prejudice that would result from the charge, and then expend substantial sums of money in defending the charge. That, surely, cannot be the solution to the applicant's difficulties. As Farwell L.J. stated at pp. 420-421 in *Dyson v. Attorney General* (1910), [1911] 1 K.B. 410 (Eng. C.A.):

> Now the action asks for no declaration in respect of any penalty; the complaint is that the Legislature has entrusted to a Government department (the Commissioners of Inland Revenue) the performance of the duty of making certain specific inquiries in a specific manner from landowners and of requiring answers to be sent to themselves, and has imposed a 50 £ penalty for disobedience. The plaintiff alleges that the Commissioners have exceeded their powers by making inquiries not authorized to be made, by not giving proper time to answer, and by requiring answers to be sent to a person not authorized to receive them and to whom it is injurious to the plaintiff's interest to send them. [. . .]; it would be a blot on our system of law and procedure if there is no way by which a decision on the true limit of the power of inquisition vested in the Commissioners can be obtained by any member of the public aggrieved, without putting himself in the invidious position of being sued for a penalty. I am, however, of opinion that the Attorney-General's contention is not well founded.

31 Farwell L.J. then went on to state, at p. 424, that " . . . the Courts are the only defence of the liberty of the subject against departmental aggression." The words of Farwell L.J. appear to be quite apposite in the present matter, since the respondents' submission is that Mr. Zawilinski acted without statutory authority in sending out the directive which is at issue in these proceedings.

32 In my view, declaratory relief is the appropriate remedy in the present case. In *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.), Dickson J. (as he then was) held that in order to obtain declaratory relief, a person need only show that a legal interest or right was "in jeopardy or grave uncertainty." Mr. Justice Dickson's reasoning is as follows (p. 457):

> None of this is to deny the preventative role of the declaratory judgment. As Madame Justice Wilson points out in her judgment, Borchard, *Declaratory Judgments* (2nd ed. 1941), at p. 27, states that:
>
> > . . . no "injury" or "wrong" need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty . . .
>
> Nonetheless, the preventative function of the declaratory judgment must be based on more than mere hypothetical consequences; there must be a cognizable threat to a legal interest before the courts will entertain the use of its process as a preventive measure. As this Court stated in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, a declaration could issue to affect future rights, but not where the dispute in issue was merely speculative. . . .

33 The case before me is surely not a case where the dispute between the parties is merely speculative. There is, in my view, a real and live dispute between the parties with respect to the interpretation of s. 29 of the TA. The applicant is certainly justified, on the facts of the case, to seek a remedy from this Court without having to submit itself to a criminal prosecution.

34 The upshot of the matter is that the respondents were at liberty to lay a charge against the applicant and, hence, seek an interpretation of s. 29 of the TA from the court of summary conviction. However, the respondents did not charge the applicant, but proceeded to send coercive letters in the hope that compliance would result, without the necessity of having to lay a charge. In these circumstances, I am satisfied that this Court is a proper forum. I am also satisfied that this application for judicial review is not premature.

35 I now turn to the merits of the application. The only issue for determination is whether selling multi-packs of cigarettes at a slightly lower price per pack than if the packs were sold separately, constitutes an unlawful cash rebate under para. 29(a) of the TA. For the reasons that follow, my answer to that question is no.

36 The relevant sections of the TA are as follows:

> 2. [. . .]
>
> "tobacco product" means a product composed in whole or in part of tobacco, including tobacco leaves and any extract of tobacco leaves. It includes cigarette papers, tubes and filters but does not include any food, drug or device that contains nicotine to which the *Food and Drug Act* applies.
>
> . . . . .
>
> 4. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> (a) to protect the health of Canadians in light of conclusive evidence implicating tobacco use to the incidence of numerous debilitating and fatal diseases;
>
> (b) to protect young persons and others from inducements to use tobacco products and the consequent dependence on them;
>
> (c) to protect the health of young persons by restricting access to tobacco products; and
>
> (d) to enhance public awareness of the health hazards of using tobacco products.
>
> . . . . .
>
> 18.(1) In this Part, "promotion" means a representation about a product or service by any means, whether directly or indirectly, including any communication of information about a product or service and its price and distribution, that is likely to influence and shape attitudes, beliefs and behaviours about the product or service.
>
> . . . . .
>
> 29. No manufacturer or retailer shall

(a) offer or provide any consideration, direct or indirect, for the purchase of a tobacco product, including a gift to a purchaser or a third party, bonus, premium, *cash rebate* or right to participate in a game, lottery or contest; . . . [Emphasis added.]

. . . . .

2. [. . .]

« produit de tabac » Produit fabriqué à partir du tabac, y compris des feuilles et des extraits de celles-ci; y sont assimilés les tubes, papiers et filtres à cigarette. Sont toutefois exclus de la présente définition les aliments, drogues et instruments contenant de la nicotine régis par la *Loi sur les aliments et drogues*.

. . . . .

4. La présente loi a pour objet de s'attaquer, sur le plan législatif, à un problème qui, dans le domaine de la santé publique, est grave et d'envergure nationale et, plus particulièrement :

a) de protéger la santé des Canadiennes et Canadiens compte tenu des preuves établissant, de façon indiscutable, un lien entre l'usage du tabac et de nombreuses maladies débilitantes ou mortelles;

b) de préserver notamment les jeunes des incitations à l'usage du tabac et du tabagisme qui peut en résulter;

c) de protéger la santé des jeunes par la limitation de l'accès au tabac;

d) de mieux sensibiliser la population aux dangers que l'usage du tabac présente pour la santé.

. . . . .

18.(1) Dans la présente partie, « promotion » s'entend de la présentation, par tout moyen, d'un produit ou d'un service - y compris la communication de renseignements sur son prix ou sa distribution -, directement ou indirectement, susceptible d'influencer et de créer des attitudes, croyances ou comportements au sujet de ce produit ou service.

. . . . .

29. Il est interdit au fabricant et au détaillant

a) d'offrir ou de donner, directement ou indirectement, une contrepartie pour l'achat d'un produit du tabac, notamment un cadeau à l'acheteur ou un tiers, une prime, un *rabais* ou le droit de participer à un tirage, à une loterie ou à un concours; . . . [Le souligné est le mien.]

37 As is obvious from s. 4 of the TA, the purpose of the TA is to protect the health of Canadians and, more particularly, to protect young persons from inducement to use tobacco products and to restrict their access to these products. That is why s. 19 of the TA prohibits the promotion of

tobacco products, except as authorized by the TA or the Regulations made thereunder. Section 29, the heading of which is "Sales promotions," falls under Pt. V of the TA, entitled "Promotion."

38 The applicants argue that the sale of multi-packs does not offend the intent, purpose, primary focus or overriding objective of the TA, nor does it result in the harm for which that legislation was enacted to prevent. Rather, according to the applicant, the sale of multi-packs simply reflects its internal pricing strategy and economic decision to generate less profit, on a per-pack basis, on the sale of multiple packs of cigarettes, in response to the pricing strategies pursued by its competitors in the highly competitive environment and business of retail cigarette sales. The applicant further argues that is selling strategy does not constitute a means to promote the sale of cigarettes by influencing or shaping attitudes, beliefs and behaviours about cigarettes, as contemplated and prohibited by ss. 18 and 29 of the TA.

39 In arguing that the sale of multi-packs offends s. 29, the respondents submit that the meaning of s. 29 can be informed by the use of the word "unit" and by the apparent meaning that they have ascribed to that word. In the direction sent the applicant, the respondents took the view that a "unit" was either an unopened carton of cigarettes or a single pack of cigarettes. Thus, in the respondents' view, retailers were free to set the selling price of their tobacco products, i.e., of the "unit." Since multi-packs are not "units," they cannot be sold, according to the respondents, at a price which is inferior to the selling price of one individual pack. The respondents' position appears at paras. 52 to 54 of their Memorandum of Fact and Law, which read as follows:

> 52. In response to paragraphs 57-61, while there is no definition of the term "unit" in the Act, the interpretation put forward by the Respondents' [sic] in the impugned letters is an [sic] accord with scheme. The use of the word unit was simply illustrative.
>
> 53. Currently the reality, which is confirmed by the Applicant's own evidence and which is sufficiently notorious in any event that this Honourable Court could take judicial notice of the fact, is that cigarettes are sold either in a single package or in a carton of 8 packages.
>
> 54. Prices may be set for the carton or the package as a matter of convenience and because of the nature in which they are produced. Once, however, a carton is broken down, it becomes a compilation of 8 separate packages. There is no evidence on record that cigarette packages come in smaller cartons or mini-cartons. Consequently, the applicant is offering an incentive for a purchaser to buy more than one package of cigarettes. That is, more than one unit.

40 Unfortunately for the respondents, I see no merit in this submission. The term "unit" is nowhere defined in the TA, nor in the Regulations made thereunder. [2] The definition of "tobacco product" found in s. 2 of the TA does not include, nor refer to, the term "unit." The fact that tobacco

is generally sold in cartons or in individual packs is, in my view, of no relevance whatsoever in regard to the interpretation of para. 29(a) of the TA.

41 The only question, as I have already stated, is whether the sale of multi-packs constitutes a cash rebate under para. 29(a). In *R. c. Rothmans, Benson & Hedges* (May 3, 1996), nº Montréal 500-27-000567-919 (C.Q.), the defendant was charged as follows:

> At Montreal, in the district of Montreal, on or about the 20th of November 1990, being a distributor, illegally offered a cash rebate in exchange for the purchase of a tobacco product, namely: an offer of a cash rebate of $1.00 for each of 800 cartons of Mark Ten cigarettes, 8 packages × 25 cigarettes, King size, sold to Sue Shang Wholesale Red., thereby committing an infraction foreseen by Sections 7(2) and 18(1)(i)(a)(i) of the *Tobacco Products Control Act*, S.C. 1988, c. 20.

42 The issue before the Court was whether the method by which the defendant promoted the sale of its Mark Ten cigarettes constituted a "cash rebate" within the meaning of the *Tobacco Products Control Act*, the predecessor Act to the TA. Subsection 7(2) of that Act provided as follows:

> No person shall offer any gift or cash rebate . . . to the purchaser of a tobacco product in consideration of the purchase thereof or to any person in consideration of the furnishing of evidence of such a purchase.

43 After a careful review of the dictionary meanings of the words "rebate" and "remise" and the relevant case law, Mr. Justice Morand of the Cour du Québec concluded as follows, at p. 5:

> It appears from all of these definitions that the words "rebate" and "remise" refer to a reduction of price of a manufactured product at the moment of the purchase of this product or following its purchase. The Court can also take direction from the text of the Act where these words are written. In Section 7(2), the Legislator has indicated that it is prohibited to offer a gift or a cash rebate. It could have added "a rebate, a reductio in price", which it did not do. For the Court, the fact of selling a product at a determined price cannot constitute a cash rebate.
>
> In this case, the accused had sold to a wholesaler a quantity of cigarettes at a determined price. As the Legislator did not prohibit the sale of cigarettes nor legislate as to the manner to set prices, the accused benefited from all its rights to sell its products at a reasonable price fixed according to its choice. The fact of selling a brand of cigarettes at a price different that of another brand is not prohibited by the Legislator. *What is prohibited, is to give a gift or to give a cash rebate in exchange for the purchase of cigarettes*. In this case, there is no evidence that the wholesaler had received a gift or was offered a cash rebate following its purchase. It only paid the price set by the accused without any other reward. [Emphasis added.]

> By way of example, every week we receive at home a "Public-Sac" containing flyers from the principal grocery retailers. We find coupons therein, which, when presented at the moment of purchase of a product, shall be deducted from the total amount of the bill. This is a cash rebate offered by the manufacturer in exchange for a purchase.
>
> In the present case, there has not been a cash rebate; there has been a sale at a slightly lesser price on one brand of cigarettes, which is not prohibited by the Legislator.

44 I agree entirely with Mr. Justice Morand's reasoning and, in particular, that the promotional scheme before him did not constitute a cash rebate so as to render the defendant guilty of an infraction under subs. 7(2) of the *Tobacco Products Control Act*.

45 In my view, the sale of multi-packs by the applicant, at a reduced per-pack price, does not constitute a "cash rebate" under para. 29(a) of the TA. I agree with the submission put forward by the applicant that the sale of multi-packs is a reflection of its internal pricing strategy and economic decision as a result of which less profit, on a per-pack basis, is generated on the sale of multi-packs. The applicant's strategy, in my view, is not tantamount to promoting tobacco products, which practice is prohibited by s. 18 and para. 29(a) of the TA.

46 On my reading of para. 29(a) of the TA, I fail to understand the respondents' submission that the sale of multi-packs constitutes a cash rebate or a consideration for the purchase of tobacco products. The non-exhaustive list of examples given by Parliament in para. 29(a) of the TA is, in my view, a clear indication of what Parliament had in mind when it prohibited the giving of any consideration for the purchase of tobacco products. The list includes "a gift to a purchaser or a third party, bonus, premium, cash rebate or right to participate in a game, lottery or contest." I cannot agree that the sale of two packs of cigarettes at a price which is slightly inferior to that of two packs sold individually, falls within the same category as the examples given by Parliament. Thus, the applicant's selling strategy does not constitute either a cash rebate or a consideration of the type which Parliament had in mind when it enacted para. 29(a) of the TA.

47 It goes without saying that I have difficulty seeing how the sale of a multi-pack of cigarettes can constitute a cash rebate, if the sale of a carton does not. In both cases, the customer pays a per pack price which is inferior to the per pack price of cigarettes sold individually. Parliament clearly decided, in my view, not to address the pricing of cigarettes and, as a result, did not include pricing strategies, of the type used herein by the applicant, in the conduct which it sought to prohibit. Had it done so, the TA and, more particularly, para. 29(a) would have been worded differently.

48 In my view, the applicant, in selling multi-packs of cigarettes, did not offer or provide any consideration, direct or indirect, to its clients for the purchase of tobacco products. As a result, the applicant is entitled to the following declaration:

The sale by the applicant of multi-packs of cigarettes for a per pack price less than the price charged on the sale of single packs of cigarettes sold individually, does not constitute, under para. 29(a) of the TA, a "cash rebate" offered to customers.

The applicant shall be entitled to its costs.

Application granted.

Footnotes

1 I am using the word "direction" because that is the word which the applicant has used in its Notice of Application filed on October 11, 2000, to characterize the letter which is at issue in these proceedings. However, the respondents contest the use of the word "direction" for the letter which they sent to the applicant.

2 This is not entirely correct, since the *Tobacco Products Information Regulations*, SOR/2000-272, made pursuant to s. 33 of the TA, define the word "unit" as follows: "(a) a cigarette; (b) a cigar; (c) a tobacco stick; (d) a kretek; or (e) a bidi." The Regulations also define the word "carton" in the following terms: " . . . a package intended to be sold to consumers and that contains two or more packages of a tobacco product, other than a tube, a filter or cigarette paper."

I should also note that s. 10 of the TA prohibits the sale of cigarettes in a package containing less that 20 cigarettes.

2019 FC 1563, 2019 CF 1563
Federal Court

Lin v. Airbnb, Inc.

2019 CarswellNat 10122, 2019 CarswellNat 10123,
2019 FC 1563, 2019 CF 1563, 315 A.C.W.S. (3d) 642

ARTHUR LIN (Plaintiff) and AIRBNB, INC., AIRBNB CANADA INC., AIRBNB IRELAND UNLIMITED COMPANY, AIRBNB PAYMENTS UK LIMITED (Defendants)

Denis Gascon J.

Heard: December 4, 2018; December 5, 2018
Judgment: December 5, 2019
Docket: T-1663-17

Counsel: Simon Lin, Jérémie John Martin, Sébastien A. Paquette, for Plaintiff
Jill Yates, Patrick Williams, for Defendants

***Denis Gascon J.*:**

I. Overview

1 In March 2016, Mr. Arthur Lin, a British Columbia resident, booked an accommodation in Japan using the Airbnb online platform [Airbnb Platform]. The Airbnb Platform is a digital marketplace connecting individuals seeking accommodations [Guests] with other individuals offering accommodations [Hosts], and allowing them to transact. Mr. Lin claims he was ultimately charged a price higher than the price initially displayed to him for the accommodation booking services supplied on the Airbnb Platform. Many other individuals residing in Canada have reserved accommodations using the Airbnb Platform, also experiencing different prices displayed to them.

2 Mr. Lin seeks an order certifying this action as a class proceeding under Rule 334.16(1) of the *Federal Courts Rules*, SOR/98-106 [Rules] and granting an order under Rule 334.17. As the proposed representative plaintiff, Mr. Lin seeks compensation from the defendants Airbnb, Inc., Airbnb Canada Inc. and Airbnb Ireland Unlimited Company, as well as Airbnb Payments UK Limited [collectively, Airbnb], on behalf of all individuals residing in Canada who, on or after October 31, 2015, reserved an accommodation anywhere in the world using Airbnb, excluding individuals reserving an accommodation primarily for business purposes.

3 Mr. Lin alleges that Airbnb breached section 54 of the *Competition Act*, RSC 1985, c C-34 [*Competition Act*], a rarely used criminal offence known as "double ticketing". Section 54 prohibits a person from supplying a product at a price that exceeds the lowest of two or more clearly expressed prices at the time the product is supplied. More specifically, Mr. Lin contests the fact that Airbnb adds "service fees" to the final price it charges for its accommodation booking services, although these fees are not included in the initial price per night displayed on the Airbnb Platform. In his proposed class proceeding, the main remedies sought by Mr. Lin are damages and the costs of investigation and prosecution, both pursuant to section 36 of the *Competition Act*. Mr. Lin also had claims of permanent injunction and punitive damages but he abandoned them at the hearing before this Court.

4 In addition to his motion for certification, Mr. Lin brought a motion to add Airbnb Payments UK Limited [Airbnb Payments] as a defendant, which was unopposed by the defendants.

5 Mr. Lin maintains that all required legal elements for certification have been met, namely, (i) that there is a reasonable cause of action; (ii) that there is an identifiable class; (iii) that there are common questions of law and fact; (iv) that certification is the preferred procedure; and (v) that he is an appropriate representative of the class. Airbnb opposes certification of the class as it claims that Mr. Lin has failed to meet those five necessary preconditions.

6 The only issue before the Court is whether Mr. Lin has met the requirements of Rule 334.16(1) to certify this action as a class proceeding and, if so, the details of the certification order that should be issued under Rule 334.17 as a result. At the center of the debate between the parties are the scope and interpretation of section 54 on "double ticketing" and its application to the circumstances of Mr. Lin and to Airbnb.

7 For the reasons detailed below, and considering the generous approach that courts are required to take at the certification stage, I will grant Mr. Lin's motion for certification, conditional upon an amendment to be made to his proposed class definition. Even though the scope of section 54 of the *Competition Act* and its application to this case are not free from doubt, I conclude that it is not plain and obvious that the pleadings disclose no reasonable cause of action. I further find that, conditional upon the amendment discussed below, (i) there is an identifiable class of two or more persons [Class]; (ii) there are common issues predominating over questions affecting only individual members, and their resolution will advance the claims of all Class members and help the Court avoid duplication of fact-finding and/or legal analysis; (iii) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law and fact, and will achieve all three principles underpinning class actions (i.e., judicial economy, behavioural modification and access to justice) more effectively than alternative procedures; and (iv) Mr. Lin is an appropriate representative plaintiff.

II. Background

A. Factual context

8 Airbnb operates the Airbnb Platform. In Canada, the Airbnb Platform is available through the website www.airbnb.ca, as well as through various mobile applications. The Airbnb Platform allows Guests to book overnight stays from Hosts anywhere in the world.

9 Airbnb operates what can be described as a two-sided transaction platform, providing services simultaneously to two different groups of customers (identified as Hosts and Guests) who depend on the platform to conclude a transaction. In other words, the Airbnb Platform brings together providers and consumers of a particular service, namely the booking of overnight stays in other people's accommodations.

10 In its Terms of Service, various versions of which are attached to the affidavit of Airbnb's deponent, Mr. Kyle Miller, Airbnb states that it provides an online platform connecting Hosts, who have accommodations to list and book, with Guests seeking to book such accommodations. In its Terms of Service, Airbnb itself defines these as its "Services" accessible on different websites. The Terms of Service also state that Airbnb makes available an online platform or marketplace with related technology for Guests and Hosts to meet online and arrange for bookings of accommodations, directly with each other.

11 Various entities are involved in operating Airbnb in Canada. First, Airbnb Ireland Unlimited Company is the entity entering into contractual relationships with Canadian users. Second, Airbnb, Inc. (also referred to as "Airbnb US" by Airbnb) owns and operates the www.airbnb.com website. Airbnb, Inc. employs Mr. Miller, whose team is responsible for the localized versions of the Airbnb Platform, and its name is mentioned on the www.airbnb.ca website. The same contact address is used on the www.airbnb.ca and www.airbnb.com websites, and Airbnb, Inc. owns four registered Canadian trademarks displayed on the www.airbnb.ca website. Third, Airbnb Canada Inc. is involved in procuring and holding the domain www.airbnb.ca, although Airbnb claims it is only a marketing entity. Fourth, Airbnb Payments collects and distributes payments made on the Airbnb Platform.

12 It is not disputed that Airbnb does not own accommodations nor manage accommodations on behalf of the Hosts. Hosts decide when they want to make their accommodations available on the Airbnb Platform, the price for their accommodations, and the booking requests they accept. With respect to price, Hosts can set different rates depending on the dates and length of the contemplated stay, and they can decide to charge cleaning fees or fees for additional visitors.

13 When Guests search for accommodations on the Airbnb Platform, they are typically directed to a search results page. This page lists the accommodations and displays the properties' price per night [First Price] based on the Guest's search parameters, with no indication that additional fees will be added. The First Price shown on the search results page includes: (i) the price per

night as set by the Host; (ii) cleaning fees, if applicable, divided by the number of nights; and (iii) fees per night for additional visitors, if applicable. If the dates of the stay or the number of visitors are not specified by the Guest in the search parameters, the search results page will only display an average First Price. When Guests select the desired accommodation, they are redirected to another page known as the listing page. The listing page displays a second price [Second Price or Total Price] consisting of: (i) the First Price for the specific dates and number of visitors, multiplied by the number of nights; (ii) Airbnb's service fees [Service Fees]; and (iii) taxes. When they are on the listing page, Guests can modify the dates and number of visitors, in which case the Second Price is updated accordingly. In some cases (such as when they search an accommodation they already know or have already booked), Guests can also directly access the listing page of an accommodation without running a search, and therefore without actually being shown the First Price displayed on the search results page. The First Price and the Second Price are both displayed on the Guests' receipt.

14 Airbnb charges a Service Fee to Guests (between 0% and 20% of the First Price according to Airbnb, or between 5% and 15% according to Mr. Lin), as well as a Service Fee to Hosts (generally 3% of the First Price). Airbnb collects the Second Price from Guests and pays to Hosts the First Price, after having deducted the Hosts' Service Fee.

15 Mr. Lin used the Airbnb Platform both as a Guest and as a Host. The event he describes in his Statement of Claim to illustrate how Airbnb allegedly engaged in "double ticketing" is a reservation he made as a Guest, on or about March 20, 2016, for a vacation to Japan. On the Airbnb Platform, Mr. Lin searched for the dates May 24, 2016 to May 31, 2016. A number of accommodations were displayed on a search results page, including the one he eventually booked; the First Price for that accommodation was displayed as being $109.00 per night for a stay of seven nights. When Mr. Lin selected this accommodation, he was redirected to a listing page displaying a Second Price of $855.00, or $122.14 per night. This Second Price was broken down as follows: $102.00 per night for seven nights, $48.00 for cleaning fees, and $91.00 for Airbnb's Services Fees. I add that, in other transactions he separately made on the Airbnb Platform as a Host, Mr. Lin also offered an accommodation which was booked six times in 2016.

16 Guests and Hosts are bound by Airbnb's Terms of Service, for transactions made since October 2015, as well as by Airbnb's Payments Terms of Service for transactions made since March 2016 [collectively, the Terms]. Guests and Hosts have to accept the Terms during the account creation process prior to booking an accommodation. When the Terms are updated, Guests and Hosts further have to accept the updated version before transacting again on the Airbnb Platform. Both Airbnb's Terms of Service and Payments Terms of Service have been updated several times since October 2015 and March 2016, respectively. The Terms notably include provisions to the effect that:

- Canadian residents are deemed to be contracting with Airbnb Ireland Unlimited Company;

• Canadian residents are not subject to the arbitration agreement and class action waiver provisions;

• The agreement with Airbnb will be interpreted in accordance with the laws of Ireland without negating consumer protection laws applicable in Canada;

• Guests and Hosts enter into contractual relationships with each other when a booking is made, with Airbnb acting on behalf of Hosts only to facilitate payments; and

• Airbnb may charge Service Fees to Hosts and Guests for using the Airbnb Platform.

17 In its Terms, Airbnb identifies the First Price described by Mr. Lin as "Listing Fee", and the Service Fees it charges to Hosts and Guests as the "Host Fee" and "Guest Fee", respectively. Airbnb calls the Second Price or Total Price described by Mr. Lin as the "Total Fees". The damages sought by Mr. Lin are specifically defined in his Statement of Claim as being equivalent to the difference between the Second Price and the First Price, minus the taxes. In other words, the damages claimed are the Service Fees.

18 Airbnb estimates that approximately 2.2 million Canadian-resident Guests reserved an accommodation using the Airbnb Platform between October 31, 2015 and August 2018.

B. Orders sought

19 In his motion for certification, Mr. Lin seeks the following orders from the Court:

1. This Action is certified as a class proceeding;

2. The Class is defined as:

> All individuals residing in Canada who, on or after October 31, 2015, reserved an accommodation for anywhere in the world using Airbnb, excluding individuals reserving an accommodation primarily for business purposes.

3. The Plaintiff is appointed as the representative plaintiff for the Class;

4. The Common Questions are stated to be those set out in Schedule "A" to the Notice of Motion;

5. The nature of the Class is stated to be violations of section 54 of the *Competition Act*;

6. The relief sought by the Class is stated to be:

> a. a declaration that the Defendants charged every Class member a price higher than the lowest of two or more prices clearly expressed by the Defendants to each Class Member, contrary to section 54 of the *Competition Act*;

b. damages, pursuant to section 36 of the *Competition Act*, for the Defendants' conduct in contravention of section 54 of the *Competition Act*;

c. an Order pursuant to Rules 334.28(1) and (2) for the aggregate assessment of monetary relief and its distribution to the Plaintiff and the Class members;

d. costs of investigation and prosecution of this proceeding on a full-indemnity basis, pursuant to section 36 of the *Competition Act*;

e. pre-judgment and post-judgment interest pursuant to sections 36 and 37 of the *Federal Courts Act*, RSC 1985, c. F-7;

f. exemplary or punitive damages; and

g. such further and other relief as this Honourable Court deems just.

7. The Litigation Plan attached as Schedule "B" to the Notice of Motion is approved as a workable method of advancing the litigation;

8. The Notice Plan included in the Litigation Plan is approved as a workable method of contacting the Class members;

9. The Defendants pay the costs of the Notice Plan;

10. The Defendants provide counsel for the Plaintiff with a list of Class members and those Class members' contact information following the expiry of the opt-out period in part 11 of the Order;

11. Class members who wish to opt-out of the Action must do so in writing within thirty days of the date of the Order;

12. Both the Plaintiff and Defendants bear their own costs for this certification motion, pursuant to Rule 334.39, without limiting the Plaintiff's right to seek the costs for prosecution of the whole proceeding at the conclusion of the trial, pursuant to section 36 of the *Competition Act*; and

13. Such further and other relief as this Honourable Court deems just.

C. Legislative framework

20 Part 5.1 of the Rules sets out the framework for establishing and managing class proceedings before this Court. Rules 334.16(1) and (2) and 334.18 are the main provisions governing the certification of class proceedings. They are reproduced in their entirety in Annex A of these Reasons.

21 Rule 334.16(1) prescribes that a class action shall be certified if the following five conditions are met: (i) the pleadings disclose a reasonable cause of action; (ii) there is an identifiable class of two or more persons; (iii) the claims raise common questions of law or fact; (iv) a class proceeding is the preferable procedure for the just and efficient resolution of those common questions; and (v) there is an appropriate representative plaintiff. Rule 334.16(1) uses mandatory language, meaning that the Court shall grant certification where all five elements of the test are satisfied (*Sivak v. R.*, 2012 FC 271 (F.C.) at para 5). Since the test is conjunctive, if a plaintiff fails to meet any of the five listed criteria, the certification motion must fail (*Buffalo v. Samson Cree Nation*, 2008 FC 1308 (F.C.) [*Buffalo FC*] at para 35, aff'd 2010 FCA 165 (F.C.A.) at para 3).

22 Conversely, Rule 334.18 describes factors which cannot by themselves, either singly or combined with the other factors listed, provide a sufficient basis to decline certification (*Kenney v. Canada (Attorney General)*, 2016 FC 367 (F.C.) [*Kenney*] at para 17; *Buffalo FC* at para 37). These factors are: (i) the relief claimed includes a claim for damages that would require an individual assessment after a determination of the common questions of law or fact; (ii) the relief claimed relates to separate contracts involving different class members; (iii) different remedies are sought for different class members; (iv) the precise number of class members or the identity of each class member is not known; or (v) the class includes a subclass whose members have claims that raise common questions of law or fact not shared by all of the class members. Nevertheless, by using the word "solely", the provision suggests that these factors may be relevant considerations on a motion for certification, provided the overall conclusion underlying a potential refusal is based on other concerns as well (*Kenney* at para 17).

23 It bears noting that the certification criteria established in Rule 334.16(1) are akin to those applied by the courts in Ontario and British Columbia (*R. v. John Doe*, 2016 FCA 191 (F.C.A.) [*John Doe FCA*] at para 22; *Buffalo v. Samson Cree Nation*, 2010 FCA 165 (F.C.A.) [*Buffalo FCA*] at para 8). Indeed, much of the Supreme Court of Canada's [SCC] case law relating to class actions on which this Court and the Federal Court of Appeal [FCA] have relied arose in those provinces.

D. General principles for certification

24 Before analyzing the individual requirements prescribed by the Rules, some general and fundamental principles governing certification motions must be underscored.

25 In *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) [*Hollick*], the SCC stated that the certification criteria should always be assessed while keeping in mind the overarching purposes of class proceedings. First, foremost consideration should be given to the fact that class actions serve judicial economy by avoiding unnecessary duplication of fact-finding and legal analysis. Second, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to bring forward on his or her own. Third, class actions serve efficiency and justice by ensuring that wrongdoers modify

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their behaviour by taking full account of the harm that they have caused or might cause. Therefore, it is "essential [...] that courts [do] not take an overly restrictive approach to the legislation, but rather interpret [class action legislation] in a way that gives full effect to the benefits foreseen by the drafters" (*Hollick* at para 15; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.) [*Dutton*] at paras 27-29; *Condon v. R.*, 2015 FCA 159 (F.C.A.) [*Condon*] at para 10). As the SCC noted in *Hollick*, "the certification stage focuses on the *form* of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action" (emphasis in original) (*Hollick* at para 16). In other words, the court plays a screening role and must view the application as a procedural means (*Option consommateurs c. Infineon Technologies AG*, 2013 SCC 59 (S.C.C.) [*Infineon*] at para 65; *Dell'Aniello c. Vivendi Canada inc.*, 2014 SCC 1 (S.C.C.) [*Vivendi*] at para 37). The objective of certification is to determine if, from a procedural standpoint, the action is best brought in the form of a class action (*Hollick* at para 16). Conversely, certification seeks to filter out manifestly unfounded and frivolous claims.

26 The SCC recently firmly reiterated and reaffirmed these core principles in *Pioneer Corp. v. Godfrey*, 2019 SCC 42 (S.C.C.) [*Godfrey*] and in *L'Oratoire Saint-Joseph du Mont-Royal c. J.J.*, 2019 SCC 35 (S.C.C.).

27 It is also well established that the onus on a party seeking certification is not an onerous one. The test to be applied on the first criterion for certification - that the pleadings disclose a reasonable cause of action - is similar to that applicable on a motion to strike or dismiss (*Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 (S.C.C.) [*Pro-Sys*] at para 63; *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24 (S.C.C.) [*Elder*] at para 20). The test is whether it is "plain and obvious" that the pleadings disclose no reasonable cause of action and that no claim exists (*Godfrey* at para 27; *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 (S.C.C.) [*Imperial Tobacco*] at para 17; *Elder* at para 20; *Hollick* at para 25; *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.) [*Hunt*] at p 980).

28 This threshold is very low (*Rae v. Minister of National Revenue*, 2015 FC 707 (F.C.) [*Rae*] at para 54; *Buffalo FC* at para 43). It must be "used with care", bearing in mind that the "law is not static and unchanging", and that "[a]ctions that yesterday were deemed hopeless may tomorrow succeed" (*Imperial Tobacco* at para 21). Stated otherwise, a pleading should only be struck where the claim is so clearly futile that it has not the slightest chance of succeeding or is certain to fail (*Hunt* at para 33). Pursuant to that test, the claim must be so clearly improper as to be "bereft of any possibility of success" (*LJP Sales Agency Inc. v. Minister of National Revenue*, 2007 FCA 114 (F.C.A.) at para 7; *Wenham v. Canada (Attorney General)*, 2018 FCA 199 (F.C.A.) [*Wenham*] at paras 27-33). The test is best expressed in the negative, and the Court must be convinced that the contemplated action has no chance of success and is doomed to fail (*Wenham* at para 22).

29 For this first criterion, the facts alleged in the pleadings are assumed to be true and no evidence may be considered by the Court (*John Doe FCA* at para 23; *Condon* at para 13). Even though the facts are assumed to be true, they must still be pleaded in support of each cause of action; bald assertions of conclusions are not allegations of material fact and cannot support a cause of action (*John Doe FCA* at para 23; *Mancuso v. Canada (Minister of National Health and Welfare)*, 2015 FCA 227 (F.C.A.) at para 27; *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184 (F.C.A.) at para 34).

30 For the remaining four certification criteria, the plaintiffs have the burden of adducing evidence to show "some basis in fact" that they have been met (*Hollick* at para 25; *Pro-Sys* at para 99). This threshold is also low, given the Court's limited scope of factual inquiry and its inability to "engage in the finely calibrated assessments of evidentiary weight" at the certification stage (*Fischer v. IG Investment Management Ltd.*, 2013 SCC 69 (S.C.C.) [*Fischer*] at para 40; *Pro-Sys* at paras 102, 104). That said, the "some basis in fact" standard cannot be assessed in a vacuum, and each case must be decided on its own facts. The "some basis in fact" requirement means that, for all certification criteria except the cause of action, an evidentiary foundation is needed to support a certification award, and the use of the word "some" implies that the evidentiary record need not be exhaustive or be a record on which the merits will be argued (*Fischer* at para 41, citing *McCracken v. Canadian National Railway*, 2012 ONCA 445 (Ont. C.A.) at paras 75-76). The Court must therefore refrain from assessing the sufficiency of the alleged facts on its merits, and is not tasked with resolving conflicts in the evidence. It is trite law that the "some basis in fact" standard falls below the standard of proof on a balance of probabilities (*Pro-Sys* at para 102; *John Doe FCA* at para 24).

31 While the certification stage is not intended to determine the viability or strength of the contemplated class action, the analysis of the evidence, however, cannot "amount to nothing more than symbolic scrutiny" (*Pro-Sys* at para 103). Given that the Court does not engage in a robust analysis of the merits at the certification stage, the outcome of a motion for certification will not be predictive of the action's success at the common issues trial (*Pro-Sys* at para 105).

III. Analysis

A. Rule 334.16(1)(a): Reasonable cause of action

32 The first certification requirement is that the pleadings disclose a reasonable cause of action. Mr. Lin's Statement of Claim invokes one single cause of action based on sections 36 and 54 of the *Competition Act*. Mr. Lin pleads that, in providing its accommodation booking services to him and other Class members, Airbnb displayed an initial First Price excluding Airbnb's Service Fees and a final, higher Second Price including such fees, and that Airbnb thus charged the Class members the higher of two displayed prices, in contravention of section 54 of the *Competition Act*. This

breach of section 54, says Mr. Lin, renders Airbnb liable, under section 36 of the *Competition Act*, for damages equal to the Service Fees and for the costs of investigation.

33 Airbnb responds that the pleadings (i.e., Mr. Lin's Statement of Claim) do not disclose a reasonable cause of action since: (i) section 54 of the *Competition Act* does not apply to the pleaded facts, described by Airbnb as a situation where there are two prices for two different products; (ii) the defence provided by section 60 of the *Competition Act* applies to Airbnb; and (iii) Mr. Lin does not plead any loss or damage as required by section 36 of the *Competition Act*, since he would have paid the same price if the Service Fees were included in the First Price on the search results page. Airbnb notably relies on the Terms to support its arguments.

34 I do not agree with Airbnb. Further to my review of the pleadings, I find that Airbnb mischaracterizes the "product" effectively defined and described by Mr. Lin in his Statement of Claim. In addition, even though Airbnb raises numerous valid points regarding the interpretation of sections 36 and 54 of the *Competition Act* and their application to this case, I am unable to conclude that, when the alleged facts are accepted as true, the cause of action pleaded by Mr. Lin is "plain and obvious" to fail. The objections voiced by Airbnb are matters to be determined at the trial on the merits with the benefit of a full evidentiary record and full legal submissions.

(1) Section 54 of the Competition Act

35 Mr. Lin's proposed class proceeding is based on section 54 of the *Competition Act*. This section creates the criminal offence of "double ticketing" and is part of the deceptive marketing practices offences contained in Part VI of the *Competition Act* entitled "Offences in Relation to Competition". Section 54 reads as follows.

> **Double ticketing**
>
> **54** (1) No person shall supply a product at a price that exceeds the lowest of two or more prices clearly expressed by him or on his behalf, in respect of the product in the quantity in which it is so supplied and at the time at which it is so supplied,
>
> (a) on the product, its wrapper or container;
>
> (b) on anything attached to, inserted in or accompanying the product, its wrapper or container or anything on which the product is mounted for display or sale; or
>
> (c) on an in-store or other point-of-purchase display or advertisement.
>
> **Double étiquetage**
>
> **54** (1) Nul ne peut fournir un produit à un prix qui dépasse le plus bas de deux ou plusieurs prix clairement exprimés, par lui ou pour lui, pour ce produit, pour la quantité dans laquelle celui-ci est ainsi fourni et au moment où il l'est:

a) soit sur le produit ou sur son emballage;

b) soit sur quelque chose qui est fixé au produit, à son emballage ou à quelque chose qui sert de support au produit pour l'étalage ou la vente, ou sur quelque chose qui y est inséré ou joint;

c) soit dans un étalage ou la réclame d'un magasin ou d'un autre point de vente.

36 This prohibition against "double ticketing" first came into effect in 1975, as section 36.2 of the *Combines Investigation Act*, SC 1974-1975-1976, c 76 [*Combines Act*]. The language of section 36.2 of the *Combines Act* was identical to the current wording of section 54 of the *Competition Act*. Pursuant to that provision, a person commits a "double ticketing" offence when that person: (i) supplies a product; (ii) at a price that exceeds the lowest of two or more prices; (iii) which are clearly expressed on the product, on anything attached to or accompanying the product, or on any point-of-purchase display or advertisement. There are no other requirements for the offence. The language of the provision clearly suggests that section 54 relates strictly to the supplier's conduct, and that it only applies to situations where different prices are expressed in respect of the *same* product in terms of quantity and time of supply. Subsection 2(1) of the *Competition Act* defines "product" as including an "article" and a "service", so section 54 can apply to both. The word "supply" also has a broad meaning, being defined by subsection 2(1) as "in relation to a service, sell, rent or otherwise provide a service or offer so to provide a service".

37 I pause to observe that the "double ticketing" offence came into force at the same time as the "sale above advertised price" criminal offence, which was previously contained in former section 37.1 of the *Combines Act* and prohibited the supply of a product at a price higher than the price advertised. This criminal provision was repealed in 1999 and was replaced by the civilly reviewable conduct of "sale above advertised price" now contained at section 74.05 of the *Competition Act*. This reviewable conduct is sometimes referred to by the Competition Bureau as fragmented pricing or drip pricing (see for example: Competition Bureau, *The Deceptive Marketing Practices Digest*, June 2015).

38 A brief review of the legislative history of section 54 suggests that this provision was meant to prevent the display of two price tags on a single product. The House of Commons and Senate debates indicate that, at the time of its adoption, the "double ticketing" prohibition stemmed from concerns about high food prices (*House of Commons Debates*, 29th Parl, 2nd Sess, vol 1 (13, 20, and 27 March 1974) at 489, 708 and 918; *House of Commons Debates*, 30th Parl, 1st Sess, vol 1 (22 October 1974) at 624-625 and 627; *House of Commons Debates*, 30th Parl, 1st Sess, vol 8 (21 October 1975) at 8419; *Senate Debates*, 30th Parl, 1st Sess, vol 2 (13 November 1974) at 1295). In essence, consumers were complaining about the food industry's practice of increasing the price of existing inventory in response to increased procurement costs, and about how certain grocery stores would put new price stickers on their products beside the previous, lower price.

39 Even though the "double ticketing" provision has now been part of the *Competition Act* and its predecessors for over 40 years, very limited jurisprudence on this provision is available. Airbnb referred to one case, *Consumers' Assn. of Canada v. Coca-Cola Bottling Co.*, 2006 BCSC 863 (B.C. S.C.) [*Coca-Cola*], aff'd 2007 BCCA 356 (B.C. C.A.), where recycling fees for bottled drinks were excluded in the price displayed on the shelf for these products, but were added at the cashier and charged to the consumer in the final price. The court found that this did not constitute "double ticketing" and did not breach section 54 (*Coca-Cola* at paras 69, 93). In his submissions, Mr. Lin did not refer the Court to any precedent on that provision. The Court has identified two other cases mentioning section 54, namely *Apotex Inc. v. Hoffmann-La Roche Ltd.* (2000), 195 D.L.R. (4th) 244 (Ont. C.A.), 2000 CanLII 16984 at para 20 and a small claims case from Quebec, *Massé c. Sears Canada inc.*, 2012 QCCQ 15181 (C.Q.) at paras 5, 16. However, none of these cases discussed the interpretation of the "double ticketing" provision to any extent.

(2) Section 36 of the Competition Act

40 For its part, section 36 of the *Competition Act* provides:

> **Recovery of damages**
>
> **36** (1) Any person who has suffered loss or damage as a result of
>
> (a) conduct that is contrary to any provision of Part VI, or
>
> [...]
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.
>
> **Recouvrement de dommages-intérêts**
>
> **36** (1) Toute personne qui a subi une perte ou des dommages par suite:
>
> a) soit d'un comportement allant à l'encontre d'une disposition de la partie VI;
>
> [...]
>
> peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel comportement ou n'a pas obtempéré à l'ordonnance une somme égale au montant de la perte ou des dommages qu'elle est reconnue avoir subis, ainsi que toute somme supplémentaire que le tribunal peut fixer et qui n'excède pas le coût total, pour elle, de toute enquête relativement à l'affaire et des procédures engagées en vertu du présent article.

41 To establish a claim under paragraph 36(1)(a), the plaintiff must plead that the defendants breached a provision of Part VI of the *Competition Act* on "Offences in Relation to Competition" and that he or she suffered loss or damage as a result of the impugned criminal conduct. The right to pursue an action in damages and to seek recovery of certain investigation costs is subject to some important limits, including a limit to pursuing compensatory damages (i.e., no punitive damages or injunctive relief).

42 I agree with Airbnb that section 36 is the provision effectively creating Mr. Lin's cause of action, of which damages caused by the alleged violation of the *Competition Act* are an essential component (*Godfrey* at para 76; *Murphy c. Cie Amway Canada*, 2015 FC 958 (F.C.) [*Murphy*] at paras 83-85; *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 (Ont. S.C.J.) [*Singer*] at paras 107-108). The combined features of paragraph 36(1)(a) and section 54 of the *Competition Act* limit the availability of this cause of action to claimants who can demonstrate that the defendants' conduct satisfies all elements of section 54, as well as a causal link between the loss or damage suffered and the "double ticketing" conduct.

(3) The "product" issue

43 Airbnb first submits that it is plain and obvious that section 54 cannot apply to this case since there are two prices for two different products. Airbnb submits that Mr. Lin's Statement of Claim does not expressly define the "product" at issue, but that the pleadings imply that it is the accommodation reserved and booked by Mr. Lin. Airbnb also states that Mr. Lin's Memorandum of Fact and Law expressly identifies a "product", namely the use of the Airbnb Platform. Airbnb maintains that, when Mr. Lin's pleadings are taken as a whole, there are two products at issue in this case, supplied through the Airbnb Platform: (i) accommodations offered by Hosts to Guests; and (ii) the use of the platform offered by Airbnb to both Hosts and Guests. Airbnb contends that Mr. Lin conflated the two products and alleged that bundling the two products together in the Second Price amounted to a price increase for a single product.

44 I am not persuaded by Airbnb's interpretation and do not find that this is an adequate reading of Mr. Lin's Statement of Claim.

45 In his Statement of Claim, Mr. Lin notably alleges the following facts:

> 10. Airbnb is the operator of an online marketplace and hospitality service, enabling people anywhere in the world to lease or rent short-term lodging from any other person in the world who is offering accommodation for lease and/or rental.
>
> 11. At all materials [sic] times, Airbnb conducted its online marketplace and hospitality services primarily via various Internet platforms including websites (such as http://

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www.airbnb.com and http://www.airbnb.ca) and mobile applications on the Apple and Android operating systems (collectively the "Booking Platform(s)").

[...]

17. On or about March 20, 2016, the Plaintiff contracted with Airbnb for accommodations for his vacation to Japan, including an accommodation in Shibuya, Japan under the following terms (the "Reservation") [...].

[...]

29. When a Class member completes any reservation for accommodations through Airbnb (including "Request to Book" and "Instant Book"), regardless of the Booking Platform used, Airbnb charges the Class member the Second Price, not the First Price.

[Emphasis added.]

46 I concede that the pleadings could have been drafted with much more clarity and details regarding the actual product involved in Mr. Lin's claim. Especially in a context where, in section 54 invoked by Mr. Lin to underlay his cause of action, the notion of "product" is a central element. However, at this certification stage, I must adopt a generous reading of the pleadings. The pleadings should be read as a whole and be given a liberal interpretation, with a view to accommodating any inadequacies in the allegations and without fastening onto matters of form (*Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.) at para 14; *Wenham* at para 34; *John Doe FCA* at para 51; *Shah v. LG Chem Ltd.*, 2018 ONCA 819 (Ont. C.A.) [*Shah*] at paras 74, 76; *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 (B.C. C.A.) [*Finkel*] at para 17).

47 In his Statement of Claim, Mr. Lin refers to Airbnb's online marketplace and hospitality *service* or *services* and to the fact that what Mr. Lin and the Class members contracted for and purchased is a reservation for accommodation through Airbnb. I am satisfied that, when read in context, Mr. Lin's Statement of Claim identifies one "product" supplied by Airbnb, namely the accommodation booking services offered and supplied by Airbnb through its platform. Put differently, I do not find it plain and obvious that, as argued by Airbnb, the pleadings relate to two prices for two different products.

48 Though I acknowledge that this is not part of the pleadings, I pause to note that, in his Memorandum of Fact and Law, Mr. Lin repeatedly and expressly refers to Airbnb's "accommodation booking service" or "accommodation booking services" when he describes the product being supplied by Airbnb, and for which he claims Airbnb violated the "double ticketing" provision. These accommodation booking services relate to the use of the Airbnb Platform to find and book accommodations.

49 My understanding of Mr. Lin's allegations is that the product effectively offered and supplied by Airbnb is a specific service: the access to and use of the Airbnb Platform in order to find a pool of accommodations and to eventually book one. Mr. Lin acknowledges that Airbnb does not own the accommodations offered by the Host, but the fact that Airbnb does not own the accommodations displayed through its service does not mean that Airbnb is not supplying a service for the booking of such accommodations.

50 According to Mr. Lin's pleadings, the product supplied by Airbnb (i.e., its booking service) does not change between the search results phase, where the First Price is expressed, and the booking phase, where the Second Price is expressed. The product is always the access to and use of the Airbnb Platform in order to find and book accommodations on Airbnb's digital marketplace. In my view, the pleadings made by Mr. Lin do not suggest that a new service element is "added" by Airbnb at the booking stage, or that Airbnb performs an additional service at the booking stage, as opposed to the search results stage. The service of providing a booking platform, where Hosts and Guests can transact, is the "product" supplied by Airbnb as soon as a person enters the Airbnb Platform (where the Guests and Hosts have access to the relevant information and presentation of that information). According to Mr. Lin, what does change between the search results and booking phases is the price at which Airbnb's accommodation booking service is supplied.

51 Again, I am mindful of the fact that Mr. Lin's pleadings are not a model of clarity on this point, far from it. But, at the certification stage, the approach has to be generous and the pleadings can be sufficient, even if the product is not described with perfect precision, as long as they are sufficiently precise to allow the reader to identify the product being the subject of the claim (*Watson v. Bank of America Corp.*, 2015 BCCA 362 (B.C. C.A.) [*Watson CA*] at paras 85-87). Here, I am of the view that the pleadings are sufficiently detailed to understand that Mr. Lin refers to one product, namely Airbnb's accommodation booking services. His written submissions clearly confirm this.

52 I observe that, in its submissions, Airbnb itself states that the Airbnb Platform connects Guests seeking accommodations with Hosts offering accommodations, and allows them to transact. Furthermore, Airbnb's own Terms of Service describe its "Services" in a similar manner. These statements echo the "accommodation booking services" referred to by Mr. Lin in his materials, and which he claims are supplied by Airbnb.

53 I do not dispute that, in its submissions, Airbnb raises a valid and very relevant point regarding the nature and identity of the product or products effectively supplied by Airbnb through the Airbnb Platform. It is certainly open to Airbnb to submit and argue that section 54 of the *Competition Act* does not apply in this case because what is effectively supplied through the Airbnb Platform are two different products by two different persons at two different prices. However, I cannot accept these arguments at the certification stage. What I have to determine is whether, based on Mr. Lin's Statement of Claim (which is the only pleading), it is plain and obvious that section

54 cannot apply. I cannot conclude that it is the case, in light of Mr. Lin's alleged facts regarding the accommodation booking services provided through the Airbnb Platform.

54 The arguments advanced by Airbnb on the presence of two products, on whether what is supplied by Airbnb could be characterized as a bundle of different articles and services, and on whether the product at issue is the bundle or its components, as opposed to the accommodation booking services put forward by Mr. Lin, require factual assessments to be determined at the trial on the merits, with the benefit of a complete evidentiary record. In other words, it is not plain and obvious that the First Price (or Listing Fee) and the Second Price (or Total Fees) alleged by Mr. Lin relate to separate products for, respectively, the accommodation and the use of the Airbnb Platform.

(4) The elements of section 54

55 As stated above, the required elements of the section 54 offence are: (i) the supply of a product by a person; (ii) at a price that exceeds the lowest of two or more prices; (iii) which are clearly expressed on the product, on anything attached to or accompanying the product, or on any point-of-purchase display or advertisement. Here, I am satisfied that Mr. Lin pleaded all the elements of the section 54 offence, namely the supply of accommodation booking services by Airbnb, the existence of a First Price and a Second Price and the fact that the service was supplied at the higher price, and the fact that the prices were clearly expressed at the point-of-purchase display on Airbnb Platform. I note that Mr. Lin has not expressly pleaded the *mens rea* element of this criminal offence. However, some required elements of a cause of action, such as *mens rea*, may be implied from the alleged facts by common sense and do not always need to be specifically pleaded (*Watson CA* at para 101). In my view, the required mental element of Airbnb's conduct is implied in Mr. Lin's pleadings, and Airbnb has indeed not raised any objection on this point (*Watson v. Bank of America Corp.*, 2014 BCSC 532 (B.C. S.C.) [*Watson SC*] at paras 101-102).

56 I recognize that, in light of the paucity of "double ticketing" cases, Mr. Lin certainly appears to be stretching the potential interpretation and application of section 54 of the *Competition Act*, and that he is extending it into unchartered territory. In fact, Airbnb argues that his claim will ultimately fail. However, at the certification stage, this is not enough to conclude to an absence of a reasonable cause of action. On the contrary, when a case raises novel or difficult questions of statutory interpretation, such questions should not be decided at the certification stage (*John Doe FCA* at para 53; *Jiang v. Peoples Trust Co.*, 2017 BCCA 119 (B.C. C.A.) [*Jiang*] at para 64; *Finkel* at para 17). Doing so would eliminate common issues based on these questions, and could prevent the judge on the merits from considering these questions with the benefit of a complete evidentiary record (*Jiang* at paras 64, 67). As the SCC reminded, "where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed" (*Hunt* at p 990; *Arsenault v. R.*, 2008 FC 299 (F.C.) [*Arsenault*] at paras 25-26). As such, the reasonable cause of action criterion can be met despite the length and complexity of the issues, the novelty of the cause of action, or the potential for the defendant to present a strong defence

(*Murphy* at para 38). It is not determinative that the law has not yet recognized a particular claim (*Imperial Tobacco* at para 21). The Court must rather ask whether, assuming the facts pleaded are true, the claim is doomed to fail. The approach must be a generous one and err on the side of permitting a novel but arguable claim to proceed to trial.

57 To further underscore the need for a liberal approach, I would add that the purpose clause of the *Competition Act* (section 1.1) expressly provides that the protection of consumers is one of its underlying purposes, and this legislation has been recognized as a consumer protection legislation (*Finkel* at para 61). This is notably true for the *Competition Act*'s criminal and civil provisions dealing with marketing practices (to which the "double ticketing" provision belongs), which often mirror comparable provisions contained in provincial consumer protection laws. As pointed out by Mr. Lin, the SCC stated that consumer protection laws are to be interpreted generously in favour of the consumers (*Seidel v. Telus Communications Inc.*, 2011 SCC 15 (S.C.C.) at para 37).

58 I also agree with Mr. Lin that the law is always speaking and must be interpreted to apply to today's circumstances, even though a provision may have been adopted a long time ago (*Interpretation Act*, RSC 1985, c I-21, s 10*; Ontario v. 974649 Ontario Inc.*, 2001 SCC 81 (S.C.C.) at para 38). While section 54 on "double ticketing" was created before the digital economy and the emergence of online commerce, the provision can extend and apply to current technologies and commercial practices. Digital marketplaces and online platforms offering digital commerce transactions, allowing sellers and buyers to connect and exchange, and charging for such service are now frequent in the digital economy. Airbnb is an example in accommodation booking services, but other examples exist in transportation booking services (such as Uber) or in ticket booking services (see 0.*Nicolas v. Vivid Seats*, 2018 QCCS 3938 (C.S. Que.)). The issue of the interpretation of section 54 of the *Competition Act*, and whether the provision effectively applies to a platform like Airbnb, goes to the merits of the claim.

59 Lastly, as mentioned above, there is very limited jurisprudence on section 54 and none of the cases I am aware of is binding on this Court. In addition, those decisions do not contain any meaningful analysis of the provision and how it should be interpreted. In its submissions, Airbnb pointed to the *Coca-Cola* case, where the Supreme Court of British Columbia found that charging recycling fees for bottled drinks in the final price to consumers, although the fees were not included in the price displayed on the shelf, was not in breach of the "double ticketing" provision (*Coca-Cola* at paras 69, 93). However, I observe that this case occurred in a different jurisdiction, and that the discussion of section 54 was very succinct. The case focused on how the deposits were held and whether recycling fees were an illegal levy. The section 54 claim was analysed and dismissed by the court in a single paragraph (*Coca-Cola* at para 93). In these circumstances, I do not consider it a very compelling authority to support rejecting Mr. Lin's claim at this early stage. In order to find that it is "plain and obvious" that no claim exists, there must be "a decided case directly on point, from the same jurisdiction, demonstrating that the very issue has been squarely dealt with and rejected" (*Arsenault* at para 27, citing *Dalex Co. v. Schwartz Levitsky Feldman* (1994), 19

694 O.R. (3d) 463 (Ont. Gen. Div.), 1994 CanLII 7290; see also *Finkel* at para 17). This is not the situation here.

60 Mr. Lin may ultimately fail on the merits of his proposed interpretation of section 54 and its application to Airbnb. I acknowledge that, depending on the factual evidence to be presented at the common issues trial, the judge on the merits could for instance find that Guests concluded one transaction with Hosts for the accommodation, and a different one with Airbnb for the service of using its platform; or that Guests concluded two separate transactions with Airbnb for two different products, one for the accommodation and one for the use of the Airbnb Platform. However, this is not a sufficient basis, at this stage, to conclude that there is no reasonably viable cause of action. For all these reasons, I find that it is not plain and obvious that Airbnb did not engage in "double ticketing" and that section 54 of the *Competition Act* does not apply to Airbnb's conduct. It will be up to the judge on the merits, with a complete record and full legal submissions, to determine whether Airbnb's conduct is sufficient to satisfy the provision's requirements.

61 If Airbnb can demonstrate, at the common issues trial, that what is effectively supplied through the Airbnb Platform are two products at two different prices, this would be sufficient to conclude that section 54 on "double ticketing" does not apply, to terminate the litigation and to dismiss the claim for damages.

(5) Section 60 of the Competition Act

62 Airbnb also submits that it is plain and obvious that section 60 of the *Competition Act* is fatal to Mr. Lin's claim. I disagree.

63 The section 60 "defence" exempts from section 54, on certain conditions, "a person who prints or publishes or otherwise distributes a representation or an advertisement on behalf of another person". It reads as follows:

> **Defence**
>
> **60** Section 54 does not apply to a person who prints or publishes or otherwise distributes a representation or an advertisement on behalf of another person in Canada if he or she establishes that he or she obtained and recorded the name and address of that other person and accepted the representation or advertisement in good faith for printing, publishing or other distribution in the ordinary course of his or her business.
>
> **Moyen de défense**
>
> **60** L'article 54 ne s'applique pas à la personne qui diffuse, notamment en les imprimant ou en les publiant, des indications ou de la publicité pour le compte d'une autre personne se trouvant au Canada, si elle établit qu'elle a obtenu et consigné le nom et l'adresse de cette autre

personne et qu'elle a accepté de bonne foi d'imprimer, de publier ou de diffuser de quelque autre façon ces indications ou cette publicité dans le cadre habituel de son entreprise.

64 Airbnb has not cited any cases on the interpretation of section 60, and the Court is aware of none. However, the provision's wording makes it clear that it refers to the passive role of mere advertisers or publishers of advertisements who have conducted a minimum level of due diligence. As pointed out by Mr. Lin, section 60 is similar to subsection 74.07(1) of the *Competition Act*, which has been described by the Competition Bureau as a publisher's defence available to those who do not have decision-making authority over the content of what is being displayed, published or represented (Competition Bureau, *Application of the Competition Act to Representations on the Internet*, February 2003, at 6). In other words, the provision intends to exempt publishers and advertisers (such as newspapers, media or other innocent bystanders) who are only displaying the prices of others, and not their own prices.

65 In this case, the pleadings establish that Airbnb is providing comprehensive accommodation booking services and has a direct stake in the accommodation booking services it supplies on the Airbnb Platform, notably in the offering and display of the Second Price or Total Price, which includes its Service Fees. To the extent that the pleadings refer to two different prices being offered and displayed for Airbnb's accommodation booking services, it is therefore not plain and obvious that section 54 does not apply to Airbnb because of section 60. Airbnb indeed acknowledges in its Memorandum of Fact and Law that section 60 may not apply to Airbnb's operation of the Airbnb Platform. As stated above, a generous reading of the pleadings leads me to conclude that the product at issue in Mr. Lin's claim is Airbnb's accommodation booking services.

66 Once again, the interpretation and application of this section 60 defence should not be weighted at the certification stage. Rather, this defence should be considered with the benefit of a complete evidentiary record, at the merits stage, considering the debate on whether Airbnb is merely an advertiser of the Hosts' accommodations (as argued by Airbnb) or provides comprehensive accommodation booking services (as submitted by Mr. Lin).

(6) Section 36 of the Competition Act

67 Airbnb finally submits that Mr. Lin has not properly pleaded loss or damage as required by section 36 of the *Competition Act*. More specifically, Airbnb maintains that Mr. Lin has failed to plead and prove causation, and to plead that he or anyone else was misled by Airbnb's display of prices. Airbnb argues that Mr. Lin had to plead (and ultimately prove) (i) that he and the proposed Class members believed they were paying only the First Price, and (ii) that they would not have booked accommodation on the Airbnb Platform had they realized that they had to pay the Second Price. Again, I do not agree with Airbnb.

68 First, keeping in mind the generous interpretation that pleadings ought to receive, I am satisfied that Mr. Lin has pleaded the necessary elements to claim the relief he seeks under section

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36. More specifically, paragraphs 30, 32 (b) and (c) and 33 of the Statement of Claim (which correspond to paragraphs 31, 34(b) and (c) and 35 of the Amended Statement of Claim) read as follows:

> 30. Airbnb charging the Plaintiff (and each of the Class members) the Second Price, instead of the First Price caused the Plaintiff (and each of the Class members) to suffer loss and/or damage.
>
> [...]
>
> 32. The Plaintiff seeks, on his own behalf and on behalf of the Class, a declaration that:
>
> > a. Airbnb supplied, or offered to supply, a product that exceeds the lowest of two clearly expressed prices at the time which the product is so supplied, in contravention of section 54 of the *Competition Act*;
> >
> > b. The Plaintiff and all Class members were entitled to pay to Airbnb only the First Price for each night of their respective reservation(s) through Airbnb in accordance with section 54 of the *Competition Act*; and
> >
> > c. The Plaintiff and all Class members, having paid the Second Price for each night of their respective reservation(s), suffered loss and/or damage equivalent to the monetary difference between the Second Price and First Price, less the Taxes.
>
> 33. The Plaintiff says that he, and the Class, have suffered damages as a result of the Defendants' breach of section 54 of the *Competition Act* and as a result seek damages pursuant to section 36 of the *Competition Act* [...]
>
> [Emphasis added.]

69 These paragraphs contain allegations of facts referring to all elements of section 36. To establish a claim under section 36, a plaintiff must demonstrate that he or she suffered a loss or damage as a result of the defendant's conduct. To have a reasonable cause of action under section 36, the plaintiff has to suffer a loss resulting from the violation of the impugned criminal provision, and must allege damages resulting from the violation (*Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2013 SCC 58 (S.C.C.) [*Sun-Rype*] at paras 74-75; *Godfrey v. Sony Corporation*, 2017 BCCA 302 (B.C. C.A.) [*Godfrey CA*] at para 231; *Murphy* at para 83; *Watson SC* at para 106; *Axiom Plastics Inc. v. E.I. DuPont Canada Co.* (2007), 87 O.R. (3d) 352 (Ont. S.C.J.) CanLII 36817 [*Axiom*] at paras 25, 35). As such, the cause of action under section 36 requires the plaintiff to prove that he or she suffered loss or damage in the actual world as compared to the "but for" world, namely the world without the violation of the criminal provision (*Eli Lilly & Co. v. Apotex Inc.*, 2009 FC 991 (F.C.) at para 849).

70 Here, the cause of action under section 36 has three components: a violation of section 54 by Airbnb, a loss or damage suffered by Mr. Lin, and a causal link between the two. The paragraphs referred to above expressly refer to the alleged violation by Airbnb, to the exact nature of the damages claimed and to the causation element of section 36. They specifically state that the loss and/or damage claimed is the monetary difference between the two prices displayed by Airbnb (which amounts to the Service Fees), and that these damages were suffered as a result of Airbnb's breach of section 54.

71 In my view, this is not a situation like in *Sandhu v. HSBC Finance Mortgages Inc.*, 2016 BCCA 301 (B.C. C.A.) [*Sandhu*], *Wakelam v. Johnson & Johnson*, 2014 BCCA 36 (B.C. C.A.) [*Wakelam*] or *Singer*, where the courts dealt with matters of misleading representation and notably found that the essentials of the cause of action were not adequately pleaded for claims under sections 36 and 52 of the *Competition Act*. The "double ticketing" pricing conduct cannot be simply assimilated to instances of misleading representations. The courts repeatedly affirmed that, when the impugned criminal conduct takes the form of a misleading representation under section 52, a claimant must demonstrate, in order to sustain a claim under section 36 for a breach of that provision, that he or she relied on the misrepresentation to his or her detriment (*Murphy* at paras 79-85; *Wakelam* at paras 74, 91; *Singer* at paras 107-108). Evidence that the claimant acted, to his or her detriment, on the strength of the alleged false representations and suffered loss or damage because of such reliance is one of the necessary ingredients for an action against the person who made the representations. In my view, the situation differs for a prohibited pricing conduct. I am aware of no precedent where an element of reliance to the person's detriment was required to support a cause of action under section 36 for the breach of a pricing conduct such as "double ticketing".

72 Section 36 must receive a broad application and a generous approach must be taken when assessing the adequacy of the pleadings of loss or damage at the certification stage (*Shah* at para 74). In previously certified proposed class actions dealing with price-related offences, it was found sufficient to describe damages in the pleadings as the price differential with the "but for" world, and to deal with causality by writing that damages resulted from the violation (*Shah* at para 75; *Pro-Sys* at para 69; *Axiom* at paras 25, 35; *Godfrey CA* at para 14). This is what Mr. Lin has done here, pleading that the damages amount to the difference between the two prices expressed by Airbnb, and that he suffered such damages by having to pay the higher price.

73 Furthermore, I note that the words "loss" and "damage" in section 36 have been liberally interpreted at the pre-trial motion stage (*Eli Lilly & Co. v. Apotex Inc.*, 2005 FCA 361 (F.C.A.) [*Apotex*] at paras 58-59; *Bédard c. Kellogg Canada Inc.*, 2007 FC 516 (F.C.) at paras 48-50, 52, 84). In *Apotex*, the plaintiff claimed that, for the purpose of section 36, the damages suffered were any amount it would have to pay to the defendant in an infringement action (*Apotex* at para 58).

698 Even if this was found to be a "strange proposition in law", the motion for summary judgement was nevertheless dismissed since it was not clear that the claim could not succeed (*Apotex* at para 59).

74 In *Godfrey*, in the context of a litigation involving a price-fixing conspiracy, the SCC recently observed that, over time, section 36 emerged as a powerful remedy for consumers and an important deterrent of anti-competitive conduct, and that it deserves a broad interpretation, such that anyone who suffers a loss from prohibited anti-competitive behaviour could bring a private action (*Godfrey* at para 68). Section 1.1 of the *Competition Act* provides that the purpose of the legislation is to "maintain and encourage competition in Canada" with a view to providing consumers with "competitive prices and product choices" (*Godfrey* at para 65). Monetary sanctions for criminal anti-competitive conduct therefore further the *Competition Act*'s purpose. The courts have also recognized that deterrence of anti-competitive behaviour and compensation for the victims of such behaviour are two other objectives of the *Competition Act* of particular relevance (*Infineon* at para 111; *Sun-Rype* at paras 24-27; *Shah* at para 37).

75 I further note that, as far as damages are concerned, Rule 182 provides that the statement of claim shall specify "the nature of any damages claimed". A general description of the nature of the damages claimed is sufficient (*Condon* at para 20; *John Doe FCA* at paras 50-51). Here, the Statement of Claim specifically describes the claimed damages as the price differential equal to the Service Fees.

76 For all these reasons, I find that Mr. Lin's pleadings on loss or damage are sufficient at this stage.

77 With regard to the allegation of loss or damage, Airbnb further submits that Mr. Lin had to plead (and eventually prove) that (i) he and the proposed Class members believed they were paying only the First Price and that (ii) they would not have booked an accommodation if they had realized that they had to pay the Second Price. Since Mr. Lin omitted to do so, Airbnb argues that it is plain and obvious that this action will fail. Again, I do not agree.

78 The statutory language of sections 36 and 54 of the *Competition Act* does not contain the requirements laid out by Airbnb and I am not persuaded that it is plain and obvious that loss or damage resulting from a "double ticketing" offence could not be established without such requirements.

79 Airbnb points to no binding decision establishing that, in order to suffer loss or damage under section 36 for a breach of section 54, an element of deception or of being misled is a necessary ingredient. The same is true for the submission that no loss or damage could be sustained if the customer does not allege that he or she would not have purchased the product at the higher price.

80 Section 54 creates a strict liability offence, pursuant to which charging a price higher than the lowest of two or more expressed prices is a violation of the *Competition Act*. This is an

offence strictly based on the supplier's conduct, more specifically on what the supplier expressed and on the price at which the product is supplied. It simply states that, if the supplier expresses two prices for a product, the supplier cannot charge the higher price. It arguably implies that the purchaser is entitled to have the benefit of the lower price. In light of the statutory language, such a pricing provision is to be analyzed from the perspective of the supplier, like similar provisions on fragmented pricing (*Union des consommateurs c. Air Canada*, 2014 QCCA 523 (C.A. Que.) at paras 70-73). Whether section 54 was violated must therefore be addressed objectively, and there is an arguable case that there is no requirement to assess whether the customers were misled or whether they would have purchased the product at the higher price or not.

81 Section 54 prohibits a supplier to clearly express two different prices for a product, and then to charge the higher price. The prohibited conduct appears to give the purchasers of such product a legal entitlement to the lower price, and it is arguable that, as a result of such "double ticketing" conduct, the customer suffers loss or damage equal to the difference between the two prices. I pause to observe that, in *Murphy*, the Court contrasted section 36 claims based on misrepresentations with those based on pyramid selling, noting that the latter provision involved questions of "structure" that "require different treatment" (*Murphy* at paras 91, 93). In light of his other conclusions, the judge did not elaborate on this point in *Murphy*. But the same can arguably be said about the "double ticketing" provision, in contrast to the misleading representation offences.

82 It is therefore not plain or obvious that, in order to prove loss or damage resulting from an alleged violation of the "double ticketing" provision, there is a requirement that the purchaser has been misled or that the purchaser's choice or decision to buy would have been affected by a difference in price. Stated differently, based on the provision's wording, it is not plain and obvious that, in order to support his claim of loss or damage, Mr. Lin needed to plead and allege that he believed he would pay only the First Price shown on Airbnb's search results page, and that he would not have paid the Second Price or would not have bought Airbnb's accommodation booking services at the Second Price.

83 I agree that it may look as a strange proposition to plead and argue that loss or damage can be established by a customer, based simply on a price differential between the lower and the higher price of a product, when the customer knew about both prices and nevertheless decided to accept the higher price and to proceed with the transaction. I also acknowledge that demonstrating and proving the existence of an actual loss or damage in these circumstances may present additional challenges for Mr. Lin and the Class members. I further understand that, in this context, Airbnb may have strong reserves about Mr. Lin's ultimate ability to demonstrate a loss or damage automatically equal to the full price differential. However, in light of section 54's wording and the lack of jurisprudence interpreting the provision, I am not persuaded that Mr. Lin's cause of action based on sections 36 and 54 is doomed to fail in the absence of pleadings addressing the two alleged requirements identified by Airbnb.

84 Again, it may well be that, further to a more comprehensive analysis of the provisions with a full evidentiary record and full legal submissions, the trial judge agrees with Airbnb and finds that establishing loss or damage under section 36 for a breach of section 54 requires demonstrating that the customer was misled or would not have proceeded to purchase the product at the higher price had it been shown to him or her in the first place, and that simply invoking the price differential does not suffice. However, this is a matter of interpretation and application of the two provisions to be debated on the merits. If Airbnb was able to demonstrate, at the common issues trial, that a loss or damage cannot be solely established by the price differential associated with a "double ticketing" conduct, this could be sufficient to conclude that no damages have been suffered by Mr. Lin and the Class members.

(7) Conclusion

85 In conclusion on this first criterion, it will be up to Mr. Lin, at the merits stage, to prove that Airbnb conducted itself in a manner contrary to section 54 of the *Competition Act* and that he is entitled to damages equal to the Service Fees under section 36. But, for the time being, I am satisfied that it is not plain and obvious that, if the alleged facts are assumed to be true, Mr. Lin's action based on those provisions is certain to fail, and that the pleadings disclose no reasonable cause of action. In my opinion, Airbnb's arguments, as attractive as they may seem at first glance, require debate of the facts and law and a foray into the merits of the case. This case raises many novel issues regarding the interpretation and application of a rarely used pricing provision of the *Competition Act*, and on its interface with section 36, and it would be inappropriate to decide them at the certification stage. Certification serves to decide which form the action will take, and Rule 334.16(1)(a) is only meant as a screen to filter out actions that are bound to fail at the merits stage. I am not persuaded that this is the case here.

B. Rule 334.16(1)(b): Identifiable class of two or more persons

86 I now turn to the four other requirements to certify a class proceedings, for which Mr. Lin has the burden of adducing evidence to show "some basis in fact" that they have been met. Having an identifiable class of two or more persons is the first one.

87 Mr. Lin asks the Court to certify the following Class: "All individuals residing in Canada who, on or after October 31, 2015, reserved an accommodation for anywhere in the world using Airbnb, excluding individuals reserving an accommodation primarily for business purposes". He submits that this is an identifiable class, as the fact that a person made a booking with Airbnb is by itself an objective criterion that will allow Class members to self-identify. Mr. Lin also warns the Court to be careful in narrowing the Class and excluding Class members at this early stage, especially given the informational imbalance between Airbnb and him.

88 I pause to underline that Mr. Lin's proposed Class definition covers all individuals having booked an accommodation with Airbnb, with no further distinction or exclusion (save for the reservations for business purposes). The definition is totally detached from the impugned pricing conduct at issue and contains no direct or indirect reference to a requirement that the Class members be individuals who paid a price higher than another price expressed by Airbnb, which is the essence of section 54 on "double ticketing" and the central thrust of Mr. Lin's claim for damages.

89 Airbnb does not contest that the proposed Class is comprised of two or more persons: approximately 2.2 million Canadian residents booked an accommodation on the Airbnb Platform from October 31, 2015 to August 2018, according to the second affidavit of Mr. Miller. Airbnb however contends that the proposed Class definition is too broad and that it should be limited in two ways. First, it should only include Guests "who saw two prices" by booking an accommodation exactly matching the parameters of a previous search they ran on the search results page of the Airbnb Platform. Second, it should only cover Guests who (i) believed they would pay only the First Price shown on the search results page, and (ii) would not have made a booking had they been aware that they would be charged the Service Fees in the Second Price. However, Airbnb explains that such amendments to the proposed Class definition would be inappropriate, since they would require relying on individuals' memories to determine who is part of the Class.

90 For the following reasons, I partly agree with Airbnb and conclude that the proposed Class definition must be amended to be a properly defined and acceptable identifiable class. As defined by Mr. Lin, the proposed Class is not sufficiently narrow and is overly broad because the definition contains no reference to the need for individuals to have been exposed to two different prices for Airbnb's accommodation booking services. The evidence shows that some Guests can access Airbnb's accommodation booking services without going to the search results page on the Airbnb Platform, where Airbnb's First Price is displayed. Airbnb therefore does not express two prices to these individuals. The definition of the identifiable class will have to be amended to exclude those individuals.

91 Three criteria must be met to find an identifiable class: (i) the class must be defined by objective criteria; (ii) the class must be defined without reference to the merits of the actions; and (iii) there must be a rational connection between the common issues and the proposed class definition (*Hollick* at para 17; *Dutton* at para 38; *Wenham* at para 69). Though the SCC instructed courts to generously interpret class action legislation, the burden lies on the proposed representative plaintiff to show that the defined class is sufficiently narrow, thereby meeting the criteria (*Hollick* at paras 14, 20). Still, the burden is not unduly onerous: the representative does not need to show that "everyone in the class shares the same interest in the resolution of the asserted common issue[s]", only that the class is not "*unnecessarily* broad" (emphasis added) (*Hollick* at para 21; *Paradis Honey Ltd. v. Canada*, 2017 FC 199 (F.C.) [*Paradis Honey*] at para 24). As such,

over-inclusion and under-inclusion are not fatal to certification, as long as they are not illogical or arbitrary (*Rae* at para 56). If the class can be defined more narrowly without arbitrarily excluding people sharing the same interest in the resolution of the common issues, the Court can allow certification on condition that the class definition be amended (*Hollick* at para 21).

92 In *Dutton*, the SCC explained the underlying rationales for proceeding with a clearly identifiable class at the outset of the litigation. The Court must be in a position to identify: (i) who is entitled to notice, (ii) who is entitled to relief, and (iii) who is bound by the judgment (*Dutton* at para 38; *Paradis Honey* at para 22). However, despite having to proceed with an identifiable class at the preliminary stages of the class action proceedings, the Court must remain flexible and open to amendments to the class definition during the post-certification stages "because of the complex and dynamic nature of class proceedings" which calls for active case management (*Buffalo FCA* at para 12; *Paradis Honey* at para 26).

93 I first briefly deal with the second argument raised by Airbnb on the overbreadth of the Class proposed by Mr. Lin, regarding the Guests who were not misled. Airbnb submits that the Class definition should be limited to Guests who (i) believed they were paying only the First Price displayed on the search results page, and (ii) would not have made a booking had they known they would be charged the Service Fees in the Second Price. This essentially echoes what Airbnb submitted with respect to the requirement to establish loss or damage, discussed above in the section on the reasonable cause of action.

94 For the reasons detailed above, I do not agree that this argument can be accepted at this stage and that the Class needs to be limited to those "Guests who were misled" to establish a rational connection with the common issues at stake. I am not persuaded at this stage that these are necessarily requirements to establish loss or damage under section 36 for a breach of the "double ticketing" provision; and it would be premature to import them in the definition of the identifiable class. It will be up to the common issues trial judge to decide whether a deception or misleading element is required to recover loss or damage under section 36, or whether proof that a purchaser would not have bought the product at the higher price is required. Mr. Lin argues that the existence of the price differential under section 54 is sufficient to establish loss or damage under section 36 in the circumstances, and this is how he has defined the actual damages suffered by the Class members in his common issues. If it was eventually determined that customers effectively do not need to have been misled or deceived to be entitled to damages, the individuals that Airbnb asks to exclude from the Class definition based on the two additional requirements described above would be left with no relief, and would have to start a new action. This would be contrary to the class actions objectives of access to justice and judicial economy.

95 At the certification stage, one should exercise caution before limiting the dimension of the class as stated by a plaintiff. The consequences of excluding members of the class at this early stage can be serious, and an overly strict approach to the class definition would undermine the

liberal approach that the SCC advised, in *Vivendi* and *Infineon*, for interpreting the requirements for class actions certification. While I cannot exclude the possibility that the class may need to be reconfigured later in these proceedings, agreeing to the second narrowing of the Class submitted by Airbnb would arbitrarily exclude people who share the same interest in the resolution of the common issues.

96 In my view, the situation is however quite different for Airbnb's first argument on the overbreadth of the Class definition proposed by Mr. Lin, regarding the Guests who did not "see" two prices.

97 According to Mr. Lin's Statement of Claim and submissions, the First Price expressed by Airbnb is solely displayed on the search results page of the Airbnb Platform. The first and second affidavits of Mr. Miller provide evidence about at least two types of situations where Guests booking accommodations on the Airbnb Platform are not exposed to the First Price described by Mr. Lin. First, Guests may directly access the listing page of a specific accommodation on the Airbnb Platform without having to visit the search results page and running a search. This is notably the case when Guests book accommodations that they previously booked, and which they can access directly without a search. Second, when Guests change the search parameters of their booking (such as the dates of their stay or the party size) once they are on the listing page of a specific accommodation - thus modifying the parameters they initially used on the search results page -, new prices are displayed to them for that accommodation on the listing page. However, such Guests are not informed of the corresponding price of the accommodation on a search results page. In those circumstances, says Airbnb, the Guests do not visit the search results page for their revised booking, and there is no First Price for that particular transaction concluded by the Guests.

98 This evidence submitted by Mr. Miller was not contradicted. Mr. Miller estimates in his second affidavit that these instances could reflect the situation of approximately 25% of the total bookings made by Canadian-resident Guests on the Airbnb Platform. This is not insignificant.

99 Airbnb presents this argument in terms of Guests who did not "see" two prices and, notably, never saw the First Price described by Mr. Lin, which excludes the Service Fees. Mr. Lin responds that section 54 of the *Competition Act* does not require customers to "actually see" the price before the supplier violates the provision, as the "double ticketing" offence focuses on whether the supplier displays two different prices and charges the higher price.

100 With respect, the overbreadth argument raised by Airbnb on the "two prices" issue should not be crafted in terms of whether the Guests "see" two prices or not. What matters is whether Airbnb *expressed a price* or not. A fundamental element required for the "double ticketing" offence is that the supplier clearly *expresses* two or more prices for the same product, and charges higher than the lowest expressed price. In the situations described by Mr. Miller, Airbnb does not *express* a First Price to the Guests; instead, for those transactions where the Guests did not go through or go

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back to the search results page, only a Second Price was expressed to the customer, at the booking phase of the transaction. More specifically, if a Guest books an accommodation without first going through the search results page, it implies that Airbnb does not express a First Price to the Guest, but only a Second Price at the booking phase. Similarly, if a Guest modifies his or her search parameters in the booking phase, a Second Price will be expressed by Airbnb for that particular transaction, for which no First Price will have been or will be expressed at the search results phase.

101 According to the evidence, these are not situations where Guests are not "seeing" a First Price that might be displayed somewhere on the Airbnb Platform for the transaction, as the only place where a First Price can be displayed is on the search results page related to a particular booking. These are instead situations where a First Price *is never expressed* for the transaction, and simply does not exist. Clearly, if Airbnb only expresses a Second Price to a Guest for a transaction, and no First Price, there cannot be a violation of section 54 of the *Competition Act*, and Guests having booked accommodations in that context cannot logically and properly belong in the identifiable class. On the evidence before me, Airbnb expresses two prices for a transaction only when a Guest books an accommodation that matches the parameters of a previous search he or she made on the search results page of the Airbnb Platform. A Guest is not exposed to a First Price if he or she does not visit Airbnb's search results page for a booking transaction.

102 Guests who book an accommodation by directly accessing the listing page without going through the search results page must therefore be excluded from the Class as no proposed common issues can be relevant or have any rational connection to them. The same is true for Guests who modify the parameters of their booking on the listing page after running a search, as they are not exposed to a First Price on the search results page. These are not potential Class members, and they are individuals who are clearly not entitled to notice or relief for a claim anchored to the "double ticketing" provision.

103 A proposed class definition will be overly broad if it binds persons who ought not to be bound, and if there is no rational connection between some of the proposed class members and the alleged impugned conduct to which the common issues relate (*Harrison v. Afexa Life Sciences Inc.*, 2018 BCCA 165 (B.C. C.A.) [*Harrison*] at para 39). This is the case here. Section 54 can only apply where two prices are expressed for the same product supplied at the same time and in the same quantity. The current proposed Class definition includes individuals with no claims under section 54 because they were never exposed to a First Price. As defined, the proposed Class is insufficiently related to the impugned "double ticketing" conduct (i.e., the requirement of a supplier having expressed two prices) and to the specific claims advanced by Mr. Lin against Airbnb. The definition does not tailor the Class to individuals exposed to two prices, despite this being the central thrust of Mr. Lin's claim against Airbnb. In that sense, the Class definition proposed by Mr. Lin is unnecessarily broad as the Class could be narrowed without arbitrarily excluding people who share the same interest in the resolution of the common issues (*Hollick* at para 21).

104 Without an amendment excluding the Guests who have not been exposed to a First Price by booking an accommodation through visiting Airbnb's search results page, the Class proposed by Mr. Lin captures individuals who do not share the same interest in the resolution of the common issues. Narrowing the class definition along those lines will not arbitrarily exclude individuals with potential valid claims. It will only exclude individuals without such claims.

105 I therefore agree with Airbnb that the identifiable class can only include Guests who booked accommodations that matched the parameters of a previous search they ran on the search results page of the Airbnb Platform, as it is only in those situations that Airbnb will have expressed both a First Price and a Second Price for a booking transaction. There cannot be a properly defined and acceptable identifiable class without such change. Mr. Lin therefore must appropriately reword the Class definition to only include individuals who reserved an accommodation that matched the parameters of a previous search made by the individual on the search results page of the Airbnb Platform and for which a First Price or Listing Fee was displayed. I pause to note that this is not a situation where the Court is resolving conflicts in the evidence to reach that conclusion. The evidence is simply insufficient to establish some basis in fact for the existence of an identifiable class which would include Guests to whom Airbnb has not expressed a First Price.

106 That being said, I am not convinced, contrary to Airbnb's submissions, that an amendment to the Class definition could not solve the problem. Limiting the Class definition to exclude the situations described in Mr. Miller's affidavits is based on an objective criterion regarding the search parameters and the visit of Airbnb's search results page. It defines the Class without reference to the merits of the action, and ensures a rational connection between the common issues and the proposed class. My understanding of the evidence provided by Mr. Miller in his second affidavit is that Airbnb further has the ability to identify and determine the bookings made by Canadian-resident Guests on the Airbnb Platform which can be matched to a previous search ran by the Guests with the same parameters, even though this may require enormous time and resources, and even though Airbnb says it currently has no efficient way to do it.

107 In my view, this situation differs from *Harrison*, referred to by Airbnb, where the class was found to be unnecessarily broad but could not be narrowed as it would have required relying on individuals' memories of specific misrepresentations to determine whether they were part of the class or not. In *Harrison*, a case on misleading representation, the class was found overbroad because it was not tailored to those who relied on the misrepresentations to purchase the product. Instead, the class covered all purchasers of the product although they were not exposed to a common, uniform set of misrepresentations. In that case, the court found that the class definition could not be amended and tailored because the class members would likely be unable to recall the precise representations on the packaging to determine whether they belong to the class or not, and would have to rely on their memories regarding the nature of the misrepresentation.

108 Here, the criterion relates to search parameters and the visit of the search results page on the Airbnb Platform for potential Class members who will claim having paid a price higher for their accommodation booking. I am not persuaded that individuals will be highly unlikely to recall having gone to a search results page where a First Price was expressed by Airbnb, or to have records that will allow them to determine it. To self-identify as potential class members, they will need to determine two elements: that they booked an accommodation with Airbnb after being exposed to two prices which included a First Price on the search results page, and that they ended up paying the higher price. The existence of a First Price or Listing Fee refers to a basic element of booking transactions made by the Guests on the Airbnb Platform. Potential class members will therefore have the ability to self-identify by applying an objective criterion regarding their own usage of Airbnb's accommodation booking services. Here, in my view, there exists a realistic possibility that a substantial number of potential Class members will be able to determine with a degree of certainty whether they fall within or outside of the amended Class definition. The connection can be established objectively by referring to a visit on Airbnb's search results page.

109 For many individuals, this determination will be straightforward, while for some it may be more complicated. The fact that there can be difficulties in objectively determining whether an individual booked an accommodation after visiting Airbnb's search results page does not mean it is impossible. Moreover, the evidence indicates that Airbnb has some ability to match bookings made by Guests to specific search parameters.

110 It is sufficient that the class definition states objective criteria by which class members can later be identified (*Sun-Rype* at para 57). Justice Rothstein's reasons in *Sun-Rype* clarifies that the identifiable class requires evidence establishing some basis in fact that sufficient information is available to class members to permit them to determine whether they belong to the class. Whether a particular individual may, as a matter of fact, be found to be within the class definition may require further inquiry in the administration phase of this class proceeding. But, it can be managed and does not pose an insurmountable hurdle. In addition, Airbnb has records which can be of assistance. The fact that individual inquiries may be required does not take away from the fact that a class may be properly defined and identifiable.

111 I am therefore satisfied that some basis in fact supports the conclusion that, as amended, the Class proposed by Mr. Lin meets the criteria to constitute a properly identifiable class of two or more persons. The amended Class will allow objective identification on the basis of whether or not the member made a booking on the Airbnb Platform after having been through the search results page and being exposed to two prices. The amended Class is defined without reference to the merits of the claims asserted and, with the amendment, a rational connection exists between the common issues regarding liability and damages and the proposed Class. In addition, there is some basis in fact that a class of two or more people meeting the amended definition exists.

C. Rule 334.16(1)(c): Common question of law or fact

112 The next requirement is for Mr. Lin to demonstrate some basis in fact for the claims of the Class members raising common questions of law or fact, regardless of whether those common questions predominate over questions affecting only individual members. Mr. Lin argues that there are common questions of fact and law with respect to liability and remedies. The common questions proposed by Mr. Lin are as follows:

Liability to the Class under the Competition Act

1. Did the Defendants clearly display a "first price" in the search results to each of the Class Members in the search result screen?

2. Did the Defendants display a "second price" immediately prior to each Class Member confirming and/or submitting their accommodation reservation?

3. Is the "second price" higher than the "first price" for all Class Members?

4. Were the Defendants only entitled to charge the "first price" under section 54 of the *Competition Act*?

5. Were the Class members entitled to pay to Airbnb the "first price" under section 54 of the *Competition Act*?

6. Are the Class Members individuals acting primarily for non-business purposes?

Recovery for the Class under Section 36 of the Competition Act

7. Have the Class Members suffered actual damages equivalent to the "second price" minus the "first price", less any applicable taxes?

8. Are the Class Members entitled to claim the damages in question #7 pursuant to section 36 of the *Competition Act*?

9. Are the Defendants jointly and severally liable for their own conduct and that of each other?

10. Are the Class Members entitled to recovery of investigation costs and costs of this proceeding, including counsel fees and disbursements on a full indemnity basis?

Miscellaneous

11. Should the Court grant a permanent injunction enjoining the Defendants from:

a. charging a price higher than the lowest clearly displayed price or otherwise displaying two or more different prices; and

b. displaying two or more different prices for the same product/service of the same quantity?

12. Are the Defendants liable to pay punitive or exemplary damages having regard to the nature of their conduct? If so, what amount and to whom?

13. Are the Defendants liable to pay court-ordered interest?

14. Can an aggregate assessment of damages be made pursuant to Rule 334.28(1)?

113 As indicated above, at the hearing before this Court, Mr. Lin abandoned his claims for permanent injunction and punitive damages, so the proposed common issues 11 and 12 are no longer in play.

114 Airbnb submits that none of the proposed issues are common. Airbnb's principal submission is that the proposed common issues cannot be answered without first making findings of fact with respect to each individual claimant.

115 For the reasons that follow, I find that, with the amended definition of the identifiable Class, Mr. Lin meets the requirement to demonstrate some basis in fact that the claims of the Class members raise certain common issues on liability and recovery of damages. I am satisfied that these issues must be settled to resolve each Class member's claim. However, some of the proposed questions require clarification.

116 The task of the Court at this stage is not to precisely determine the common issues, but rather to "assess whether the resolution of the issue is necessary to the resolution of each class member's claim" (*Wenham* at para 72). In assessing the commonality of issues, the emphasis is not on the differences between the class members but on the identical, similar or related issues of law or fact. The judge must simply assess whether common questions stemming from facts relevant to all class members exist. If the fact is significant enough to advance the resolution of every class member's claim, the condition is met.

117 In *Pro-Sys*, Justice Rothstein summarized the SCC's instructions for ascertaining the commonality requirement previously stated in *Dutton*. Underpinning the commonality question, as well as the overarching class action framework, is an inquiry into "whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis" (*Pro-Sys* at para 108, citing *Dutton* at para 39). In light of these considerations, the Court must determine the existence of a common question while applying the following principles: (i) the commonality question should be approached purposively; (ii) an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim; (iii) it is not essential that the class members be identically situated vis-à-vis the opposing party; (iv) it is not necessary that common questions predominate over non-common issues, though the class members' claims

must share a substantial common ingredient to justify a class action, as the Court will examine the significance of the common issues in relation to individual issues; and (v) success for one class member must mean success for all, since all class members must benefit from the successful prosecution of the action, albeit not necessarily to the same extent (*Pro-Sys* at para 108; *Rae* at para 58; *Paradis Honey* at paras 68-69).

118 In *Vivendi*, the SCC further underlined that the common success requirement should not be applied "inflexibly" (*Vivendi* at para 45). Thus, a common question can exist even if the answer may vary from one class member to another; success for one member does not necessarily entail success for all members, though success for one must not mean failure for another (*Vivendi* at para 45). In interpreting the principles laid down in *Dutton* and *Rumley v. British Columbia*, 2001 SCC 69 (S.C.C.), the SCC reiterated that a question will be considered common if it can serve to advance the resolution of every class member's claim, which may require nuanced and varied answers based on the situation of individual members (*Vivendi* at para 46; *Paradis Honey* at para 77). In other words, the commonality requirement does not call for identical answers for all class members or even that each member must benefit to the same extent. Rather, it is "enough that the answer to the question does not give rise to conflicting interests among members" (*Vivendi* at para 46).

119 Concerning the substantiality of the common issues, the FCA clarified that the commonality requirement can be met even if many issues, such as causation and damages, remain to be decided individually after the trial on common issues (*John Doe* at paras 62-63).

120 Common issues are at the heart of the class action process because resolving common issues is what allows a class action to efficiently provide access to justice, resulting in economic use of judicial resources and behaviour modification. That said, the threshold to meet the commonality requirement is low: it suffices to establish a rational connection between the class and the proposed common issues, and the determination of each common issue must contribute to advance the litigation for (or against) the class. Conversely, an issue is not common if its resolution is dependent upon individual findings of fact that would have to be made for each class member.

121 I am satisfied that, subject to the comments below and a few changes in the wording, the questions identified by Mr. Lin need to be established for all Class members, as defined in the amended Class definition. They are central to the litigation and do not require individualized evidence from Class members. The claims under sections 54 and 36 raise common issues that predominate over questions affecting individual members, such that the criterion in Rule 334.16(1) is satisfied. The proposed common issues focus on Airbnb's pricing conduct and I am satisfied that resolution of these issues will advance the action on behalf of all Class members. They will also avoid duplication of fact-finding or legal analysis. This is not to say that individual assessments may not be necessary - they probably will be. However, the legal and factual foundation of the claims will be common to all Class members.

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122 The first set of issues (proposed common questions 1 to 6) are questions relating to Airbnb's liability. The first three issues relate to Airbnb's pricing practices, and there is some basis in fact regarding Airbnb's uniform practice of charging the Service Fees and the Second Price at the booking stage and of expressing a First Price on the search results page of the Airbnb Platform. As to proposed issues 4 and 5, they are essentially legal questions directed at the interpretation of section 54 of the *Competition Act* and its application to Airbnb.

123 With the Class redefined to ensure that it only covers the Guests to whom Airbnb expressed two prices, I am satisfied that the proposed common issues 1 to 5 can be resolved on a common basis and are suitable for collective adjudication. They constitute common questions of law or fact which fulfills the requirements of Rule 334.16(1)(c). Questions 1 and 2 will also allow the trial judge to assess and determine the "product" issue at the core of the debate between the parties, the applicability of section 54 to this case, as well as the availability of the section 60 defence. The trial judge's findings on these liability issues can be applied to each Class member.

124 Airbnb objected to these questions as common issues, arguing that the proposed identifiable Class included Guests to whom a First Price might not have been expressed. This is no longer relevant with the amended Class definition being limited to Guests having booked an accommodation matching the parameters of a previous search made by the Guest on the search results page of the Airbnb Platform and for which a First Price was expressed on the search results page.

125 When certifying an action, the Court has the discretion to redefine the common issues proposed by the representative plaintiff. Because of the key issue surrounding the "product" or "products" at stake in assessing Airbnb's pricing conduct, the wording of section 54 and the determinative role of the product notion in the "double ticketing" provision, proposed common questions 1 and 2 should be reformulated and clarified as follows:

> 1. Did the Defendants clearly express a "first price" for a product to each of the Class Members in the search results screen?
>
> 2. Did the Defendants clearly express a "second price" for the same product immediately prior to each Class Member confirming and/or submitting their accommodation reservation?

126 With regard to proposed common question 6, I agree with Airbnb that it is redundant and not common. The Class definition already excludes an individual who booked an accommodation for business purposes, as the class is only composed of people who booked an accommodation for non-business purposes. There is no point in asking if these people acted for non-business purposes. Question 6 will therefore not be part of the certified common issues.

127 The second group of proposed common questions (7 to 10) deals with remedies and recovery of monetary damages under section 36 of the *Competition Act*. Airbnb argues that they are not common if the Class is not limited to Guests who (i) believed they would pay only the price shown on the search results page, and (ii) would not have made a booking had they known they would be charged the Service Fees in the Second Price. This again goes back to Airbnb's arguments regarding the additional requirements allegedly needed to establish loss or damage under section 36 for a breach of section 54.

128 As discussed above, whether these requirements are necessary under the provision underlying Mr. Lin's cause of action is open for debate and the proposed common questions 7 and 8 on damages will address that. They will serve to establish what is the loss or damage resulting from an alleged violation of section 54, and whether Mr. Lin's position, to the effect that it can boil down to the simple price differential between the First Price and the Second Price without more on deception or intent to make a booking, is sufficient. Proposed common question 7 refers to the Class members having suffered "actual damages equivalent to the "second price" minus the "first price"", and proposed common question 8 asks whether Class members are entitled to claim such damages under section 36. Mr. Lin contends that the Class members only need to show the price differential to meet the requirements of section 36 in cases of an alleged breach of the "double ticketing" provision, and the common issues trial judge will be tasked with determining whether Mr. Lin is right. The damages as they are defined by Mr. Lin in question 7 are expressly limited to the price differential. Determining whether the price differential can constitute "actual damages" without proof that the Class members (i) believed they would pay only the price shown on the search results page, and (ii) would not have made a booking had they been aware that they would also be charged the Service Fees - which Mr. Lin says he does not need to prove -, will advance the action on behalf of all Class members, and will also avoid duplication of fact-finding or legal analysis.

129 These questions on remedies contested by Airbnb will therefore move the litigation forward for every Class member, even if the common issues trial judge eventually decides that section 36 also requires proof that individuals have been misled or that they had no intention of purchasing the product at the higher price.

130 I agree that questions 7 and 8 should be combined and I would reformulate them as follows:

> 7. Have the Class Members suffered actual damages equivalent to the "second price" minus the "first price", less any applicable taxes, entitling them to claim such damages pursuant to section 36 of the *Competition Act*?

131 Answering this common issue will move the litigation forward even though damages would vary between each Class member, as the price differential equal to the Service Fees would be different for each transaction. However, this is not a bar to certification pursuant to Rule 334.18(a).

712 With the answer to proposed common questions 7 and 8, proposed questions 9 and 10 can be answered and can be certified.

132 The last group of proposed common issues (questions 13 and 14) relates to other remedies. Regarding the proposed common issue 13 on whether Airbnb can be liable to pay court-ordered interest, the resolution of this issue will not advance the litigation. In addition, it falls within the inherent jurisdiction of the trial judge, whether certified or not. I am not satisfied that the question is appropriate for certification.

133 Turning to common issue 14 on aggregate damages, a court can make an aggregate assessment of damages as part of the common issues trial, in the event the defendant is found at the said trial to have breached an applicable obligation or duty. Indeed, in *Pro-Sys* at paragraphs 132-134, while observing that aggregate damages are applicable only once liability has been established, Justice Rothstein held that the question of whether aggregate damages are an appropriate remedy can be certified as a common issue and be determined at the common issues trial, once a finding of liability has been made. However, aggregate damages are not available unless liability and entitlement to damages can be determined on a class wide basis, with no questions of fact or law remaining. The availability of aggregate damages has been certified as a common issue if there is a reasonable likelihood of such remedy being granted (*Sankar v. Bell Mobility Inc.*, 2013 ONSC 5916 (Ont. S.C.J.) at para 86).

134 Here, a number of common issues must first be determined before concluding to Airbnb's liability under sections 36 and 54 of the *Competition Act*, and the issue of the availability of aggregate damages can only be dealt with after all these complex issues will be decided. There is some basis in fact that aggregate damages could be awarded after the common issues trial. Here, monetary relief is claimed and the common issues will be dispositive of liability and entitlement to damages for the Class. In addition, the aggregate liability of Airbnb can be determined by Airbnb's records of all Service Fees collected from the Class members. In these circumstances, I am satisfied that the proposed common issue on aggregate damages is appropriate for certification.

D. Rule 334.16(1)(d): The preferable procedure for the just and efficient resolution of the common questions of law or fact

135 The next criterion is the preferable procedure criterion, set out in Rule 314.16(1)(d). According to the test outlined by the SCC, in order to meet the preferable procedure criterion, the representative plaintiff must show (i) that a class proceeding would be a fair, efficient and manageable method of advancing the claim and determining the common issues which arise from the claims of multiple plaintiffs, and (ii) that it would be preferable to any other reasonably available means of resolving the class members' claims (*Fischer* at para 48; *Hollick* at para 28; *Wenham* at para 77). Determining whether a class proceeding is preferable must be "conducted

through the lens of the three principal goals of class action, namely judicial economy, behaviour modification and access to justice" (*Fischer* at para 22).

136 A number of principles need to be considered when determining whether a class action is the preferable procedure (*Wenham* at paras 77-78; *John Doe FCA* at para 26). First, the preferable procedure requirement is broad enough to encompass all available means of resolving the class members' claims, including avenues of redress other than court actions (*Fischer* at paras 19-20; *Hollick* at para 31). Second, the common issues must be examined in their context, taking into account the importance of the common issues in relation to the claim as a whole (*Hollick* at paras 29-30). As such, when comparing possible alternatives with the proposed class proceeding, a practical, cost-benefit approach must be adopted to consider the impact of the class proceeding on the class members, defendants and courts (*Fischer* at para 21). Third, the preferable procedure analysis is concerned with the extent to which the proposed class action serves the overarching goals of class proceedings (*Hollick* at para 27). This involves a comparative exercise ultimately questioning whether other available means of resolving the common issues are preferable, not whether a class action would fully achieve those goals (*Fischer* at paras 22-23). Fourth, the preferable procedure requirement can be met even where substantial individual issues exist (*Hollick* at para 30).

137 A plaintiff is expected to show some basis in fact for concluding that a class action would be preferable to any other litigation options. However, he or she cannot be expected to address every single conceivable non-litigation option; in fact, "[w]here the defendant relies on a specific non-litigation alternative, he or she has an evidentiary burden to raise it" (*Fischer* at para 49). Yet, once some of the adduced evidence proves that such an alternative exists, the burden of satisfying the preferable procedure criterion remains on the plaintiff (*Fischer* at para 49).

138 Moreover, Rule 334.16(2) provides a list of factors to be considered by the Court in the analysis, including: (i) the extent to which common questions predominate over individual questions; (ii) whether a significant number of class members have an interest in individually controlling the proceedings; (iii) whether the same claims have been the subject of other proceedings; (iv) whether other means of resolving the claims are less practical or efficient; and (v) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced, if relief were sought by other means.

139 Mr. Lin submits that a class proceeding is the preferable procedure in this case, since it favors access to justice, judicial economy and behaviour modification. Furthermore, he maintains that he meets all the factors set out in Rule 334.16(2): common questions predominate over individual ones; there is no evidence of Class members having an interest in controlling individual actions; there are no individual proceedings, and only one class proceeding has been filed in a provincial court, on the basis of a different cause of action; there is no viable alternative to resolve the claims; and the class proceeding will not create greater difficulties than any other alternative.

140 Airbnb responds that a class proceeding is not the preferable proceeding, as the difficulties in identifying Class members will overwhelm the resolution of the common issues. Airbnb's argument is once again anchored on its submissions that the Class should be limited to Guests who "saw two prices" and who "were misled". Those concerns were addressed earlier and, for the reasons discussed above and with the amended Class definition, I am not persuaded that this action will be dominated by individual issues which would be far more time-consuming that the common issues, thus rendering the action unmanageable. On the contrary, the numerous common questions to be resolved do predominate.

141 I find little in Airbnb's submissions to convince me that Mr. Lin failed to demonstrate that a class proceeding is the preferable procedure for resolving the commons issues identified above, in the context where the Class definition is amended as discussed. After reviewing the jurisprudence on the principles relating to the preferable procedure analysis, I am satisfied that a class action is the preferable procedure in the circumstances.

142 Because of the likely modest claims of each individual Class member, individual Class members have no interest to pursue their own separate claims and to bring separate proceedings against Airbnb. In this case, both access to justice and judicial economy make a class proceeding preferable over thousands of individual proceedings. Given the cost of individual proceedings in relation to the likely value of the claims, there does not appear to be any other means of resolving the claims of the Class members than by a class proceeding. Airbnb failed to identify any viable alternative remedy with better efficiency or providing equivalent relief. Mr. Lin mentions having approached the Competition Bureau, which possesses the power to take enforcement action leading to possible criminal prosecution under section 54, but there is no indication that it will take any such action. Furthermore, an enforcement action under the criminal provision could not lead to recovery of damages for the Class members.

143 In this case, a class proceeding is preferable to any other reasonably available means of resolving the Class members' claims, in light of the overarching goals of class proceedings. Compared to individual actions, a class proceeding favors access to justice because the pooling of financial resources makes the litigation possible for claims of relatively small amounts of money; the no-cost regime in this Court shield the parties from costs if they lose; and the notification requirements ensure that individuals know if they are entitled to a claim (*Wenham* at paras 86-89). Judicial economy is also favored here since a class proceeding will entail one single review of the numerous legal and factual issues raised by Mr. Lin's claim regarding the interpretation and application of the "double ticketing" provision and of section 36.

144 I conclude that the preferable procedure criterion is satisfied in this case.

E. Rule 334.16(1)(e): Appropriateness of the representative plaintiff

145 The fifth and final criterion for certification as a class action concerns the ability of Mr. Lin to act as a representative plaintiff who would adequately represent the interests of the Class without conflict of interest.

146 According to Rule 334.16(1)(e), the requirements for establishing that the proposed representative plaintiff is appropriate are that he or she: (i) would fairly and adequately represent the interests of the class; (ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing; (iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members; and (iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record. In *Dutton*, the SCC noted that the proposed representative need not be typical of the class or the best possible representative, but the court assessing this criterion should "be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class" (*Dutton* at para 41).

147 Though a litigation plan "is not to be scrutinized in great detail" at the certification stage because it will "likely be amended during the course of the proceeding", the plan must nevertheless demonstrate that the plaintiff (and their counsel) have thought the process through, having considered the complexities of the case and procedures (*Buffalo FC* at para 148; *Rae* at paras 79, 80). There are no "fixed rules or requirements" for a litigation plan, and the appropriate content of a litigation plan will depend on the "nature, scope and complexity" of the particular litigation (*Buffalo FC* at para 150; *Rae* at para 80). As such, the jurisprudence established the following non-exhaustive list of topics to be addressed in a litigation plan: (i) the steps to be taken to identify and locate necessary witnesses and to gather their evidence; (ii) the collection of relevant documents from members of the class, as well as from others; (iii) the exchange and management of documents produced by all parties; (iv) ongoing reporting to the class; (v) mechanisms for responding to inquiries from class members; (vi) whether the discovery of individual class members is likely and, if so, the intended process for conducting those discoveries; (vii) the need for experts and, if needed, how those experts are going to be identified and retained; (viii) if individual issues remain after the termination of the common issues, what plan is proposed for resolving those individual issues; and (ix) a plan to address how damages or any other forms of relief are to be assessed or determined after the common issues have been decided (*Buffalo FC* at para 151; *Rae* at para 79).

148 Regarding conflicts of interest, a mere possibility of conflict is not enough to deny certification (*Infineon* at paras 150-151). Furthermore, a representative plaintiff should only be excluded if the conflict of interest "is such that the case could not possibly proceed fairly" (*Infineon* at para 149).

149 Mr. Lin submits that he is an appropriate representative plaintiff. He claims that he is familiar with the substance of the issues, understands the role of a representative plaintiff, has proposed a detailed litigation plan taking into account the complexities of the case, has no conflict of interest, and has provided a summary of its retainer agreement with counsel. I am satisfied that there is some basis in fact in Mr. Lin's affidavits to support all of these elements. This evidence was not challenged or contradicted.

150 Airbnb responds that Mr. Lin cannot be the representative plaintiff since no evidence shows that he meets the elements that, according to Airbnb, should allegedly be added to the Class definition. In the alternative, Airbnb pleads that a sub-class should be created for Guests like Mr. Lin who have also been Hosts, to avoid conflicts of interest. More specifically, Airbnb submits that a conflict could develop, considering that some Guests may not have booked an accommodation if the Service Fees would have been displayed on the search results page.

151 I am not persuaded by Airbnb's arguments on this last criterion for certification. First, Airbnb's submissions on the additional requirements for an appropriate class definition have been addressed above. Mr. Lin's claim is for Guests who made a booking on the Airbnb Platform, regardless of whether the individual would not have booked because of the additional Service Fees. It is Mr. Lin's position that the "double ticketing" offence entitles the Class members to the lower price, irrespective of their willingness to pay the higher price. Second, regarding conflicts of interest, the possibility of a conflict is not enough to prevent someone from being a representative plaintiff and to deny certification (*Infineon* at paras 150-151). A representative plaintiff should only be excluded if the conflict of interest "is such that the case could not possibly proceed fairly" (*Infineon* at para 149). Third, on the record before me, I find no factual support for Airbnb's submissions about a potential conflict of interest due to Mr. Lin being also a Host on the Airbnb Platform. Moreover, if needed, it will remain open to the common issues trial judge to create a subclass later in the proceedings, based upon the evidence at trial (*Daniells v. McLellan*, 2017 ONSC 3466 (Ont. S.C.J.) at para 40).

152 I see no serious challenge to Mr. Lin's ability to fairly and adequately represent the Class or to fulfill the role demanded of him in instructing counsel and pursuing the action diligently. He fits within the definition of the amended Class, appears to fully understand the issues and the responsibility he is taking on, and has retained experienced counsel to represent the Class. The litigation plan contained in the motion record proposes an efficient procedure for the balance of the litigation. No evidence indicates or suggests that the case cannot proceed fairly with Mr. Lin as the representative plaintiff.

153 In my opinion, Mr. Lin satisfies the fifth criterion for certification.

IV. Conclusion

154 In conclusion, I find that, on the condition that the Class definition be amended as discussed above, Mr. Lin successfully meets the legal requirements for the certification of this class action. Therefore, I will grant the motion to certify this action as a class proceeding, conditional on the amendment of the Class definition. The Order issued with these Reasons will address the points contemplated by Rule 334.17(1), in a manner consistent with the conclusions in these Reasons.

155 I will also grant the motion to add Airbnb Payments as a defendant.

156 Pursuant to Rule 334.39, no costs are typically awarded on a motion for certification. Neither party has sought costs, and there is no basis to depart from the principle established by Rule 334.39 and to award costs in the present motion.

ORDER in T-1663-17

THIS COURT ORDERS that:

1. This action is hereby certified as a class proceeding, conditional upon the amendment to be made to the definition of the Class, described below.

2. Arthur Lin is appointed as the representative Plaintiff.

3. The definition of the Class proposed by the Plaintiff, described as "All individuals residing in Canada who, on or after October 31, 2015, reserved an accommodation for anywhere in the world using Airbnb, excluding individuals reserving an accommodation primarily for business purposes", shall be amended by the Plaintiff to be limited to individuals who reserved an accommodation that matched the parameters of a previous search made by the individual on the search results page of the Airbnb Platform and for which a First Price or Listing Fee was displayed.

4. The nature of the claim made on behalf of the Class is as follows: The claim asserts a breach of section 54 of the *Competition Act*.

5. The relief claimed by the Class is as follows:

The claim seeks damages and costs pursuant to section 36 of the *Competition Act*.

6. The questions to be certified as common issues are as follows:

Liability to the Class under Section 54 of the Competition Act

1. Did the Defendants clearly express a "first price" for a product to each of the Class Members in the search results screen?

2. Did the Defendants clearly express a "second price" for the same product immediately prior to each Class Member confirming and/or submitting their accommodation reservation?

3. Is the "second price" higher than the "first price" for all Class Members?

4. Were the Defendants only entitled to charge the "first price" under section 54 of the *Competition Act*?

5. Were the Class members entitled to pay to the Defendants the "first price" under section 54 of the *Competition Act*?

Recovery for the Class under Section 36 of the Competition Act

6. Have the Class Members suffered actual damages equivalent to the "second price" minus the "first price", less any applicable taxes, entitling them to claim such damages pursuant to section 36 of the *Competition Act*?

7. Are the Defendants jointly and severally liable for their own conduct and that of each other?

8. Are the Class Members entitled to recovery of investigation costs and costs of this proceeding, including counsel fees and disbursements on a full indemnity basis?

9. Can an aggregate assessment of damages be made pursuant to Rule 334.28(1)?

7. The time and manner for Class members to opt out of the class proceeding are reserved to be addressed through the case management process.

8. The style of cause is modified to add Airbnb Payments UK Limited as a Defendant.

9. No costs are awarded.

Motion granted, conditional on amendment of class definition.

Annex A

Rules 334.16(1) and (2), and 334.18 read as follows:

Certification

Conditions

334.16 (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if

(a) the pleadings disclose a reasonable cause of action;

(b) there is an identifiable class of two or more persons;

(c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;

(d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and

(e) there is a representative plaintiff or applicant who

(i) would fairly and adequately represent the interests of the class,

(ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,

(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and

(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

Matters to be considered

(2) All relevant matters shall be considered in a determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether

(a) the questions of law or fact common to the class members predominate over any questions affecting only individual members;

(b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;

(c) the class proceeding would involve claims that are or have been the subject of any other proceeding;

(d) other means of resolving the claims are less practical or less efficient; and

(e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[...]

Grounds that may not be relied on

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334.18 A judge shall not refuse to certify a proceeding as a class proceeding solely on one or more of the following grounds:

(a) the relief claimed includes a claim for damages that would require an individual assessment after a determination of the common questions of law or fact;

(b) the relief claimed relates to separate contracts involving different class members;

(c) different remedies are sought for different class members;

(d) the precise number of class members or the identity of each class member is not known; or

(e) the class includes a subclass whose members have claims that raise common questions of law or fact not shared by all of the class members.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20140919

Docket: A-218-14

Citation: 2014 FCA 205

Present: **WEBB J.A.**

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

REASONS FOR ORDER

WEBB J.A.

[1] Dr. Gábor Lukács, on April 22, 2014, commenced "an application for judicial review in respect of:

> (a) the practices of the Canadian Transport Agency ("Agency") related to the rights of the public, pursuant to the open-court principle, to view information provided in the course of adjudicative proceedings; and

(b) the refusal of the Agency to allow the Applicant to view unredacted documents in File No. M4120-3/13-05726 of the Agency, even though no confidentiality order has been sought or made in that file."

[2] The Agency brought a motion to quash this application for judicial review pursuant to paragraph 52(a) of the *Federal Courts Act*. This paragraph provides that:

52. The Federal Court of Appeal may	52. La Cour d'appel fédérale peut :
(a) quash proceedings in cases brought before it in which it has no jurisdiction or whenever those proceedings are not taken in good faith;	a) arrêter les procédures dans les causes qui ne sont pas de son ressort ou entachées de mauvaise foi;
…	[…]

[3] The Agency does not allege that the notice of application for judicial review was not taken in good faith but rather that this Court does not have the jurisdiction to hear this application. The grounds upon which the Agency relies are the following:

1. Subparagraph 28(1)(k) of the *Federal Courts Act* provides that it has jurisdiction to hear application for judicial review made in respect of decisions of the Agency.

2. A "refusal" to disclose government information, containing personal information such as in the present case for example, is a "refusal" of the head of the institution. It is therefore not a decision of the Agency falling within the purview of section 28 of the Federal Courts Act.

3. The application for judicial review should have been filed with the Federal Court.

4. Any person who has been refused access to a record requested under the Access to Information Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Federal Court for a review of the matter within the time specified in the Access to Information Act.

5. There are three prerequisites that must be met before an access requestor may apply for Judicial Review:

    1) The applicant must have been refused access to a record

    2) The applicant must have complained to the Information Commissioner

    3) The applicant must have received an investigation report by the Information Commissioner

6. The applicant could not apply for a judicial review because (1) the applicant's request was treated informally and there is therefore no “refusal”; (2) the applicant did not complain to the Information Commissioner before filing the within judicial review application; and (3) the applicant did not receive an investigation report by the Information Commissioner.

7. Even if the application for judicial review had been filed with the appropriate Court, it would have had no jurisdiction to obtain this application.

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

[4] In *Canada (Minister of National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2013] F.C.J. No. 1155, Stratas J.A., writing on behalf of this Court, noted that:

> **(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.

[5] In this case the Agency is relying on the authority provided in section 52 of the *Federal Courts Act* to strike the notice of application for judicial review. However, the comments of Stratas J. that an application for judicial review will only be struck if the application is “so clearly improper as to be bereft of any possibility of success" are equally applicable in this case. In *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588, this Court also

noted that a reason for such a high threshold is the difference between an action and an application for judicial review. As stated in paragraph 10:

> … An action involves, once the pleadings are filed, discovery of documents, examinations for discovery, and then trials with viva voce evidence. It is obviously important that parties not be put to the delay and expense involved in taking a matter to trial if it is "plain and obvious" (the test for striking out pleadings) that the pleading in question cannot amount to a cause of action or a defence to a cause of action…
>
> Further, the disposition of an application commenced by originating notice of motion does not involve discovery and trial, matters which can be avoided in actions by a decision to strike. In fact, the disposition of an originating notice proceeds in much the same way that an application to strike the notice of motion would proceed: on the basis of affidavit evidence and argument before a single judge of the Court. Thus, the direct and proper way to contest an originating notice of motion which the Agency thinks to be without merit is to appear and argue at the hearing of the motion itself…

[6] Therefore, there is a high threshold for the Agency to succeed in this motion to quash the application for judicial review.

[7] The first three grounds for quashing the application for judicial review identified by the Agency can be consolidated and summarized as a submission that there is no decision of the Agency and that this Court only has the jurisdiction under subparagraph 28(1)(k) of the *Federal Courts Act* to judicially review decisions of the Agency.

[8] Subparagraph 28(1)(k) of the *Federal Courts Act* provides that:

28. (1) The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals:	28. (1) La Cour d'appel fédérale a compétence pour connaître des demandes de contrôle judiciaire visant les offices fédéraux suivants :
…	[…]

(k) the Canadian Transportation Agency established by the Canada Transportation Act;	k) l'Office des transports du Canada constitué par la Loi sur les transports au Canada;

[9] There is nothing in subsection 28(1) to suggest that an application for judicial review can only be made to this Court if there is a decision of the Agency.

[10] In *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2011] F.C.J. No. 1725, Stratas J.A. stated that:

> **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*.

[11] Subsection 28(2) of the *Federal Courts Act* provides that section 18 to 18.5 (except subsection 18.4(2)) apply to any matter within the jurisdiction of this Court. Therefore, a decision is not necessarily required in order for this Court to have jurisdiction under section 28 of the *Federal Courts Act*.

[12] The other grounds that are submitted for quashing the notice of application are related to the *Access to Information Act*, R.S.C., 1985, c. A-1. It is acknowledged by both Dr. Lukács and the Agency that Dr. Lukács did not submit a request for information under this *Act.* Section 41 of that *Act* would only apply if the conditions as set out in that section were satisfied. Since he did not submit a request under that *Act*, the conditions of this section are not satisfied.

[13] However, the argument of Dr. Lukács is that he has the right to the documents in question without having to submit a request for these under the *Access to Information Act*. The Agency did not refer to any provision of the *Access to Information Act* that provides that the only right to obtain information from the Agency is by submitting a request under that *Act*.

[14] The issue on this motion is not whether Dr. Lukács will be successful in this argument but rather whether his application is "so clearly improper as to be bereft of any possibility of success". I am not satisfied that the Agency has met this high threshold in this case. I agree with the comments of this Court in *David Bull Laboratories (Canada) Inc.* that "the direct and proper way to contest a [notice of application for judicial review] which the Agency thinks to be without merit is to appear and argue at the hearing of the [application] itself".

[15] The Agency's motion to quash the notice of application for judicial review in this matter is dismissed, with costs, payable in any event of the cause.

"Wyman W. Webb"

J.A.

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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-218-14
STYLE OF CAUSE:	DR. GABOR LUKACS v. CANADIAN TRANSPORTATION AGENCY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	WEBB J.A.
DATED:	SEPTEMBER 19, 2014

WRITTEN REPRESENTATIONS BY:

Self-represented	FOR THE APPLICANT
Odette Lalumière	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Self-represented	FOR THE APPLICANT
Legal Services Branch Canadian Transportation Agency	FOR THE RESPONDENT

1999 CarswellNat 218
Federal Court of Canada — Trial Division

Markevich v. Canada

1999 CarswellNat 1796, 1999 CarswellNat 218, [1999] 2 C.T.C. 104, [1999] 3 F.C. 28, [1999] F.C.J. No. 250, 163 F.T.R. 209, 172 D.L.R. (4th) 164, 99 D.T.C. 5136

In the Matter of an application under section 18.1 of the Federal Court Act

Joe Markevich, Applicant and Her Majesty The Queen in Right of Canada, Respondent

Evans J.

Judgment: February 19, 1999
Docket: T-250-98

Counsel: *Douglas, Symes & Brissenden*, for the Applicant.
Mr. Morris Rosenberg, for the Respondent.

Subject: Civil Practice and Procedure; Income Tax (Federal)

Application by taxpayer for judicial review.

***Evans J.*:**

A. Introduction

1 The *Income Tax Act* imposes no limitation on the time within which the Minister of National Revenue (hereinafter "the respondent" or "the Minister") may seek to collect unpaid tax for which a taxpayer has been duly assessed. In the absence of any express provisions in the *Income Tax Act* itself, the principal question raised in this case is whether the Minister's exercise of the statutory collection powers is subject to a limitation period, whether that contained in the *Crown Liability and Proceedings Act* R.S.C. 1985, c. C-50, section 32 or in the relevant provincial limitation statute. The applicant contends that it is, while the Minister says that it is not.

2 The question comes before me in the form of an application for judicial review under section 18.1 of the *Federal Court Act* R.S.C. 1985, c. F-7 [as amended]. The subject matter of the application is a letter of January 15th, 1998 written to the applicant by Ms. Nasim Kara of the Revenue Canada office in Richmond, British Columbia, informing the applicant that he owes more than $770,583.42 in unpaid taxes. The applicant requests a declaration that this amount is

not owing and an order restraining the Minister from issuing requirements to pay to the applicant's creditors.

B. Background

3 The applicant, Mr. Markevich, has been at all material times a resident in the province of British Columbia. In the early 1980s he failed to pay taxes on income that he had earned in the promotion of stocks. He has never challenged the validity or correctness of the notices of assessment issued by the Minister.

4 In 1986 he was assessed as owing $267,437.61 to Revenue Canada. In 1987 his house was sold and Revenue Canada took the proceeds of sale to reduce his indebtedness. Later in that same year Revenue Canada decided to "write-off" the amount of tax still owed by the applicant, on the ground that he had no other assets and no income, and there were no realistic prospects of collecting the tax from him within the foreseeable future.

5 "Writing-off" a tax debt does not extinguish or forgive it; it is an internal book- keeping device that removes a taxpayer's tax debt from Revenue Canada's active collection list. Subsection 25(3) of the *Financial Administration Act*, R.S.C. 1985, c. F-11 [as amended] provides that "[t]he writing off of any debt, obligation or claim pursuant to this section does not affect any right of Her Majesty to collect or recover the debt, obligation or claim."

6 From 1992 the applicant reported income on his tax returns; in some years he was late in paying the amount for which he was assessed. After making payments in respect of those years, he received a statement of account in September 1993 showing the balance owing to Revenue Canada as $0.00. In the years 1995 to 1997 he again fell into arrears, and requirements to pay were issued to creditors informing them of the tax owing by the taxpayer and requiring them to pay to Revenue Canada money that they owed to the applicant. During the period 1995 to 1997, the statements of account sent to the applicant, and the requirements to pay issued to its creditors, showed him as owing only the tax due in respect of those years, not the larger amount owing from the years before 1986.

7 However, in January 1998 the applicant was informed that he also owed unpaid taxes assessed in the years up to 1986 in the amount $770,583.42, which comprised $267,437.61 of unpaid taxes and $503,145.81 of accrued interest. Apparently as a result of a change of policy, previously written-off tax debts are now included by Revenue Canada in both the statements of account sent to taxpayers, and any requirements to pay issued to taxpayers' creditors.

8 Having heard virtually nothing about this debt in any of his communications with Revenue Canada since 1986, and having neither acknowledged nor made any payments in respect of this indebtedness since 1986, the applicant was taken aback when he received this information in January 1998. In particular, he feared that the inclusion of this large amount in any requirements to

pay that Ms. Kara indicated would be issued to his creditors would be extremely damaging to him in the conduct of his business. However, it should also be noted that in August 1996 the applicant had been told that the assessment notice issued for the tax year 1993 did not include a previously unpaid tax liability and that a detailed statement would follow. It did not.

C. Jurisdiction

9 The respondent made a preliminary objection to the Court's jurisdiction to entertain this proceeding. The argument was that only a "decision or order" may be the subject of an application for judicial review under section 18.1 of the *Federal Court Act*. The letter written on behalf of the Minister, which is identified in the applicant's originating notice of motion as the subject of the application for judicial review, was simply informative in nature and did not purport to determine or otherwise affect any legal rights or duties of the applicant. It was not a "decision or order", and was therefore unreviewable by this Court. Indeed, on very similar facts to those at bar, this was the conclusion reached by Teitelbaum J. in *Fuchs v. R.*, [1997] 2 C.T.C. 246 (Fed. T.D.).

10 With all respect, I do not share this rather limited view of the scope of the subject-matter of this Court's judicial review jurisdiction. The words "decision or order" are found in subsection 18.1(2) of the *Federal Court Act*, which provides that an application for judicial review of a "decision or order" must be made within 30 days after the time that the decision or order was first communicated by the decision-maker. In my opinion, this subsection simply provides a limitation period within which an application for judicial review of a decision or order must normally be made. It does not say that only decisions or orders may be the subject of an application for judicial review, nor does it say that administrative action other than decisions or orders are subject to the 30 days' limitation period: *Krause v. Canada* (February 8, 1999), Doc. A-135-98 (Fed. C.A.).

11 It seems to me that the permitted subject-matter of an application for judicial review is contained in subsection 18.1(3), which provides that on an application for judicial review the Trial Division may order a federal agency to do *any act* or *thing* that it has unlawfully failed or refused to do, or declare invalid or set aside and refer back, prohibit or restrain "a decision, order, *act* or *proceeding* of a federal board, commission or other tribunal". The words "act or proceeding" are clearly broad in scope and may include a diverse range of administrative action that does not amount to a "decision or order", such as subordinate legislation, reports or recommendations made pursuant to statutory powers, policy statements, guidelines and operating manuals, or any of the myriad forms that administrative action may take in the delivery by a statutory agency of a public programme: see *Krause v. Canada, supra*.

12 However, in order to qualify as an "act or proceeding" that is subject to judicial review, the administrative action impugned must be an "act or proceeding" of a "federal board, commission or other tribunal", that is a body or person "having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament" (subsection 2(1) of the *Federal Court Act*).

While the letter written on the Minister's behalf to the applicant that is the subject-matter of this application for judicial review was not an act or proceeding by a federal body in the *exercise* of any statutory power, the Minister, of course, is a person *having* statutory powers under the *Income Tax Act*.

13 Even though not taken in the exercise of a statutory power, administrative action by a person *having* statutory powers may be reviewable as an "act or proceeding" under paragraph 18.1(3)(*b*) if it affects the rights or interests of individuals. The letter in question here contained no decision made pursuant to a statutory power, nor did it explicitly purport adversely to affect any right or interest of the applicant. However, it is a reasonable inference from both the letter, and the applicant's communications with Ms. Kara, the writer of the letter, that it signified that Revenue Canada had made a decision to try to collect the unpaid tax and intended to take measures to attempt to recover the previously "written-off" tax debt. And, as is apparent from the requirements to pay that were subsequently issued, this was indeed the case.

14 There is no doubt that it is potentially very damaging to a taxpayer's business or professional reputation for Revenue Canada to issue requirements to pay that disclose that a taxpayer is in default on a large unpaid tax debt and require the creditor to pay to Revenue Canada whatever the creditor owes to the taxpayer. The *Income Tax Act* provides no remedy by which a taxpayer can challenge the validity of the issuance of a requirement to pay. In my opinion, it would be a serious gap in the Court's supervisory jurisdiction if it could not entertain a challenge to the issuance of a requirement to pay where, as here, the ground of the challenge could not have been raised by the taxpayer on receipt of the notice of assessment

D. Legislative Framework

15 It will be necessary in the course of these reasons to refer to a number of provisions in the federal *Income Tax Act* and the *Income Tax Act* of British Columbia. To set them all out at this stage would be both unnecessary and distracting. I shall therefore set out here only the statutory provisions that are of central importance to the disposition of this application.

Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50

> 32. Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.
>
> 32. Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers

s'appliquent lors des poursuites auxquelles l'État est partie pour tout fait générateur survenu dans la province. Lorsque ce dernier survient ailleurs que dans une province, la procédure se prescrit par six ans.

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) [as amended]

222. All taxes, interest, penalties, costs and other amounts payable under this Act are debts due to Her Majesty and recoverable as such in the Federal Court or any other court of competent jurisdiction or in any other manner provided by this Act.

224 (1) Where the Minister has knowledge or suspects that a person is, or will be within one year, liable to make a payment to another person who is liable to make a payment to another person who is liable to make a payment under this Act (in this subsection and subsections (1.1) and (3) referred to as the "tax debtor"), the Minister may in writing require the person to pay forthwith, where the moneys are immediately payable, and in any other case as and when the moneys become payable, the moneys otherwise payable to the tax debtor in whole or in part to the Receiver General on account of the tax debtor's liability under this Act.

222. Tous les impôts, intérêts, pénalités, frais et autres montants payables en vertu de la présente loi sont des dettes envers Sa Majesté et recouvrables comme telles devant la Cour fédérale ou devant tout autre tribunal compétent, ou de toute autre manière prévue par la présente loi.

224(1) S'il sait ou soupçonne qu'une personne est ou sera, dans les douze mois, tenue de faire un paiement à un autre personne qui, elle-même, est tenue de faire un paiement en vertu de la présente loi (appelée "débiteur fiscal" au présent paragraphe et aux paragraphes (1.1) et (3)), le ministre peut exiger par écrit de cette personne que les fonds autrement payables au débiteur fiscal soient en totalité ou en partie versés, sans délai si les fonds sont immédiatement payables, sinon au fur et à mesure qu'ils deviennent payables, au receveur général au titre de l'obligation du débiteur fiscal en vertu de la présente loi.

Limitation Act R.S.B.C. 1996, c. 266

1. The term 'action' is defined as including any proceeding in a court and any exercise of a self help remedy.

3(5) Any other action not specifically provided for in this Act or any other Act may not be brought after the expiration of 6 years after the date on which the right to do so arose.

9(1) On the expiration of a limitation period set by this Act for a cause of action to recover any debt, damages or other money, or for an accounting in respect of any matter, the right and title of the person formerly having the cause of action and of a person claiming through

the person in respect of that matter is as against the person against whom the cause of action formerly lay and as against his successors, extinguished.

9(3) *A cause of action*, whenever arising, to recover costs on a judgment or to recover arrears of interest on principal money is extinguished by the expiration of the limitation period set by this Act for an action between the same parties on the judgment or to recover the principal money,

E. Issues

16 Although they will be broken into several more specific components, the principal issues raised by this litigation are as follows.

1. Does section 32 of the *Crown Liability and Proceedings Act* apply to the exercise by the Minister of National Revenue of the statutory power to issue requirements to pay with respect to a duly assessed tax liability under the *Income Tax Act*?

2. If it does, is the applicant's liability under the *Income Tax Act* one that "arises in a province", or "otherwise than in a province"?

3. If it arises in a province, is the issue of a requirement to pay a "proceeding in a court" or an "exercise of a self help remedy" within the definition of "action" in section 1 of the British Columbia *Limitation Act*?

4. Regarding the requirement to pay issued with respect to unpaid taxes under the British Columbia *Income Tax Act*:

i) does the British Columbia *Income Tax Act* exclude the application of the British Columbia *Limitation Act* from governing the time within which the Minister must exercise the power to collect the tax?

ii) if it does not, does the British Columbia *Limitation Act* apply to the exercise of powers by a Minister of the federal Crown pursuant to the British Columbia *Income Tax Act*?

F. Analysis

17 Before embarking on a detailed analysis of the issues described above, it will be helpful to bear in mind the approaches to the interpretation of taxation statutes adopted by the courts in recent years. At one time, the principal presumption of statutory interpretation in this area of the law was that taxing statutes should be construed narrowly in favour of the taxpayer, who should also be given the benefit of any doubt about the meaning of the legislative provisions in dispute: *Johns-Manville Canada Inc. v. R.*, [1985] 2 S.C.R. 46 (S.C.C.).

18 More recently, however, the courts have developed other interpretative approaches or principles that undoubtedly limit the influence previously exercised by the presumption requiring a narrow interpretation of tax legislation in favour of the taxpayer. The following passage from the judgment of Gonthier J. in *Québec (Communauté urbaine) c. Notre-Dame de Bonsecours (Corp.)*, [1994] 3 S.C.R. 3 (S.C.C.) at 17-18 provides authoritative guidance to the current interpretation of tax legislation:

> ...there is no longer any doubt that the introduction of tax legislation should be subject to the ordinary rules of construction. At page 872 of his text *Construction of Statutes* (2nd. ed. 1983), Driedger fittingly summarizes the basic principles: "... 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". The first consideration should therefore be to determine the purpose of the legislation, whether as a whole or as expressed in a particular provision.
>
> . . . . .
>
> The teleological approach makes it clear that in tax matters it is no longer possible to reduce the rules of interpretation to presumptions in favour of or against the taxpayer or to well-defined categories known to require a liberal, strict or literal interpretation. ...

19 In addition, as the *Income Tax Act* recognizes, the principle of "horizontal equity" among taxpayers is an important policy objective of the statute, so that whenever possible the Act should be interpreted to ensure that taxpayers who are similarly situated should pay the same amount of tax: *Symes v. R.*, [1993] 4 S.C.R. 695 (S.C.C.), 751-752. The cost of the failure to collect duly assessed tax must inevitably be borne by other taxpayers and the population at large.

20 Nonetheless, the special nature of tax legislation, and in particular the reliance placed upon its provisions by those planning their affairs in order to minimize or avoid tax liability, has meant that the broad and purposive approach applied to legislation in general is not applied to the same extent to the interpretation of tax statutes. The "plain meaning" rule retains a vigour in this area that it does not have elswhere: see, for example, *Antosko v. Minister of National Revenue*, [1994] 2 S.C.R. 312 (S.C.C.) at 326-327. And in *2747-3174 Québec Inc. c. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919 (S.C.C.), 1013-1014, L'Heureux-Dubé J. said that, for these reasons, and because business practice has often contextualized the meaning of words used in tax statutes, the "plain meaning" rule should be given priority over the purposive or "modern" approach with which courts generally approach the interpretation of legislation.

Issue 1

21 In order to establish that section 32 of the *Crown Liability and Proceedings Act* applies to the Minister's exercise of the power to issue requirements to pay, the applicant must show that the following two elements are satisfied.

(i) Is the issue of a requirement to pay a "proceeding with respect to any cause of action arising in a province".

22 There are two methods by which the Minister may seek to collect a debt that is owing as a result of an unpaid tax liability under section 222 of the *Income Tax Act*. First, the Minister may institute legal proceedings by way of a statement of claim for the recovery of a debt in the Federal Court or any other court of competent jurisdiction. Second, the Minister may employ one of the statutory collection methods that do not require the institution of an action. These include registering a certificate of indebtedness with the Federal Court under section 223 of the *Income Tax Act* and issuing to third party creditors a requirement to pay under section 224 of the Act.

23 The applicant's first argument was that section 32 of the *Crown Liability and Proceedings Act* applies to anything that is a "proceeding", and that the phrase "in respect of a cause of action" only modifies the words that follow it, namely, "arising in a province" or, when relevant, "otherwise than in a province". He then relied on cases where it has been said that "proceedings" is a word of the broadest connotation and is not confined to measures taken in court or as a step in the initiation or prosecution of litigation.

24 Thus, in *Royce v. Macdonald* (1909), 12 W.L.R. 347 (Man. C.A.) it was held that the sale of property under a writ of *fieri facias* in the execution of a judgment was "a *proceeding*" for the purpose of a municipal taxing statute.

25 Similarly, in *E.H. Price Ltd. v. R.*, [1983] 2 F.C. 841 (Fed. C.A.) the Federal Court of Appeal held that the registration in the Federal Court by the Minister of National Revenue of a certificate of indebtedness was a "proceeding by the Crown" for the purpose of the then subsection 38(2) of the *Federal Court Act*, which prescribed the limitation period applicable to proceedings by and against the Crown. And in *Twinriver Timber Ltd. v. British Columbia* (1980), 25 B.C.L.R. 175 (B.C. C.A.) affirming (1979), 15 B.C.L.R. 38 (B.C. S.C.), the British Columbia Court of Appeal concluded that the filing of a certificate of default for taxes due constituted an "action" within the meaning of section 1 of the provincial *Limitation Act* and that therefore the six year limitation period was applicable.

26 The difficulty that I have with this argument is that it depends upon reading the words of section 32 of the *Crown Liability and Proceedings Act* in an artificial and compartmentalized fashion. It seems to me that a more natural interpretation of the words "proceeding with respect to a cause of action arising in a province" is that they constitute a single concept, so that each of the components limits what precedes it. Thus, the phrase "with respect to a cause of action" limits the scope of the word "proceeding", and "arising in a province" locates the "cause of action".

27 In my opinion, therefore, the relevant question at this stage of the inquiry is whether the issue of a requirement to pay is a "proceeding with respect to a cause of action". Returning to *E.H.*

Price Ltd., the respondent argued that the court in that case concluded that the registration of a certificate was a "proceeding by the Crown" for the purpose of subsection 38(2), as it then was, of the *Federal Court Act*. However, the court also said that the registration was not a "proceeding *in the Court* with respect to a cause of action" for the purpose of the limitation period prescribed by subsection 38(1).

28 The absence of the words, "in the Court", from section 32 of the *Crown Liability and Proceedings Act* arguably makes section 32 broader in scope than subsection 38(2) of the *Federal Court Act* that was considered in *E.H. Price Ltd.* In an attempt to refute this argument, counsel for the respondent submitted that the words, "in the Court", are merely formulaic in nature and are found throughout the *Federal Court Act*, where their function is simply to limit the application of its provisions to the Federal Court of Canada.

29 The words, "in the Court", should therefore not be read in the former subsection 38(1) of the *Federal Court Act* as imposing any kind of limit on the concept of a "proceeding with respect to a cause of action", other than to locate it in the Federal Court of Canada. Thus, the conclusion in *E.H. Price Ltd.* that the registration of a certificate under the *Excise Tax Act* was not a "proceeding in the Court with respect to a cause of action" disposes of the applicant's contention that a requirement to pay is a "proceeding with respect to a cause of action" for the purpose of section 32 of the *Crown Liability and Proceedings Act*.

30 A difficulty with this argument is that, in distinguishing subsections 38(1) and (2) in *E.H. Price Ltd.*, Clement D.J. emphasized the presence of the words "in the Court" (or "in court" as he also sometimes incorrectly put it) in subsection 38(1). This is what he seems to have regarded as preventing him from concluding that registering a certificate of indebtedness fell within that subsection, but permitted him to decide that it did fall within subsection 38(2), where the operative words were "proceedings by and against the Crown", with no "in the court" limitation. In view of this, I am unable to conclude that *E.H. Price Ltd.* is as damaging to the applicant's case as the respondent contends.

31 Counsel for the respondent also argued that, by their very nature, statutory limitation periods operate as defences raised to proceedings taken in the course of litigation. A requirement to pay is not issued as a result of any court process and therefore statutes of limitation are simply irrelevant to the timing of its issuance. While the applicant's failure to pay tax due undoubtedly created a cause of action in the respondent, the respondent had elected not to pursue that cause of action, but to have resort to one of the statutory debt collection tools provided by the *Income Tax Act*. The existence of an uninvoked cause of action is not sufficient to render the issue of a requirement to pay a proceeding "with respect to a cause of action".

32 Support for this view, albeit in a rather different context, can be found in *Mark v. Canada (Minister of Fisheries & Oceans)* (1991), 50 F.T.R. 157 (Fed. T.D.), where Cullen J. held that the

suspension of a commercial fishing licence for allegedly breaching fishery regulations was not "a proceeding in any cause or matter" that could be the subject of a stay by the Court pursuant to section 50 of the *Federal Court Act*, even though the Minister could presumably have instituted proceedings in court for any breach of the regulations.

33 The respondent's submission on the limiting effect of the words "with respect to a cause of action" seems to me persuasive. Nor is it weakened by the fact that limitations statutes may apply both to the initiation of proceedings in court, and to attempts to execute judgments. This is because a judgment is obtained as a result of a litigant's pursuing a cause of action, and the execution of a judgment can therefore readily be characterized as a measure taken "with respect to a cause of action".

34 My conclusion on this point is sufficient to dismiss the application, but out of deference to the thorough arguments presented by counsel, and in case I am wrong, I shall now consider whether the applicant has established that the other element of section 32 of the *Crown Liability and Proceedings Act* is satisfied.

(ii) Does the Income Tax Act exclude the application of section 32 of the Crown Liability and Proceedings Act?

35 The opening words of section 32, "Except as otherwise provided in this Act or any other Act of Parliament", limit the scope of its application. The respondent's argument is that the *Income Tax Act* contains its own limitation periods that apply to various aspects of the assessment, reassessment, review of assessments and collection of tax. In other words, the statute is a complete code and is not subject to limitation periods prescribed in general legislation dealing with proceedings to which the Crown is a party, or to civil litigation as a whole.

36 Two cases were brought to my attention where this issue was explicitly raised. In *E.H. Price Ltd.*, *supra*, it was held that the limitation statutes did not prescribe the time within which a certificate of indebtedness must be registered with the Court under the *Excise Act*. The court drew this inference from provisions in the *Excise Act* to the effect that sums payable under it were recoverable "at any time".

37 A similar inference was drawn in *Brière v. Canada (Employment & Immigration Commission)* (1988), 57 D.L.R. (4th) 402 (Fed. C.A.), where the statute prescribed specific limitation periods within which the Commission could recover benefits paid in error to those not entitled. Having failed to comply with the notice provisions under the *Unemployment Insurance Act*, which were relevant to the running of the limitation period, the Commission was not able to rely upon a provision in the *Civil Code of Lower Canada* governing prescription periods in general.

38 However, since there were words in the statutes in these cases that related to the very measures invoked and alleged to be subject to the limitations statute, the decisions do not bear directly on

the problem in the case at bar. However, counsel for the respondent also pointed out that when *E.H. Price Ltd.*, *supra*, and *Brière*, *supra*, were decided, subsection 38(2) of the *Federal Court Act* stated that it applied unless another act *expressly* provided otherwise. The word "expressly" no longer appears in section 32 of the *Crown Liability and Proceedings Act*, thus making it easier for a court to infer from the overall scheme created by the statute that its limitations provisions are exhaustive.

39 Counsel for the respondent took me through a large number of provisions in the *Income Tax Act* that impose a time limit on other aspects in the assessment and collection of tax. The provision that seemed to me of most direct assistance is section 225.1, which prohibits the collection of tax until the expiry of the 90 days within which the taxpayer may appeal an assessment. The existence of this provision supports an inference from the absence of a prescribed time *after* which no collection can be made that Parliament intended that there should be no such limitation period.

40 In addition, I attach some importance to the fact that subsection 152(1) of the *Income Tax Act* requires the Minister, on the receipt of the taxpayer's return, to examine the return and assess the tax payable "with all due dispatch". This provision ensures that in most cases taxpayers are assessed soon enough after the end of the year in which the income was earned and the return filed, so that the evidence required to challenge the assessment is still likely to be fresh. The fact that the Court has held in *Ginsberg v. R.* (1996), 96 D.T.C. 6372 (Fed. C.A.) reversing (1994), 94 D.T.C. 1430 (T.C.C.) and *J. Stollar Construction Ltd. v. Minister of National Revenue* (1989), 89 D.T.C. 134 (T.C.C.) that a failure by Revenue Canada to comply with subsection 152(1) does not invalidate the assessment is not inconsistent with Parliament's intention that assessments are to be made promptly.

41 Other examples of the inclusion in the *Income Tax Act* of specific time limitation periods include: subsections 227.1(4) (two year limitation period beyond which the Minister may not assess a director of a corporation for corporate tax debts); 152(2) (reassessments must normally be undertaken within three years of an assessment); 152(4) (in certain situations the Minister may reassess tax at any time); and 227(10) (the Minister may assess a director of a corporation at any time).

42 I am satisfied that, given the complex and unique nature of the statutory scheme for the levying and collection of income tax, it is a clear inference from the statutory provisions to which I have referred that Parliament has "otherwise provided" for prescription, and that section 32 of the *Crown Liability and Proceedings Act* accordingly does not apply to the collection of a debt arising under section 222 of the *Income Tax Act*.

43 The courts have often accepted that taxing statutes constitute complete codes into which the legislature did not intend them to import general legal principles, rules or remedies. For example, in *Québec (Sous-ministre du Revenu) c. Marcel Grand Cirque Inc.* (1995), 107 F.T.R. 18 (Fed. T.D.),

21, this Court held that it had no jurisdiction to entertain a motion in revocation of judgment in respect of a certificate filed with the court in which the taxpayer sought to challenge the assessment of tax on which the certificate was based:

> The *Excise Tax Act*, like the *Income Tax Act*, ... contains in effect a complete code for the collection of taxes pursuant to which a taxpayer, after receiving a notice of assessment, may file a notice of opposition and possibly appeal to the Tax Court of Canada.

44 Counsel for the applicant, Mr. Worland, had some difficulty in articulating the injustice that his client would suffer if the Minister were permitted to issue requirements to pay, or to take other statutory collection measures, more than six years after the applicant's tax liability had been assessed. The applicant had been assessed promptly and had had an opportunity to challenge these assessments soon enough after the income had been earned to enable him to produce any relevant evidence. In fact, he has never disputed the assessments. His financial inability to pay the arrears would have prevented him from discharging his pre-1986 tax debts earlier, thus avoiding the large amount of interest that has been charged to him. At best, the applicant could be said to have been entitled in 1992 to the peace of mind that comes from knowing that the Minister of National Revenue could no longer pursue him for an old debt.

45 Although not directly relevant to this application, the logic of the respondent's position is that, since it can be inferred from other provisions in, and the overall structure of, the *Income Tax Act* that section 32 of the *Crown Liability and Proceedings Act* is excluded, the Crown may attempt to collect a tax debt outside the general statutory limitation periods either by one of the statutory collection methods, as here, or by an action for debt. Surprising as it may seem that the Crown's action for debt would not be statute barred, this does seem to be a logical consequence of the respondent's argument. While this consideration has given me some pause, I have decided that it does not tip the balance in favour of the applicant's position.

46 First, it is a hypothetical consideration in the context of this case, and there may be reasons that have not been canvassed here for concluding that the Crown's right to pursue an action for debt is subject to a statutory limitation period, even though the statutory collection methods are not. Second, the respondent's statutory duty to assess "with all due dispatch" the tax owing provides protection against most of the mischiefs at which statutory prescription periods are aimed. Third, to regard the respondent's ability to collect tax as subject to the *Crown Liability and Proceedings Act* for this reason alone would give insufficient weight to the difficulties that importing general limitation periods would cause to the fair and effective collection of tax arrears.

47 For example, as already noted, horizontal equity is a well-established principle of tax law and administration, and to prevent the Crown from recovering against persons whose income may fluctuate considerably over time, as seems to be the applicant's position, would be unfair to the majority of taxpayers whose income is steady and who have tax deducted at source.

48 Moreover, if the prescription period were to run from the date of assessment then, in cases where the taxpayer seeks a review and exercises rights of appeal, the respondent may be left with relatively little time within which to collect any arrears. However, this difficulty may be avoided by holding that the prescription period starts only at the time when the Crown may collect the tax; 90 days after the assessment, or when all rights of appeal have been exhausted.

49 Accordingly, I am satisfied that the *Income Tax Act* provides for prescription and by clear implication excludes section 32 of the *Crown Liability and Proceedings Act* from applying to an exercise by the Minister of the statutory powers to enforce tax debts.

Issue 2

50 In the event that my conclusion on both parts of the above issue are wrong, then the final question relating to the interpretation of section 32 of the *Crown Liability and Proceedings Act* is whether the British Columbia *Limitation Act* applies. It will apply only if the failure to pay tax owing is a "cause of action arising in a province". If, on the other hand, the cause of action arises "otherwise than in a province", then the six years' limitation provision contained in section 32 for proceedings by and against the federal Crown will apply.

51 In this case there appear to be two principal consequences of concluding that the cause of action arises in a province and that the applicable limitation period is that contained in the British Columbia *Limitation Act*. First, section 1 of that Act defines the word "action" to which the Act applies as meaning, "any proceeding in a court and any exercise of a self help remedy". The applicant argues that the issue of a statutory requirement to pay must fall under one or the other branch of this broad definition of the word "action", and that if they are not a "proceeding in a court", they must be a "self help remedy". Second, the *Limitation Act* provides in subsection 9(3) that a time-barred debt is *extinguished*; most limitation statutes merely make the debt unenforceable by proceedings instituted in court.

52 Although not relevant in the context of this case, if the applicant is correct in his contention that a debt owed under the *Income Tax Act* normally arises in the province where the taxpayer resides, then the length of time available to the Crown to collect a tax debt will vary according to the taxpayer's province of residence, since provincial limitation statutes vary quite significantly across the country.

53 Mr. Worland relied on two cases where it was asserted that a debt under a federal statute is a cause of action arising in a province, and therefore would have been subject to the limitations statute of the province in which the taxpayer resided if the federal statute had not excluded its application: *E.H. Price, supra*, at 844 (*Excise Tax Act*), *Brière*, *supra*, at 418-419 (*Unemployment Insurance Act*).

54 More recently, however, in *Gingras v. Canada* (1994), 113 D.L.R. (4th) 295 (Fed. C.A.), Décary J.A. considered (at 319) whether the Crown's obligation to pay a language bonus to the plaintiff as a member of the R.C.M.P. arose under federal or provincial law. If the latter, then it would be subject to the limitation period prescribed in the *Civil Code of Lower Canada*. Décary J.A. pointed out that it would be somewhat incongruous if the enforceability of the right created by a federal statute depended on the province in which the member happened to live. On the facts, however, it was not necessary for him to express a definitive view on whether the statute created a federal cause of action.

55 I should note that I did not find particularly helpful the statements in *English, Scottish & Australian Bank Ltd. v. Inland Revenue Commissioners*, [1932] A.C. 238 (U.K. H.L.) to the effect that a debt must have a "local situation" and that this will normally be where the debtor resides. The context of that case was very different, relating as it did to whether a debt was "property locally situate out of the United Kingdom" for the purpose of being exempted from stamp duty. Moreover, it did not speak at all to the federalism aspect of the issue raised by the case at bar which may call for a different approach to "locating" a debt.

56 In principle there is much to be said in favour of the proposition that the *Income Tax Act* should be applied uniformly to taxpayers across the country to the greatest extent possible. Of course, as Mr. Worland pointed out, there are situations in which taxpayers' liability on the same facts will inevitably vary depending on the province where they reside. Thus, whether or not a tax is payable, or an expenditure deductible, may depend on the legal consequences that the law of contract of the province where the taxpayer resides ascribes to a particular transaction.

57 However, in my view even though the liability of the taxpayer to pay money due under the *Income Tax Act* is a debt to the Crown, and debt is a common law concept, there is no reason of policy for subjecting its enforceability to provincial law when this will detract from the uniform application of the statute without any justification. Indeed, if the law of British Columbia applies to the debt in question here it would be extinguished altogether.

58 Moreover, I note that in *Vancouver Society of Immigrant & Visible Minority Women v. Minister of National Revenue* [reported (1999), 99 D.T.C. 5034 (S.C.C.)] (S.C.C.; January 28, 1999), Gonthier J. said that, even though the *Income Tax Act* did not define the term "charitable", but left it to the courts to elaborate, the statute's conception of charity is uniform federal law across the country and does not

> accord precisely with the way these terms are understood in the common law provinces, due to judicial decisions and provincial statutory incursions into the common law.

59 In my opinion, therefore, the *Income Tax Act* should be interpreted as creating a federal cause of action in the event that a taxpayer fails to pay tax duly assessed. Accordingly, if a general

limitation period were applicable to the Crown's ability to collect tax through any of the statutory collection methods, it would be the six year period prescribed by section 32 of the *Crown Liability and Proceedings Act*, and not that contained in the limitation statute of the province where the taxpayer resided.

Issue 3

60 If I am wrong on this point, and the British Columbia *Limitation Act* applies, then I agree with the applicant's contention that use of the statutory collection methods available under the *Income Tax Act*, including the issue of a requirement to pay, constitutes "any exercise of a self help remedy" within the meaning of section 1 of the provincial *Limitations Act*.

61 No doubt statutory remedies of the kind contained in the *Income Tax Act* were not what the Legislature primarily had in mind when it defined "action" to include "any exercise of a self help remedy". However, when included as an alternative to "any proceeding in court", self help remedies should be regarded as including the statutory remedies available to assist Revenue Canada in recovering tax debts by unilateral means that do not include resort to litigation. Otherwise, there would be a gap in the law that cannot be justified in light of the policy of the *Limitation Act*.

Issue 4

62 The question here is whether the British Columbia *Limitation Act* applies to attempts by the Crown to collect tax due under the British Columbia *Income Tax Act* outside the limitation period prescribed by the *Limitation Act*. Under the *British Columbia-Canada Tax Collection Agreement* [Memorandum of Agreement between The Minister of Finance, Government of Canada and the Minister of Finance, Province of British Columbia, dated August 23, 1984, amending an earlier agreement, pursuant to subsection 7(2) of the *Federal-Provincial Fiscal Arrangements Act* (R.S. 1985, c. F-8) [as amended] and subsection 69(2) of the *Income Tax Act* of British Columbia] the federal Crown collects tax owing under the provincial *Income Tax Act* as agent for the provincial authorities.

63 To a large extent, the assessment and collection provisions of the British Columbia *Income Tax Act* have been amended so as to harmonize with those contained in the federal *Income Tax Act*. For example, the requirement to pay provisions in the federal *Income Tax Act* (subsection 224(1)) are incorporated by reference in section 67 of the British Columbia *Income Tax Act*. And subsections 69(2) and (3) of the British Columbia *Income Tax Act* authorize the Minister and Deputy Minister of National Revenue of Canada to exercise the various powers relating to the collection of tax conferred by the Act on the British Columbia minister.

64 The analysis of the problem raised here is essentially the same as that developed in the context of Issue 1 with regards to the federal *Income Tax Act*. Thus, the first question is whether

the British Columbia *Income Tax Act* can be said to have excluded the application of the Province's *Limitation Act* by the various measures that the Minister may take in the assessment, reassessment and collection of tax.

65 Even when the respondent seeks to collect tax allegedly owing under a provincial tax statute that he is administering under a provincial-federal agreement, section 32 of the *Crown Liability and Proceedings Act* is still potentially relevant because the collection measure is being taken by a minister of the federal Crown, albeit under the authority of provincial legislation.

66 However, the proviso in section 32 that states that the section applies "Except as otherwise provided in this Act or any other Act of Parliament" is obviously inapplicable to a provision in a provincial statute, such as the British Columbia *Income Tax Act*.

67 Nonetheless, section 32 will only apply to the issuance of a requirement to pay if it can be characterized as a "proceeding by the Crown in respect of any cause of action arising in that provision". For the reasons given in connection with requirements to pay issued in respect of moneys owing under the federal *Income Tax Act*, in my opinion the exercise of a power to issue a requirement to pay is not a "proceeding in respect of a cause of action".

68 However, the fact that section 32 does not apply to the issuance of a requirement to pay under the British Columbia *Income Tax Act* still leaves the question whether the British Columbia *Limitation Act* applies of its own force, and not by virtue of the reference to the applicable provincial law in section 32 of the *Crown Liability and Proceedings Act*.

69 The first issue here is whether that provincial *Limitation Act* is capable of applying to a measure taken by the respondent, a Minister of the federal Crown, in an attempt to collect a debt owing to the provincial Crown under the British Columbia *Income Tax Act*.

70 The British Columbia *Interpretation Act* R.S.B.C., c. 238 reverses the common law presumption that statutes do not bind the Crown in the absence of express words or necessary implication. Subsection 14(1) of that Act provides:

> Unless it specifically provides otherwise an enactment is binding on the government

. The question then is whether "the government" includes a Minister of the federal Crown when exercising on behalf of the provincial government a power under a provincial statute.

71 Section 29 of the *Interpretation Act* defines "government" to mean "Her Majesty in right of British Columbia". Therefore, "government" does not include a Minister of the federal Crown, even when acting on behalf of the Crown in right of the Province. Since the statutory presumption does not apply here, the common law presumption does. Therefore, in the absence of express words or necessary implication, the British Columbia *Limitation Act* does not apply to measures taken by

a Minister of the federal Crown to enforce the British Columbia *Income Tax Act*. In my opinion the *Limitation Act* cannot be said as a matter of necessary implication to apply to the federal Crown.

72 However, if I am wrong on this point, for reasons that I have already given I would conclude that the issuance of a requirement to pay is the "exercise of a self help remedy" and thus subject to the British Columbia *Limitation Act* by virtue of section 1.

G. Conclusion

73 For these reasons, the application for judicial review is dismissed. Accordingly, my answers to the questions posed in paragraph 16 are:

1. No

2. "otherwise than in a province"

3. Yes

4. i) No ii) No

Application dismissed.

1979 CarswellNat 2
Supreme Court of Canada

Martineau v. Matsqui Institution

1979 CarswellNat 2, 1979 CarswellNat 3, [1979] S.C.J. No. 121, [1980] 1 S.C.R. 602, 106 D.L.R. (3d) 385, 13 C.R. (3d) 1 (Eng.), 15 C.R. (3d) 315 (Fr.), 30 N.R. 119, 50 C.C.C. (2d) 353

MARTINEAU v. MATSQUI INSTITUTION INMATE DISCIPLINARY BOARD (No. 2)

Laskin C.J.C., Martland, Ritchie, Pigeon, Dickson, Beetz, Estey, Pratte and McIntyre JJ.

Heard: May 3, 1979
Judgment: December 13, 1979
Judgment: December 3, 1979

Counsel: *B. A. Crane, Q.C.*, and *J. Conroy*, for appellant.
T. B. Smith, Q.C., and *H. Molot*, for respondent.

***Pigeon J. (Martland, Ritchie, Beetz, Estey* and *Pratte JJ.* concurring):**

1 For a disciplinary offence dealt with as "flagrant or serious" the appellant was sentenced to 15 days in the special corrections unit of the institution in which he is held pursuant to the Penitentiary Act, R.S.C. 1970, c. P-6. He made applications to the Federal Court for certiorari in the Trial Division and for judicial review under s. 28 of the Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), before the Court of Appeal. This application was dealt with first, while the other was kept pending. It was dismissed by the Federal Court of Appeal [[1976] 2 F.C. 198, 31 C.C.C. (2d) 39, 12 N.R. 150] and this dismissal was affirmed by a majority in this court [[1978] 1 S.C.R. 118, 33 C.C.C. (2d) 366, 74 D.L.R. (3d) 1, 14 N.R. 285].

2 In view of the wording of s. 28, the affirmation of the denial of judicial review means that it was determined that the disciplinary sentence in question was "a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis". The reasons of the majority, except one judge who agreed with the reasons of the Court of Appeal, show that, in their view, the "directives" governing the procedure for dealing with disciplinary offences were considered to be administrative directions, rather than "law", although the regulations defining disciplinary offences and specifying the penalties that may be inflicted by the penitentiary authorities were in the nature of law.

3 After the judgment of this court, proceedings were resumed on the application for certiorari in the Trial Division. The parties appeared before Mahoney J., who issued an order that the court had jurisdiction [[1978] 1 F.C. 312, 37 C.C.C. (2d) 58, 22 N.R. 250]. At the outset of his reasons, he said (at p. 58):

> By agreement, this is deemed to be an application by the applicant, Robert Thomas Martineau, under Rule 474 of the Rules of this Court for a preliminary determination of a question of law: namely, whether or not the Federal Court of Canada, Trial Division, has jurisdiction to grant relief by way of *certiorari* in the circumstances.

4 Having quoted s. 18 of the Federal Court Act, s. 29(1) and (2) [re-en. R.S.C. 1970, c. 22 (2nd Supp.), s. 15] of the Penitentiary Act and relevant parts of ss. 2.28 [am. SOR/79-398] and 2.29 [now ss. 38 and 39] of the Penitentiary Service Regulations, SOR/62-90 [now C.R.C., vol. XIII, c. 1251], he went on to say (at pp. 61 and 63):

> I take it that the jurisdiction to grant the relief sought depends upon the material in support of the application disclosing that some right of the applicant has been abridged or denied. A punishment consisting only of a 'loss of privileges' would not, by definition, involve a denial or abridgement of any right. The liability to forefeiture of statutory remission when an inmate 'is convicted in disciplinary court of any disciplinary offence' is expressly provided by s-s. 22(3) of the Act. The liability to dissociation as punishment depends entirely on the Regulation made by authority of s. 29 of the Act. With respect to that authority, it was not argued that s-s. 29(2) of the Act is to be construed as not authorizing the inclusion of a penalty for its violation in a Regulation made under para. 29(1)(*b*) and that, therefore, Regulations made by authority of para. 29(1)(*b*) are not 'law' ...
>
> The disciplinary offences of which the appellant was convicted were created by law. The punishment imposed was authorized by law. The law required that, as a precondition to the imposition of the punishment, he be 'convicted' of the offence. I am mindful of, and accept, the caveat of Chief Justice Jackett not to place too much significance on the fact that the phraseology of criminal proceedings is imported into the Regulations. Neverthless, it is manifest that the law envisages some process by which an inmate is to be determined to have committed a disciplinary offence, prescribed by law, as a condition precedent to the imposition of a punishment, also prescribed by law. The law, the statute and Regulations which prescribe both offence and punishment, is silent as to that process.

Finally, after quoting from the reasons of the majority in *Re Howarth and Nat. Parole Bd.*, [1976] 1 S.C.R. 453, 18 C.C.C. (2d) 385, 50 D.L.R. (3d) 391, 3 N.R. 349, he said (at p. 64):

> I take it that in Canada, in 1975, a public body, such as the respondent, authorized by law to impose a punishment, that was more than a mere denial of privileges, had a duty to act

> fairly in arriving at its decision to impose the punishment. Any other conclusion would be repugnant. The circumstances disclosed in this application would appear to be appropriate to the remedy sought. I am not, of course, deciding whether the remedy should be granted but merely whether it could be granted by the Federal Court of Canada, Trial Division. In my view it could.

5 This judgment was reversed in the Federal Court of Appeal [[1978] 2 F.C. 637, 40 C.C.C. (2d) 325, 22 N.R. 250]. The ratio of this decision appears to be in these three paragraphs (on pp. 638-39):

> The originating notice of motion relates to 'convictions' that were the subject of a section 28 application to this Court as a result of which it was decided by the Supreme Court of Canada that this Court had no jurisdiction under that section because, as we understand that decision, the 'convictions' were administrative decisions that were 'not required by law to be made on a judicial or quasi-judicial basis' within the meaning of those words in that section.
>
> In our view, it follows from that decision that the 'convictions' in question cannot be attacked under section 18 of the Federal Court Act by a writ of certiorari or proceedings for relief in the nature of that contemplated by such a writ.
>
> While the ambit of certiorari has expanded over the period that has elapsed since it was a writ whose sole function was to enable a superior court of law to review decisions of inferior courts of law, in our opinion, it continues to have application only where the decision attacked is either judicial in character or is required by law to be made on a judicial or quasi-judicial basis. We have not been referred to any decision to the contrary.

6 From these quotations it is apparent that the reason for which the Federal Court of Appeal reversed the judgment of the Trial Division is that it did not accept that the common law remedy of certiorari may be available in the case of violation of the duty to act fairly in an administrative decision "not required by law to be made on a judicial or quasi-judicial basis". A footnote on p. 639 ends with this sentence:

> Any decision that is not judicial but is 'sufficiently near a judicial decision to be the subject of a writ of certiorari' is, in our view, a decision that is required to be made on a 'quasi-judicial basis' within the meaning of those words in section 28.

7 With respect, I cannot agree with this view. In *Bates v. Lord Hailsham of St. Marylebone*, [1972] 1 W.L.R. 1373, [1972] 3 All E.R. 1019, Megarry J. said (at p. 1024):

> Let me accept *that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness*. Neverthless, these considerations do not seem to me to affect the process of legislation,

> whether primary or delegated. Many of those affected by delegated legislation, and affected very substantially, are never consulted in the process of enacting that legislation; and yet they have no remedy.

8 The words I have italicized in this passage were accepted "as a common law principle" in the reasons of the majority of this court in *Nicholson v. Haldimand-Norfolk Regional Bd. of Police Commrs.*, [1979] 1 S.C.R. 311 at 324, 88 D.L.R. (3d) 671, 23 N.R. 410. In that judgment, delivered subsequent to the decision of the Federal Court of Appeal herein, judicial review under the Judicial Review Procedure Act, 1971 (2nd Sess.) (Ont.), c. 48, was allowed against the decision of a police commission to dispense with the services of a constable. By the relevant regulation, the right to a quasi-judicial hearing was not available to the appellant because he was still within his 18-month probationary period. Although accepting (at p. 318) that the termination of "a master servant relationship would not, *per se*, give rise to any legal requirement of observance of any of the principles of natural justice", the majority held that, in the case of the holder of a public office such as a constable, there was a common law duty to act fairly which fell short of a duty to act quasi-judicially but neverthless could be enforced by judicial review. Under the Ontario Act, this includes precisely the remedies contemplated in s. 18 of the Federal Court Act.

9 More recently, an important judgment was given by the United Kingdom Court of Appeal in *R. v. Hull Prison Bd. of Visitors; Ex parte St. Germain*, [1979] 1 All E.R. 701. I do not think I can better summarize some of the views expressed than by quoting from the headnote the following:

> The courts were the ultimate custodians of the rights and liberties of the subject whatever his status and however attenuated those rights and liberties were as the result of some punitive or other process, unless Parliament by statute decreed otherwise. There was no rule of law that the courts were to abdicate jurisdiction merely because the proceedings under review were of an internal disciplinary character and, having regard to the fact that under the Prison Act 1952 a prisoner remained invested with residuary rights regarding the nature and conduct of his incarceration despite the deprivation of his general liberty, the Divisional Court had been in error in refusing to accept jurisdiction ...
>
> Per Megaw and Waller L.JJ. Although proceedings of boards of visitors in respect of offences against discipline are subject to judicial review by the courts, such interference will only be justified if there has been some failure to act fairly, having regard to all relevant circumstances, and such unfairness can reasonably be regarded as having caused a substantial, as distinct from a trivial or merely technical, injustice which is capable of remedy. Moreover the requirements of natural justice are not necessarily identical in all spheres ...
>
> Semble. Certiorari does not lie against a disciplinary decision of a prison governor.

10 Although in this judgment some dicta in *Ex parte Fry*, [1954] 1 W.L.R. 730, [1954] 2 All E.R. 118 (C.A.), were put in doubt, no doubt was expressed as to the correctness of the decision of

the Court of Appeal in *Fraser v. Mudge*, [1975] 1 W.L.R. 1132, [1975] 3 All E.R. 78. In that case, a prisoner charged with an offence against prison discipline (assaulting a prison official) and due to appear before a board of visitors had applied for an injunction. The prisoner sought a declaration that he was entitled to the assistance of counsel, and prayed for an injunction restraining the board from inquiring into the charge until he had an opportunity of appearing by lawyers. The Court of Appeal unanimously upheld the refusal of the injunction. Lord Denning M.R. said (at pp. 1133-34):

> We all know that, when a man is brought up before his commanding officer for a breach of discipline, whether in the armed forces or in ships at sea, it never has been the practice to allow legal representation. It is of the first importance that the cases should be decided quickly. If legal representation were allowed, it would mean considerable delay. So also with breaches of prison discipline. They must be heard and decided speedily. Those who hear the cases must, of course, act fairly. They must let the man know the charge and give him a proper opportunity of presenting his case. But that can be done and is done without the matter being held up for legal representation. I do not think we ought to alter the existing practice.

11 Roskill L.J. added, after a reference to the Prison Rules, 1964 (at p. 1134):

> One looks to see what are the broad principles underlying these rules. They are to maintain discipline in prison by proper, swift and speedy decisions, whether by the governor or the visitors; and it seems to me that the requirements of natural justice do not make it necessary that a person against whom disciplinary proceedings are pending should as of right be entitled to be represented by solicitors or counsel or both.

12 It appears to me that the proper view of the situation of a prison inmate in respect of disciplinary offence proceedings was taken in what I have just quoted. The requirements of judicial procedure are not to be brought in and, consequently, these are not decisions which may be reviewed by the Federal Court of Appeal under s. 28 of the Federal Court Act, a remedy which, I think, is in the nature of a right of appeal. However, this does not mean that the duty of fairness may not be enforced by the Trial Division through the exercise of the discretionary remedies mentioned in s. 18 of the Federal Court Act.

13 I must, however, stress that the order issued by Mahoney J. deals only with the jurisdiction of the Trial Division, not with the actual availability of the relief in the circumstances of the case. This is subject to the exercise of judicial discretion and in this respect it will be essential that the requirements of prison discipline be borne in mind, just as it is essential that the requirements of the effective administration of criminal justice be borne in mind when dealing with applications for certiorari before trial, as pointed in *A. G. Que. v. Cohen*, [1979] 2 S.C.R. 305, 13 C.R. (3d) 36, 46 C.C.C. (2d) 473, 97 D.L.R. (3d) 193. It is specially important that the remedy be granted only in cases of serious injustice and that proper care be taken to prevent such proceedings from being used to delay deserved punishment so long that it is made ineffective, if not altogether avoided.

14 I would allow the appeal, set aside the judgment of the Federal Court of Appeal and restore the order of Mahoney J. of the Federal Court, Trial Division. There should be no costs in this court nor in the Federal Court of Appeal.

Dickson J. **(concurring in the result) (*Laskin C.J.C.* and *McIntyre J.* concurring):**

15 The applicant, an inmate of a federal penitentiary in British Columbia known as "Matsqui Institution", seeks an order in the nature of a writ of certiorari removing into the Trial Division of the Federal Court of Canada, for the purpose of quashing, a conviction by the Inmate Disciplinary Board of the penitentiary.

I

16 The appeal raises in general terms the question of the supervisory role, if any, of the Federal Court, Trial Division, in respect of disciplinary boards within Canadian penitentiaries. It also calls for consideration of three related issues of importance in Canadian administrative law.

17 First, it compels resolution of the continuing debate concerning the review jurisdiction of the Trial Division and Court of Appeal under, respectively, ss. 18 and 28 of the Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), an issue left open by this court in earlier judgments. If the Court of Appeal lacks jurisdiction under s. 28 to entertain an application to review and set aside, then the question which must be asked, and to which this case must give the answer, is whether the impugned decision or order can be challenged by application for certiorari under s. 18 of the Act.

18 Second, the case calls for closer analysis of the duty to act fairly — the English "fairness doctrine" — than has hitherto been necessary.

19 Third, the appeal raises the question of the potential breadth of the common law remedy of certiorari in Canada.

20 Helpful comment upon these several issues thus raised will be found in a number of scholarly articles. See, for example: D. J. Mullan, "The Federal Court Act: A Misguided Attempt at Administrative Law Reform?" (1973), 23 University of Toronto L.J. 14; D. J. Mullan, "Fairness: The New Natural Justice?" (1975), 25 University of Toronto L.J. 281; N. M. Fera, "Certiorari in the Federal Court and Other Matters" (1977), 23 McGill L.J. 497; N. M. Fera, "While Certiorari May Live in the Trial Division of the Federal Court, the Fairness Concept Has Suffered a Serious Blow: The Recent *Martineau* Decisions" (1979), 11 Ottawa L. Rev. 78; R. R. Price, "Doing Justice to Corrections?" (1977), 3 Queen's L.J. 214; H. N. Janisch, "What is 'Law'?" (1977), 55 Can. Bar Rev. 576; J. M. Evans, "The Duty to Act Fairly" (1973), 36 Modern L. Rev. 93; J. M. Evans, "The Trial Division of the Federal Court: An Addendum" (1977), 23 McGill L.J. 132; J. F. Northey, "Pedantic or Semantic", [1974] N.Z.L.J. 133; J. F. Northey, "The Aftermath of the *Furnell*

Decision" (1974), 6 N.Z. University L. Rev. 59; G. D. S. Taylor, "The Unsystematic Approach to Natural Justice" (1973), 5 N.Z. University L. Rev. 373; G. D. S. Taylor, "Natural Justice — The Modern Synthesis" (1974), 1 Monash University L. Rev. 258; M. Loughlin, "Procedural Fairness: A Study of the Crisis in Administrative Law Theory" (1978), 28 University of Toronto L.J. 215; E. I. Sykes and R. R. S. Tracey, "Natural Justice and the Atkin Formula" (1976), 10 Melbourne University L. Rev. 564.

II

21 At the outset, it will be recalled that s. 18 provides that the Trial Division has exclusive original jurisdiction to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto or grant declaratory relief against any federal board, commission or other tribunal. Section 28(1) provides:

> 28.(1) Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, upon the ground that the board, commission or tribunal
>
> (*a*) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (*b*) erred in law in making its decision or order, whether or not the error appears on the face of the record; or
>
> (*c*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

Section 28(3) goes on to say:

> (3) Where the Court of Appeal has jurisdiction under this section to hear and determine an application to review and set aside a decision or order, the Trial Division has no jurisdiction to entertain any proceeding in respect of that decision or order.

22 It has been argued that s. 18 purports to transfer jurisdiction from provincial courts to the Trial Division of the Federal Court and clothes the latter with exclusive jurisdiction to grant relief by way of certiorari against federal boards, commissions or other tribunals, but that s. 28 removes that jurisdiction from the Trial Division in respect of certiorari, despite the express words of s. 18. In other words, the terms of s. 28 completely exclude what s. 18 apparently granted. If that view be correct, and s. 18 is indeed sterile and without independent life, then a narrow reading of s. 28 will virtually deny Canadians recourse against federal tribunals. It is not disputed that the Inmate Disciplinary Board of Matsqui Institution is a federal board, commission or other tribunal.

III

23 It is important to emphasize that the point, and the only point, in this appeal is as to jurisdiction. We are not concerned at this time with whether Martineau has a valid complaint.The only question before us is whether he has the right to have that complaint considered in the Trial Division of the Federal Court.

24 A detailed recital of the facts set out in the affidavits is unnecessary. Martineau and one Butters, both inmates at Matsqui Institution, were charged with having committed two offences: (i) two inmates in a cell; and (ii) committing an indecent act (homosexual). The offences were categorized as "flagrant or serious" and thus were referred to a staff disciplinary board (assistant director of security, a security guard and a living unit officer) for a hearing of the charges.

25 Martineau pleaded guilty to the first charge. On the second charge he was found guilty of the lesser offence of being in an indecent position and was sentenced to the special corrections unit (punitive isolation) for 15 days on a restricted diet and loss of privileges. He challenged the conviction, relying upon directive 213 of the Commissioner of Penitentiaries (issued pursuant to s. 29(3) of the Penitentiary Act, R.S.C. 1970, c. P-6, and ss. 2.28 [am. SOR/72-398], 2.29, 2.30 and 2.31 [now ss. 38 to 41] of the Penitentiary Service Regulations, SOR/62-90 [now C.R.C., Vol. XIII, c. 1251]. Section 13(c) of the directive provides that no finding shall be made against an inmate for a serious or flagrant offence unless: (i) he has received written notice of the charge and a summary of the evidence alleged against him at least 24 hours before the hearing; (ii) he has appeared personally at the hearing so that the evidence against him is given in his presence; and (iii) he has been given an opportunity to make full answer and defence to the charge. Martineau alleges a number of departures from these procedural safeguards. He says that neither he nor anyone representing him was permitted to be present when the disciplinary board heard evidence from the person alleged to have participated with him in the offence of which he was convicted. In essence, his claim is grounded upon a breach of procedural fairness on the part of the disciplinary board.

26 So far as I have been able to determine, there is no provision for appeal to a higher authority by an inmate who feels aggrieved by a conviction or sentence of the disciplinary board.

IV

27 Faced with the difficult and uncertain language of ss. 18 and 28 of the Federal Court Act, *Martineau* launched proceedings in both the Federal Court of Appeal and the Trial Division of that court. The Federal Court of Appeal, before whom the matter first came on a s. 28 application, by a majority, dismissed the application for lack of jurisdiction [[1976] 2 F.C. 198, 31 C.C.C. (2d) 39, 12 N.R. 150]. This court, by a majority, dismissed the further appeal [[1978] 1 S.C.R. 118, 33 C.C.C. (2d) 366, 74 D.L.R. (3d) 1, 14 N.R. 285 (hereinafter referred to as *Martineau* (No. 1))]. The court held that the impugned order was not within the scope of the opening words of s. 28 of

the Federal Court Act and that the directive of the Commissioner of Penitentiaries was not "law" within the meaning of the phrase "by law" in s. 28.

28 Unsuccessful in his challenge by way of the Federal Court of Appeal, Martineau resumed the proceedings, temporarily held in abeyance, which he had commenced in the Trial Division of the Federal Court. Mahoney J. of the Trial Division, by agreement, heard an application by Martineau under Federal Court R. 474 for preliminary determination of a question of law, namely, whether or not the Federal Court, Trial Division, had jurisdiction in the circumstances. His conclusion [[1978] 1 F.C. 312 at 318-19, 37 C.C.C. (2d) 58, 22 N.R. 255]:

> I take it that in Canada, in 1975, a public body, such as the respondent, authorized by law to impose a punishment, that was more than a mere denial of privileges, had a duty to act fairly in arriving at its decision to impose the punishment. Any other conclusion would be repugnant. The circumstances disclosed in this application would appear to be appropriate to the remedy sought. I am not, of course, deciding whether the remedy should be granted but merely whether it could be granted by the Federal Court of Canada, Trial Division. In my view it could.

29 In *Magrath v. R.*, [1978] 2 F.C. 232, 38 C.C.C. (2d) 67, Collier J. of the Federal Court, Trial Division, agreed with the observations and conclusions of Mahoney J. in the *Martineau* case.

30 Shortly thereafter, however, Jackett C.J.T.D. gave judgment for a unanimous Federal Court of Appeal [[1978] 2 F.C. 637, 40 C.C.C. (2d) 325, 22 N.R. 250] allowing an appeal from the judgment of Mahoney J. in the Trial Division. The reasons of the court are brief but amplified in footnotes and in an appendix. This court is taken to have decided in *Martineau* (No. 1) that the Appeal Division of the Federal Court lacked jurisdiction because "the 'convictions' were administrative decisions that were 'not required by law to be made on a judicial or quasi-judicial basis' ". It followed, in the view of the Federal Court of Appeal, that the "convictions" could not be attacked under s. 18 of the Federal Court Act by a writ of certiorari. The court recognized that the ambit of certiorari has expanded from the time it was a writ whose sole function was to enable a superior court of law to review decisions of inferior courts of law. In the view of the court, however, the writ continues to have application only where the decision attacked is either judicial in character or is required by law to be made on a judicial or quasi-judicial basis. The conclusion of the court is expressed in these words (p. 640):

> When we read sections 18 and 28 of the *Federal Court Act*, we cannot escape the conclusion that the words 'quasi-judicial basis' were intended to include every method of reaching a decision or order that would support an application by way of *certiorari* other than a purely 'judicial ... basis'.

31 The appendix to the judgment reveals the basis for the court's reading of *Martineau* (No. 1). If "quasi-judicial" in s. 28 is regarded as delimiting the range of decisions to which

the "fairness" doctrine may apply, then, should jurisdiction be lacking under s. 28, a remedy of certiorari grounded upon the fairness doctrine cannot avail an applicant under s. 18. With great respect, in my view, this court's decisions in *Re Howarth and Nat. Parole Bd.*, [1976] 1 S.C.R. 453, 18 C.C.C. (2d) 385, 50 D.L.R. (3d) 391, 3 N.R. 349, and *Martineau* (No. 1), and the court's recent judgment in *Nicholson v. Haldimand-Norfolk Regional Bd. of Police Commrs.*, [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 671, 23 N.R. 410 (which post-dates the judgment of the Federal Court of Appeal in these proceedings), indicate a different approach. Particularly, the judgment in *Nicholson* betokens a significant development in our administrative law in its adoption of the English case authorities on the fairness doctrine.

V

32 *Howarth* brought to the fore a difference in perception of the relationship between s. 18 and s. 28 of the Federal Court Act. The minority indicated a desire to read the new s. 28 application to review and set aside as a remedy at least as broad as, if not broader than, certiorari, primarily by means of an expansive view of "decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis". The majority view, however, began with the premise that [p. 470]: "s. 28 of the Federal Court Act operates as an exception to the general provision of s. 18, whereby supervisory jurisdiction over federal boards is wholly transferred from the superior courts of the provinces to the Trial Division of the Federal Court". Accordingly [p. 471], "the new remedy created by s. 28 is restricted in its application to judicial decisions or to administrative orders required by law to be made on a judicial or quasi-judicial basis." Because of their importance in the resolution of the present appeal, I must quote in extenso from the judgment of Pigeon J., speaking for a majority of the court in *Howarth* (pp. 471-72):

> It will be seen that while supervisory jurisdiction over federal boards is conferred generally upon the Trial Division without any restriction as to the nature of the decision under consideration, the new remedy created by s. 28 is restricted in its application to judicial decisions or to administrative orders required by law to be made on a judicial or quasi-judicial basis. It is only in respect of such decisions or orders that the new remedy equivalent to an appeal is made available. Thus, the clear effect of the combination of ss. 18 and 28 is that a distinction is made between two classes of orders of federal boards. Those that, for brevity, I will call judicial or quasi-judicial decisions are subject to s. 28 and the Federal Court of Appeal has wide powers of review over them. The other class of decisions comprises those of an administrative nature not required by law to be made on a judicial or quasi-judicial basis. With respect to that second class, the new remedy of s. 28, the kind of appeal to the Appeal Division, is not available, but all the other remedies, all the common law remedies, remain unchanged by the *Federal Court Act*. The only difference is that the jurisdiction is no longer exercisable by the superior courts of the provinces, but only by the Trial Division of the Federal Court. The very fact that such a distinction is made shows that the s. 28 application is not intended to be available against all administrative board decisions.

> The reason I am stressing this point is that in argument, Counsel for the appellant relied mainly on cases dealing with the duty of fairness lying upon all administrative agencies, in the context of various common law remedies. These are, in my view, completely irrelevant in the present case because a s. 28 application is an exception to s. 18 and leaves intact all the common law remedies in the cases in which it is without application. The Federal Court of Appeal did not consider, in quashing the application, whether the Parole Board order could be questioned in proceedings before the Trial Division.

33 Thus *Howarth* distinguishes between s. 18 and s. 28 review jurisdiction in the Federal Court, the new remedy under s. 28 not being exhaustive of Federal Court jurisdiction to review federal government action. The consequence, as Pigeon J. puts it, is that under the Federal Court Act "a distinction is made between two classes of orders of federal boards".

34 Further, a distinction is clearly drawn between the duty to act judicially and the duty to act fairly. Pigeon J. rejects the argument that a duty to act fairly is relevant to the question of jurisdiction under s. 28, but the relevance of such an argument in the context of s. 18 is expressly left open.

35 The duty to act fairly was alluded to by Spence J., speaking on behalf of the full court in *Minister of Manpower & Immigration v. Hardayal*, [1978] 1 S.C.R. 470 at 479, 75 D.L.R. (3d) 465, 15 N.R. 396. He said: "It is true that in exercising what, in my view, is an administrative power, the Minister is required to act fairly and for a proper motive and his failure to do so might well give rise to a right of the person affected to take proceedings under s. 18(*a*) of the *Federal Court Act*". See also *Roper v. Royal Victoria Hospital Medical Bd. Executive Committee*, [1975] 2 S.C.R. 62 at 67, 50 D.L.R. (3e) 1 N.R. 39.

36 *Martineau* (No. 1) was wholly unconcerned with the issue of "fairness". The central issue there was whether the decision of the disciplinary board was within the scope of s. 28 as being "required by law to be made on a judicial or quasi-judicial basis".

37 Pigeon J., again speaking for a majority of the court, considered the question whether the directive of the commissioner was to be regarded as "law" within the wording of s. 28 and concluded that while regulations under the Penitentiary Act were law the same could not be said of the directives [p. 129]: "It is not in any legislative capacity that the Commissioner is authorized to issue directives but in his administrative capacity."

38 In the case of an inmate disciplinary board, the directive of the commissioner lacks statutory force and, by implication then, Parliament did not intend the directive to have status as a procedural code defining rules of natural justice exhaustively for the board. Accordingly, the decision in question was not one required by law to be made on a judicial or quasi-judicial basis, and the applicant had not brought himself within the precise language of s. 28. That does not, however,

determine the relevant question of a certiorari application under s. 18, where the inquiry is whether the public body may have a duty to act fairly in the broader, non-technical manner suggested in *R. v. Hull Prison Bd. of Visitors; Ex parte St. Germain*, [1979] 1 All E.R. 701, reversing [1978] 2 All E.R. 198 (C.A.).

39 The reasoning of the court in *Martineau* (No. 1) is instructive on this point. Pigeon J., while denying that the directive was a "procedural code", also rejected the suggestion that mere fairness in its "good faith" sense, as employed by the Federal Court of Appeal, fulfils the obligation of the board (p. 127):

> With respect, I find it difficult to agree with the view that Directive No. 213 merely requires that a disciplinary decision such as the impugned order be made fairly and justly.

40 Implicitly, then, the majority in *Martineau* (No. 1) accepted a measure of procedural content in a duty of fairness resting upon the board — something more than the absolute minimum of "good faith", but something less than strict application of the procedure set forth in the directive.

41 The Matsqui Institution Disciplinary Board, the respondent in this appeal, has cited the following passage from the judgment of this court in *Minister of National Revenue v. Coopers & Lybrand Ltd.*, [1979] 1 S.C.R. 495, 92 D.L.R. (3d) 1, 24 N.R. 163, in support of the contention that non-reviewability under s. 28 forecloses review by writ of certiorari under s. 18 (p. 501):

> Accordingly, administrative decisions must be divided between those which are reviewable, by certiorari or by s. 28 application or otherwise, and those which are nonreviewable. The former are conveniently labelled 'decisions or orders of an administrative nature required by law to be made on a judicial or quasi-judicial basis', the latter 'decisions or orders not required by law to be made on a judicial or quasi-judicial basis'. It is not only the decision to which attention must be directed, but also the process by which the decision is reached,

The issues to which *Coopers & Lybrand* was directed relate to the classification of decisions eligible for review under s. 28 of the Federal Court Act, the very classification process with which the court was concerned in *Howarth* and *Martineau* (No. 1). This is implicitly recognized by mention of both cases in *Coopers & Lybrand*. If anything pertinent to the present discussion is suggested by the latter judgment, it is that "administrative decision does not lend itself to rigid classification of functions". As such, it has no direct application to the new and broader territory, unhindered by exigencies of classification, that is now opened by evolution of the common law doctrine of fairness enforced by the common law remedies, including certiorari.

42 Restrictive reading of s. 28 of the Federal Court Act need not, of necessity, lead to a reduction in the ambit for judicial review of federal government action. Section 18 is available. Section 28 has caused difficulties, not only because of the language in which it is cast but, equally, because it tended to crystallize the law of judicial review at a time when significant changes were occurring

in other countries with respect to the scope and grounds for review. Sections 18 and 28 of the Federal Court Act were obviously intended to concentrate judicial review of federal tribunals in a single federal court. As I read the Act, Parliament envisaged an extended scope for review. I am therefore averse to giving the Act a reading which would defeat that intention and posit a diminished scope for relief from the actions of federal tribunals. I simply cannot accept the view that Parliament intended to remove the old common law remedies, including certiorari, from the provincial superior courts and vest them in the Trial Division of the Federal Court, only to have those remedies rendered barren through the interaction of s. 18 and s. 28 of the Act. I would apply the principle laid down by Brett L.J. in *R. v. Loc. Govt. Bd.* (1882), 10 Q.B.D. 309 at 321 (C.A.), that the jurisdiction of a court ought to be exercised widely when dealing with matters perhaps not strictly judicial but in which the rights or interests of citizens are affected.

VI

43 The dominant characteristic of recent developments in English administrative law has been expansion of judicial review — jurisdiction to supervise administrative action by public authorities. Certiorari evolved as a flexible remedy, affording access to judicial supervision in new and changing situations. In 1700 Hold C.J. could say, in *Cardiffe Bridge Case* (1700), 1 Salk. 146, 91 E.R. 135, "wherever any new jurisdiction is erected, be it by private or public Act of Parliament, they are subject to the inspections of this Court by writ of error, or by *certiorari* and *mandamus*". And in *Groenvelt v. Burwell* (1700), 1 Ld. Raym. 454 at 467-69, 91 E.R. 1202, Hold C.J. held again, in the context of the censors of the College of Physicians of London, that:

> ... it is plain, that the censors have judicial power ... where a man has power to inflict imprisonment upon another for punishment of his offence, there he hath judicial authority ... for it is a consequence of all jurisdictions, to have their proceedings returned here by certiorari, to be examined here ... Where any Court is erected by statute, a certiorari lies to it.

Nor has perception of certiorari as an adaptable remedy been in any way modified. The amplitude of the writ has been affirmed time and again. See, for example, the judgment of Lord Parker C.J. in *R. v. Criminal Injuries Comp. Bd.; Ex parte Lain*, [1967] 1 Q.B. 864, [1967] 2 All E.R. 770 at 778 (D.C.):

> The position as I see it is that the exact limits of the ancient remedy by way of certiorari have never been, and ought not to be, specifically defined. They have varied from time to time, being extended to meet changing conditions. At one time the writ only went to an inferior court. Later its ambit was extended to statutory tribunals determining a lis inter partes. Later again it extended to cases where there was no lis in the strict sense of the word, but where immediate or subsequent rights of a citizen were affected. The only constant limits throughout were that the body concerned was under a duty to act judicially and that it was performing a public duty.

44 Roskill L.J. in *R. v. Liverpool Corpn.; Ex parte Liverpool Taxi Fleet Operators' Assn.*, [1972] 2 Q.B. 299, *(*sub nom. *Re Liverpool Taxi Owners' Assn.)* [1972] 2 All E.R. 589 at 596 (C.A.), expressed the thought in these words:

> The long legal history of the former prerogative writs and of their modern counterparts, the orders of prohibition, mandamus and certiorari shows that their application has always been flexible as the need for their use in differing social conditions down the centuries had changed.

45 The principles of natural justice and fairness have matured in recent years. And the writ of certiorari, in like measure, has developed apace. The speeches in *Ridge v. Baldwin*, [1964] A.C. 40, [1963] 2 All E.R. 66 (H.L.), show the evolutionary state of administrative law.

VII

46 Does certiorari lie to the Inmate Disciplinary Board? The usual starting point in a discussion of this nature is the "Electricity Commissioners" formula, found at p. 205 of *R. v. Electricity Commrs.; Ex parte London Electricity Joint Committee Co. (1920) Ltd.*, [1924] 1 K.B. 171 (C.A.), where Atkin L.J. had this to say:

> Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.

Difficulty has arisen from the statement of Atkin L.J., in part from the fact that his words have been treated as if they had been engraved in stone and in part because it is not clear what Atkin L.J. meant. How far, if at all, did he mean to limit the use of orders for certiorari and prohibition by the phrase "and having the duty to act judicially"? What did he mean by "judicially" in the context? It will be recalled that in the *Electricity Commrs.* case itself certiorari and prohibition issued to a group of administrators who were acting far more as part of the legislative than of the judicial process.

"Rights of Subjects"

47 The term "rights of subjects" has given concern, often being treated by courts as the sine qua non of jurisdiction to permit review. There has been an unfortunate tendency to treat "rights" in the narrow sense of rights to which correlative legal duties attach. In this sense, "rights" are frequently contrasted with "privileges" in the mistaken belief that only the former can ground judicial review of the decision-maker's actions. *R. v. Criminal Injuries Comp. Bd.; Ex parte Lain*, supra, is invaluable on this branch of Atkin L.J.'s test. There, the absence of any legal right on the part of the claimants to ex gratia payments from the criminal injuries compensation board would

seem to pose an insuperable obstacle, but Ashworth J. disposed of this impediment without trouble and in broadest language (p. 784):

> For my part I doubt whether Atkin, L.J., was propounding an all-embracing definition of the circumstances in which relief by way of certiorari would lie. In my judgment the words in question read in the context of what precedes and follows them, would be of no less value if they were altered by omitting 'the rights of' so as to become 'affecting subjects'.

48 Lord Denning aptly summarized the state of the law on this aspect in *Schmidt v. Secretary of State for Home Affairs*, [1969] 2 Ch. 139, [1969] 1 All E.R. 904 (C.A.). There, the Master of the Rolls stated (p. 170):

> The speeches in *Ridge v. Baldwin* [supra] show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.

49 Professor H.W.R. Wade, in his book Administrative Law, 4th ed. (1977), has captured the relevance of this requirement of the test in this passage (pp. 541-42):

> This requirement is really correlative to the idea of legal power, the exercise of which necessarily affects some person's legal rights, status or situation. The primary object of certiorari and prohibition is to make the machinery of government operate properly in the public interest, rather than to protect private rights ... The requirement of a decision 'affecting rights' is not therefore a limiting factor; it is rather an automatic consequence of the fact that power is being exercised.

50 When concerned with individual cases and aggrieved persons there is the tendency to forget that one is dealing with public law remedies which, when granted by the courts, not only set aright individual injustice but also ensure that public bodies exercising powers affecting citizens heed the jurisdiction granted them. Certiorari stems from the assumption by the courts of supervisory powers over certain tribunals in order to assure the proper functioning of the machinery of government. To give a narrow or technical interpretation to "rights" in an individual sense is to misconceive the broader purpose of judicial review of administrative action. One should, I suggest, begin with the premise that any public body exercising power over subjects may be amenable to judicial supervision, the individual interest involved being but one factor to be considered in resolving the broad policy question of the nature of review appropriate for the particular administrative body.

"Duty to Act Judicially"

51 Prior to the decision in *Ridge v. Baldwin*, supra, it was generally accepted that certiorari would be granted only when the nature of the process by which the decision was arrived at was a judicial process or a process analogous to the judicial process: *Nakkuda Ali v. M.F. de S. Jayaratne*, [1951] A.C. 66 (P.C.). This notion of a "super-added duty to act judicially", as a separate and independent pre-condition to the availability of natural justice and, inferentially, to recourse to certiorari, was unequivocally rejected by Lord Reid in *Ridge* (p. 75):

> If Lord Hewart meant that it is never enough that a body simply has a duty to determine what the rights of an individual should be, but that there must always be something more to impose on it a duty to act judicially before it can be found to observe the principles of natural justice, then that appears to me impossible to reconcile with the earlier authorities.

52 In the *Electricity Commrs.* case, supra, itself, Lord Reid observed, the judicial element was inferred from the nature of the power.

53 Perhaps the best expression of the significance of the decision in *Ridge v. Baldwin* is found in the reasons of Lord Widgery C.J. in *R. v. Hillington London Borough Council; Ex parte Royco Homes Ltd.*, [1974] Q.B. 720, [1974] 2 All E.R. 643 (D.C.), wherein he considered the availability of certiorari to review the grant of a planning permission by a local authority [p. 648]:

> Accordingly it may be that previous efforts to use certiorari in this field have been deterred by Atkin L.J.'s reference to it being necessary for the body affected to have the duty to act judicially. If that is so, that reason for reticence on the part of applicants was, I think, put an end to in the House of Lords in *Ridge v. Baldwin* ... in the course of his speech Lord Reid made reference to that oft-quoted dictum of Atkin L.J. and pointed out that the additional requirement of the body being under a duty to act judicially was not supported by authority. Accordingly it seems to me now that that obstacle, if obstacle it were, has been cleared away and I can see no reason for this court holding otherwise than that there is power in appropriate cases for the use of the prerogative orders to control the activity of a local planning authority.

54 A flexible attitude toward the potential application of certiorari was furthered in another recent English case, this one in the Court of Appeal, in *R. v. Barnsely Metro. Borough Council; Ex parte Hook*, [1976] 1 W.L.R. 1052, [1976] 3 All E.R. 452.

55 In a habeas corpus case, *Re H. K.*, [1967] 2 Q.B. 617, [1967] 1 All E.R. 226 (D.C.), Lord Parker was of the opinion that the immigration officers who refused to admit a boy into the United Kingdom were acting in an administrative and not in a judicial or quasi-judicial capacity; nevertheless, he held that they must act honestly and fairly, otherwise their decision could be questioned by certiorari. And in the *Liverpool Taxi Fleet Operators'* case, supra, Roskill L.J. spoke of the power of the courts to intervene in a suitable case when the function was administrative and not judicial or quasi-judicial (p. 596):

> The power of the court to intervene is not limited, as once was thought, to those cases where the function in question is judicial or quasi-judicial. The modern cases show that this court will intervene more widely than in the past. Even where the function is said to be administrative, the court will not hesitate to intervene in a suitable case if it is necessary in order to secure fairness.

56 Then there is the well-known passage in the speech of Lord Morris of Borth-y-Gest in *Furnell v. Whangarei High Schools Bd.*, [1973] A.C. 660, [1973] 1 All E.R. 400 at 412, speaking for a Privy Council majority of three: "Natural justice is but fairness writ large and juridically. It has been described as 'fair play in action'. Nor is it a leaven to be associated only with judicial or quasi-judicial occasions." In the same case, the penultimate paragraph from the speech of Viscount Dilhorne and Lord Reid, dissenting, reads (p. 421):

> It is not in this case necessary to decide whether the function of the sub-committee is to be described as judicial, quasi-judicial or administrative. I am inclined to think that it is at least quasi-judicial, but if it be administrative, it was the duty of the sub-committee before they condemned or criticised the appellant 'to give him a fair opportunity of commenting or contradicting what is said against him'. That they did not do.

57 Professor John Evans, writing in "The Trial Division of the Federal Court: An Addendum" (1977), 23 McGill L.J. 132 at 134-5, has noted:

> Recent English decisions have ever the availability of *certiorari* and prohibition from the requirement that the body must act 'judicially' in the sense that it is bound by the rules of natural justice. It may be concluded, therefore, that there is nothing in the judgment of Pigeon J. [in *Howarth*, supra] to prevent the Trial Division from quashing decisions of a 'purely administrative' nature or from developing procedural requirements derived from the 'duty to act fairly'.

In the view of another commentator, Professor D. P. Jones, "*Howarth v. Nat. Parole Bd.* Comment" (1975), 21 McGill L.J. 434 at 438:

> Certainly in England and in most other parts of the Commonwealth, the requirement for judicial review that the exercise of a statutory power must not only affect the rights of a subject, but also be subject to a superadded duty to act judicially, is now thoroughly discredited. In other words, the ratio of *Nakkuda Ali v. Jayaratne* [supra] in the Privy Council — and hence, one would have thought, of *Calgary Power v. Copithorne*, [1959] S.C.R. 4, 16 D.L.R. (2d) 241, in the Supreme Court of Canada — is no longer good law.

58 The authorities to which I have referred indicate that the application of a duty of fairness with procedural content does not depend upon proof of a judicial or quasi-judicial function. Even though the function is analytically administrative, courts may intervene in a suitable case.

59 In the case at bar, the disciplinary board was not under either an express or implied duty to follow a judicial type of procedure, but the board was obliged to find facts affecting a subject and to exercise a form of discretion in pronouncing judgment and penalty. Moreover, the board's decision had the effect of depriving an individual of his liberty by committing him to a "prison within a prison". In these circumstances, elementary justice requires some procedural protection. The rule of law must run within penitentiary walls.

60 In my opinion, certiorari avails as a remedy wherever a public body has power to decide any matter affecting the rights, interests, property, privileges or liberties of any person.

VIII

"Fairness"

61 The approach taken to the "fairness" doctrine by the court in *Nicholson v. Haldimand-Norfolk Regional Bd. of Police Commrs.*, supra, notably its differentation from traditional natural justice, permits one to dispense with classification as a precondition to the availability of certiorari. Conceptually, there is much to be said against such a differentiation between traditional natural justice and procedural fairness, but if one is forced to cast judicial review in traditional classification terms, as is the case under the Federal Court Act, there can be no doubt that procedural fairness extends well beyond the realm of the judicial and quasi-judicial, as commonly understood.

62 Once one moves from the strictures of s. 28 of the Federal Court Act, the judgment in *Nicholson* permits departure from the rigidity of classification of functions for the purposes of procedural safeguards. In finding that a duty of fairness rested upon the police commissioners in a dismissal case Laskin C.J.C., speaking for a majority of the court, employed the English fairness cases to import that duty. While the cases were there used to establish minimal protection for the constable under the Judicial Review Procedure Act, 1971 (2nd sess.), (Ont.), c. 48, the same cases have been employed in England to extend the reach of certiorari to decisions not strictly judicial or quasi-judicial. After referring to the emergence of a notion of fairness "involving something less than the procedural protection of traditional natural justice", the chief justice had this to say (pp. 423-24):

> What rightly lies behind this emergence is the realization that the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work

> injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question: see, generally, Mullan, *Fairness: The New Natural Justice* (1975), 25 Univ. of Tor. L.J. 281.

63 The chief justice also quoted a passage from Lord Denning M.R.'s judgment in *R. v. Race Relations Bd.; Ex parte Selvarajan*, [1975] 1 W.L.R. 1686, [1976] 1 All E.R. 12 (C.A.), in which the Master of the Rolls summed up his earlier decisions and formulated the "fundamental rule" (p. 19):

> ... that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it.

Of particular interest in the passage is the absence of reference to "rights". The imprecise "rights/privileges" dichotomy is utterly ignored.

IX

64 One matter remains — the so-called "disciplinary exception". There are authorities (see *R. v. Army Council; Ex parte Ravenscroft*, [1917] 2 K.B. 504 (D.C.); *Dawkins v. Lord Rokeby* (1875), L.R. 8 Q.B. 255, affirmed L.R. 7 H.L. 744 (H.L.); *Re Armstrong*, [1973] 2 O.R. 495, 11 C.C.C. (2d) 327 (C.A.)) which hold that review by way of certiorari does not go to a body such as the armed services, police or firemen with its own form of private discipline and its own rules. Relying on this analogy, it is contended that disciplinary powers are beyond judicial control and that this extends to prison discipline. I do not agree.

65 In *Fraser v. Mudge*, [1975] 1 W.L.R. 1132, [1975] 3 All E.R. 78 (C.A.), it was held that the English Prison Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2), c. 52, requiring the Home Secretary to give an inmate charged with an offence a proper opportunity of presenting his case, did not entitle the inmate to legal representation at the hearing, but Lord Denning M.R. observed that those who heard the case had the duty to act fairly. Judicial review was not precluded.

66 There is the more recent case of *R. v. Hull Prison Bd. of Visitors; Ex parte St. Germain*, supra. The central issue in that case was whether certiorari would go to quash a disciplinary decision of a board of visitors, the duties of which embraced inquiry into charges against inmates. The Divisional Court found that disciplinary procedures within the prison were judicial, but invoked the "disciplinary exception" and held that the actions of the board of visitors were not amenable to the review by way of certiorari. A unanimous Court of Appeal disagreed, however, holding that adjudication by boards of visitors in prisons were, indeed, amenable to certiorari. The court rejected the submission that prisoners have no legally enforceable rights. Megaw L.J. concluded that the observance of procedural fairness in prisons is properly a subject for review. Shaw L.J.

held that despite deprivation of his general liberty a prisoner remains invested with residuary rights appertaining to the nature and conduct of his incarceration. Waller L.J. accepted the proposition of Lord Reid, in *Ridge v. Baldwin*, supra, that deprivation of rights or privileges are equally important, and applied that proposition to the context of prison discipline.

67 Another case of interest is *Daemar v. Hall*, [1978] 2 N.Z.L.R. 594, a decision of the New Zealand Supreme Court, relied upon by the Court of Appeal in *Hull Prison*, supra. Daemar had been tried by a visiting justice and sentenced to four days' loss of remission. It was argued that the decision was not subject to judicial review under the Judicature Amendment Act, 1972, as certiorari would not lie to such a disciplinary decision. McMullin J. reviewed the authorities at length, including the Canadian decisions of *R. and Archer v. White*, [1956] S.C.R. 154, 114 C.C.C. 77, 1 D.L.R. (2d) 305; *Martineau* (No. 1), supra; and *R. v. Institutional Head of Beaver Creek Correctional Camp; Ex parte MacCaud*, [1969] 1 O.R. 373, *(*sub nom. *Re MacCaud)* 5 C.R.N.S. 317, [1969] 1 C.C.C. 371, 2 D.L.R. (3d) 545 (C.A.). McMullin J. exercised his discretion in favour of the prisoner, commenting that the loss of four days' remission was not a "trifle" but "tantamount to the imposition of an extra four days' imprisonment at the end of a sentence". As in *Hull Prison*, supra, this decision is based upon a finding that the visiting justice was acting in a judicial capacity and that the regulations were a procedural code, any breach of which constituted a breach of natural justice in the circumstances. Both of these conclusions are foreclosed in the case at bar by the decision in *Martineau* (No. 1). *Hull Prison* and *Daemar* are important, however, as supporting the view that there is no domestic "discipline" exception to the scope of certiorari.

68 The case of *R. and Archer v. White*, supra, must also be noted. White, a constable, was convicted by Archer, a police superintendent, of four disciplinary charges laid under s. 30 of the Royal Canadian Mounted Police Act, R.S.C. 1952, c. 241 (now R.S.C. 1970, c. R-9). He applied for certiorari. The trial judge denied the writ, 10 W.W.R. (N.S.) 305, 107 C.C.C. 230, [1953] 4 D.L.R. 220. He was reversed on appeal, 12 W.W.R. 315, 109 C.C.C. 247, [1954] 4 D.L.R. 714. The decision of the Court of Appeal for British Columbia was reversed in this court. Rand J., delivering judgment on the part of four members of the court, likened the force to the army, saying (p. 158):

> From the beginning it has been stamped with characteristics of the Army: the mode of organization, its barrack life, the uniform, address and bearing of the members, esprit de corps and discipline.

He then referred to the engagement for a term of service not exceeding five years upon which one entered on becoming a member of the force. Parenthetically, this notion of contractual commitment to rules of internal discipline, a sort of volens, is sometimes advanced in support of the argument for a disciplinary exception. Whatever may be the force of that argument in other contexts, it is wholly inapplicable in a prison environment.

69 The Federal Court of Appeal in *Martineau* (No. 1) relied upon *R. and Archer v. White* in holding that "disciplinary decisions" were not amenable to review by way of s. 28 application. There can be no doubt that all members of this court in *R. and Archer v. White* held that in the circumstances certiorari would not lie to the domestic disciplinary decision of the R.C.M.P. superintendent. As I read the case, however, Rand J. does not rule out the possibility of certiorari in a suitable case. He regarded the internal code as prima facie the exclusive means by which discipline would be enforced, but in the passage quoted hereunder he appears to have recognized three exceptions, where: (i) the powers are abused to such a degree as to put the action beyond the purview of the statute; (ii) the action is itself unauthorized; or (iii) the proceedings infringe those underlying principles of judicial process deemed annexed to legislation unless excluded by its implications. Natural justice and fairness are principles of judicial process deemed by the common law to be annexed to legislation with a view to bringing statutory provisions into conformity with the common law requirements of justice. The passage to which I refer reads as follows (p. 159):

> Parliament has specified the punishable breaches of discipline and has equipped the Force with its own courts for dealing with them and it needs no amplification to demonstrate the object of that investment. Such a code is prima facie to be looked upon as being the exclusive means by which this particular purpose is to be attained. Unless, therefore, the powers given are abused to such a degree as puts action taken beyond the purview of the statute or unless the action is itself unauthorized, that internal management is not to be interfered with by any superior court in exercise of its long established supervisory jurisdiction over inferior tribunals. The question, therefore, is whether or not in the application made before Wood J., including the materials furnished by affidavit, anything has been alleged and supported by evidence to show that the proceedings infringed or were outside the authority of either the statute or those underlying principles of judicial process to be deemed annexed to legislation unless excluded by its implications.

70 The Supreme Court of the United States in *Wolff v. McDonnell*, U.S. Neb., 418 U.S. 539, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974), was called upon to consider what "due process", assured by the Fourteenth Amendment of the American Constitution, required in a prison setting. The court, speaking through White J., held that where the prisoner was in peril of losing good time or being placed in solitary confinement he was entitled to written notice of the charge and a statement of fact findings and to call witnesses and present documentary evidence where it would not be unduly hazardous to institutional safety or correctional goals. However, there was no constitutional right to confront and cross-examine witnesses or to counsel.

71 It seems clear that although the courts will not readily interfere in the exercise of disciplinary powers, whether within the armed services, the police force or the penitentiary, there is no rule of law which necessarily exempts the exercise of such disciplinary powers from review by certiorari.

72 The authorities, in my view, support the following conclusions:

73 1. Certiorari is available as a general remedy for supervision of the machinery of government decision-making. The order may go to any public body with power to decide any matter affecting the rights, interests, property, privileges or liberty of any person. The basis for the broad reach of this remedy is the general duty of fairness resting on all public decision-makers.

74 2. A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection, and any attack upon such a decision will have to be founded upon abuse of discretion. Similarly, public bodies exercising legislative functions may not be amenable to judicial supervision. On the other hand, a function that approaches the judicial end of the spectrum will entail substantial procedural safeguards. Between the judicial decisions and those which are discretionary and policy-oriented will be found a myriad of decision-making processes with a flexible gradation of procedural fairness through the administrative spectrum. That is what emerges from the decision of this court in *Nicholson*, supra. In these cases, an applicant may obtain certiorari to enforce a breach of the duty of procedural fairness.

75 3. Section 28 of the Federal Court Act, that statutory right of review, compels continuance of the classification process in the Federal Court of Appeal with clear outer limits imposed on the notion of "judicial or quasi-judicial". No such limitation is imported in the language of s. 18, which simply refers to certiorari and is therefore capable of expansion consistent with the movement of the common law away from rigidity in respect of the prerogative writs. The fact that a decision-maker does not have a duty to act judicially, with observance of formal procedure which that characterization entails, does not mean that there may not be a duty to act fairly which involves importing something less than the full panoply of conventional natural justice rules. In general, courts ought not to seek to distinguish between the two concepts, for the drawing of a distinction between a duty to act fairly and a duty to act in accordance with the rules of natural justice yields an unwieldy conceptual framework. The Federal Court Act, however, compels classification for review of federal decision-makers.

76 4. An inmate disciplinary board is not a court. It is a tribunal which has to decide rights after hearing evidence. Even though the board is not obliged, in discharging what is essentially an administrative task, to conduct a judicial proceeding observing the procedural and evidential rules of a court of law, it is nonetheless subject to a duty of fairness, and a person aggrieved through breach of that duty is entitled to seek relief from the Federal Court, Trial Division, on an application for certiorari.

77 5. It should be emphasized that it is not every breach of prison rules of procedure which will bring intervention by the courts. The very nature of a prison institution requires officers to

make "on the spot" disciplinary decisions, and the power of judicial review must be exercised with restraint. Interference will not be justified in the case of trivial or merely technical incidents. The question is not whether there has been a breach of the prison rules, but whether there has been a breach of the duty to act fairly in all the circumstancs. The rules are of some importance in determining this latter question as an indication of the views of prison authorities as to the degree of procedural protection to be extended to inmates.

78 6. A widening of the ambit of certiorari beyond that of a s. 28 application will undoubtedly, at times, present a problem in determiming whether to commence proceedings in the Court of Appeal or in the Trial Division. However, the quandary of two possible forums is not less regrettable than complete lack of access to the Federal Court.

79 7. It is wrong, in my view, to regard natural justice and fairness as distinct and separate standards and to seek to define the procedural content of each. In *Nicholson*, supra, the chief justice spoke of a "notion of fairness involving something less than the procedural protection of the traditional natural justice". Fairness involves compliance with only some of the principles of natural justice. Professor de Smith, in Judicial Review of Administrative Action, 3rd ed. (1973), p. 208, expressed lucidly the concept of a duty to act fairly:

> In general it means a duty to observe the rudiments of natural justice for a limited purpose in the exercise of functions that are not analytically judicial but administrative.

80 The content of the principles of natural justice and fairness in application to the individual cases will vary according to the circumstances of each case, as recognized by Tucker L.J. in *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 at 118 (C.A.).

81 8. In the final analysis, the simple question to be answered is this: Did the tribunal on the facts of the particular case act fairly toward the person claiming to be aggrieved? It seems to me that this is the underlying question which the courts have sought to answer in all the cases dealing with natural justice and with fairness.

XI

82 I would allow the appeal, set aside the judgment of the Federal Court of Appeal and restore the judgment of Mahoney J. of the Federal Court, Trial Division. There should be no costs in this court nor in the Federal Court of Appeal.

Appeal allowed.

2013 CAF 177, 2013 FCA 177
Federal Court of Appeal

Meeches v. Meeches

2013 CarswellNat 2239, 2013 CarswellNat 6963, 2013 CAF 177, 2013 FCA 177, [2014] 1 C.N.L.R. 267, 230 A.C.W.S. (3d) 3, 447 N.R. 168, 60 Admin. L.R. (5th) 1

George Assiniboine, Marvin Daniels and Ruth Roulette, Appellants and Dennis Meeches, Respondent

David Meeches, Appellant and Dennis Meeches, Respondent

Pierre Blais C.J., Robert M. Mainville, D.G. Near JJ.A.

Heard: June 25, 2013
Judgment: July 5, 2013
Docket: A-102-13, A-101-13

Proceedings: reversing in part *Meeches v. Meeches* (2013), 2013 CarswellNat 463, 2013 FC 196 (F.C.)

Counsel: Anthony Lafontaine Guerra, for Appellants, George Assiniboine, Marvin Daniels, Ruth Roulette
Timothy J. Fry, Alfred Thiessen, for Appellant, David Meeches
Harley I. Schachter, Kaitlyn Lewis, for Respondent, Dennis Meeches

***Robert M. Mainville J.A.*:**

1 This concerns two consolidated appeals from a judgment of Russell J. of the Federal Court (the "Application Judge") dated February 26, 2013 and cited as 2013 FC 196 (F.C.) (the "Reasons") which declared that the Long Plain First Nation Election Appeal Committee (the "Election Appeal Committee" or "Committee") had made a final and binding decision requiring new elections for the offices of the Chief and all the councillors.

Background and Context

(a) Overview of the litigation

2 The Long Plain First Nation (the "First Nation") is a band within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5. It is governed by a Chief and four councillors forming the council of the band under the *Indian Act*. They are elected for three year terms pursuant to the *Long Plain First*

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Nation Election Act (the "Election Act" or the "Act"), an election code adopted by the First Nation. The last elections were held in April 2012, and resulted in the election of the appellant David Meeches as Chief, and of the appellants George Assiniboine, Marvin Daniels and Ruth Roulette as councillors. Barbara Esau, who is not a party to these appeals, was also elected councillor at that time.

3 The Election Act designates the Chief and the councillors as the "Tribal Government". This is an expression borrowed from American Indian law. Though the expression "Long Plain First Nation Government" may be more appropriate, I will nevertheless refer to the "Tribal Government" in these reasons in light of its use in the Election Act.

4 Various appeals challenging the results of the April 2012 elections were submitted to the Election Appeal Committee constituted under the Election Act. One of the appeals was made by the respondent Dennis Meeches, who had unsuccessfully run against the appellant David Meeches in the election for the office of Chief. After reviewing the appeals before it, the Election Appeal Committee concluded that the election process overall appeared to have been fairly conducted. It nevertheless recommended that the elections be set aside and new elections be held.

5 An application for judicial review was subsequently filed in the Federal Court on behalf of the First Nation seeking to set aside that decision. Concurrently, a motion was brought seeking to stay the decision pending the final determination of that application. The stay motion was dismissed by Harrington J. (the "Motion Judge") on the ground that the Election Appeal Committee had simply recommended that new elections be held, and that this recommendation was not a "decision" or an "order" that had to be accepted or acted upon by the Tribal Government. The Motion Judge however noted that if an order was issued by the Election Appeal Committee calling for new elections, then a new stay motion could be submitted, if need be. The First Nation discontinued its application shortly thereafter.

6 The respondent Dennis Meeches then initiated his own application for judicial review before the Federal Court. That application was dealt with in the judgment under appeal. The Application Judge found that he was not bound by the prior decision of the Motion Judge. He rather concluded that the Committee had made a binding decision calling for new elections.

7 The respondent subsequently filed a motion in the Federal Court seeking an order pursuant to Rule 431 of the *Federal Courts Rules*, SOR/98-106 compelling compliance with the judgment of the Application Judge. That motion was dismissed by Strickland J. on April 11, 2013 on the ground that the judgment was purely declaratory and could therefore not be enforced under Rule 431.

8 The appellants subsequently sought an order from this Court staying the judgment of the Application Judge. I granted this stay on April 29, 2013 for reasons cited as 2013 FCA 114 (F.C.A.). In light of the circumstances, I further ordered that the consolidated appeals be expedited.

(b) The Election Act

9 It is appropriate to reproduce upfront the principal provisions of the Election Act which are at issue.

10 Article Five of the Election Act provides for the conduct of a candidate during an election. It specifically forbids vote buying and states the consequences for a candidate engaging in the practice:

> 5.4 No buying of votes in any manner, i.e. giving money, buying alcohol, or anything given or exchanged of monetary value between Nomination Day and Election Day.
>
> . . .
>
> 5.11 Failure to adhere to Sections 5.1 to 5.10 will lead to disqualification of the candidate.

11 Article Eight of the Election Act deals with the Election Appeal Committee. It notably provides for the following regarding the composition, duties and authorities of the Committee:

> 8.1 The Election Appeal Committee shall consist of three (3) non-Tribal members.
>
> . . .
>
> 8.5 The Election Appeal Committee shall have the authority ... to investigate and determine whether any elected official has vacated his/her office as a result of the provisions of Article 18 herein.
>
> 8.6 The Election Appeal Committee shall investigate a substantial matter brought before them relating to ... an allegation pursuant to Article 5 or Article 17 upon receiving a written request to investigate. The written request shall be delivered to the Election Appeal Committee by any elector.
>
> 8.7 The Election Appeal Committee shall have the discretion to determine the scope of any investigation and upon completion; (*sic*) the Election Appeal Committee shall provide to the Tribal Government their findings within two (2) days, in writing.
>
> 8.8 In the event the Election Appeal Committee recommends that the elected official has vacated his or her office pursuant to a breach, the Tribal Government shall declare the office vacant and forthwith call a By-election. The declaration shall be in the form of a Band Council Resolution passed at a duly convened meeting of the Tribal Government.

12 Article Twelve of the Act deals with nomination appeals. It sets out an appeal mechanism for candidates who have been found by the Electoral Officer to be ineligible to run in an election:

12.1 If a candidate is found to be ineligible by the Electoral Officer, with respect to his/her nomination, he/she may appeal within two (2) days of the close of the nomination meeting.

12.2 The candidate must submit a letter, with supporting documentation, stating the reasons for his/her nomination appeal.

12.3 The Election Appeal Committee will immediately convene a meeting with the ineligible candidate appealing to present his/her nomination appeal.

12.4 The Election Appeal Committee will discuss and make a recommendation within three (3) days of the nomination meeting as to whether or not the ineligible candidate is to be reinstated.

12.5 The decision of the Election Appeal Committee shall be binding and final.

13 Article Seventeen concerns election appeals. It sets out the provisions governing an appeal of the results of an election:

17.1 Any candidate or elector has the right to appeal the results of an election within seven (7) days from the date of the election.

17.2 Grounds for an appeal are restricted to election practices that contravene this Election Act.

17.3 An appeal must be in writing duly signed to the Electoral Officer and must contain details and supporting documentation as to the grounds upon which the appeal is being made and include a non-refundable deposit fee of $100.00 by certified cheque, money order, bank draft or cash and which monies are to be applied toward the appeal costs.

17.4 The Election Appeal Committee shall determine as to whether or not an appeal hearing should take place.

17.5 If it is determined that there is sufficient evidence to warrant an appeal hearing, the Election Appeal Committee shall schedule a formal meeting two (2) days after the election appeal deadline.

17.6 An appeal hearing will take the form of a formal meeting consisting of: The Electoral Officer The Election Appeal Committee The candidate or elector making the appeal.

17.7 The decision of the Election Appeal Committee shall be irrevocable, binding, and final. The decision must be made public within (2) (*sic*) days of the appeal hearing with the decision being posted at the Tribal Government office, Administration office, and Keeshkeemaqua Conference Centre.

14 Article Eighteen is entitled "Vacancy" and deals with various disqualifications of elected Tribal Government members, including disqualifications related to corrupt election practices:

> 18.1 Any office of the Tribal Government becomes vacant when the person who holds office:
>
> . . .
>
> d. Has been found guilty of corrupt practice in connection with the election pursuant to a decision of the Election Appeal Committee. A corrupt practice shall include, but not be limited to, tampering with the election process, bribery, or coercion related to the election, campaigning while the polls are open, and anything else the Election Appeal Committee deems to be a corrupt practice.
>
> . . .
>
> i. If an Ogema [Chief] or an Oginjigan [Councillor] ceases to hold office by virtue of Article 18.1 (c) to Article 18.1 (h) inclusively, he or she shall be ineligible to be a candidate for Ogema [Chief] or Oginjigan [Councillor] for the next 10 years.

(c) The Respondent's Election Appeal and the Report of the Election Appeal Committee

15 Following his unsuccessful bid for the office of Chief in the election held in April 2012, the respondent Dennis Meeches submitted an election appeal to the Election Appeal Committee in which he raised two principal issues: (a) whether there should be new elections as a result of contraventions to the Election Act which occurred during the election, and (b) whether the elected Chief, the appellant David Meeches, had been involved in conduct that would disqualify him from holding office for 10 years and would result in the office of Chief being vacated, thereby requiring a by-election to be held for that position: affidavit of Dennis Meeches at para. 11, p. 70 of the Appeal Book ("AB"). The principal allegations of candidate misconduct raised by the respondent were that the appellant David Meeches had used band funds for his campaign and had been involved in widespread vote buying contrary to the Election Act: *ibid.* at para. 10, pp.69-70 and pp. 121-122 of AB.

16 The Election Appeal Committee held a series of meetings and telephone communications with a number of individuals. The Committee also held a meeting to hear the respondent and other electors. The Committee also heard the appellant and elected Chief David Meeches, but it did not hear any of the elected councillors.

17 The Election Appeal Committee prepared a written (but undated) report of its findings which was received by the respondent at the beginning of May 2012 (the "Report").

18 With respect to the alleged contraventions to the Election Act, the Committee concluded in its Report that "[w]hile there were some deviations from the Long Plain Election Act as

discussed above, the election process overall appears to have been fairly conducted." Nevertheless, it followed this conclusion with the following statement: "However, since the Election Act is a key part of the governance of the First Nation and since it was enacted to govern elections, we recommend that the election be set aside and an election process be undertaken following the Act as it is written": Report at p. 6, AB at p. 143.

19 The Committee also considered the allegations of candidate misconduct in its Report. These allegations had been primarily made against the elected Chief, the appellant David Meeches. The Committee made the following observations with respect to these allegations (Report at p. 5, AB at p. 142):

> The other two appeals contain allegations of misconduct primarily by the individual elected as Ogema [Chief] in the April 2012 election.
>
> The allegations include vote buying, interference with the election process and use of band funds to gain re-election.
>
> In regard to the use of band funds the examples provided include the publication of a Long Plain Newsletter just prior to the poll in Brandon. Documents were provided which indicate preparation of the Newsletter was paid for by the Tribal Government. The Committee was advised that there was a misunderstanding regarding the preparation and printing of the Newsletter. Documents show that Arrowhead Development Corporation initially paid for the newsletter. This was subsequently corrected. The Committee received receipts verifying the candidate for Omega [Chief] reimbursed Arrowhead Development Corporation and paid Mayfair Printing for the Newsletter.
>
> The appeal also alleged that a meeting room used by the same candidate was paid for with band funds. Receipts show that the meeting room was paid by the individual. Both the name of the individual and the name of the First Nation appear on the documents.
>
> . . .
>
> The allegations of vote buying present considerable challenges for the Election Appeal Committee. While the Election Act provides a broad mandate to investigate matters brought to it, the allegations of vote buying rely on statements made by individuals and interpretation of conversations overheard during the conduct of the vote and reported to the scrutineers for the individual who filed the appeal.
>
> One document was provided to support the allegation of vote buying. The document is signed by an individual stating she received $20.00 to Vote for one of the candidates for Ogema [Chief]. However, the individual clearly states that she would like to remain anonymous. She was asked by the individual appealing to appear before the Appeal Committee and she advised that her statement was true and correct.

(d) The Initial Judicial Review Application and the Order of the Motion Judge

20 Shortly after the release of the Report, a judicial review application was filed in the Federal Court in the name of the First Nation seeking to set aside the decision of the Committee and allowing the elected Chief and councillors to remain in office (the "initial judicial review application"). Simultaneously, a motion for an interim stay of the decision of the Committee was also filed in the Federal Court.

21 The respondent was served with the initial judicial review application and the stay motion on Wednesday May 9, 2012: affidavit of Dennis Meeches at par. 32, AB at p. 75. The stay motion was heard shortly thereafter on Friday May 11, 2012, by way of teleconference. The respondent Dennis Meeches participated in this hearing, but he was not then represented by counsel in light of the short notice.

22 The Motion Judge dismissed the interim stay motion at the hearing on a ground which he appears to have himself raised. The pertinent extracts of his order, cited as 2012 FC 570 (F.C.), read as follows:

> [6] I immediately seized on the word "recommend" [in the Committee's report]. Section 18.1(2) of the *Federal Courts Act* deals with applications for judicial review "in respect of a decision or an order of a federal board, commission or other tribunal..." I raised the point that a "recommendation" is directed to somebody else, in this case, perhaps, the Tribal Government. It is not a "decision" or an "order" as such. It may or may not be accepted and acted upon.
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> . . .
>
> [8] The applicant is concerned that in context the Election Appeal Committee's "recommendation" was in fact a decision. However, the Election Appeal Committee did not recommend that any elected official has vacated office due to a breach, and therefore there is no requirement that the Tribunal (*sic*) Government declares an office vacant and calls a bielection (*sic*). Since article 8.8 [of the Election Act] does not apply, the word "recommend" must be given its ordinary meaning.
>
> . . .
>
> [10] The respondent raised issues which deserve comments.
>
> [11] The first is, whether the "recommendation" could be construed as a "decision" or "order". In my opinion, it cannot.
>
> . . .

> [14] If circumstances change, in that the "recommendation" is acted upon and an order is issued for a new election, the applicant may re-present its motion, and the respondents will have full opportunity to contest.

23 The initial application for judicial review which had been brought in the name of the First Nation was discontinued shortly after this order was issued.

The Judgment Under Appeal

24 Following the order of the Motion Judge, the respondent Dennis Meeches sent a letter to the Election Appeal Committee requesting that it clarify its position on his election appeal: affidavit of Dennis Meeches at para. 36 and exhibit H thereto, AB pp. 76 and 176-177. The Committee did not respond.

25 The respondent consequently filed his own application for judicial review in the Federal Court seeking various types of relief for the purpose of setting aside the elections and to have new elections held.

26 The Application Judge treated the application as principally seeking to enforce the decision of the Election Appeal Committee calling for new elections. This approach lead the Application Judge into an analysis of (a) the power of the Election Appeal Committee to compel new elections (Reasons at paras. 75 to 87); and (b) the nature and scope of the decision which had been made by the Committee in this case (Reasons at paras. 88 to 114).

27 Dealing first with the power of the Election Appeal Committee, the Application Judge recognized that a distinction was set out in the Election Act between, on the one hand, a complaint concerning the impeachable conduct of an incumbent leading to the vacancy of an elected position (sections 8.5, 8.8 and 18.1 of the Act), and, on the other hand, an appeal of the results of an election based on election practices which contravened the Act (sections 17.1 to 17.7 of the Act).

28 The Application Judge further recognized that in the case of a complaint concerning the impeachable misconduct of an incumbent, the Election Act provides that the resulting "recommendation" of the Election Appeal Committee is binding on the Tribal Government (section 8.8 of the Act), while in the case of an appeal of the election results, the Committee must make a "decision" which is "irrevocable, binding, and final" (section 17.7). He further noted that section 17.7 of the Act does not stipulate on whom this "decision" is binding. Applying a purposive interpretation to the Election Act, the Application Judge concluded that a decision by the Election Appeal Committee under section 17.7 is binding on the Tribal Government, which must act upon it forthwith: Reasons at para. 87.

29 He opined that by calling for a new election in this case, the Committee was essentially declaring that the Tribal Government was not legitimate: Reasons at para. 101. In his view, it

would therefore be both improper and somewhat absurd to allow the affected members of the Tribal Government to disregard the view of the Committee: Reasons at para. 103. He further found that "[n]owhere in the Election Act can I find a 'recommendation' that is not mandatory", and he concluded from this that a recommendation under that Act "is a decision that has binding effect, and must be acted upon": Reasons at para. 107.

30 The Application Judge recognized that his conclusion on the mandatory effect of the Committee's recommendation was directly contradictory to the prior order of the Motion Judge. However, he did not deem himself bound by that order on the following grounds: (a) he was deciding the matter on a different record; (b) the Motion Judge's order was interlocutory rather than final, and (c) that order was not persuasive since it was made on a different basis: Reasons at paras. 111-112.

31 Turning his mind to the nature and scope of the decision which had been made in this case by the Committee, the Application Judge recognized that though the Committee had found that there were some deviations from the Election Act during the elections, it had nevertheless concluded that the election process overall appeared to have been fairly conducted.

32 Nevertheless, relying on *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 (S.C.C.), the Application Judge was of the view that the Committee's findings had to be understood in the context of its Report read as a whole, as well as in the context of the entire record that was before it. After reviewing the record himself, he found that the Committee had called new elections on the ground of candidate misconduct which was sufficient to affect the outcome of the election. He concluded as follows at paras. 95 and 114 of his Reasons:

> [95] Having made these findings, the Election Appeals Committee then moves to its Decision, and this is to the effect that, even though overall the election appears to have been fairly conducted (i.e. the deviations were not widespread) those deviations that did occur require that the election be set aside and a new election called. The rationale is that the "Election Act is a key part of the governance of the First Nation." In other words, those deviations that did occur had "a material effect on the outcome of the election" so that it should be set aside.
>
> . . .
>
> [114] When I look at the evidence before the Election Appeal Committee in this case, I see that there was evidence of vote buying. Instead of coming to conclusions on this issue the Election Appeal Committee tells us that the "allegations of vote buying present considerable challenges for the Election Appeal Committee." Rather than make recommendations on vote buying, the Election Appeal Committee decides to simply recommend a new election because of material deviations from the Election Act. It chooses not to tell us specifically what deviations it has in mind. The Election Appeal Committee would know, of course, that a decision on vote-buying and a recommendation under paragraph 8.8 would exclude the

elected officials concerned from running for office again for 10 years. That could be a very unfortunate consequence for the Long Plain First Nation as well as the individuals involved. Hence, those individuals accused of vote buying should have breathed a sigh of relief that the Election Appeal Committee opted instead to treat the whole matter under Article 17 and decide that a new election was required.

The Issues in Appeal

33 The issues raised by this appeal may be described as follows:

a. Did the Application Judge err in determining that he was not bound by the reasons set out in the order of the Motion Judge?

b. If not, did he err in holding that the Election Appeal Committee had the power to compel new elections under Article 17 of the Election Act?

c. If not, did he err in determining that in this case the Election Appeal Committee had made an irrevocable, binding and final decision to compel new elections?

d. If not, should the decision of the Election Appeal Committee nevertheless be set aside?

(a) Were the reasons in the order of the Motion Judge binding on the Application Judge?

34 The appellants principally rely in this appeal on their submission that the Application Judge was precluded from deciding the respondent's application for judicial review on a different ground than that set out by the Motion Judge in his order dismissing the interim stay motion in the initial judicial review application. The appellants submit that the principles of issue estoppel, of abuse of process and of collateral attack all precluded the Application Judge from deciding the matter as he did.

35 The fundamental flaw in the appellants' submission is that the Motion Judge dismissed the interim motion to stay the decision of the Election Appeal Committee, thus precluding the respondent Dennis Meeches from appealing that order. Indeed, an appeal does not lie against the reasons for an order or judgment: *Pfizer Canada Inc. v. Canada (Minister of Health)*, 2007 FCA 261, 367 N.R. 103 (F.C.A.); *Konecny v. Ontario Power Generation*, 2010 FCA 340 (F.C.A.) at para. 7. Further, as a result of the discontinuance of the initial application for judicial review, the respondent was also precluded from challenging the initial judicial review application on its merits. The appellants' reliance on issue estoppel, abuse of process and collateral attack is consequently somewhat suspect.

36 These doctrines form part of a public policy favouring the finality of judicial decisions and which is designed to advance the interest of justice: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.) ("*Danyluk*") at para. 19. In this case, these doctrines are

being advanced by the appellants in a context which precludes the interest of justice. As noted by Justice Binnie in *Danyluk* at para. 1 a "judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice."

37 In the recent decision of *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19, 356 D.L.R. (4th) 595 (S.C.C.) at paras 40-41, Justices Cromwell and Karakatsanis explained that these doctrines apply where there was a fair opportunity for the parties to put forward their position, to adjudicate the issues and to have the decision reviewed. Though these comments were made in the context of a claim of issue estoppel following a decision of a police disciplinary tribunal, they are nevertheless applicable to this case:

> [40] If the prior proceedings were unfair to a party, it will likely compound the unfairness to hold that party to its results for the purposes of a subsequent proceeding. For example, in *Danyluk*, the prior administrative decision resulted from a process in which Ms. Danyluk had not received notice of the other party's allegations or been given a chance to respond to them.
>
> [41] Many of the factors identified in the jurisprudence, including the procedural safeguards, the availability of an appeal, and the expertise of the decision maker, speak to the opportunity to participate in and the fairness of the administrative proceeding. These considerations are important because they address the question of whether there was a fair opportunity for the parties to put forward their position, a fair opportunity to adjudicate the issues in the prior proceedings and a means to have the decision reviewed. If there was not, it may well be unfair to hold the parties to the results of that adjudication for the purposes of different proceedings.

38 In this case, the interim motion for a stay was filed at the same time or shortly after the initial judicial review application, leaving little time for the respondent Dennis Meeches to secure legal counsel and to organize an appropriate response. As a result, the hearing of that motion was held without the benefit of argument from counsel for the respondent. In addition, the ground on which the motion was decided was raised by the Motion Judge himself at the hearing, thus leaving little opportunity for the respondent to properly address that issue. More important, however, is the fact that the Motion Judge was deciding whether or not to grant an interim stay on the basis of an incomplete record and limited arguments on the merits of the underlying application. All these factors lead me to conclude that the Application Judge properly exercised his discretion in determining that he was not bound by the reasons of the Motion Judge.

39 As a general rule, a judge on an interim motion should not decide the merits of the underlying proceedings when determining whether to issue a stay. Applying the tripartite test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) ("*RJR-MacDonald*"), a judge deciding a stay motion must, of course, make a preliminary assessment of the merits of the underlying proceedings to ensure that there is a serious issue to be determined in those proceedings. However, the threshold for a serious issue is low, since it is usually met if the underlying proceedings are not frivolous or vexatious: *RJR-MacDonald* at p. 337.

40 Consequently, at the stage of a motion for a stay, a "prolonged examination of the merits is neither necessary nor desirable": *RJR-MacDonald* at p. 338. It is only in exceptional circumstances that a judge deciding a stay motion should engage in an extensive review of the merits of the underlying proceedings, such as when the right which the stay seeks to protect can only be exercised immediately or not at all, or when the result will impose such hardship on one party as to remove any potential benefit from proceeding further with the litigation: *ibid*. None of these exceptional circumstances existed when the Motion Judge decided the stay motion.

41 There are important judicial policy considerations at issue here. It is indeed usually inappropriate to determine the respective rights of litigants in the absence of a complete record and of full argument on all the pertinent issues. A judge deciding a stay motion should therefore be restrained in his or her approach to the merits of the underlying proceedings, and must strive not to decide substantive issues unless special circumstances dictate otherwise.

(b) Does the Election Appeal Committee have the power to compel new elections under Article 17 of the Election Act?

42 The appellants further submit that the Application Judge erred in law by finding that the Election Appeal Committee had the power to call a new election under Article 17 of the Election Act. For the appellants, the only compelling power vested in the Committee is to be found in sections 8.7 and 8.8 of the Election Act, reproduced above, providing for the removal of an incumbent from office for misconduct. They submit that in order to call for a new election under Article 17 of the Election Act, the Committee must first find impeachable misconduct under Article 8. Since no finding of misconduct was made in this case, the appellants conclude that sections 8.7 and 8.8 do not apply, and no election may consequently be called under Article 17.

43 I cannot accept these submissions.

44 The Election Act is clear and unambiguous as to the authority of the Election Appeal Committee, which is set out in multiple provisions throughout the Act. When the Committee recommends under Article 8 that the office of an elected official be vacated for impeachable misconduct, the Tribal Government must declare the office vacant and forthwith call a by-election: sections 8.7 and 8.8 of the Act. When the Committee makes a recommendation as to whether or not a candidate who was found ineligible by the Electoral Officer is to be reinstated, its decision is binding and final: sections 12.4 and 12.5 of the Act. When the Committee makes a decision following an election appeal under Article 17, its decision is "irrevocable, binding, and final": section 17.7 of the Act. This is clear and unambiguous language.

45 The submission that the decision of the Committee under section 17.7 is unenforceable since it does not indicate to whom it is addressed is incongruous and illogical. The Election Act is the result of an exercise in self-government by the membership of the First Nation. When the

membership of the First Nation specifies that a decision of the Election Appeal Committee under Article 17 is "irrevocable, binding, and final" it should be clear to all concerned, including the appellants, that such a decision binds the First Nation as a whole, including all its governance structures such as the Tribal Government and the Electoral Officer. Were it otherwise, this would lead to the bizarre proposition that a decision pursuant to Article 17 of the Election Act could be ignored at whim of an illegitimately elected Tribal Government.

(c) Has the Election Appeal Committee made a decision to compel new elections?

46 Largely relying on the reasons of the Motion Judge, the appellants further submit that the Election Appeal Committee has made a non enforceable "recommendation" to call a new election, rather than a "decision" as provided for under section 17.7 of the Election Act.

47 The turn of phrase the Committee used was the following: "we recommend that the election be set aside and an election process be undertaken following the Act as it is written." The Application Judge found that this turn of phrase should be viewed as a binding decision. I agree.

48 Depending on the context, a "recommendation" may be viewed as non-binding advice or as a binding decision: compare *Thomson v. Canada (Department of Agriculture)*, [1992] 1 S.C.R. 385 (S.C.C.) with *Therrien c. Québec (Ministre de la justice)*, 2001 SCC 35, [2001] 2 S.C.R. 3 (S.C.C.) at paras. 42-43; see also *R. v. Canadian Import Co.*, [1935] A.C. 500 (Quebec P.C.), [1935] UKPC 33, [1935] A.C. 500 (Quebec P.C.).

49 In *Therrien (Re)*, above, the issue was whether a "recommendation" from the Quebec Court of Appeal to remove a provincial judge from office could be viewed as a final decision. Justice Gonthier found that, in light of the context, it could be so viewed. He noted at para. 43 that "the report of the Court of Appeal amounts to much more than the expression of a mere opinion; rather, it is substantially in the nature of a decision".

50 A contextual and purposive analysis is thus required in this case to ascertain whether the recommendation made by the Election Appeal Committee is to be viewed as advice or as a binding decision.

51 Throughout its provisions, the Election Act calls for the Election Appeal Committee to make "recommendations", but it treats such recommendations as binding decisions. Thus, section 8.8 of the Act provides that when the Committee "*recommends* that the elected official has vacated his or her office, the Tribal Government shall declare the office vacant and forthwith call a Byelection." Likewise, when dealing with a nomination appeal, section 12.4 of the Act provides that the Committee will "make a *recommendation* ... as to whether or not the ineligible candidate is to be reinstated", while section 12.5 sets out that this recommendation is "binding and final".

52 Consequently, applying a contextual and purposive approach to the matter, when a "recommendation" to hold a new election is made by the Committee, this "recommendation" should be treated as a decision which is "irrevocable, binding, and final" under section 17.7 of the Act.

53 When the Election Appeal Committee issued its report with the recommendation that new elections be held, it could not have intended that its conclusion would be simply advisory and without any effect. Calling for a new election is precisely the purpose of an election appeal under Article 17, and the binding effect of such a conclusion is indisputable in light of section 17.7 of the Act. Consequently, irrespective of the precise wording used by the Committee in its report, when it called for a new election to be held, this constituted a binding decision under the meaning of section 17.7.

(d) Should the decision of the Election Appeal Committee nevertheless be set aside?

54 As an alternative relief, the appellants seek in effect a judicial review of the decision of the Election Appeal Committee. They submit that the Committee (a) erred in law and in fact by calling for new elections; and (b) breached the principles of procedural fairness in reaching its decision. Consequently, in the event their other submissions are rejected, they seek that the decision of the Committee be set aside and that the matter be returned to it for a new determination.

55 The respondent notes that the appellants had the opportunity to challenge the decision of the Election Appeal Committee through the initial judicial review application, but chose to discontinue that application. The respondent concludes from this that the appellants should not be allowed to raise such a challenge. I disagree.

56 It cannot be ignored that the appellants discontinued the initial judicial review application by relying on the reasons set out in the order of the Motion Judge. Taking into account the overall circumstances, the fact that in his own application the respondent himself was seeking to quash and set aside the decision of the Committee, and also taking into account the paramount interest of ensuring the fairness of these proceedings, it is appropriate to address the arguments raised by the appellants challenging the validity of the Committee's decision. Moreover, the evidentiary record supporting such a challenge was before the Application Judge.

57 I will first discuss the alleged errors of fact and law committed by the Committee.

58 The appellants basically submit that the deviations in the elections identified by the Committee were not material enough to affect the results of the election, and that consequently, the Committee did not act reasonably in calling for new elections. They add that there was no evidence before the Committee which could have supported a finding of vote buying, and that in

any event, any allegation of vote buying must be dealt with under Article 8 of the Election Act rather than under Article 17.

59 Section 17.2 of the Election Act sets out that the grounds for an election appeal under Article 17 are "restricted to election practices that contravene this Election Act." This surely includes allegations of vote buying, a practice which is specifically prohibited by section 5.4 of the Act. Consequently, the Committee was empowered under Article 17 to consider allegations of candidate misconduct related to the election, including allegations of vote buying.

60 Thus the Committee has a choice between two paths when assessing allegations of candidate misconduct related to an election, including allegations of vote buying: (a) it may treat such allegations under Article 8 of the Act: section 8.6; or (b) it may also treat these allegations under Article 17.

61 Under Article 8, the Committee focuses on the allegations of misconduct *by the concerned individual* in the context of impeachment proceedings: sections 8.5 and 8.7. Where the Committee determines the allegations are founded, the incumbent must vacate the position to which he or she was elected, and a by-election must be held forthwith to replace the incumbent: section 8.8 of the Act. In addition, the incumbent is ineligible to run in an election for Chief or councillor for a period of ten years: para. 18.1(*i*) of the Act. These measures apply whether or not the misconduct had a material effect on the results of the election. This is an important distinction with Article 17 of the Election Act.

62 Article 17 deals with another matter: *the election practices themselves*. Under an election appeal pursuant to this Article, the issue to be determined by the Committee is whether the election practices that contravened the Election Act could have materially affected the results of the election: section 17.1. In this case, the focus is not on the impeachment of a candidate found to have contravened the Act, but rather on the election practices themselves, so as to ensure the legitimacy of the results of an election, and by necessary implication, the electoral legitimacy of the Tribal Government itself: sections 17.6 and 17.7.

63 As a general rule, and contrary to an impeachment, an election will not be set aside if the results do not appear to have been affected by the alleged irregularities. This rule was put forward in *Camsell v. Rabesca*, [1987] N.W.T.R. 186 (N.W.T. S.C.) and in *Flookes v. Shrake* (1989), 100 A.R. 98, 70 Alta. L.R. (2d) 374 (Alta. Q.B.), and it has been affirmed by the Supreme Court of Canada in *Wrzesnewskyj v. Canada (Attorney General)*, 2012 SCC 55, [2012] 3 S.C.R. 76 (S.C.C.) ("*Opitz*") at paras. 55 to 57. The rule was expressed as follows in *Flookes v. Shrake*, above:

> So the rule, then, on a review of these authorities and subject to statutory modification, could be stated, in my view, as follows: that the vote should be vitiated only if it is shown that there were such irregularities that, on a balance of probabilities, the result of the election might

have been different; and secondly, that the vote could not be said to have been a vote, that is, it was not conducted generally in accordance with electoral practice under existing statutes.

64 This is precisely how the Election Appeal Committee viewed its mandate under Article 17: "In considering these deviations the Committee asked whether the deviation from the provisions of the Act would have a material effect on the outcome of the election.": Report at p. 2, AB at p. 139.

65 In the election for the position of Chief, the appellant David Meeches received 618 votes while the respondent Dennis Meeches received 586 votes. Had 17 of the votes cast for David Meeches been allocated to Dennis Meeches, the latter would have been elected Chief. Dennis Meeches sought to have a new election called on the ground that this small discrepancy in votes was attributable to the alleged misconduct of David Meeches, including use of band funds to support his campaign, and widespread vote buying.

66 The Election Appeal Committee recognized that some band funds had been used by the appellant David Meeches to support his campaign. It however noted that these funds had been subsequently reimbursed: Report at p. 5, AB at p. 142. The Committee also recognized that there were widespread allegations of vote buying by the appellant David Meeches, and some evidence supporting these allegations: *ibid*. David Meeches himself recognizes that he gave money to a voter on the Election Day, but he submits that this was a charitable loan: affidavit of David Meeches at para. 2, reproduced at pp. 219-220 of the AB. It is however useful to note that section 5.4 of the Election Act prohibits "giving money" "or anything given or exchanged of monetary value between the Nomination Day and Election Day."

67 The Application Judge found that the Election Appeal Committee had concluded that new elections were required on the ground of candidate misconduct which was sufficient to affect the outcome of the election: Reasons at paras. 95 and 114 reproduced above. I agree with the Application Judge that this is a reasonable understanding of the decision of the Committee with respect to the election for the position of Chief, taking into account the overall circumstances and the record as a whole. As aptly stated by Justices Rothstein and Moldaver in *Opitz* at para. 43, "[f]raud, corruption and illegal practices are serious. Where they occur, the electoral process will be corroded." See also *Sideleau v. Davidson*, [1942] S.C.R. 306 (S.C.C.).

68 However, since the allegations of candidate misconduct affecting the result of the election primarily concerned the elected Chief David Meeches, I fail to understand how the Committee could have called for new elections for the positions of the councillors in light of the evidence before it. Indeed, no serious allegations of vote buying or of other electoral misconduct were made against the elected councillors. As the Committee noted in its Report, the allegations of misconduct were all primarily made against David Meeches: Report at p. 5, AB at p.142.

69 Thus there was no evidence before the Committee of candidate misconduct on the part of the elected councillors. The Election Appeal Committee further concluded that the election process

overall appears to have been fairly conducted. Moreover, the vote tabulation does not show that the results of the elections for the councillors might have been different in light of the irregularities or the allegations of vote buying. As an example, there was a 122 vote margin between the respondent Marvin Daniels (519 votes) and the next unsuccessful candidate who received the most votes (397 votes): Electoral Officer's Report, AB pp.80-81.

70 The only allegations concerning the elected councillors were alleged administrative irregularities in the conduct of the elections which could not have affected the results of the elections of the councillors. Justices Rothstein and Moldaver have recently held in *Opitz* at para. 2 that administrative irregularities in elections are often inevitable and, owing to the need for finality and public confidence in election results, cannot in and of themselves amount to a reasons for annulling an election.

71 Taking into account all the circumstances and the applicable legal principles, it was unreasonable for the Committee to call new elections for the elected positions of councillors.

72 In light of this conclusion, the submissions of the appellant councillors concerning the alleged breaches of procedural fairness by the Election Appeal Committee need not form the basis of this Court's decision. I will simply note that in calling new elections for their positions without hearing the affected elected councillors, the Election Committee breached the principles of procedural fairness. In future election appeals, the Committee would be well advised to ensure that all affected councillors are heard prior to a decision being made.

73 However, though he appeared before the Committee, the appellant David Meeches nevertheless also alleges breaches of procedural fairness. He submits that the Committee did not provide him with the specifics of the allegations of misconduct (vote buying) which had been made against him, and that this was a breach of procedural fairness: affidavit of David Meeches at para. 3, AB at pp. 220 to 222.

74 A duty of procedural fairness is incumbent on every public authority making an administrative decision which affects the rights, privileges or interests of an individual: *Mavi v. Canada (Attorney General)*, 2011 SCC 30, [2011] 2 S.C.R. 504 (S.C.C.) at par. 38. The question in every case, however, is "what the duty of procedural fairness may reasonably require of an authority in the way of specific procedural rights in a particular legislative and administrative context".

75 The requirements of procedural fairness must consequently be assessed contextually in every circumstance, taking into account the legislative and administrative context: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 (S.C.C.) at p. 682; *Chiarelli v. Canada (Minister of Employment & Immigration)*, [1992] 1 S.C.R. 711 (S.C.C.), at p. 743; *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) at para. 21; *Therrien c. Québec (Ministre de la justice)*, above, at para. 82; *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809 (S.C.C.) at para. 9; *Mavi v. Canada (Attorney General)*, above, at para. 39.

76 As I have already noted, the Election Appeal Committee decided to treat the allegations of misconduct under Article 17 of the Election Act rather than under Article 8. The requirements of procedural fairness are different under Article 17, which deals with the legitimacy of the election results, than under Article 8 which deals with individual misconduct leading to impeachment and a ten year disqualification from office.

77 There is no formal requirement under Article 17 of the Act that a copy of the election appeal documentation be forwarded to any candidate. Nevertheless, in this case the Committee did call the elected Chief David Meeches to a hearing, and he was fully aware that the principal issue of concern to the Committee was the allegation of vote buying made against him. The Committee gave him an opportunity to provide his views on this matter. In these circumstances, I cannot conclude that the Committee breached the rules of procedural fairness such as to vitiate its decision concerning the election for the position of Chief.

Conclusions

78 For the reasons set out above, I would grant the appeals in part, set aside the judgment of the Application Judge, and giving the judgment that the Federal Court should have given, I would set aside that part of the Election Appeal Committee decision which set aside the elections for the position of the councillors ("Oginjigan") and called new elections for these elected positions. I would confirm that part of the Election Appeal Committee decision which set aside the election for the office of Chief ("Ogema") and called a new election for this elected position, and order the First Nation's officials and employees, including the appellant members of the band council or Tribal Government and the Electoral Officer, to organize forthwith in accordance with the Election Act a new election for the remainder of the term of office of Chief. Such election is to be held on the days determined by the Electoral Officer, but no sooner than forty-five (45) days, and no later than seventy-five (75) days from the date of this judgment.

79 To avoid any ambiguity, since the decision of the Election Appeal Committee was made pursuant to Article 17 of the Election Act, and since no recommendation was made by the Committee under sections 5.4 or 8.8 of the Act, the appellant David Meeches may continue to occupy the office of Chief until such time as the results of the election called for above are known. In addition, and for the same reason, he is not disqualified to run for office in that new election as a result of the decision of the Election Appeal Committee.

80 The respondent should be entitled to costs in the Federal Court, and in this Court in appeal docket A-101-13, and such costs should be assumed by the appellant David Meeches. There should be no order for costs in appeal docket A-102-13.

***Pierre Blais C.J.*:**

I agree.

***D.G. Near J.A*:**

I agree.

Appeal allowed in part.

2000 CarswellNat 980
Federal Court of Canada — Appeal Division

Morneault v. Canada (Attorney General)

2000 CarswellNat 3282, 2000 CarswellNat 980, [2000] F.C.J. No. 705, [2001] 1 F.C. 30, 184 F.T.R. 15 (note), 189 D.L.R. (4th) 96, 256 N.R. 85, 32 Admin. L.R. (3d) 292, 97 A.C.W.S. (3d) 588

The Attorney General of Canada, Appellant and Lieutenant-Colonel Paul R. Morneault, Respondent

Stone, Strayer, Robertson JJ.A.

Heard: March 21, 2000
Judgment: May 24, 2000 *
Docket: A-346-98

Proceedings: reversing in part (1998), 150 F.T.R. 28, 10 Admin. L.R. (3d) 251 (Federal Court of Canada — Appeal Division)

Counsel: *Ivan Whitehall, Q.C.*, *Lynn Watt* and *Catarine Moore*, for appellant
Ronald Lunau and *Mary Rose Ebos*, for respondent

Subject: Civil Practice and Procedure; Public

APPEAL from judgment reported at (1998), 160 F.T.R. 28, 10 Admin. L.R. (3d) 251 (Fed. T.D.), granting application for judicial review of findings made in report of Commission of Inquiry dated June 30, 1997, into deployment in 1992 of Canadian Forces to Somalia.

The judgment of the court was delivered by *Stone J.A.*:

1 This is an appeal from an order of the Trial Division of April 27, 1998, granting the respondent's application for judicial review of findings made in the report of a Commission of Inquiry (the "Commission") dated June 30, 1997 (the "Report"), into the deployment in 1992 of Canadian Forces to Somalia. The Inquiry was carried out pursuant to the provisions of the *Inquiries Act*, R.S.C. 1985, c. I-11. The purpose of the application, brought pursuant to s. 18.1 of the *Federal Court Act*, R.S.C. 1985, c. F-7, was to quash various findings made in the Report. By the order in issue, the Motions Judge declared certain of the findings in the Report not to be applicable to the respondent and declared other findings to be invalid.

2 As the background of the dispute is fully set forth in the judgment of the learned Motions Judge,[1] it will not be necessary to cover the same ground in detail. In approaching the issues in this appeal it is well to recall the counsel of Cory J. in *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 (S.C.C.) (hereafter "*Krever*"), with respect to the distinctive nature of a commission of inquiry. At para. 34, Cory J. stated:

> A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event or series of events. The findings of a commissioner relating to that investigation are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are unconnected to normal legal criteria. They are based upon and flow from a procedure which is not bound by the evidentiary or procedural rules of a courtroom. There are no legal consequences attached to the determinations of a commissioner. They are not enforceable and do not bind courts considering the same subject matter.

Background

3 The Commission was appointed by Order in Council dated March 20, 1995, "under Part 1 of the *Inquiries Act*" with the mandate of inquiring into and reporting,

> . . . on the chain of command system, leadership within the chain of command, discipline, operations, actions and decisions of the Canadian Forces and actions and decisions of the Department of National Defence in respect of the Canadian Forces deployment to Somalia.

In carrying out this mandate the Commission was required by the terms of appointment to have particular regard to several enumerated concerns related to the pre-deployment, in-theatre and post-deployment phases of the Somalia deployment. Those respecting the pre-deployment phase were:

> Pre-Deployment (prior to 10 January 1993)
>
> (a) the suitability of the Canadian Airborne Regiment for service in Somalia;
>
> (b) the mission and tasks assigned to the Canadian Airborne Regiment Battle Group (CARBG) and the suitability of its composition and organization for the mission and tasks assigned;
>
> (c) the operational readiness of the CARBG, prior to deployment, for its mission and tasks;

(d) the adequacy of selection and screening of officers and non-commissioned members of the Somalia deployment;

(e) the appropriateness of the training objectives and standards used to prepare for deployment of the Airborne Regiment;

(f) the state of discipline within the Canadian Airborne Regiment prior to the establishment of the CARBG and within the CARBG prior to deployment;

(g) the effectiveness of the decisions and actions taken during the training period prior to deployment by leadership at all levels of the Airborne Regiment to prepare for its mission and tasks in Somalia;

(h) the effectiveness of the decisions and actions taken by leadership at all levels within Land Forces Command to resolve the operational, disciplinary and administrative problems that developed in the Canadian Airborne Regiment and the CARBG in the period leading up to the CARBG deployment to Somalia;

(i) the effectiveness of the decisions and actions taken by Canadian Forces leadership at all levels to ensure that the CARBG was operationally ready, trained, manned and equipped for its mission and tasks in Somalia;

4 In 1992, at the time the Canadian Airborne Regiment (the "regiment") was selected for deployment to Somalia, it was under the command of the respondent, who had been appointed to the position on June 24, 1992. In addition to a headquarters and services unit, the regiment comprised "three company sized units: 1 Commando, 2 Commando and 3 Commando," which were under the command of Majors Pommet, Seward and Magee, respectively. On September 5, 1992, the regiment was given formal notice (a "Warning Order") that it had been assigned to Somalia on a peacekeeping mission (code named "Operation Cordon") under Chapter VI of the *United Nations Charter*. The nature of the mission changed on December 2, 1992, when it became a peace enforcement mission under Chapter VII of the *United Nations Charter*. The respondent had continued to serve as Commanding Officer until October 21, 1992, when he was removed. His hope was that the Inquiry would investigate the circumstances which led to his removal.

5 On September 15, 1995, the respondent applied for full standing as a party before the Commission, and by order of September 20, 1995, his application was granted. On September 22, 1995, he was served in confidence with a notice under s. 13 of the *Inquiries Act*. The notice reads in part:

TAKE NOTICE that pursuant to powers vested in them under section 13 of the *Inquiries Act*, R.S.C. 1985, c. I-11, the Commissioners will hear and consider submissions that you or your counsel may wish to make in relation to charges of misconduct or allegations that

may lead to an adverse finding that could reasonably be expected to bring discredit upon you, or that may be made against you during the pre-deployment phase of the Commission's evidentiary hearings.

At the evidentiary hearings, in relation to the shortcomings or failures in the fulfilment of your military duties, your actions, or the role played by you, Commissioners' counsel may investigate charges of misconduct or allegations that may lead to an adverse finding that could reasonably be expected to bring discredit upon you, as regards:

(a) whether the Canadian Airborne Regiment was suitable for the Somalia mission;

(b) whether the Canadian Airborne Regiment Battle Group (CARBG) was properly constituted in terms of its organization and composition, and operationally ready for deployment in Somalia;

(c) the effectiveness of your decisions within the chain of command with respect to the pre-deployment phase of the Somalia mission, the selection and screening of officers and non-commissioned members and the operational readiness of CARBG, as well as your leadership;

(d) preparing and declaring the Battle Group ready or approving a decision to that effect, especially in light of the composition of CARBG, the state of discipline in CARBG, the lack of previous command experience of many of the officers, the high turnover in officers and non-commissioned members in 2 Commando, the late replacement of the Commanding Officer of CAR, the change in the structure of CAR, the late change in the nature of the mission and the training received; or

(e) addressing the administrative, operational and disciplinary problems encountered in the pre-deployment phase.

6 By this notice the respondent was informed that he was entitled to be heard in relation "to the above-noted charges or allegations" either in person or by counsel or by means of written submissions. By his counsel's letter to the Commission of October 3, 1995, the respondent indicated his wish to be heard in person and by counsel. In the same letter he requested "that you provide us with further information concerning the specific charges of misconduct or allegations that may be made against our client, and which form the basis of the section 13 notice" and, also, that the respondent be provided "with any witness statements in which allegations that may lead to an adverse finding against our client have been made."

7 On October 2, 1995, shortly after the evidentiary hearings into the pre-deployment phase of the Inquiry commenced, the respondent was informed that he would be called as a witness. On October 9, 1995, he was interviewed by Commission counsel for a full day, at which time he suggested

names of a number of possible witnesses and provided documentation from his own personal files. The respondent testified before the Inquiry from January 22, 1996, to January 25, 1996.

8 By letter of January 31, 1997, Commission counsel notified the respondent as follows:

> The Commissioners have instructed me to advise you that, pursuant to the section 13 Notice already delivered to you and based upon the evidence adduced before the Inquiry, the Commissioners will, in their Final Report, consider allegations that you exercised poor and inappropriate leadership in the pre-deployment phase of the Somalia mission by failing:
>
> > (i) in advising Brigadier-General Beno that the Canadian Airborne Regiment would be operationally ready once the unit had completed Exercise Stalwart Providence when you knew, or ought to have known, that the Regiment was experiencing problems with discipline, cohesiveness, training at the regimental level and informal leadership.
> >
> > (ii) to adequately organize, direct and supervise the training preparations of the Canadian Airborne Regiment during the period from receipt of the Warning Order for Operation Cordon until you were relieved of command.
> >
> > (iii) to ensure that all members of the Canadian Airborne Regiment were adequately trained and tested in the Law of War or the Law of Armed Conflict including the four 1949 Geneva Conventions on the protection of victims of armed conflict.
> >
> > (iv) in your duty as a Commanding Officer as defined in Queen's Regulations and Orders, s. 4.20 and in military custom.
>
> This letter is designed to provide greater specification and particularization of the matters previously conveyed to you in your section 13 Notice.
>
> The Commissioners, in writing their Final Report, will limit their comments regarding your possible misconduct to these matters.

9 A letter of reply dated February 3, 1997, from the respondent's counsel reads in part:

> We also request further particulars of some of the allegations against LCol. Morneault that are set out in your notice, in order for our client to effectively respond. The allegations, as stated, are very sweeping. The requested particulars include:
>
> > (a) With respect to para. 2 of the notice, what acts or omissions by LCol. Morneault are alleged to have constituted poor and inappropriate leadership in adequately organizing, directing and supervising the training preparations?
> >
> > (b) With respect to para. 3 of the notice, what acts or omissions of LCol. Morneault are alleged to have shown poor and inappropriate leadership in training and testing

in the Law of War and the Law of Armed Conflict, including the four 1949 Geneva Conventions?

(c) With respect to para. 4 of the notice, in what respect is LCol. Morneault alleged to have failed to perform his duty as defined in QR&O 4.20?

(d) With respect to para. 4 of the notice, what "military customs" are being referred to?

10 Commission counsel responded by letter dated February 11, 1997, addressed to the respondent's counsel. The material portion of that letter reads:

For the four allegations against LCol Morneault for which you request further particulars in your February 3, 1997 letter, the Commissioners will consider in their Final Report:

(a) With respect to para. 2 of the Notice:

He spent insufficient time observing and supervising training and providing direction with respect to training, especially as it related to the tone of the training [see the testimony of BGen Beno, p. 7795 and 8115; Maj Turner, pp. 3547-48, 3446, 3449, 3527, 3674 and 3728; Maj Kyle, pp. 3845, 3808 and 3855-57. LCol Morneault said in his own evidence that he spent 15 to 20 per cent of his time supervising training. [see also his testimony at p. 7321]

He did not set out a statement of concept, objectives, standards and priorities in the training plan. [See the testimony of BGen Beno, p. 7753; Maj Turner, pp. 3724, 3435-38 and 3619-20; Maj Seward, p. 5760 and Maj MacKay, p. 6485]

He did not provide uniform training for the various sub-units. [See the testimony of Maj Turner, pp. 3449 and 3528 and MWO Murphy, p. 6646. In this context, the Commissioners will take into account the performance of the CAR during exercise Stalwart Providence]

Please note: these references are not exhaustive.

(b) With respect to para. 3 of the Notice:

He did not exercise his responsibility as commander of the CAR, to ensure that all of the personnel under his command were familiar with their rights and obligations under the law of armed conflict (LOAC). Reference should be made to his obligations as set out in the four Geneva Conventions of 1949 (articles 47, 48, 127, 144 respectively for Convention I-IV), and the First Additional Protocol of 1977 (article 87).

The Commissioners will examine the question of whether your client ensured that the members of the CAR understood their obligations toward the basic rights of "detainees", whether civilian or captured, sick or wounded combatants.

The Commissioners will also consider if your client directed his staff to include adequate LOAC training in the Op Cordon training plan, provided guidance to his subordinates on the content of the LOAC training, directed the OCs to include refresher training in the LOAC in their sub-unit training and tested or provided for testing of all ranks on this subject.

The Commissioners will consider if your client advised the SSF Commander, BGen Beno, or his staff of the importance of including LOAC in Exercise Stalwart Providence, with a view to ensuring that the soldiers understood the principles of the LOAC.

(c) With respect to para. 4 of the Notice:

The Commissioners will consider whether LCol Morneault retained for himself "important matters requiring the Commander's personal attention and decision," in accordance with s. 4.20 of the QR&O. In particular, the Commissions will consider whether he supervised the training of his commandos, supervised specific training in 2 Commando even though problems had been brought to his attention concerning the status of readiness of the sub-units, redressed problems of command within the CAR, adequately assess the operational readiness of the CAR and properly informed his superiors of the state of readiness, discipline and training of the CAR.

A further question which will be addressed is whether LCol Morneault maintained adequate "general control and supervision of the various duties" that he allocated to others. In particular, did he supervise adequately the training plans and activities of the OCs, review properly the orders and directives that his subordinate commanders were issuing and ensure that his orders and directives were being followed as intended.

(d) With respect to para. 4 of the Notice:

The Commissioners will consider whether LCol Morneault maintained good order and discipline in the unit under his command.

Did he lead by example in the field?

A further reference for you with respect to "military custom" is found in s. 1.13 of Q.R.&O and s. 49 of the *National Defence Act*.

11 Hearings into the pre-deployment phase continued until February 22, 1996. They were followed by hearings into the in-theatre phase, which began on April 1, 1996, and, after a four-month interruption relating to the post-deployment phase, continued until March 1997. In the meantime, the time for completing the Inquiry and for filing a report with the Governor in Council was extended to March 31, 1997, and to June 30, 1997, respectively. A total of 116 witnesses testified before the Inquiry and something in the order of 200,000 documents were filed

in evidence. In April 1997 the respondent filed lengthy written submissions and presented oral submissions before the Inquiry with respect to the alleged misconduct.

The Motion

12 The respondent's motion focussed on general statements made by the Commission in the preface to Vol. 1 of the Report and in the introductory chapter to Vol. 4, as well as on specific findings made in c. 35 of Vol. 4, which is devoted exclusively to the respondent's conduct as Commanding Officer of the regiment. The principal attack on the general statements is that they ought to have been made the subject of a s. 13 notice. While the Motions Judge agreed that this was so, she found that the statements did not apply to the respondent and granted a declaration to that effect.

13 In the preface to Vol. 1 the Commission laments the Government's "decision to impose time constraints" on the Inquiry and, more significantly, that the Commissioners "were too often frustrated by the behaviour of witnesses whose credibility must be questioned." The statement attacked appears in the same section of the Report, at pp. xxxii-xxxiii. It reads:

> We are cognizant of the institutional and peer pressure on witnesses appearing before us. Giving testimony before a public inquiry is a test of personal integrity that demands the moral courage to face reality and tell the truth. It also involves a readiness to be held to account and a willingness to accept the blame for one's own wrongdoing. Many soldiers, non-commissioned officers and officers have shown this kind of integrity. They have demonstrated courage and fidelity to duty, even where doing so required an acknowledgement of personal shortcomings or the expression of unwelcome criticism of the institution. These soldier-witnesses deserve society's respect and gratitude for contributing in this way to improving of an institution they obviously cherish.
>
> With regret, however, we must also record that on many occasions, the testimony of witnesses before us was characterized by inconsistency, improbability, implausibility, evasiveness, selective recollection, half truths, and even plain lies. Indeed, on some issues, we encountered what can only be described as a "wall of silence". When several witnesses behave in this manner, the wall of silence becomes a wall of calculated deception.
>
> The proper functioning of an inquiry depends upon the truthfulness of witnesses under oath. Truthfulness under oath is the foundation of our system of justice. Some witnesses clearly flouted their oath.
>
> Perhaps more troubling is the fact that many of the witnesses who displayed these shortcomings were officers, non-commissioned members (active or retired) or senior civil servants - individuals sworn to respect and promote the values of leadership, courage, integrity, and accountability. For these individuals, undue loyalty to a regiment or to the

> military institution or, even worse, naked self-interest, took precedence over honesty and integrity. By conducting themselves in this manner, these witnesses have also reneged on their duty to assist this Inquiry in its endeavours. In the case of officers, such conduct is a breach of the undertakings set out in their Commissioning Scroll.
>
> . . . . .
>
> Our concern is not with the mere fact of contradictions in testimony. Even where all who testify speak the truth as they know it, contradictions can occur. Contradictions often relate to recollections of conversations that took place between or among people without the presence of other witnesses and without the benefit of notes. At the time, a particular conversation may have seemed unimportant. The passage of time may have driven its details from memory. We are not concerned with differences in recollection that simply reflect the frailty of human memory. We are concerned, however, with something darker than imprecision and contradiction, something closer to a pattern of evasion and deception.

14 The respondent also attacks the general statement at p. 953 in the introductory chapter to Vol. 4 of the Report. It reads:

> A few additional words are called for concerning the portrayal of the actions of individuals that follows. The individuals whose actions are scrutinized are members of the Canadian Forces (CF) who have had careers of high achievement. Their military records, as one would expect of soldiers who have risen so high in the CF pantheon, are without blemish. The Somalia deployment thus represents for them a stain on otherwise distinguished careers. There have been justifications or excuses advanced before us which, if accepted, might modify or attenuate the conclusions that we have reached. These have ranged from "the system performed well; it was only a few bad apples" to "there will always be errors" to "I did not know" or "I was unaware" to "it was not my responsibility" and "I trusted my subordinates". We do not review these claims individually in the pages that follow, but we have carefully considered them.
>
> Also mitigating, to a certain extent, is the fact that these individuals must be viewed as products of a system that placed great store in the "can do" attitude. The reflex to say "yes sir" rather than to question the appropriateness of a command or policy obviously runs against the grain of free and open discussion, but it is ingrained in military discipline and culture. However, leaders properly exercising command responsibility must recognize and assert not only their right but their duty to advise against improper actions, for failing to do so means that professionalism is lost.

15 The respondent also challenges various specific findings in c. 35 of Vol. 4 for lack of procedural fairness and for absence of evidentiary support.

16 It was contended before the Motions Judge that the c. 35 findings in issue were not reviewable under para. 18.1(4)(d) of the *Federal Court Act* because they did not constitute "decisions." The

Motions Judge rejected this argument. She rejected the appellant's further argument that, in any event, there was evidence in the record of the Inquiry to support each of the c. 35 findings. After proceeding to a detailed examination of those findings the Motions Judge concluded, at para. 109 of her reasons:

> It is clear, on the basis of the above, that the Commission's finding of misconduct against the applicant on the ground that he failed to adequately organize, direct, and supervise training preparations from September 5, 1992 to September 21, 1992 is deeply flawed. Many of the primary findings of fact simply do not accord with the evidence. Many conclusions are simply not supported by the evidence. I do not think it is possible to reach any other conclusions than that the decision was patently unreasonable.

Issues

17 Three issues are raised in this appeal. First, whether the Motions Judge erred in determining that the Commission did not give reasonable notice of matters that were eventually cited by the Commission as grounds for findings of misconduct. Second, whether the Judge erred in determining that the findings of misconduct constituted reviewable "decisions" under para. 18.1(4)(d) of the *Federal Court Act*. Third, whether the Judge erred in determining that findings of fact made by the Commission in respect of the respondent's conduct were not supported by the evidence and, therefore, were patently unreasonable.

18 I turn to a discussion of these issues.

Analysis

Reasonable Notice

The General Statements

19 The respondent contends that the general statements in issue include findings that reflect adversely on his own reputation and that he was denied procedural fairness because they were not made the subject of a s. 13 notice. He maintains, as well, that five specific findings made by the Commission in c. 35 were not the subject of such a notice.

20 The requirement for "reasonable notice" of alleged misconduct is laid down in s. 13 of the *Inquiries Act*, which reads:

> 13. No report shall be made against any person until reasonable notice has been given to the person of the charge of misconduct alleged against him and the person has been allowed full opportunity to be heard in person or by counsel.

. . . . .

13. La rédaction d'un rapport défavorable ne saurait intervenir sans qu'auparavant la personne incriminée ait été informée par un préavis suffisant de la faute qui lui est imputée et qu'elle ait eu la possibilité de se faire entendre en personne ou par le ministère d'un avocat.

21 The critical importance for reasonable notice of alleged misconduct is made clear in *Krever*, *supra*, given that a finding may damage the reputation of a witness. As Cory J. put it, at para. 54:

> That same principle of fairness must be extended to the notices pertaining to misconduct required by s. 13 of the *Inquiries Act*. A commission is required to give parties a notice warning of potential findings of misconduct which may be made against them in the final report. As long as the notices are issued in confidence to the party receiving them, they should not be subject to as strict a degree of scrutiny as the formal findings. This is because the purpose of issuing notices is to allow parties to prepare for or respond to any possible findings of misconduct which may be made against them. The more detail included in the notice, the greater the assistance it will be to the party. In addition, the only harm which could be caused by the issuing of detailed notices would be to a party's reputation. But so long as notices are released only to the party against whom the finding may be made, this cannot be an issue. The only way the public could find out about the alleged misconduct is if the party receiving the notice chose to make it public, and thus any harm to reputation would be of its own doing. Therefore, in fairness to witnesses or parties who may be the subject of findings of misconduct, the notices should be as detailed as possible. Even if the content of the notice appears to amount to a finding that would exceed the jurisdiction of the commissioner, that does not mean that the final, publicized findings will do so. It must be assumed, unless the final report demonstrates otherwise, that commissioners will not exceed their jurisdiction.

If a notice of alleged misconduct complies with s. 13 requirements and the inquiry process is otherwise fair, a commission of inquiry is authorized by that section, as Cory J. found in *Krever*, *supra*, at para. 52, to make findings of fact and reach conclusions based upon the facts.

22 The tone of the statement in the preface to Vol. 1 is unquestionably harsh. However, while the respondent complains that the statement applies to him, the language in which it is couched suggests that this is not necessarily so. It refers to "the testimony of witnesses," "several witnesses" and "some witnesses," and states that "many of the witnesses who displayed these shortcomings were officers, non-commissioned officers, and senior civil servants." It is clear, therefore, that the statement is not aimed at *all* senior officers so as to unmistakably include the respondent. The Motions Judge herself concluded with respect to both statements that it was not "seriously contended that the statements of general condemnation" applied to Lieutenant-Colonel Morneault.

23 Even if it could be said that the statement in Vol. 1 applies to the respondent, I am not at all sure that its presence deprived the respondent of procedural fairness. There would appear to be no link between that statement and findings of misconduct in c. 35. What needs to be

addressed is whether the adverse findings of credibility suggested by the statement required a s. 13 notice, assuming for the moment that the statement was intended to apply to the respondent. As was emphasized by Cory J. in *Krever*, *supra*, at para. 52, the "primary role, indeed the *raison d'être*, of an inquiry investigating a matter is to make findings of fact" and that, in doing so, the commission "may have to address and make findings of credibility of witnesses." Indeed, as Cory J. explained in that case, at para. 42, the very wording of s. 13 of the *Inquiries Act* "by necessary inference authorizes a commissioner to make findings of fact and to reach conclusions based upon those facts, even if the findings and conclusions may adversely affect the reputation of individuals or corporations." He also explained, at para. 40, that the authority in s. 13 to make findings of "misconduct" encompasses "not only findings of fact, but also evaluating and interpreting them" and, if necessary, "to weigh the testimony of witnesses . . . and make findings of credibility." It is by adhering to this process that a commissioner is able to determine whether a party's behaviour amounted to "misconduct."

24 The process would not in general appear to require the giving of prior notice that a party's credibility may be made the subject of an adverse finding. Such a finding could be made only after the witness had testified and perhaps not until his or her testimony could be weighed and evaluated in the light of other evidence. A requirement that there be prior notice could well impose on a commission of inquiry an unduly onerous standard of procedural fairness.

25 By contrast with the Vol. 1 statement, the general statement in the introductory chapter to Vol. 4 would appear on its face to apply to *all* of the military officers whose conduct is addressed in that volume including the respondent. Thus, the "portrayal of actions" is of the "individuals that follows," namely, "members of the Canadian Forces . . . whose actions are scrutinized." The statement is objected to on the twin bases that the respondent was not given prior notice and that the evidence does not support the finding that the respondent conducted himself in the manner described in the statement. The Motions Judge concluded that the statement ought not be have been made because no reasonable notice had been given in compliance with s. 13.

26 The appellant contends that the statement is unassailable because it cannot be construed as a finding of misconduct against the respondent. I find this difficult to accept. As a "product of the system" the respondent was one whose reflex was to say "yes sir," who as a "leader exercising command responsibilities" had a "duty to advise against improper actions" and to lose "professionalism" by failing in that duty. There is a direct link between the statement and the findings in c. 35, for, as we have seen, the statement is expressly tied to the "individuals that follow." The appellant conceded before the Motions Judge and in written argument on appeal that the statement did not amount to misconduct and, indeed, the Motions Judge herself found that it did not apply to the respondent. In my view, the Court should, if it can, uphold the declaratory order below in this respect, so as to remove any possible question that this critical statement which, on its face, applies to the respondent was not intended to apply to him.

Availability of Declaratory Relief

27 There was a time when declaratory relief was not available if it would have no legal effect, but this is no longer so. In *Merricks v. Nott-Bower*, [1964] 1 All E.R. 717 (Eng. C.A.), at 721, Lord Denning stated:

> If a real question is involved, which is not merely theoretical, and on which the court's decision gives practical guidance, then the court in its discretion can grant a declaration. A good instance is the recent case on the football transfer system decided by WILBERFORCE, J., *Eastham v. Newcastle United Football Club, Ltd.*, [1963] 3 All E.R. 139. Counsel for the plaintiff said that, in this particular case, the declaration might be of some use in removing a slur which was cast against the plaintiffs by the transfer. He also put us on the wider ground of the public interest that the power to transfer can only be used in the interest of administrative efficiency and not as a form of punishment. He said that it would be valuable for the court so to declare. Again on this point, but without determining the matter, it seems to me that there is an arguable case that a declaration might serve some useful purpose.

Salmon L.J., concurring, added at 774:

> It is said: Even if the plaintiffs' rights under the regulations were infringed, what good could the remedies which are claimed by the plaintiffs do them? Can they benefit by these declarations? If a plaintiff seeks some declaration in which he has a mere academic interest, or one which can fulfil no useful purpose, the court will not grant the relief claimed. In this case, however, again without deciding the point in any way, it seems to me clearly arguable that, if the declarations are made, they might induce those in authority to consider the plaintiffs' promotion, there being some evidence that the alleged transfers by way of punishment have prejudiced, and whilst they remain will destroy, the plaintiffs' chances of promotion.

The principle was applied by Pratte J. (as he then was) in *Landreville v. R.*, [1973] F.C. 1223 (Fed. T.D.), at 1231, and very recently, again in the context of a commission of inquiry, in *Peters v. Davidson*, [1999] 2 N.Z.L.R. 164 (New Zealand C.A.), at 186-187. The Motions Judge granted declaratory relief in respect of this error. I am satisfied that this remedy was available notwithstanding Cory J.'s characterization of a report of a commission of inquiry in *Krever*, *supra*, as having "no legal consequences." Cory J. acknowledged at the same time that it is precisely because the reputation of a witness is at stake that procedural fairness must be accorded for, as he put it at para. 55: "For most, a good reputation is their most highly prized attribute." In my view, the respondent does have an interest in protecting his reputation. It is also to be noted that R. 64 of the *Federal Court Rules, 1998* provides for the granting of declaratory relief, whether or not any consequential relief is or can be claimed.

28 It seems to me that while a declaration would not affect a legal right, it would serve the useful purpose of removing any possible, though perhaps unintended, harm that may have been caused to the respondent's reputation by the statement in the introductory chapter to Vol. 4 of the Report. I would restrict the declaration accordingly.

Specific Findings

29 Five specific findings in c. 35 of the Report are then attacked on the ground that they were not made the subject of prior notice in compliance with s. 13. I shall underline these findings in the following extracts from c. 35: [2]

> 1. [P]ersonal supervision is of utmost importance and must be made one of the highest priorities in the matter of training, if not the overall priority, for it is on the CO that the greatest responsibility for training falls. We find, however, that LCol Morneault failed to meet this important responsibility in two respects. First, *he failed to inculcate in his commandos, through the design of an appropriate training plan and through adequate direct supervision, an attitude suitable to a peacekeeping mission* . . .
>
> 2. LCol Morneault knew his troops were training for a Chapter VI United Nations peacekeeping mission, *and he knew or ought to have known that such missions require a broader knowledge base than normal general purpose combat training permits*. Despite this, he allowed 2 Commando (2 Cdo) to train in a manner far too focused on general purpose combat skills, and with a level of aggression not in keeping with a peacekeeping mission. LCol Morneault himself admitted that 2Cdo spent too much time on general purpose combat training, and did not complete the tasks it was assigned. LCol Morneault also knew of 2 Cdo's aggressiveness . . .
>
> 3. We find that LCol Morneault knew early in the training period that 2 Cdo had problems with leadership and aggressiveness, and that these problems were closely linked. He was the primary officer answerable for training, and bore the responsibility of ensuring that pertinent and adequate training was conducted by the appropriate officers commanding (OCs). *If any of the OCs were found lacking, it was incumbent upon LCol Morneault to make the required changes. But LCol Morneault did not make these changes* . . .
>
> 4. LCol Morneault responded similarly to LCol MacDonald's criticisms of Maj Seward and 2 Cdo. He told him that he did not want his hands tied with regard to Maj Seward and requested that LCol MacDonald remove critical comments about Maj Seward from a letter LCol MacDonald was to send to BGen Beno. LCol MacDonald deleted the reference as LCol Morneault requested, and no subsequent action was taken to correct the serious deficiency in 2Cdo's leadership as noted by LCol MacDonald. *Though LCol Morneault was relieved of command almost immediately after this incident, and cannot*

> *be held responsible for others' inactions, his direction to LCol MacDonald prevented immediate action from being taken against Maj Seward, and for this he is accountable . . .*
>
> 5. On this point, one of the more serious criticisms arising from Stalwart Providence was that the *three commandos operated independently without the cohesion required of a regimental unit. Cohesion develops in accordance with clear training direction issued from the CO, and is ensured only when the CO personally supervises the execution of that direction. LCol Morneault did neither . . .*

30 The Motions Judge found that reasonable notice had not been given of many of the matters cited by the Commission in these c. 35 findings. She noted further, at para. 46 of her reasons, that most of the negative comments concerning the respondent's conduct "originated with one person, a person whose version of events conflicted with his own," and that the comments were repeated by others. "In those circumstances," she added, "the applicant would have great difficulty knowing, in the absence of specific notice, which of the statements concerning his conduct the Commission was treating seriously."

31 I must respectfully disagree that the respondent was not given reasonable notice of these findings. It is to be recalled that Commission counsel's letter of January 31, 1997, as amplified by his letter of February 11, 1997, sets forth a general allegation that the respondent had "exercised poor and inappropriate leadership in the pre-deployment phase of the Somalia mission" by failing, inter alia,

> . . . to adequately organize, direct and supervise the training preparations of the Canadian Airborne Regiment during the period from the receipt of the Warning Order for Operation Cordon until [he was] relieved of command;
>
> . . . in his duty as a Commanding Officer, as defined in Queen's Regulations and Orders, art. 4.20, and in military custom.

32 These allegations were clearly the prime focus of the Commission's findings in c. 35. That training of the regiment while the respondent was its Commanding Officer was the Commission's predominant concern is made plain at the beginning of the chapter, where the Commission stated: [3]

> As the Commanding Officer (CO) of the Canadian Airborne Regiment (CAR) until October 23, 1992, LCol Morneault bore primary responsibility to ensure that training was conducted appropriately during that time with regard to factors relevant to a peacekeeping mission. Training is fundamental to deployment preparations and is the principal activity through which leadership is exercised, attitudes conveyed, and operational readiness ascertained. Those who bear responsibility for training are therefore expected to pay particular attention to its proper supervision, ensuring that the conduct of training is adequate and appropriate, and that its progression follows a carefully articulated plan.

With respect to the applicability of Art. 4.20 and military custom, the Commission wrote: [4]

> Given our findings above concerning the leadership failures of LCol Morneault, and in view of the importance of control and supervision of training for overseas missions, we conclude that LCol Morneault failed as a commander.

33 As early as September 22, 1995, the respondent was put on formal notice that the Commission would investigate the "suitability of the regiment" for service in Somalia, its "readiness," the "screening of officers and non-commissioned officers," the "appropriateness of training objectives and standards" and "effectiveness of decisions and actions taken during the training period prior to deployment," and the "state of discipline." The particularized notice of January 31, 1997, as we have seen, laid primary emphasis on the adequacy of "training preparations" for the Somalia assignment. It was followed by the letter of February 11, 1997, which contained additional details of alleged misconduct as particularized in the January 31, 1997, letter with respect to the adequacy of "training preparations" and performance of the duty imposed by Art. 4.20 of the Q.R.&O. and by military custom.

34 In my view, when the findings in issue are viewed in their immediate contexts and the entire context of c. 35, it cannot be said that the respondent was denied procedural fairness due to lack of reasonable notice. It seems to me that the findings were well within the scope of the notice and of the Commission's mandate. I am satisfied in all of the circumstances that the respondent was given reasonable notice in accordance with s. 13 of the *Inquiries Act*. The respondent was present in person or by counsel throughout all of the evidentiary hearings into the pre-deployment phase, was provided in advance with a summary of what other witnesses intended to say on the stand, had access to all of the documentary evidence, had the right to examine and cross-examine witnesses and to apply to call witnesses of his own, was prepared by Commission counsel prior to testifying, was given the opportunity to, and did, present oral submissions and written submissions before the findings in issue were made. The written submissions, running to some 117 pages, addressed in much detail the issues of training and discipline within the regiment. In my view, all of these factors are relevant in considering whether the respondent was given reasonable notice. They, together with the s. 13 notice, made the respondent aware of the substance of the case against him such that nothing that the Commission found could have caught him by surprise: see *Canadian Fishing Co. v. Smith*, [1962] S.C.R. 294 (S.C.C.), at 316.

Reviewability of Commission's Findings

35 The respondent next attacks specific findings made in c. 35 on the basis that they are not supported by the record. The Motions Judge agreed and declared them invalid. These findings are conveniently summarized by the Motions Judge in her reasons:

> [40] I turn then to a summary of the findings against Lieutenant-Colonel Morneault set out in chapter 35 of the Commission's Report. The relevant portion of the text starts with the statement that Lieutenant-Colonel Morneault failed to meet his important responsibilities with respect to training because he failed to inculcate in his commandos, through the design of an appropriate training plan and through adequate direct supervision, an attitude suitable to a peacekeeping mission. The Report then states that: he spent insufficient time directly supervising the troops; the content of the training plan was too focussed on general purpose combat skills with an inappropriate level of aggression; he ought to have known that a broad knowledge base was required; he had been warned several times about the inappropriate level of aggression in the training but had not corrected this; he had not removed Major Seward as officer commanding of 2 Commando when he had been told that that officer was not fit to command the unit; he had prevented immediate action being taken against the officer.
>
> [41] The second basis for the Commission's finding of misconduct with respect to training set out in the Report is that Lieutenant-Colonel Morneault failed to adequately instruct his OCs on the aim, scope, and objectives of the training they were to conduct, and failed to include a proper statement of these in the training plan he designed; he should have known that a written statement clearly establishing priorities within an overall training concept is an important feature of training direction; the cohesiveness within the Regiment suffered as a result of this absence; he failed to make every effort to draw his unit together as a cohesive whole.

36 Two discrete issues are raised in this connection. The first is whether the Motions Judge erred in concluding that she had jurisdiction to review the findings because they were "decisions" within the meaning of para. 18.1(4)(d) of the *Federal Court Act* and, second, whether she erred in determining that the findings were not supported by the Inquiry's record.

37 The issue of reviewability is certainly novel and not without some difficulty. Although the Motions Judge found that the c. 35 findings were "decisions" that were amenable to review under para. 18.1(4)(d), the whole of the section should be examined not only so as to assist in the interpretation of that paragraph but because it was invoked by the respondent in his application for judicial review.

38 Section 18.1 reads:

> 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.

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

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

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

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

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

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

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

(5) Where the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Trial Division 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 order, make an order validating the decision or order, to have effect from such time and on such terms as it considers appropriate.

. . . . .

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) 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 Section de première instance peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

(3) Sur présentation d'une demande de contrôle judiciaire, la Section de première instance peut :

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

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

(4) Les mesures prévues au paragraphe (3) sont prises par la Section de première instance si elle est convaincue que l'office fédéral, selon le cas :

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

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

c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

f) a agi de toute autre façon contraire à la loi.

(5) La Section de première instance 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.

39 The Motions Judge noted that the procedure adopted by the Commission in investigating the alleged misconduct was similar to that which applies in a court of law, and that this supported an argument that the findings were "decisions" reviewable under para. 18.1(4)(d). Her analysis on the point appears in para. 52 of her reasons, where she stated:

> The procedure followed by the Commission for the purpose of its Volume 4 findings has many similarities to that followed in a court: the proceedings are all held in public; the individuals are answering "charges of misconduct"; the individuals are allowed to call at least some witnesses; they are given an opportunity to make submissions; the outcome is either a dismissal of the "charge" or a finding of misconduct against the individual. This is a quasi-judicial decision-making process. In addition, the Commission's findings of individual misconduct against named individuals can have grave consequences for the reputations and careers of those individuals. To hold that decisions arising out of such a process are not reviewable under paragraph 18.1(4)(d) would be completely contrary to the whole purpose of judicial review and its development as a remedy in the law.

40 The issue, in my view, resolves itself into one of statutory construction. It is not clear, however, that similarities in procedure by itself affords a reliable basis for concluding that the findings in issue are "decisions" reviewable under para. 18.1(4)(d). This Court has been called upon on many occasions to construe the phrase "decision or order . . . required by law to be made on a judicial or *quasi*-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal" in s. 28 of the Act as it read prior to the 1992 amendments. As has been pointed out in D. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing, 1998), at para. 2:4420, note 476, "initially the Court restricted the term to 'final' decisions or orders, and to those that the tribunal was expressly charged by its enabling legislation to make" but, subsequently, the scope of s. 28 was "broadened to include a decision that was fully determinative of the substantive rights of the party, even though it may not be the ultimate decision of the tribunal." Indeed, a recommendation to a Minister of the Crown by an investigative tribunal, which, by reasonable expectation, would lead to a deportation, has been considered reviewable under s. 28: *Moumdjian v. Canada (Security Intelligence Review Committee)*, [1999] 4 F.C. 624 (Fed. C.A.).

41 I must confess to some difficulty in viewing the findings in issue as "decisions" within the meaning of the section. The decision in *Krever*, *supra*, suggests that the contrary may be true, for, as has been seen, the findings of a commissioner under the *Inquiries Act* "are simply findings of fact and statements of opinion" that carry "no legal consequences," are "not enforceable" and "do not bind courts considering the same subject matter." In an earlier case, *Nenn v. R.*, [1981] 1 S.C.R. 631 (S.C.C.), at 636, it was held that the "opinion" required of the Public Service Commission under para. 21(b) of the *Public Service Employment Act*, R.S.C. 1970, c. P-32, was not a "decision or order" that was amenable to judicial review by this Court under s. 28. I must, however, acknowledge the force of the argument the other way, that the review of findings like those in issue is available on the ground afforded by para. 18.1(4)(d) despite their nature as non-binding opinions, because of the serious harm that might be caused to reputation by findings that lack support in the record.

42 If a ground for granting relief is not available under that paragraph, I have the view that the findings are yet reviewable under the section. Judicial review under s. 18.1 is not limited to a "decision or order." This is clear from subs. 18.1(1), which enables the Attorney General of Canada and "anyone directly affected by a matter" to seek judicial review. It is plain from the section as a whole that, while a decision or order is a "matter" that may be reviewed, a "matter" other than a decision or order may also be reviewed. This Court's decision in *Krause v. Canada*, [1999] 2 F.C. 476 (Fed. C.A.), illustrates the point. It was there held that an application for judicial review pursuant to s. 18.1 for a remedy by way of *mandamus*, prohibition and declaration provided for in s. 18 of the Act, were "matters" over which the Court had jurisdiction and that the Court could grant appropriate relief pursuant to paras. 18.1(3)(a) and 18.1(3)(b). See also *Sweet v. R.*, [1999] F.C.J. No. 1539 (Fed. C.A.); *Devinat v. Canada (Immigration & Refugee Board)* (1999), [2000] 2 F.C. 212 (Fed. C.A.). I am satisfied that the respondent is directly affected by the findings and that they are amenable to review under s. 18.1. The findings are exceptionally important to the respondent because of the impact on his reputation. The Court must be in a position to determine whether, as alleged, the findings are not supported by the evidence.

43 To be reviewable under s. 18.1 a "matter" must yet emanate from "a federal board, commission or other tribunal." Such was the case in *Krause*, *supra*. The phrase "a federal board, commission or other tribunal" is defined in s. 2 of the Act to mean "any body or any person having, exercising or purporting to exercise jurisdiction or power conferred by or under an Act of Parliament . . . " In my view, the Commission falls within the scope of that definition, for it derived its mandate from the March 20, 1995, Order in Council, as subsequently amended, and its detailed investigatory powers and power to make findings of misconduct from the *Inquiries Act*: see *Yamani v. Canada (Solicitor General)* (1995), [1996] 1 F.C. 174 (Fed. T.D.).

44 If, as I have stated, the findings in issue are reviewable under s. 18.1, it would follow that relief may be made available under subs. 18.1(3) provided a ground for granting relief is established under subs. 18.1(4). If the findings are not "decisions or orders" no ground for review is available under para. 18.1(4)(d) or para. 18.1(4)(c). The appellant suggested in argument that a finding of the Commission that happened to be contrary to the evidence might be reviewed under para. 18.1(4)(f), "acted in any other way that was contrary to law." I have difficulty in accepting this argument in that the intent of the paragraph appears to have been to afford a ground that was not otherwise specifically mentioned in subs. 18.1(4). I leave the point open as I believe that an unsupported finding in c. 35 made in exercise of the Commission's statutory powers falls within the scope of para. 18.1(4)(b). While natural justice and procedural fairness are usually associated with the quality of a hearing that ends with a decision or order, it has not been so confined by the case law. Thus, natural justice will be denied if the findings of the tribunal, including those of a commission of inquiry, are not supported by some evidence: *Mahon v. Air New Zealand Ltd.*, [1984] 1 A.C. 808 (New Zealand P.C.), per Lord Diplock, at 820:

> The rules of natural justice that are germane to this appeal can, in their Lordships' view, be reduced to those two that were referred to by the Court of Appeal of England in *Reg. v. Deputy Industrial Injuries Commissioner, Ex parte Moore*, [1965] 1 Q.B. 456, 488, 490, which was dealing with the exercise of an investigative jurisdiction, though one of a different kind from that which was being undertaken by the judge inquiring into the Mt. Erebus disaster. The first rule is that the person making a finding in the exercise of such a jurisdiction must base his decision upon evidence that has some probative value in the sense described below. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.

See W. Wade and C. Forsyth, *Administrative Law* (Oxford: Clarendon Press, 1994), at 540. See also *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)*, [1996] 3 F.C. 259 (Fed. T.D.), at para. 144; compare *O.P.S.E.U. v. Ontario* (1984), 45 O.R. (2d) 70 (Ont. Div. Ct.); *Hamilton Street Railway v. A.T.U., Local 1585*, [1996] O.J. No. 3039 (Ont. Div. Ct.).

45 If the findings in issue are supported by some evidence, the respondent could not really complain that the findings may have harmed his reputation. On the other hand, if there was no evidence to support the findings, the potential harm to the respondent's reputation would be significant. The respondent could not go back to the Commission to have the error corrected. Its mandate has been exhausted. Nor could he appeal an erroneous finding to a court of law. Unless the findings in issue are reviewable under s. 18.1, any error that may have been committed could never be corrected and harm that may have been done could never be undone. The respondent would be obliged to live with the harm for the rest of his life regardless of how much damage may have been done to his reputation. This would seem unjust. I concede that these considerations alone are not decisive of the issue of reviewability, but neither are they to be ignored. I am satisfied, however, that a case such as this is indeed reviewable on the ground provided in para. 18.1(4)(b) so as to ensure that natural justice has been done and that no unjustified harm is caused to the respondent's reputation.

The Inquiry's Evidentiary Record

46 I turn, then, to the appellant's argument that the findings in issue are supported by the record. The motions judge examined the findings on a standard of patent unreasonableness, although they are findings of a commission of inquiry. Where that standard applies, the Supreme Court has held that "if there is any evidence capable of supporting the decision even though the reviewing court may not have reached the same decision" the decision is not patently unreasonable: *C.J.A., Local*

579 v. Bradco Construction Ltd., [1993] 2 S.C.R. 316 (S.C.C.), at 340-341. Given that the findings are those of a commission of inquiry, I prefer to review them on a standard of whether they are supported by some evidence in the record of the inquiry. In *Mahon*, *supra*, at 814, Lord Diplock remarked on differences between an investigative inquiry and ordinary civil litigation and went on, at 820, to lay down the two rules of natural justice in the passage quoted above. He then added, at 821:

> Technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice. What is required by the first rule is that the decision to make the finding must be based on *some* material that tends logically to show the existence of facts consistent with the finding and that the reasoning of the finding, if it be disclosed, is not largely self-contradictory.

47 I am satisfied from my own examination of the Inquiry's record that it contains some evidence to support each of the findings which the Motions Judge found to be unsupported. I say this even if the evidence may not appear to be wholly consistent for, in the final analysis, it was for the Commission to weigh and assess the evidence of the various witnesses in coming to its findings of fact. It scarcely requires mention that such is not an easy task in the best of circumstances, and certainly not here where the sense of frustration with some of the testimony is made readily apparent in the Report. In my view, therefore, it is surely not the proper function of a reviewing Court to assume the role of the Commissioners by reweighing and reassessing the evidence that is here in dispute.

48 As to the first of these findings, the respondent testified that "of the time available to me, I think it is 15 per cent of my time, 15 to 20 per cent of my time supervising training."[5] This evidence and other evidence on the point are discussed in the respondent's written submissions, at paras. 165-173.[6] The finding that the time spent was "insufficient" would appear to represent the conclusion or opinion the Commission arrived at on the basis of the facts found.[7] Then a finding is made that the respondent knew or ought to have known that a peacekeeping mission "requires a broader knowledge base than normal general purpose combat training permits." There is evidence to the effect that a peacekeeping mission involves a "completely different mind set"[8] and that too little "mission-specific training" had been given to the soldiers during the pre-deployment phase.[9] The finding that the respondent allowed 2 Commando "to train in a manner far too focussed on general purpose combat skills, and with the level of aggression not in keeping with a peacekeeping mission" would, again, appear to be supported by the record. There was some evidence of general purpose combat training including use of lethal force in 2 Commando that was not compatible with a peacekeeping mission.[10] The finding that the respondent "failed to take Captain Kyle's criticism of 2 Commando training seriously" appears to have some basis in the evidence.[11] So too the finding that a direction given by the respondent to Lieutenant-

Colonel Macdonald "prevented immediate action being taken against Major Seward, the officer commanding 2 Commando" and for which the respondent was accountable.[12] Similarly, the finding that the respondent "failed to adequately instruct his OCs on the aim, scope and objective of the training that they were to conduct, and failed to include a proper statement of these in the training plan he designed," has support in the evidence.[13] Finally, the findings that the 3 Commando units "operated independently without the cohesion required of a Regimental unit" and that the respondent "failed to make every effort to draw his unit together as a cohesive whole," has support in the evidence.[14]

Disposition

49 I would allow the appeal in part, set aside the order of the Trial Division and substitute a declaration that the general statement quoted above and appearing at pp. xxxii-xxxiii of Vol. 1 and the general statement quoted above and appearing at p. 953 of Vol. 4 of the Report do not apply to the respondent. In all other respects I would dismiss the application for judicial review. As the appellant has enjoyed a large measure of success on this appeal, she should have two-thirds of her party and party costs of the appeal.

Appeal allowed in part.

Footnotes

* On October 25, 2000, the court released a corrigendum, and the changes have been incorporated herein.

1 *Morneault v. Canada (Attorney General)* (1999), 150 F.T.R. 28 (Fed. T.D.)

2 Commission Report, Vol. 4, at 1030-1031

3 *Ibid.*, at 1029

4 *Ibid.*, at 1032

5 *Inquiry Transcript*, Appeal Book, Vol. IV, at 765

6 *Ibid.*, Appeal Book, Vol. I, at 190-191

7 *Ibid.*, Appeal Book, Vol. IV, at 764

8 *Ibid.*, Appeal Book, Vol. IV, at 918

9 *Ibid.*, Appeal Book, Vol. V, at 953-954, 1112

10 *Ibid.*, at 1166-1167, Vol. VI, at 1176

11 *Ibid.*, Vol. V, at 954-955

12 *Ibid.*, Vol. VI, at 1182-1183

13 *Ibid.*, Vol. V, at 1131, 1151-1161. See also at 1113, 1116, 1128, 1129, 1130

14 *Ibid.*, Vol. VI, at 1185, 1205, 1208, 1212, 1215; Vol. V, at 1086-1087, 1134-1135

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2019 FCA 250
Federal Court of Appeal

Oceanex Inc. v. Canada (Transport)

2019 CarswellNat 5444, 2019 FCA 250, 311 A.C.W.S. (3d) 678, 439 D.L.R. (4th) 159, 62 Admin. L.R. (6th) 159

OCEANEX INC. (Appellant) and CANADA (MINISTER OF TRANSPORT) and MARINE ATLANTIC INC. (Respondents) and ATTORNEY GENERAL FOR NEWFOUNDLAND AND LABRADOR (Intervener)

Eleanor R. Dawson, Judith Woods, J.B. Laskin JJ.A.

Heard: May 28-29, 2019
Judgment: October 10, 2019
Docket: A-113-18

Proceedings: affirming *Oceanex Inc. v. Canada (Transport)* (2018), 2018 FC 250, 2018 CarswellNat 753, 36 Admin. L.R. (6th) 181, Cecily Y. Strickland J. (F.C.)

Counsel: Guy J. Pratte, Ashley Thomassen, Peter A. O'Flaherty, for Appellant
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Jeff Galway, Peter Hogg, Todd Stanley, Q.C., for Respondent, Marine Atlantic Inc.

***J.B. Laskin J.A.*:**

I. Introduction

1 The Terms of Union of Newfoundland with Canada require Canada to maintain a freight and passenger ferry service on what is known as the "constitutional route" — the route between North Sydney, Nova Scotia and Port aux Basques, Newfoundland and Labrador: *Newfoundland Act*, 12 & 13 Geo. VI, c. 22 (U.K.), Schedule, Term 32(1). Since 1987, the respondent Marine Atlantic Inc., a federal Crown corporation, has been Canada's "principal instrument" for carrying out this constitutional obligation. Canada pays it substantial subsidies for doing so. Marine Atlantic also provides service between North Sydney and Argentia, Newfoundland and Labrador.

2 The appellant Oceanex Inc., a privately-owned corporation, is a competitor of Marine Atlantic. It provides, among other things, freight service between Halifax and St. John's, and Montreal and St. John's. It has repeatedly complained to the federal government about the low rates charged by,

and the level of federal subsidies paid to, Marine Atlantic, which it maintains distort the market and cause it harm. It has also complained of the failure, in setting Marine Atlantic's rates, to take into account the National Transportation Policy set out in section 5 of the *Canada Transportation Act*, S.C. 1996, c. 10. The NTP states in part that the objectives that it declares — which include "a competitive, economic and efficient national transportation system" — are "most likely to be achieved when [...] competition and market forces, both within and among the various modes of transportation, are the prime agents in providing viable and effective transportation services [...]."

3 Not satisfied with the response to its complaints, Oceanex brought an application for judicial review in the Federal Court challenging the approval of Marine Atlantic's 2016/17 commercial freight rates. Though its notice of application referred to Marine Atlantic's commercial freight rates without qualification, the focus of the application was the rates charged on the constitutional route. In its amended notice of application, Oceanex described the decision that it sought to have reviewed as the decision of the federal Minister of Transport to approve the rates, or alternatively, the Minister's failure to approve them, the Minister's decision to pre-authorize rate increases up to 5%, the Minister's decision to allow Marine Atlantic to approve the rates, or Marine Atlantic's decision to approve them. The core ground for the application was that, regardless of how and by whom the rate decision was made, the decision-maker had erred in law by failing to consider the NTP.

4 The amended notice of application also asserted that the Terms of Union create no constitutional obligation to approve rates on the constitutional route that are inconsistent with the NTP. This constitutional issue, and the potential for the Court's decision to affect the subsidies paid to Marine Atlantic for service on the constitutional route, attracted the intervention of the Attorney General for Newfoundland and Labrador. He expressed the concern that any decision that reduces or eliminates Marine Atlantic's federal subsidy would detrimentally affect the economy and well-being of the citizens of the province.

5 The Federal Court dismissed the application: *Oceanex Inc. v. Canada (Transport)*, 2018 FC 250 (F.C.) (Strickland J.), (2018), 36 Admin. L.R. (6th) 181 (F.C.). In lengthy reasons, the Federal Court carefully reviewed the competing submissions and the corresponding portions of the record. It first considered who, as between the Minister and Marine Atlantic, made the decision to implement the 2016/17 rates, and concluded that it was Marine Atlantic. It determined, however, that in making this decision, Marine Atlantic was not a "federal board, commission or other tribunal" within the meaning of subsection 2(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, and that, as a result, subsection 18(1) of the *Federal Courts Act* did not give the Federal Court jurisdiction to review the decision. This was so even though the rate decision had a public aspect and was not either purely of a private and commercial nature or incidental to the exercise of Marine Atlantic's general powers of corporate management.

6 Though it recognized that it was unnecessary to do so, the Federal Court proceeded, in the event its decision on jurisdiction was in error, to consider a number of the other issues raised by the parties. It found that Oceanex did not have direct standing to bring the application, because it was not directly affected by the rate decision, but exercised the discretion to grant Oceanex public interest standing. It held that the NTP was not a required consideration in setting the 2016/17 rates, so that the failure to consider the NTP when setting the rates was not a reviewable error. And it held that if (contrary to its conclusion) the NTP was a required consideration in setting the 2016/17 rates, the NTP could not limit the level of public costs assumed by Canada in meeting its constitutional obligation under the Terms of Union. It declined in light of its other conclusions to consider whether the decision on the 2016/17 rates was unreasonable on the basis that it was made without taking the NTP into consideration.

7 Oceanex now appeals to this Court. It makes two main submissions. The first is that the Federal Court erred in failing to find that the Minister became "accountable" for the decision on the 2016/17 rates when he recommended Marine Atlantic's corporate plan for approval of the Governor in Council under the *Financial Administration Act*, R.S.C. 1985, c. F-11. Once that submission is accepted, it submits, it follows that the Federal Court had jurisdiction, because in recommending the corporate plan under the *FAA* the Minister was a "federal board, commission or other tribunal" subject to judicial review.

8 The second main submission is that the Federal Court erred in concluding that the Minister was not required in making his recommendation to consider the NTP in relation to the 2016/17 rates. Once that submission is accepted, Oceanex argues, this Court should set aside the dismissal of its application, grant a declaration that the Minister erred in law in failing to consider the NTP, and make an order requiring the Minister to have regard to the NTP going forward. Oceanex argues in the alternative that if it was Marine Atlantic that made the rate decision, then it too was required to consider the NTP, and the Federal Court erred in concluding that Marine Atlantic was not subject to the judicial review jurisdiction of the Federal Court and in failing to grant relief. Oceanex also submits that the Federal Court erred in finding that the Terms of Union and the NTP are incompatible, and erred in denying it direct standing.

9 For the reasons that follow, I would dismiss the appeal. As will become apparent, these reasons differ in a number of respects from the reasons of the Federal Court. That is in no small part because, as I perceive the way in which the arguments unfolded, Oceanex argues the case in this Court on the first main issue on a basis substantially different from that on which it was argued in the Federal Court. I also hold a different view from that of the Federal Court on the question of jurisdiction.

10 In brief, I conclude that the Federal Court made no reviewable error in determining that Marine Atlantic made the rate decision, but that the Federal Court erred in concluding that the

decision was not subject to judicial review. However, that error does not lead to the granting of the appeal, because the Federal Court correctly determined that there was no legal requirement in setting the rates to consider the NTP. I would not give effect to Oceanex's submission that the Minister became "accountable" for the rates when he recommended Marine Atlantic's corporate plan for approval by the Governor in Council. That was not the decision challenged by Oceanex when it brought its application for judicial review. I would decline to decide the question of the potential incompatibility of the NTP with the Terms of Union.

II. Standing

11 Before turning to the principal issues, I will deal briefly with the issue of standing. In my view, it is unnecessary to deal at any length with Oceanex's submission that it should have had direct standing, or the respondents' submissions that Oceanex should not have been granted public interest standing. Public interest standing is a matter of discretion, to be exercised in a purposive, flexible, and generous manner: *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45 (S.C.C.) at para. 53, [2012] 2 S.C.R. 524 (S.C.C.). A discretionary decision of the Federal Court is reviewable, absent an error of law, only on the stringent standard of palpable and overriding error: *Grand Council of the Crees (Istchee) v. McLean*, 2019 FCA 185 (F.C.A.)at para. 3, (2019), 306 A.C.W.S. (3d) 451 (F.C.A.). In deciding to grant Oceanex public interest standing, the Federal Court considered the relevant factors and gave particular emphasis to the concern that rate decisions raising serious justiciable issues might otherwise be immune from review. I see no basis to interfere with its exercise of discretion.

12 Unless expressly limited, standing is standing, regardless of the basis on which it is acquired. Once Oceanex was granted public interest standing, its position was the same for all practical purposes as if it had direct standing. There is therefore no need to consider the standing issue further.

III. The remaining issues

13 The issues that remain, then, are whether the Federal Court erred in

- failing to find that the Minister set, or was "accountable" for, the 2016/17 rates;
- determining that it had no jurisdiction to review the rate decision;
- concluding that it was not necessary to consider the NTP in setting the rates; and
- concluding that if the NTP had to be considered in setting the rates, the NTP could not constrain the level of costs assumed by Canada in meeting its constitutional obligation to provide ferry service on the constitutional route.

14 To the extent that standard of review applicable to these issues requires consideration, I will deal with it in addressing the substantive issues.

IV. Did the Federal Court err in in failing to find that the Minister set, or was "accountable" for, the 2016/17 rates?

15 The focus of Oceanex's first main submission appears, especially in light of its oral argument before this Court, to have shifted significantly from what it was in the Federal Court. There Oceanex argued that the Minister made the decision, not Marine Atlantic. It advanced two principal reasons for this submission: first, that the Minister controlled the terms and conditions of the operation and management of the ferry service on the constitutional route, and second, that the Minister and his department, Transport Canada, were heavily involved in the preparation of Marine Atlantic's 2016/17-2020/21 corporate plan (Federal Court reasons at paras. 57 to 61). Marine Atlantic is a "parent Crown corporation" within the meaning of the *FAA* — a corporation that is wholly owned directly by the Crown. By section 122 of the *FAA*, it is therefore required to submit annually to the Minister a corporate plan for the approval of the Governor in Council on the Minister's recommendation. It is also required to carry on business in a manner consistent with its last approved corporate plan. Marine Atlantic's corporate plan for 2016/17-2020/21 included the 2016/17 rates.

16 The Federal Court rejected Oceanex's submission. After reviewing the history of rate-setting on the constitutional route since 1949 and summarizing the evidence and the parties' positions, it concluded (at para. 186) that it was Marine Atlantic, and not the Minister, that made the decision on the 2016/17 rates. It determined that there was no legislative obligation on the Minister to set specific rate levels, and that nothing in the relationship between the Minister and Marine Atlantic established that Canada controlled Marine Atlantic, to the extent that the Minister effectively made the decision on the 2016/17 rates. It found that, while an agreement between the Minister and Marine Atlantic, known as the "Bilateral Agreement", had given the Minister a contractual right to approve the rates, the parties to that agreement had made and acted on an informal amendment to the agreement that authorized Marine Atlantic to set the rates by up to a 5% increase without ministerial approval. Acting in accordance with this amendment, the board of Marine Atlantic made the decision on its own to increase the 2016/17 rates by 2.6%.

17 In oral argument in this Court, Oceanex submitted that its case did not depend on whether or not the Minister made the rate decision, and acknowledged that it was Marine Atlantic that made the specific decision to increase the rates by 2.6%. However, it argued that the Minister was "accountable" for the rate decision, because he has an implied supervisory power under the *FAA* to question Marine Atlantic's rate assumptions, and because he recommended to the Governor in Council for approval under the *FAA* a corporate plan for Marine Atlantic that included the rates. It

submitted that this recommendation was subject to judicial review if the Minister allowed Marine Atlantic to set rates that were inconsistent with the NTP.

18 Given the course of the argument, and Oceanex's acknowledgment, it may not be strictly necessary for this Court to review the Federal Court's finding that it was Marine Atlantic that made the rate decision. I would in any event not disturb this finding. It was a heavily factually suffused determination of a question of mixed fact and law. Under *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), it is reviewable, absent an extricable error of law, only for palpable and overriding error. While ordinarily, according to *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 (S.C.C.) at paras. 45-47, [2013] 2 S.C.R. 559 (S.C.C.), this Court's task in an appeal from the judgment of the Federal Court in an application for judicial review is to determine whether the Federal Court selected the correct standard of review and applied it correctly, the *Housen* and not the *Agraira* standard applies where, as on this issue, the Federal Court made findings of fact or mixed fact and law based on the consideration of evidence at first instance, rather than on a review of the administrative decision: *Apotex Inc. v. Canada (Health)*, 2018 FCA 147 (F.C.A.) at paras. 56-58, (2018), 157 C.P.R. (4th) 289 (F.C.A.).

19 As the reasons of the Federal Court make clear, there was ample evidence to support the conclusion that it was Marine Atlantic that made the rate decision. This included evidence that the rates were set by the board of Marine Atlantic and that they came into effect before the corporate plan approval process was completed. I see no palpable and overriding error on the part of the Federal Court in coming to this conclusion. Nor do I see any extricable error of law.

20 This conclusion leaves the question whether, as Oceanex now submits, the Federal Court erred in failing to find that the Minister was "accountable" for the rate decision, having recommended Marine Atlantic's corporate plan, which set out the rates, for approval by the Governor in Council in accordance with the *FAA*. In my view, the short answer to this question is that even if the Minister's recommendation could render the Minister legally accountable for Marine Atlantic's rates, Oceanex's application did not challenge that recommendation. The Federal Court cannot be faulted for failing to accede to a challenge that was not made.

21 There was no reference in Oceanex's original or amended notice of application to the Minister's recommendation of the corporate plan. Rather, as noted above, the amended notice of application challenged the Minister's decision to approve the rates, or alternatively his failure to approve them, his decision to pre-authorize rate increases up to 5%, his decision to allow Marine Atlantic to approve the rates, or Marine Atlantic's decision to approve them. The only *FAA*-related grounds put forward were that the Minister, or alternatively Marine Atlantic, failed to consider or violated the *FAA*.

22 Similarly, the only reference to the *FAA* in the notice of appeal is in the list of legislation relied on. The errors Oceanex alleges include nothing that relates to the Minister's recommendation of the corporate plan.

23 In Oceanex's memorandum of fact and law filed with this Court, there is one reference to accountability (in para. 5(a)), but it asserts error by the Federal Court in failing to consider whether, having delegated to Marine Atlantic his rate-setting power, the Minister remained legally accountable for the exercise of a power he allowed to be exercised on his behalf. This is an argument different from the argument now put to the Court, which depends on the *FAA*. The *FAA* is mentioned in two paragraphs of the memorandum (paras. 29 and 30), but not in relation to the argument of accountability based on delegation. The first of the two sets out the requirement under the *FAA* that a parent Crown corporation submit an annual corporate plan for approval by the Governor in Council (and operating and capital budgets for approval of the Treasury Board), and states that Marine Atlantic and the Minister "work very closely together to ensure that [Marine Atlantic] has a corporate plan in place which reflects the direction it receives from the government and how [Marine Atlantic] will deliver on its mandate." There is no reference to any error on the part of the Federal Court or any legal "accountability" arising from the plan process. The second of the two merely points to the *FAA* as the authority for the contract between Canada and Marine Atlantic establishing the terms on which ferry services were to be provided.

24 In these circumstances, it would in my view be inappropriate for this Court to address, let alone give effect to, Oceanex's argument that the Federal Court erred in failing to find that in approving Marine Atlantic's corporate plan, the Minister became "accountable" for the 2016/17 rates. I will therefore proceed to consider the further issues solely on the basis of the finding of the Federal Court that it was Marine Atlantic that made the 2016/17 rate decision.

V. Did the Federal Court err in determining that it had no jurisdiction to review the rate decision?

25 Whether the Federal Court had jurisdiction to judicially review the rate decision is a question of law, to which the standard of correctness applies on appeal: *Canada (Conseil de la magistrature) c. Girouard*, 2019 FCA 148 (F.C.A.) at para. 30, (2019), 52 Admin. L.R. (6th) 24 (F.C.A.).

A. The Federal Court's judicial review jurisdiction

26 By subsection 18(1) of the *Federal Courts Act*, the Federal Court has jurisdiction in applications for judicial review of decisions of a "federal board, commission or other tribunal" (except those tribunals in respect of which this Court has jurisdiction under section 28 of the Act): see *Girouard* at para. 31.

27 The term "federal board, commission or other tribunal" is defined in subsection 2(1) of the Act. Subject to certain exceptions not relevant in this context, the definition includes a body that has, exercises, or purports to exercise jurisdiction or powers that are conferred by or under either an Act of Parliament or an order made pursuant to the Crown prerogative:

> **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, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*.
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> **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, à l'exclusion de la Cour canadienne de l'impôt et ses juges, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la *Loi constitutionnelle de 1867*.

28 Despite the reference in the definition to "an order made pursuant to a prerogative of the Crown," properly read the definition extends to exercises of jurisdiction or power "rooted solely in the federal Crown prerogative": *Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*, 2015 FCA 4 (F.C.A.) at para. 58, (2015), 379 D.L.R. (4th) 737 (F.C.A.).

29 This Court set out in *Anisman v. Canada (Border Services Agency)*, 2010 FCA 52 (F.C.A.) at paras. 29-30, (2010), 400 N.R. 137 (F.C.A.), a two-step inquiry for determining whether an entity is a "federal board, commission or other tribunal": the court must first identify the jurisdiction or power at issue, and then identify the source or the origin of that jurisdiction or power. The Court in *Anisman* cited with approval a passage in D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada*, Vol. 1, looseleaf (Toronto: Canvasback Publishing, 1998) at para. 2:4310, in which the authors state that it is "the source of a tribunal's authority, and not the nature of either the power exercised or the body exercising it, [that] is the primary determinant of whether it falls within the [subsection 2(1)] definition." This Court reiterated the *Anisman* test in *Girouard* (at paras. 34, 37).

30 The Supreme Court recently revisited the law governing the availability of judicial review in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750 (S.C.C.), a case decided after the Federal Court's decision here, and one not involving the *Federal Courts Act*. In doing so it emphasized (at para. 14) that judicial review is available only where two conditions are met — "where there is an exercise of state authority *and* where that exercise is of a sufficiently public character" (emphasis added). It agreed with the

observation by my colleague Justice Stratas in *Air Canada v. Toronto Port Authority*, 2011 FCA 347 (F.C.A.) at para. 52, (2011), [2013] 3 F.C.R. 605 (F.C.A.), that bodies that are public may nonetheless make decisions that are private in nature — the Court referred as examples to renting premises and hiring staff — and that these private decisions are not subject to judicial review.

31 The Supreme Court went on to state (at para. 20) that "a decision will be considered to be public where it involves questions about the rule of law and the limits of an administrative decision maker's exercise of power," and added that "[s]imply because a decision impacts a broad segment of the public does not mean that it is public in the administrative law sense of the term. Again, judicial review is about the legality of state decision making." This Court has held, in effect, that the same prerequisite applies in determining reviewability under the *Federal Courts Act* — that "it is necessary to consider whether the powers exercised by the body in a particular instance are public in nature or of a private character": *Zaidi v. Immigration Consultants of Canada Regulatory Council*, 2018 FCA 116 (F.C.A.) at paras. 6, 8-9, (2018), 293 A.C.W.S. (3d) 370 (F.C.A.), citing *Air Canada* and referring to the factors that may assist in making this determination that it sets out.

B. The Federal Court's decision on jurisdiction

32 After quoting from *Anisman*, the Federal Court began (at para. 201) its consideration of whether it had jurisdiction to review Marine Atlantic's determination of the 2016/17 rates by addressing the source of Marine Atlantic's power to make this determination. It first considered whether the power was conferred, in the language of the definition of "federal board, commission or other tribunal," "by or under an Act of Parliament."

33 As the Court had discussed earlier in its reasons (at para. 5), Marine Atlantic is a corporation incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, and a parent Crown corporation as defined in subsection 83(1) of the *FAA*. Subsection 15(1) of the *CBCA* gives Marine Atlantic, like other *CBCA* corporations, the capacity and, subject to the Act, the rights, powers, and privileges of a natural person. Subsection 102(1) of the *CBCA* gives the directors, subject to any unanimous shareholder agreement, the authority to manage, or supervise the management of, its business and affairs.

34 Section 109 of the *FAA*, similarly, gives the board of directors of a Crown corporation responsibility for the management of the businesses, activities, and other affairs of the corporation, subject to Part X of the *FAA*. The potential constraints to which the board of a parent Crown corporation are subject under Part X include the power of the Governor in Council under section 89, on the recommendation of the Minister, to give a directive to the corporation, and the obligation of the directors under section 89.1 to see that the directive is implemented. In addition, by subsection 122(5), no parent Crown corporation may carry on any business or activity in a manner that is not consistent with its last approved corporate plan.

35 The Federal Court first determined (at para. 201) that Marine Atlantic's power to set its rates was not conferred by "any federal legislative authority for rate-setting," but rather that its board acted "pursuant to the general corporate authority afforded by the CBCA and/or the FAA to conduct the business of the corporation," including the power to enter into and amend the Bilateral Agreement. However, it expressed the view (at paras. 202 and 203) that the *CBCA* was not an "Act of Parliament" within the meaning of the term in the definition of "federal, board commission or other tribunal," because this would mean that decisions of "all of the thousands of CBCA incorporated companies" would be subject to judicial review if the decisions were deemed to be of a public character. It also rejected Oceanex's submission that the *FAA* was a source of Marine Atlantic's rate-setting power, in part on the basis that the *FAA* "applies to all Crown corporations" and "does not address [Marine Atlantic] specifically."

36 The Federal Court then proceeded to determine (at para. 219) that Marine Atlantic's power to set rates did not derive from the Crown prerogative, but rather arose from the terms and conditions of the Bilateral Agreement with the Minister and was therefore "contractual." It further found (at para. 220) that even if a rate-setting power was conferred "indirectly" on the Minister through the order-in-council that approved his entering into the Bilateral Agreement, that agreement was subsequently amended by its parties without, and without the necessity for, an order-in-council, so that the prerogative was not engaged. The Court therefore concluded (at para. 224) that Marine Atlantic was not a "federal board, commission or other tribunal" when it made the rate decision. It followed that the Court had no jurisdiction to review the decision.

37 However, the Court went on to consider (at paras. 225 and following), in the event that its conclusions on jurisdiction were wrong, whether Marine Atlantic's rate-setting was of a "public character." Before making its assessment, the Federal Court set out (at para. 227) the non-exhaustive list of factors set out in *Air Canada* (at para. 60, citations omitted), noting that no one factor is determinative:

> • *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?
>
> • *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. This is all the more the case if that public source of law supplies the criteria upon which the decision is made. 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.

• *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. Mere mention in a statute, without more, may not be enough.

• 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. A requirement that policies, by-laws or other matters be approved or reviewed by government may be relevant.

• *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.

• *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.

• *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. 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.

38 The Court concluded (at para. 234) that Marine Atlantic provides the services on the constitutional route because of "Canada's constitutional obligation to do so," and that, based on the evidence, "Canada views its constitutional obligation as not simply providing a ferry service [...] but to provide a service that, by its rates, is accessible to its public users." The Court found that, in this sense, Marine Atlantic's rate decision had "a public element." In light of this finding, it concluded (at para. 235) that the decision had "a public aspect and was not purely of a private or commercial nature [or] incidental to the exercise of [Marine Atlantic's] general powers of management [...]." However, this conclusion did not lead to reviewability because, as it had already determined, the decision was not grounded in either statute or the prerogative.

C. Analysis

39 In my view, the Federal Court erred in concluding that it did not have jurisdiction to review the rate decision that it found was made by Marine Atlantic. In making the rate decision,

828 Marine Atlantic was exercising its powers of a natural person conferred by an Act of Parliament — the *CBCA* — and the Federal Court was wrong to read that statute out of the definition of "federal board, commission or other tribunal." In view of its role as a Crown corporation fulfilling a constitutional obligation, Marine Atlantic is a public body, and its rate decision was of a public not a private character. The central issue raised by the application for judicial review was one of the legality of state decision-making concerning the rates on the constitutional route.

(1) Source of Marine Atlantic's power to set the rates

40 I agree with the Federal Court to the extent that it concluded that the source of Marine Atlantic's power to set the rates was its rights, powers, and privileges of a natural person conferred by subsection 15(1) of the *CBCA*, including its power to contract. A statutory grant of the powers of a natural person includes the right to enter into and perform contracts: *C.U.P.W. v. Canada Post Corp.*, 1996 CanLII 12458at para. 15, (1996), 135 D.L.R. (4th) 80 (Fed. C.A.); *Friedmann Equity Developments Inc. v. Final Note Ltd.*, 2000 SCC 34 (S.C.C.) at para. 34, [2000] 1 S.C.R. 842 (S.C.C.). Here the parties' amendment to the Bilateral Agreement gave Marine Atlantic the authority to set the rates up to an increase of 5%.

41 For clarity, I should say that I would not, as the Federal Court appeared to do, also treat subsection 102(1) of the *CBCA* and section 109 of the *FAA*, referred to above, as sources of Marine Atlantic's rate-setting power. These provisions give the directors management authority within the corporation. They do not specify the powers of the corporation itself.

42 As I have already stated, I also disagree with the Federal Court's conclusion that the *CBCA* is not an "Act of Parliament" within the meaning of the definition of "federal board, commission or other tribunal" in the *Federal Courts Act*. I do so for several reasons.

43 First, the Federal Court's conclusion is inconsistent with the plain meaning of the definition. It refers to powers conferred by or under "an Act of Parliament" / "une loi féderale" without qualification.

44 Second, a limited reading of "Act of Parliament" would not accord with the overall purpose of sections 18 and 18.1 of the *Federal Courts Act* — to transfer from provincial superior courts to the Federal Courts a broad jurisdiction to review federal administrative decisions: see *Hupacasath* at paras. 52-54; *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works & Government Services)*, [1995] 2 F.C. 694 (Fed. C.A.) at 705, (1995), 184 N.R. 260 (Fed. C.A.). The Federal Court itself noted (at para. 199, citing *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62 (S.C.C.) at para. 3, [2010] 3 S.C.R. 585 (S.C.C.)), that "the definition of 'federal board, commission or other tribunal' is sweeping, encompassing decision-makers that 'run the gamut from the Prime Minister and major boards and agencies to the local border guard and customs official and everybody in between.'"

45 These decision makers can certainly include Crown corporations. As one commentator has observed, "important regulatory decisions in a variety of fields are clearly made either directly or indirectly by Crown corporations": Alastair A. Lucas, "Judicial Review of Crown Corporations," (1987), 25 Alta. L. Rev. 363 at 363. While the majority of parent Crown corporations are created by Parliament through legislation that is specific to them, and that sets out their mandate and powers (see, for example, *Canada Post Corporation Act*, R.S.C. 1985, c. C-10, ss. 5, 16), others are incorporated under general company legislation like the *CBCA*, which is then the source of their powers. Marine Atlantic is in the latter category. Others in that category include Canada Development Investment Corporation, The Federal Bridge Corporation, PPP Canada Inc., and VIA Rail Canada Inc.: see Government of Canada, "Overview of federal organizations and interests" (16 August 2016), online: <https://www.canada.ca/en/treasury-board-secretariat/services/reporting-government-spending/inventory-government-organizations/overview-institutional-forms-definitions.html>; Treasury Board of Canada Secretariat, "Annual Report to Parliament: Crown Corporations and Other Corporate Interests of Canada 2010", online: <http://publications.gc.ca/collections/collection_2011/sct-tbs/BT1-15-2010-eng.pdf>.

46 Since there are no common law corporations, all corporations are creatures of statute, and their powers are always entirely statutory: see *Knox v. Conservative Party of Canada*, 2007 ABCA 295 (Alta. C.A.) at para. 25, (2007), 286 D.L.R. (4th) 129 (Alta. C.A.), leave to appeal refused, [2008] 1 S.C.R. ix (note) (S.C.C.). The reviewability of a decision of a public character taken by a parent Crown corporation under a power conferred by statute should not turn on whether the statute is specific or general.

47 Third, the "floodgates" concern that appears to have animated the Federal Court's conclusion on this issue is in my view exaggerated, and does not justify a limited interpretation. Both the case law of this Court and now the Supreme Court's decision in *Highwood* make clear that judicial review is limited to decisions by public bodies that have a "public character." I endorse the observation of the British Columbia Court of Appeal in *Strauss v. North Fraser Pretrial Centre (Deputy Warden of Operations)*, 2019 BCCA 207 (B.C. C.A.) at para. 49, (2019), 435 D.L.R. (4th) 111 (B.C. C.A.) — a case decided after *Highwood* — that "[i]t appears clear, based on Air Canada that the mere existence of a statutory power will not suffice to allow a purely private matter to be judicially reviewed under the provisions of the Federal Courts Act [...]."

48 As to whether the source of Marine Atlantic's power to set the rates was the Crown prerogative, I agree with the Federal Court that the setting of the rates was a matter of contractual responsibility, so that, as already discussed, its source was instead Marine Atlantic's statutory power to contract. In light of the Federal Court's conclusion that it was not the Minister but Marine Atlantic that set the rates, whether the source of the Minister's power was the prerogative would be relevant only if Marine Atlantic exercised its rate-setting power as the delegate of the Minister.

830 I see no basis to interfere with the Federal Court's conclusion (at para. 219) that there was no delegation, but a reassignment of responsibility by contract.

(2) Character of the decision

49 I also agree with the Federal Court that the rate-setting decision had a public character.

50 I should perhaps first observe that despite certain comments by the Supreme Court in *Highwood*, there was in my view nothing problematic in the Federal Court's reference to the factors set out in *Air Canada* in considering this question. In *Highwood*, the Supreme Court commented (at para. 21) that some confusion had arisen from courts' reliance on *Air Canada* to determine the "public" nature of matters, and thus whether they were subject to judicial review. It stated that "what Air Canada actually dealt with was the question of whether certain public entities were acting as a federal board, commission or tribunal such that the judicial review jurisdiction of the Federal Court was engaged."

51 I see this caution concerning the *Air Canada* factors as limited to their use to conclude that a matter is "public" and amenable to judicial review without first being satisfied that the decision-maker was a public body exercising "state authority." In my view the factors remain available and helpful in determining what they were used for in *Air Canada* itself. None of the cases cited by the Supreme Court in expressing its concern were decisions of the Federal Courts. Indeed, the Federal Courts are arguably best equipped to follow the Supreme Court's direction in *Highwood*, because judicial review jurisdiction under the *Federal Courts Act* requires an initial finding that the power exercised is a "state" power — one sourced in statute or Crown prerogative. The *Air Canada* factors can then be used to ensure that its exercise is of a "sufficiently public character," consistent with *Highwood*, or to determine that it is "private" and therefore not reviewable.

52 In my view, it is apparent that Marine Atlantic is a public body for purposes of judicial review. It is, again, a parent Crown corporation, wholly owned directly by the Crown and subject to the requirements of Part X of the *FAA*. The Treasury Board describes Crown corporations as "*government organizations* that operate following a private sector model, but usually have a mixture of commercial and public policy objectives": "Overview of federal organizations and interests" (emphasis added). As another indicator of their public nature, by section 3 and subsection 4(1) of the *Access to Information Act*, R.S.C. 1985, c. A-1, parent Crown corporations are "government institutions" subject to that Act.

53 There can also be no doubt that Marine Atlantic has a "public policy objective." Its corporate plan summary refers to Canada's constitutional obligation to provide ferry service on the constitutional route, and states that Marine Atlantic "exists to fulfill that mandate." The Bilateral Agreement recites that "Her Majesty has for some time used the Corporation as her principal instrument for providing certain federally supported ferry and coastal shipping services."

54 As for the nature of the rate decision itself, I share the Federal Court's view, to which it came (at para. 235) after considering the *Air Canada* factors, that it is of a public character, and cannot properly be said to be private and commercial in nature. To use the terminology employed in *Highwood*, the decision is public in a "public law sense," not merely in a "generic sense." Its public nature is not a function simply of its broad public impact. It arises from Marine Atlantic's role in fulfilling Canada's constitutional obligation, and from the potential effect of the rates on accessibility of the service that Canada is constitutionally required to provide. And Oceanex's challenge to the decision based on the failure to consider the NTP raises an issue of public law, going to the legality of state decision making.

55 The decisions of other Crown corporations have been subjected to judicial review when they were exercising powers of a public character: see, for example, *Montréal (Ville) c. Administration portuaire de Montréal*, 2010 SCC 14, [2010] 1 S.C.R. 427 (S.C.C.); *Rural Dignity of Canada v. Canada Post Corp.* (1991), 40 F.T.R. 255, 78 D.L.R. (4th) 211 (Fed. T.D.), affirmed (1992), 139 N.R. 203, 88 D.L.R. (4th) 191 (Fed. C.A.), leave to appeal refused, [1992] 2 S.C.R. ix (note) (S.C.C.). These cases recognize the suitability of public law remedies — one of the *Air Canada* factors — where a Crown corporation is exercising powers of this nature. In my view the prerequisites for judicial review of the rate decision by Marine Atlantic are equally made out here.

VI. Did the Federal Court err in concluding that it was not necessary to consider the NTP in setting the rates?

56 In light of my conclusion that the Federal Court had jurisdiction to hear Oceanex's application, it is appropriate in my view for this Court to decide the issue of the applicability of the NTP to the rate decision that the Federal Court found was made by Marine Atlantic. While Oceanex's main argument on the application of the NTP assumed that the rate decision was made by the Minister, it argued in the alternative, and also submits on appeal, that if Marine Atlantic made the decision, then it too was legally bound to consider the NTP.

57 The parties are in agreement that the standard of review on this issue is correctness, because it raises a question of statutory interpretation, and thus a question of law. I am content to proceed on that basis.

58 It could be argued that Marine Atlantic implicitly interpreted the *CTA* as not requiring it to consider the NTP, and that this implicit decision attracts the presumption of reasonableness review that applies to a decision maker's interpretation of its home statute: see *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 (S.C.C.) at paras. 2, 22, [2016] 2 S.C.R. 293 (S.C.C.). However, "[t]he presumption of reasonableness is grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing": *Edmonton East* at para. 33. Here there is no ground to conclude that Parliament chose to give this type of responsibility to Marine Atlantic

832 in relation to the *CTA*: Marine Atlantic has no role in relation to the *CTA* that would give the *CTA* status as a "home statute" so as to trigger the presumption. In any event, this appears to be a case in which standard of review makes no practical difference, because "the ordinary tools of statutory interpretation lead to a single reasonable interpretation": see *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67 (S.C.C.) at para. 38, [2013] 3 S.C.R. 895 (S.C.C.); *Huang v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FCA 228 (F.C.A.) at para. 78, (2014), [2015] 4 F.C.R. 437 (F.C.A.).

A. The NTP

59 Section 5 of the *CTA*, in which the NTP is set out, reads in full as follows:

> **National Transportation Policy Declaration**
>
> **5** It is declared that a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards and contributes to a sustainable environment and makes the best use of all modes of transportation at the lowest total cost is essential to serve the needs of its users, advance the well-being of Canadians and enable competitiveness and economic growth in both urban and rural areas throughout Canada. Those objectives are most likely to be achieved when
>
> (a) competition and market forces, both within and among the various modes of transportation, are the prime agents in providing viable and effective transportation services;
>
> (b) regulation and strategic public intervention are used to achieve economic, safety, security, environmental or social outcomes that cannot be achieved satisfactorily by competition and market forces and do not unduly favour, or reduce the inherent advantages of, any particular mode of transportation;
>
> (c) rates and conditions do not constitute an undue obstacle to the movement of traffic within Canada or to the export of goods from Canada;
>
> (d) the transportation system is accessible without undue obstacle to the mobility of persons, including persons with disabilities; and
>
> (e) governments and the private sector work together for an integrated transportation system.
>
> **Politique nationale des transports Déclaration**
>
> **5** Il est déclaré qu'un système de transport national compétitif et rentable qui respecte les plus hautes normes possibles de sûreté et de sécurité, qui favorise un environnement durable et qui utilise tous les modes de transport au mieux et au coût le plus bas possible est essentiel

à la satisfaction des besoins de ses usagers et au bien-être des Canadiens et favorise la compétitivité et la croissance économique dans les régions rurales et urbaines partout au Canada. Ces objectifs sont plus susceptibles d'être atteints si:

a) la concurrence et les forces du marché, au sein des divers modes de transport et entre eux, sont les principaux facteurs en jeu dans la prestation de services de transport viables et efficaces;

b) la réglementation et les mesures publiques stratégiques sont utilisées pour l'obtention de résultats de nature économique, environnementale ou sociale ou de résultats dans le domaine de la sûreté et de la sécurité que la concurrence et les forces du marché ne permettent pas d'atteindre de manière satisfaisante, sans pour autant favoriser indûment un mode de transport donné ou en réduire les avantages inhérents;

c) les prix et modalités ne constituent pas un obstacle abusif au trafic à l'intérieur du Canada ou à l'exportation des marchandises du Canada;

d) le système de transport est accessible sans obstacle abusif à la circulation des personnes, y compris les personnes ayant une déficience;

e) les secteurs public et privé travaillent ensemble pour le maintien d'un système de transport intégré.

60 Section 5 is preceded by two provisions that figured prominently in Oceanex's argument, sections 2 and 3:

2 This Act is binding on Her Majesty in right of Canada or a province.

3 This Act applies in respect of transportation matters under the legislative authority of Parliament.

2 La présente loi lie Sa Majesté du chef du Canada ou d'une province.

3 La présente loi s'applique aux questions de transport relevant de la compétence législative du Parlement.

61 There are two references to the NTP elsewhere in the *CTA*. First, paragraph 50(1)(*a*) authorizes the Governor in Council to make regulations requiring persons involved in transportation who are subject to federal legislative authority to provide information to the Minister of Transport for the purposes of national transportation policy development. This authority has been exercised in the *Transportation Information Regulations*, SOR/96-344, which require marine operators, among others, to provide information. The definition of "marine operator" appears to include Marine Atlantic.

62 The second reference is in section 53. Subsection 53(1) requires the Minister, no later than eight years after the day the subsection came into force, to commission "a comprehensive review of the operation of [the] Act and any other Act of Parliament for which the Minister is responsible that pertains to the economic regulation of a mode of transportation or to transportation activities under the legislative authority of Parliament."

63 Subsection 53(2) states that this review is to assess whether this legislation "provides Canadians with a transportation system that is consistent with the national transportation policy set out in section 5," and that it may recommend amendments to the NTP or the legislation. Counsel advised that the review has been conducted; the provision is therefore spent.

64 The *CTA* contains no provisions regulating rates for marine transportation. Its principal provisions that extend to marine transportation are those set out in Part V, which give the Canadian Transportation Agency certain powers respecting the transportation of persons with disabilities.

65 Two federal statutes apart from the *CTA* refer to the NTP. First, subsection 3(1) of the *Motor Vehicle Transport Act*, R.S.C. 1985, c. 29 (3rd Supp.), states that the objectives of the Act include "[ensuring] that the National Transportation Policy set out in section 5 of the *Canada Transportation Act* is carried out with respect to extra-provincial motor carrier undertakings [...]." Second, subsection 34(2) of the *Pilotage Act*, R.S.C. 1985, c. P-14, permits any interested person with reason to believe that any charge in a proposed tariff of pilotage charges is prejudicial to the public interest, including "the public interest that is consistent with the national transportation policy set out in section 5 of the *Canada Transportation Act*," to file a notice of objection with the Agency. By section 35, the Agency may then investigate, including by holding a hearing, and make recommendations to the Pilotage Authority.

66 There is no reference to the NTP in the *Canada Marine Act*, S.C. 1998, c. 10, which like the *Pilotage Act* applies to marine transportation. It includes, in section 4, its own purpose statement, cast in different terms.

B. The Federal Court's decision on applicability of the NTP

67 The Federal Court described this issue (at para. 301) as the "central issue" in the application. However, it is worth repeating that its decision on the issue was premised on its having erred in concluding that Marine Atlantic was the decision maker and that the Court was without jurisdiction. The majority of the submissions made on this issue appear to have been based on the assumption that it was the Minister who made the decision. The Federal Court's conclusions on this issue reflect the same assumption.

68 In addressing the applicability of the NTP, the Federal Court first considered the *CTA* as a whole, noting (at para. 320) that it does not expressly address marine transportation. It then

turned to three decisions directly bearing on the interpretation of the NTP — *Ferroequus Railway v. Canadian National Railway*, 2003 FCA 454, [2004] 2 F.C.R. 42 (F.C.A.); *Canadian National Railway v. Moffatt*, 2001 FCA 327, [2002] 2 F.C. 249 (Fed. C.A.); and *Jackson v. Canadian National Railway*, 2012 ABQB 652, 73 Alta. L.R. (5th) 219 (Alta. Q.B.), affirmed, 2013 ABCA 440, 91 Alta. L.R. (5th) 401 (Alta. C.A.), leave to appeal refused, [2014] 2 S.C.R. vii (note) (S.C.C.).

69 In *Ferroequus* and *Moffatt*, this Court considered the role of the NTP in the Canadian Transportation Agency's exercise of its powers under the *CTA*. *Ferroequus* involved an application by a railway company to the Agency for a "running rights" order, authorizing it to operate over another railway company's tracks. An order of this kind is available at the discretion of the Agency under section 138 of the *CTA*, having regard to "the public interest." This Court held (at para. 21) that the NTP informed and imposed legal limitations on the Agency's exercise of discretion under section 138. However, this Court also observed (at para. 22) that the policy expresses competing considerations, and so necessarily operates at "some level of generality" in guiding and structuring the Agency's exercises of discretion.

70 *Moffatt* concerned the Agency's jurisdiction to inquire into the application of the Terms of Union to the setting of freight rates. In determining that the Agency did not have this jurisdiction, this Court held (at para. 27) that the NTP is "not a jurisdiction conferring provision," but a declaratory provision setting out certain objectives to be "implemented by the regulatory provisions of the CTA and, in the current largely deregulated environment, by the absence of regulatory provisions." The Supreme Court has held, similarly, that "declarations of policy" do not confer jurisdiction on subordinate bodies, but rather "describe the objectives of Parliament in enacting the legislation": *Reference re Broadcasting Act, S.C. 1991 (Canada)*, 2012 SCC 68 (S.C.C.) at para. 22, [2012] 3 S.C.R. 489 (S.C.C.); see also *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 (S.C.C.) at para. 85, [2018] 1 S.C.R. 635 (S.C.C.) (Côté J., dissenting).

71 In *Jackson*, the Alberta Court of Queen's Bench refused to certify a proposed class action, in part in reliance on this Court's reasoning in *Ferroequus* and *Moffatt*. The plaintiff in *Jackson* alleged that railway freight rates did not reflect decreased operating costs, and therefore contravened the NTP, resulting in unjust enrichment. The Court disagreed, concluding (at paras. 57-63) that the policy is a "purpose statement" that imposes no duty on railways to charge rates reflecting efficiencies they have realized.

72 The Federal Court then considered the guidance in Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014). The author states (at § 14.39-40) that "like definitions and application provisions, purpose statements do not apply directly to facts but rather give direction on how the substantive provisions of the legislation [...] are to be interpreted," and that "statements of purpose and principle do not create legally binding rights or

obligations [but] merely state goals or principles that may be referred to in interpreting the rights and obligations that are created elsewhere in the legislation."

73 Taking account of these authorities, the Federal Court held (at paras. 337-338) that the NTP is a purpose clause that does not itself create any legally binding rights or obligations, but rather aids in the interpretation of the rights and obligations created elsewhere in, and guides exercises of power under, the *CTA*. It reiterated that the *CTA* contains no provisions relating to the regulation or oversight of maritime freight rates and confers no powers on any entities to make maritime freight rate decisions, or address complaints arising from rate decisions. It concluded (at para. 340) that because the decision under review had not been made under the *CTA*, the NTP did not limit the Minister's discretion in making it.

74 The Court went on to state (at paras. 342-347) that sections 2 and 3 of the *CTA* did not change these conclusions. It reasoned that section 2 simply serves to displace the ordinary presumption of Crown immunity. Neither it nor section 3 expands the substantive provisions of the *CTA*.

75 The Federal Court accordingly concluded (at para. 360) that the NTP was not a required consideration in the making of the rate decision.

C. Analysis

76 I substantially agree with the reasoning of the Federal Court on this issue. In my view, it reflects a proper application of the required textual, contextual, and purposive approach to the interpretation of section 5 of the *CTA*: see *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para. 21, (1998), 154 D.L.R. (4th) 193 (S.C.C.). It is also fully consistent with the authorities, including this Court's decision in *Moffatt*. Indeed, *Moffatt* can be read as having decided the issue in a manner that was binding on the Federal Court.

77 In particular, I agree that sections 2 and 3 of the *CTA*, on which Oceanex heavily relies again in this Court, do not advance its position. The Federal Court properly concluded that the role of section 2 is merely to displace the presumption of Crown immunity, rather than to render the NTP a substantive limitation on the exercise of regulatory authority. The form of words employed in section 2 is found in more than 100 other federal statutes. In each instance it appears, as it does in the *CTA*, under the heading "Binding on Her Majesty."

78 As for section 3, it is not meaningless, as Oceanex suggested, if it is not interpreted as requiring the Minister, in making decisions, to consider the NTP. Rather, it plays a role in ensuring that both the limited provisions of the *CTA* that refer to the NTP, and the regulatory provisions that the *CTA* does contain, are given their proper application. The references to the NTP in the *Motor Vehicle Transport Act* and the *Pilotage Act*, and the absence of a reference in the *Canada Marine Act*, are a strong indication that when Parliament has wanted the NTP to apply outside the *CTA* context, it has expressly said so.

79 In support of its position on appeal, Oceanex also refers to the text of the NTP itself. It points out that the text speaks of "strategic public intervention." It argues that this encompasses the expenditure of public funds in the form of subsidies, and is therefore conduct that only the government or the Minister, and not the Agency, can undertake. I would also reject this argument. The issue is not whether the NTP applies to the government, but whether it applies to government action not taken under the *CTA*. Further, as set out in *Moffatt*, the Agency does have certain powers of "public intervention" under the *CTA*, including the power to make orders affecting the rights of railway owners, when it is in the public interest to do so. These powers simply do not extend to marine transportation.

80 For these reasons, I would not interfere with the Federal Court's determination that if the Minister made the rate decision, he was not required to consider the NTP in doing so. If the Minister was not subject to a requirement to consider the NTP, I can see no basis for coming to a different conclusion respecting Marine Atlantic in its rate-setting role.

VII. Did the Federal Court err in concluding that if the NTP had to be considered in setting the rates, the NTP could not constrain the level of costs assumed by Canada in meeting its constitutional obligation to provide ferry service on the constitutional route?

81 This is another issue that the Federal Court did not need to decide; the Court addressed it in case it was found to have erred in determining that there was no requirement to consider the NTP in setting the rates. I have concluded that the Federal Court did not err in this regard. This issue therefore does not arise.

82 It is ordinarily prudent for the Court not to decide hypothetical questions, especially questions that are constitutional in nature. If it should become necessary to decide this issue, it would be preferable to do so not in the abstract, but with the benefit of evidence concerning such matters as how the various factors set out in the NTP (which the parties accepted is "polycentric" in nature) have been balanced, the financial consequences flowing from the balancing process, how those consequences might be reflected in changes to rates and subsidies, and the impact of those changes on users and potential users of the ferry service on the constitutional route, and on the province of Newfoundland and Labrador more generally. In the circumstances here, I would decline to address the issue.

VIII. Proposed disposition

83 I would dismiss the appeal, with costs payable by Oceanex to the respondents. There should be no costs payable to or by the intervener.

***Eleanor R. Dawson J.A.*:**

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I agree.

***Judith Woods J.A.*:**

I agree.

Appeal dismissed.

2020 ABCA 183
Alberta Court of Appeal

Piikani Nation v. McMullen

2020 CarswellAlta 806, 2020 ABCA 183

Piikani Nation, Piikani Nation Chief and Council, Piikani Nation Oldman Hydro Limited Partnership, Chief Reg Crow Shoe, Councilor Adam North Peigan and Councilor Erwin Bastien (Respondents / Plaintiffs) and Dale McMullen (Applicant / Defendant) and Stephanie Ho Lem, Kerry Scott, Stan Knowlton, Edwin Yellow Horn, Jordie Provost and Shelly Small Legs (Not parties to this Application / Defendants) and Corbin Provost, Herman Many Guns, Doane Crow Shoe, Mike Zubach, the Accounting Firm Meyers Norris Penny LLP, Will Willier, Mark Klassen, Gayle Strikes With A Gun, Wesley Provost, Willard Yellow Face, Angela Grier, Andrew Provost Jr., Fabian North Peigan, Clayton Small Legs, Kyle David Grier, Rebecca Weasel Traveller, Maurice Little Wolf, Eloise Provost, Casey Scott, Piikani Resource Development Ltd., Shawna Morning Bull, Sonny Richards and Kirby Smith (Not parties to this Application / Third Parties)

Barbara Lea Veldhuis J.A.

Heard: April 22, 2020
Judgment: May 4, 2020
Docket: Calgary Appeal 2001-0049-AC

Counsel: C.G. Jensen, Q.C., C. Hanert, for Piikani Nation
Dale McMullen, Applicant, for himself
D.V. Tupper, I.J. Breneman, for Canadian Imperial Bank of Commerce, CIBC Trust Corporation, CIBC World Markets Inc.
C.G. Jensen, Q.C., for Jensen Shawa Solomon Duguid Hawkes LLP, Gowlings WLG
D.J. Wachowich, Q.C., for Blake, Cassels & Graydon LLP

Subject: Civil Practice and Procedure; Public

***Barbara Lea Veldhuis J.A.*:**

Overview

1 The applicant, Dale McMullen, has filed six appeals related to case management decisions regarding leave applications.

2 This action has a complex and lengthy history before this Court and the Alberta Court of Queen's Bench. The litigation was commenced in 2010, although it is related to an earlier bankruptcy proceeding and other related-party litigation. There have been numerous reported judgments from this Court that have consumed significant judicial resources: see *Piikani Energy Corporation (Re)*, 2013 ABCA 293; *Piikani Nation v Kostic*, 2015 ABCA 60; *Kostic v Piikani Nation*, 2017 ABCA 53; *Piikani Nation v Kostic*, 2017 ABCA 259; *Kostic v Piikani Nation*, 2017 ABCA 263; *Piikani Nation v Kostic*, 2017 ABCA 350; *Piikani Nation v Kostic*, 2017 ABCA 399; *Ho Lem v Piikani Nation*, 2018 ABCA 171; *Ho Lem v Piikani Nation*, 2018 ABCA 180; *Piikani Nation v Kostic*, 2018 ABCA 219; *Piikani Nation v Kostic*, 2018 ABCA 234; *Piikani Nation v Kostic*, 2018 ABCA 275; *Piikani Nation v Kostic*, 2018 ABCA 320; *Piikani Nation v Kostic*, 2018 ABCA 358; *Kostic v CIBC Trust Corporation*, 2018 ABCA 64; *Kostic v CIBC Trust Corporation*, 2018 ABCA 355; *Kostic v CIBC Trust*, 2019 ABCA 29; *Kostic v CIBC Trust*, 2019 ABCA 173; *McMullen v Norton Rose Fullbright Canada LLP*, 2018 ABCA 299; and *McMullen v Norton Rose Fulbright Canada LLP*, 2019 ABCA 181.

3 The litigation has been case managed for several years. I understand that the parties have been plagued by procedural and other interlocutory disputes for the better part of a decade and that they have not completed a number of basic litigation steps. It is unclear whether there is a formal litigation plan in place. Trial is still a long way off.

4 The history and current circumstances reinforce the need for all levels of court to make decisions and provide direction to the parties that are consistent with the foundational rules of court. Rule 1.2 of the *Alberta Rules of Court*, Alta Reg 124/2010 states:

> Purpose and intention of these rules
>
> 1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.
>
> (2) In particular, these rules are intended to be used
>
> (a) to identify the real issues in dispute,
>
> (b) to facilitate the quickest means of resolving a claim at the least expense,
>
> (c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,

(d) to oblige the parties to communicate honestly, openly and in a timely way, and

(e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

(3) To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,

(a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,

(b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,

(c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and

(d) when using publicly funded Court resources, use them effectively.

(4) The intention of these rules is that the Court, when exercising a discretion to grant a remedy or impose a sanction, will grant or impose a remedy or sanction proportional to the reason for granting or imposing it.

Background

5 In 2013, the case management judge issued an order requiring all parties to bring leave applications before every application was heard on the merits. There were a variety of reasons for why this procedural order was issued, including the complexity of the litigation and the voluminous number of applications being filed.

6 The parties filed a series of applications in 2018 and 2019. The case management judge issued decisions on all six in February 2020. They are reported as follows:

(a) Decision #1 (2020 ABQB 87): Leave application by McMullen for recusal of the case management judge (referred to as the Recusal Leave Application);

(b) Decision #2 (2020 ABQB 88): Leave application by McMullen to disqualify opposing counsel JSS Barristers (JSS Disqualification Leave Application);

(c) Decision #3 (2020 ABQB 89): Leave application by McMullen to bring a third-party claim (TPC) against JSS Barristers et al (JSS TPC Leave Application);

(d) Decision #4 (2020 ABQB 90):

(i) Leave application by McMullen to bring a TPC against opposing counsel Blakes (Blakes TPC Leave Application),

(ii) Leave application by Blakes to strike the Blakes TPC Leave Application on the basis that McMullen incorporated privileged information protected by restricted access orders into his affidavit filed in support (Blakes Strike Leave Application),

(iii) Leave application by JSS Barristers to hold McMullen in contempt for breaching the restricted access orders and other court orders (JSS Contempt Leave Application);

(e) Decision #5 (2020 ABQB 91) — Leave application by McMullen to bring a separate originating application against the Piikani Investment Corporation (PIC) under an alleged indemnity and save harmless agreement (PIC Originating Leave Application);

(f) Decision #6 (2020 ABQB 92) — Leave application by McMullen to strike or dismiss action 1001- 10326 for delay (Strike/Dismiss 326 Leave Application).

7 The beginning of each judgment is almost identical and provides for a bit of history and other procedural information to assist the parties (and this Court) with understanding the circumstances of the applications and decisions reached. The reasons suggest that all six decisions should be read together to get a full appreciation of the facts and the results.

8 In the decisions, the case management judge reminded himself that he was not actually deciding the substance or merits of the issues raised in the applications. Instead he was imposing a threshold requirement that appears to have been informed by the conditions set out in Rule 3.68(2). In particular, the case management judge assessed whether the application disclosed a reasonable chance of success, was frivolous, irrelevant or improper or was an abuse of process. In any case, the threshold for granting leave imposed by the case management judge was low.

9 The case management judge dismissed the Recusal Leave Application, the JSS Disqualification Leave Application, the JSS TPC Leave Application, and the PIC Originating Leave Application in Decisions #1-3 and #5.

10 In Decision #4, the case management judge granted the Blakes Strike Leave Application and the JSS Contempt Leave Application. He stayed the Blakes TPC Leave Application pending the result of the Blakes Strike Application. He also set out a procedural timeline regarding the exchange of materials and the conduct of examinations on affidavits for the Blakes Strike Application/JSS Contempt Application.

11 In Decision #6, the case management judge was inclined to grant leave of the strike portion of the Strike/Dismiss 326 Leave Application, however he decided to stay it pending the results of the

ongoing McMullen application to disqualify the opposing counsel of Gowlings WLG (Gowlings Disqualification Application). Leave was denied on all other relief requested.

12 McMullen now seeks a stay of the directions set out in Decision #4. He also seeks a variety of relief related to opposing counsel. He asks this Court to disqualify and remove JSS Barristers, Blakes and Gowlings WLG and to direct them to deliver to him certain records.

13 I will deal first with the stay of proceedings application.

Stay of Proceedings

14 The tripartite test for granting a stay pending appeal is set out in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, 111 DLR (4th) 385. McMullen must demonstrate that:

(a) there is a serious question arguable on appeal;

(b) he would suffer irreparable harm absent the stay; and

(c) the balance of convenience favours granting the stay.

15 A stay of proceedings and an injunction are remedies of the same nature and in absence of legislation setting out different tests, the same general principles should be applied: *RJR-MacDonald* at 334. As a result, I find that the Supreme Court of Canada's guidance in *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at paragraph 25 is equally applicable here: the fundamental question is whether the stay of proceeding is just and equitable in all of the circumstances of the case. This will necessarily be context-specific.

16 The respondents oppose the application on the basis that McMullen has not satisfied any branch of the test. They state that McMullan has not identified a serious question arguable on appeal and reiterate that the case management judge's leave decisions will be owed considerable deference on appeal. Further, they stress that the Blakes Strike Application/JSS Contempt Application have not actually been heard yet. The respondents also argue that McMullen has not provided any evidence of irreparable harm. Finally, they state that the balance of convenience favours the Piikani Nation and Blakes as they have submitted evidence demonstrating a strong case for contempt and to strike the Blakes TPC Leave Application. Given McMullen's repeated breaches of court orders and other abuses of process in the Alberta courts and elsewhere, they state that he does not come to this Court with clean hands. As a result, his is not entitled to any equitable relief.

17 I have reviewed the substantial record before me, which includes the six leave applications under appeal. The case management judge sought fit to consider all six leave applications together, despite the fact that they were filed months apart. Looking at these applications holistically was

likely done because a few of them are interrelated; two of them relate to applications that could bring about an end to the litigation, but with success to different parties; and one calls into question whether the case management judge should recuse himself for bias or a reasonable apprehension of bias. As a result, fairness dictates that all six decisions should be considered together for the purposes of this application.

18 I conclude that a stay of proceedings is just and equitable in all of the circumstances of this case and best accords with the foundational rules. The interests of justice, court resources and parties are best served if Decision #4 is stayed until such time as the Court of Appeal renders its decisions on the six appeals. I understand from the Registry that the six appeals will be heard together by the same panel. Once a decision has been reached, the parties will be in a better position to assess the path forward.

Is there a serious question arguable on appeal?

19 McMullen raises a variety of arguments regarding the Blakes Strike Application/JSS Contempt Application. He challenges the procedures followed in obtaining the 2014 restricted access orders and what he characterizes as false and misleading submissions made by JSS Barristers. He proposes an alternative interpretation of these orders that suggest he was entitled to possession and use of the privileged information. He also suggests that JSS Barristers' decision to amend the application materials to seek additional relief that would strike his defence and claim was improper, constitutes an abuse of process, and is a collateral attack on Decision #4 and an earlier order that he states permitted him to file the affidavit containing the offending material. Finally, he argues that the Supreme Court's decision in *R v Jordan*, 2016 SCC 27 applies to contempt applications and that JSS Barristers is out of time to pursue its allegations of contempt.

20 McMullen agreed during the oral hearing that in the ordinary course, the proper procedure would be to bring these arguments before the case management judge during the hearing of the applications on the merits. However, this litigation is contentious and one of the outstanding appeals relates to McMullen's assertion that the case management judge is biased against him. McMullen stresses that he will not receive a fair hearing before the existing case management judge with these allegations outstanding.

21 The test for whether an appeal is arguable is a low threshold; it is an assessment of whether the appeal is frivolous or vexatious: *Polansky Electronics Ltd v AGT Limited*, 2000 ABCA 46 at para 11.

22 Judicial impartiality is of fundamental importance to our society. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer: *R v S(RD)*, [1997] 3 SCR 484, 1997 CanLII 324 at paras 93-94 per Cory J. Language and the approach used in the six leave decisions, regardless of whether there is merit, suggests

that the case management judge's long history with the parties and the dispute may no longer be having the intended positive benefit.

23 I agree that a case management judge's decisions will be owed considerable deference on appeal. However, in these unique circumstances the allegations of bias and a reasonable apprehension of bias speak to procedural fairness, which is a principle of fundamental justice: see *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177, 1985 CanLII 65. I find that this branch of the test is met.

Irreparable Harm and Balance of Convenience

24 McMullen's irreparable harm and balance of convenience arguments are predicated on his insistence that opposing counsel are guilty of serious misconduct and that the case management judge is biased, undermining the administration of justice. He states that to allow the Blakes Strike Application/JSS Contempt Application to proceed will result in continuing breaches of procedural fairness and solicitor-client privilege. In the end, he may be found liable for millions of dollars in damages.

25 When irreparable harm is considered in context of all six appeals, and in particular the appeal of the Recusal Leave Application, McMullen has satisfied me that he will suffer irreparable harm. If a reasonable apprehension of bias arises, it colours the entire proceedings and it cannot be cured by the correctness of subsequent decision: *S(RD)* at para 100 per Cory J. In my view, it would also throw into question the validity of any interlocutory decision made in the interim.

26 I do not accept the respondents' position that somehow the parties will be able to easily roll back any interim decision should McMullen's appeal of the Recusal Leave Application be successful. Costs are not an adequate remedy for McMullen should this circumstance arise. He would in effect have to run the Recusal Leave Application and appeal any interim decision on the same grounds of bias and reasonable apprehension of bias. This is nonsensical.

27 The Piikani Nation states that it is prejudiced by the continuing breaches of the restricted access orders. But given the court-access restrictions imposed by the COVID-19 pandemic, it appears that the status quo can easily be maintained, and each party kept on the same footing, until the appeals are heard. I see no prejudice to the respondents in having to wait.

28 Continuing with piecemeal litigation is a waste of resources and entirely impractical in these circumstances. Courts are community property that exist to service everyone. They have finite resources that cannot be squandered: *Canada v Olumide*, 2017 FCA 42 at paras 17-19. The balance of convenience weighs in favour of a stay.

Conclusion on Stay of Proceedings

29 The application for a stay of proceedings of Decision #4 is allowed pending the appeal of the six related leave decisions on the specific conditions set out below:

(a) McMullen will file one appeal record by June 8, 2020, and

(b) McMullen will file a single factum to address all six appeals with a total maximum of 50 pages.

30 Any further directions will be given by the Case Management Officer at the Court of Appeal, which will include arranging the earliest possible appeal hearing date in the fall of 2020 with a single panel hearing all six appeals.

Relief against Opposing Counsel

31 The Court of Appeal is not a court of first instance and it has no ability to remove opposing counsel or direct them to return documents to McMullen. Many of McMullen's arguments are applicable to the *merits* of the numerous applications and not the appeals of the leave applications which are before this Court. *There has not yet being a finding on the merits of any application.* As a result, McMullen will still have an opportunity to advance these arguments on the applications where leave is granted and the Gowlings Disqualification Application, which is ongoing. He will also have the right to appeal the outcome of these applications. As a result, only the request for a stay of proceedings is properly before this Court.

Costs

32 Given the mixed success, neither party is entitled to costs of this application.

2000 CarswellNat 1094
Federal Court of Canada — Trial Division

P.S.A.C. v. R.

2000 CarswellNat 1094, 2000 CarswellNat 5555, [2000]
S.C.J. No. 754, 192 F.T.R. 23, 97 A.C.W.S. (3d) 1098

Public Service Alliance of Canada, Plaintiff and Her Majesty the Queen, Defendant

Pelletier J.

Judgment: May 18, 2000
Heard: December 2, 1999
Docket: T-1383-99

Counsel: *Andrew Raven*, for Plaintiff.
Elizabeth Richards, for Defendant.

***Pelletier J.*:**

Reasons for Order and Order

1 Unlike the Parliament at Westminster, the Parliament of Canada is not supreme. It has never been so. The division of powers found in sections 91 and 92 of the *Constitution Act, 1867* (formerly the *British North America Act*) identified certain subjects in respect of which Parliament could not legislate. Federal legislation which touched upon matters reserved to the provinces was struck down. Since the advent of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), Parliament has been further constrained in that it cannot legislate in ways which infringe the rights enumerated in the *Charter*. Legislation which did so has been declared invalid. In this action, the plaintiff, Public Service Alliance of Canada ("PSAC"), argues that, in addition to the constraints on Parliament arising_ from the *Constitution Act, 1867* and the *Charter*, Parliament is also incompetent to pass laws which are contrary to the rule of law. The foundation for that argument is found in the preambles to the *Constitution Act, 1867*[1] and the *Charter*[2]. It is an argument which is not without significance.

2 The application before the Court is a motion by the defendant, Her Majesty the Queen, to strike out PSAC's claim on the basis that it discloses no cause of action. The facts alleged in the Statement of Claim are therefore to be taken as proven for the purposes of the motion. They are as follows:

2. The Public Service Alliance of Canada is an employee organization within the meaning of the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35, as amended, ("*PSSRA*") and is certified as bargaining agent for two Correctional Group bargaining units - one unit consisting of supervisory employees and another consisting of non-supervisory employees. The Correctional Group (also know as the CX Group) consists of Correctional Officers employed by Correctional Services Canada in federal penitentiaries.

3. Terms and conditions of employment governing employees within the Correctional Group bargaining units are contained in collective agreements negotiated between the Public Service Alliance of Canada and the Treasury Board. The Treasury Board is the federal government agency which is designated as the employer of employees within the federal public service.

4. Sections 78 to 78.5 of the *PSSRA* specify a process by which positions in bargaining units may be designated as requiring the performance of duties which are necessary in the interest of the safety or security of the public. Where a position is designated as having such duties, an incumbent of such a position is not entitled to engage in strike action under the *PSSRA*.

5. Historically, the Treasury Board has taken the position that Correctional Officers must be designated under the *PSSRA* and, in fact, all positions within the CX bargaining units have been designated in the past. As no one in the CX bargaining units may engage in strike action on the basis of this designation pattern, engaging in a strike to settle a collective agreement would be ineffective.

6. Under the *PSSRA*, there are two processes for resolving collective bargaining disputes. Under the first process, the parties are required to bargain in good faith following the service of Notice to Bargain. Where no collective agreement is concluded, the parties may refer the matter to conciliation. Once conciliation is complete, the parties may engage in strike action subject to express conditions set forth in the *PSSRA*.

7. The second process under the *PSSRA* includes the obligation to bargain in good faith following the service of Notice to Bargain. However, where no collective agreement is concluded, the dispute is referred to an Arbitration Board which will consider and rule upon the issues raised. Any arbitral award issued by an Arbitration Board is binding upon the parties as if it were a collective agreement.

8. Under the *PSSRA*, bargaining agents are entitled to choose one of these two processes for the purpose of resolving disputes which arise in the course of collective bargaining with an employer. As the conciliation - strike option is ineffective for the CX bargaining units, the Alliance has historically elected the arbitration process for the resolution of collective bargaining disputes.

9. In 1996, by operation of section 62 of the *PSSRA*, the availability of binding arbitration as a dispute settlement mechanism was suspended until June 1999. This legislative amendment therefore deprived members of the CX bargaining units of their right to elect that collective bargaining disputes be resolved by arbitration and forced CX members to utilize the conciliation-strike process even though, to that point, all members could not engage in legal strike activity.

10. On the 22nd day of April 1997, the Alliance served notice to bargain in respect of the CX bargaining units on the Treasury Board. Thereafter, Treasury Board representatives proceeded to identify a number of CX positions in order that they be designated pursuant to sections 78 to 78.5 of the *PSSRA*. The Plaintiff states, however, that several hundred CX positions were not properly designated in accordance with the stated requirements of the *PSSRA*. As a result, incumbents of those positions were entitled to engage in lawful strike activity.

11. On the 9th day of February 1999, the Alliance presented an application to the Public Service Staff Relations Board ("PSSRB")for an order of the Board that the incumbents of those CX positions which had not been properly designated by the Treasury Board could engage in lawful strike activity in the event that the parties were unsuccessful in concluding a collective agreement.

12. Thereafter, the Treasury Board initiated separate proceedings before the *PSSRB* the essential purpose of which was to obtain orders from the Board designating specified CX positions and, thereby, disentitling the incumbents of such positions from engaging in strike activity.

13. In response to the proceedings initiated by the Alliance and by the Treasury Board, hearings were scheduled to proceed before the Board over several days commencing March 22, 1999.

14. On March 19, 1999, an appointed Conciliation Board issued its report pursuant to section 87 of the *PSSRA* with the result that lawful strike activity could be engaged in by incumbents of non-designated positions within the CX Group on March 26,1999.

15. On March 19, 1999, representatives of the Alliance and Treasury Board as employer reached agreement respecting the various designation proceedings outstanding before the Board as specified in paragraphs ll to 13 hereof. This agreement provided that incumbents of approximately 728 positions within the CX bargaining unit would not be designated pursuant to the designation procedure established under the *Act*. Accordingly, the incumbents of the 728 identified positions were entitled to engage in strike action on or about March 26,1999. It was expressly agreed between the parties that the terms and conditions of the aforesaid agreement were to be confirmed by the Board in the form of a consent order. This agreement was formally ratified on Monday, March 22, 1999, by the parties.

16. On Monday, March 22, 1999, Bill C-76, the *Government Services Act*, 1999, was formally introduced in the House of Commons. Generally speaking, Bill C-76 was intended to prohibit the CX Group from engaging in strike action and provided to the Governor-in-Council the authority to impose terms and conditions of employment which would be binding on the members of the CX Group and the Alliance.

17. On Friday, March 26,1999, incumbents of the 728 positions referred to in paragraph 15 hereof commenced lawful strike activity.

18. O n March 25, 1999, the *Government Services Act*, 1999 was assented to. Pursuant to an Order-in-Council dated March 29, 1999, Part II of the *Government Services Act*, 1999 came into force on March 29, 1999, at 23:30 hours (standard time). Part II of the *Act* deals expressly with employees in the Correctional Groups.

19. Sections 16 and 17 of the *Act* broadly required members of the CX Group to return to work and prohibited them from engaging in further strike action. As well, strict obligations were imposed upon the Alliance to ensure that no further strike action occurred. Among these obligations were the requirement that the Alliance, and each officer and representative of the Alliance, give notice to employees that its lawful strike authorization for the incumbents of the 728 positions referred to in paragraph 15 hereof was "invalid". Sections 16 and 17 provide as follows:

> 16. On the coming into force of this Part,
>
> (a) the employer shall resume without delay, or continue, as the case may be, government services; and
>
> (b) every employee shall, when so required, resume without delay, or continue, as the case may be, the duties of that employee's employment.
>
> 17. The bargaining agent and each officer and representative of the bargaining agent shall
>
> (a) without delay on the coming into force of this Part, give notice to the employees that, by reason of the coming into force of this Part,
>
> (i) any declaration, authorization or direction to go on strike given to them before the coming into force of this Part is invalid, and
>
> (ii) government services are to be resumed or continued, as the case may be, and that the employees, when so required, are to resume without delay, or continue, ast the case may be, the duties of their employment;
>
> (b) take all reasonable steps to ensure that employees comply with paragraph 16(b); and

(c) refrain from any conduct that may encourage employees not to comply with paragraph 16(b).

20. In addition, the *Act* provided for the resumption of expired collective agreements and the authority of the Governor-in-Council to prescribe terms and conditions of employment, as indicated in section 19, 20 and 21 of the *Act*:

19. The master agreement and each group specific agreement is deemed to have had effect from the date it expired to the coming into force of this Part and shall continue to have effect in respect of the employer, the bargaining agent and the employees until the earlier of

(a) the day they become bound by a collective agreement concluded by the employer and the bargaining agent, and

(b) the day they become bound by a collective agreement referred to in subsection 20(3).

20. (1) The Governor in Council may, on the recommendation of the Treasury Board, and taking into account collective agreements entered into by the employer in respect of bargaining units in the Public Service since the *Public Sector Compensation* Act ceased to apply to compensation plans applicable to them, prescribe

(a) the terms and conditions of employment applicable to the employees; and

(b) the period during which those terms and conditions of employment are applicable.

(2) The Governor in Council may provide that any of the terms and conditions of employment is effective and binding on a day before or after the beginning of the period prescribed under paragraph (1)(b).

(3) The terms and conditions prescribed under paragraph (1)(a) constitute a new collective agreement in respect of each group of employees bound by an agreement referred to in Schedule 2.

(4) The *Public Service Staff Relations Act* applies to the collective agreements referred to in subsection (3) and those collective agreements are effective and binding on the employer, the bargaining agent and the employees for the duration of the period they are applicable, despite any provision of that *Act*.

(5) For greater certainty, the *Statutory Instruments Act* does not apply in respect of anything done under this section.

(6) If the employer, the bargaining agent and employees become bound by a collective agreement concluded by the employer and the bargaining agent before terms and conditions of employment applicable to those employees are prescribed under subsection (1), subsections (1) to (5) and section 22 are deemed to be spent in respect of those employees.

21. During the period beginning on the coming into force of this Part and ending on the expiration of the period during which a collective agreement referred to in paragraph 19(a) or a collective agreement referred to in subsection 20(3), whichever is applicable, has effect,

(a) no officer or representative of the bargaining agent shall declare, authorize or direct a strike by any employee bound by that collective agreement; and

(b) no employee bound by that collective agreement shall participate in a strike against the employer.

21. Section 23 of the *Act* further provided that individuals who contravened any provision of the Part applicable to correctional officers would be guilty of an offence and liable to a fine of not more than $50,000 for each day or part of a day that the individual is acting in the capacity of an officer or representative of the employer or the Alliance or of not more than $1,000 in any other case. If the Alliance contravened any provision of this Part, it would be guilty of an offence and liable to a fine of not more than $100,000 for each day or part of a day during which the offence continues.

22. By Order-in-Council dated March 29, 1999, the new terms and conditions of employment governing CX employees were issued by the Governor-in-Council on the recommendation of the Treasury Board. These terms and conditions constituted a new collective agreement which was to be in force as of 00:01 hours on March 30, 1999, and would be binding on the employer, the Alliance, and the employees affected until May 31, 2000. The Alliance did not agree with the terms of the collective agreement imposed by the Order-in-Council.

23. The Plaintiff states that Part II of the *Government Services Act*, 1999 is offensive of the rule of law and therefore of no force or effect for the following reasons:

(a) the *Act* represents arbitrary interference with the statutory right to engage in collective bargaining in circumstances where those affected by the law had fully expected to engage in collective bargaining in accordance with the *PSSRA*;

(b) the *Act*, combined with the suspension of arbitration, denies access to a statutorily appointed decision maker to address disputes under the *PSSRA*;

(c) the *Act* was passed in bad faith as it deprived correctional officers of the right to strike even though Treasury Board as employer had, just prior to the passage of the legislation, negotiated an agreement, consequent upon its own negligence, which enabled a specified number of correctional officers to engage in strike action;

(d) the *Act* was passed in bad faith as it compelled the Alliance, its officers and representatives to declare that its strike authorization was " invalid" even though that strike authorization was lawful particularly in view of the agreement reached with the Treasury Board respecting the 728 positions which would not be designated under the *PSSRA*; and

(e) the *Act* confers discretion on the Governor-in-Council to impose terms and conditions of employment on correctional officers.

24. The Plaintiff states further that the provisions of Part II of the *Government Services Act, 1999* are inconsistent with section 2(b) of the *Canadian Charter of Rights and Freedoms*, and cannot be saved under section 1 of the *Canadian Charter of Rights and Freedoms*, as the *Act* has deprived members of the CX Group the right to express themselves through collective bargaining and strike action and as the *Act* compelled the Alliance, its officers and representatives to make certain statements as specified in the *Act*.

25. The Plaintiff states that Part II of the *Government Services Act, 1999* is in violation of the freedom of association protected by section 2(d) of the *Charter* and cannot be saved by section 1 of the *Charter*. In particular, the Plaintiff states that the provisions of Part II of the *Act* prohibit members of the CX Group from exercising their freedom of expression in association through the collective bargaining and strike process.

3 The hard kernel of the facts is that the Treasury Board and PSAC negotiated an agreement with respect to certain members of the CX group (correctional officers) which confirmed their right to strike. Days later, Parliament passed legislation which had the effect of rendering ineffective the negotiated agreement by ordering the CX group back to work and compelling PSAC to advise its members that any direction or authorization to strike given prior to the passage of the legislation was invalid by reason of the coming into force of the legislation. PSAC says that the legislation is contrary to the rule of law because it is arbitrary and was passed in bad faith. It is also an infringement of the plaintiff's freedom of expression because it requires the officers of the plaintiff to communicate certain information to their members. A claim that the legislation was an infringement of PSAC's members freedom of association was abandonned, at least for purposes of this application.

4 It is important to note that the motion before the Court is one to strike the Statement of Claim as failing to disclose a cause of action. It is not an application for summary judgment. In an application such as this, the Court is not free to dispose of issues of law which have not been

"fully settled in the jurisprudence". *Falloncrest Financial Corp. v. Ontario* (1995), 27 O.R. (3d) 1, [1995] O.J. No. 4043 (Ont. C.A.). Wilson J. reviewed and summarized the Canadian and English jurisprudence on this point in *Hunt v. T & N plc* (1990), 117 N.R. 321, [1990] 2 S.C.R. 959 (S.C.C.) and concluded as follows:

> Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C. O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

5 As a result, my function on this application is not to decide if there is an issue for trial but whether, as a matter of law, the claim discloses a legal foundation for a claim. The threshold is not high.

6 The plaintiff's position is that the law in this area is in a state of development. As an indication of the direction the law is taking, it points to dicta of Nöel J. (as he then was) in *Huet c. Ministre du Revenu national* (1994), 85 F.T.R. 171, [1994] F.C.J. No. 1022 (Fed. T.D.):

> If the Courts have the power to keep in force laws which are otherwise inoperative by virtue of the necessity to maintain the rule of law, they must also have the power to invalidate laws when the effect of their application in time is to suspend the rule of law. p. 191

7 As a foundation for its position, the plaintiff points to a number of Supreme Court of Canada cases which recognize the rule of law as a constitutional principle. Foremost among these authorities are *Reference re Language Rights Under s. 23 of Manitoba Act, 1870 & s. 133 of Constitution Act, 1867*, [1985] 1 S.C.R. 721, 19 D.L.R. (4th) 1 (S.C.C.) and *Reference re Secession of Quebec* (1998), 161 D.L.R. (4th) 385, [1998] 2 S.C.R. 217 (S.C.C.). In the *Reference re Language Rights Under s. 23 of Manitoba Act, 1870 & s. 133 of Constitution Act, 1867* case, the Supreme Court concluded that the failure to pass the laws of Manitoba in French as well as English resulted in the invalidity of those laws. Giving immediate effect to the Court's judgment would have created an immediate legal vacuum, an absence of laws, a prospect which the Court found to be intolerable. It relied upon the rule of law to fashion a means of avoiding this state of lawlessness:

The difficulty with the fact that the unilingual Acts of the Legislature of Manitoba must be declared invalid and of no force or effect is that, without going further, a legal vacuum will be created with consequent legal chaos in the Province of Manitoba. p. 747

In the present case, declaring the Acts of the Legislature of Manitoba invalid and of no force or effect would, without more, undermine the principle of the rule of law. The rule of law, a fundamental principle of our Constitution, must mean at least two things. First, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power. p. 748

Second, the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life. "The rule of law in this sense implies ... simply the existence of public order." p. 749

The conclusion that the Acts of the Legislature of Manitoba are invalid and of no force or effect means that the positive legal order which has purportedly regulated the affairs of the citizens of Manitoba since 1890 will be destroyed and the rights, obligations and other effects arising under these laws will be invalid and unenforceable. p. 749

Additional to the inclusion of the rule of law in the preambles of the Constitution Acts of 1867 and 1982, the principle is clearly implicit in the very nature of a Constitution. The Constitution, as the Supreme Law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence. The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by rule of law. While this is not set out in a specific provision, the principle of the rule of law is clearly a principle of our Constitution. p. 750

The Court has in the past inferred constitutional principles from the preambles to the Constitution Acts and the general object and purpose of the Constitution. p. 751

In other words, in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada. In the case of the *Patriation Reference, supra*, this unwritten postulate was the principle of federalism. In the present case it is the principle of rule of law. p. 752

The only appropriate solution for preserving the rights, obligations and other effects which have arisen under invalid Acts of the Legislature of Manitoba and which are not saved by the de facto or other doctrines is to declare that, in order to uphold the rule of law, these rights, obligations and other effects have, and will continue to have, the same force and effect they would have had if they had arisen under valid enactments, for that period of time during which

> it would be impossible for Manitoba to comply with its constitutional duty under s. 23 of the Manitoba Act, 1870. The Province of Manitoba would be faced with chaos and anarchy if the legal rights, obligations and other effects which have been relied upon by the people of Manitoba since 1890 were suddenly open to challenge. The constitutional guarantee of rule of law will not tolerate such chaos and anarchy. p. 754

8 As can be seen from this series of excerpts, the resort to the rule of law in the *Manitoba Language Reference* was driven by the need to avoid creating a legal vacuum. The principle of the rule of law was not used to invalidate legislation but to justify a suspension of the coming into effect of the Court's own judgment.

9 In the *Reference re Quebec Secession*, the Supreme Court was called to rule upon the circumstances under which Quebec could separate from the rest of Canada. This entailed a review of the constitutional structure of the country:

> Our Constitution is primarily a written one, the product of 131 years of evolution. Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based. p. 247 (S.C.R.)
>
> The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole. As we recently emphasized in the *Provincial Judges Reference*, certain underlying principles infuse our Constitution and breathe life into it. Speaking of the rule of law principle in the *Manitoba Language Rights Reference*, supra, at p. 750, we held that "the principle is clearly implicit in the very nature of a Constitution". The same may be said of the other three constitutional principles we underscore today. p. 248
>
> Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the preamble to the *Constitution Act, 1867*, it would be impossible to conceive of our constitutional structure without them. p. 248
>
> Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have " full legal force", as we described it in the *Patriation Reference*, supra, at p. 845), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments. "In other words", as this Court confirmed in the Manitoba Language Rights Reference, supra, at p.

752, "in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada". pp. 249-250

At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action. p. 257

In the *Manitoba Language Rights Reference, supra*, at pp. 747-52, this Court outlined the elements of the rule of law. We emphasized, first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, we explained, at p. 749, that " the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order". It was this second aspect of the rule of law that was primarily at issue in the *Manitoba Language Rights Reference* itself. A third aspect of the rule of law is, as recently confirmed in the *Provincial Judges Reference, supra*, at para. 10, that "the exercise of all public power must find its ultimate source in a legal rule". Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance. pp. 257-258

10 The plaintiff also relies on a series of other pronouncements from other decisions of the Supreme Court of Canada, each advancing in its own way the proposition that the Constitution does not exist in a vacuum, that it is nourished by unwritten constitutional principles which can also be given effect, a position perhaps best expressed by the following extract from the *Reference re Questions Concerning Amendment of Constitution of Canada as Set out in O.C. 1020/80* (1981), 125 D.L.R. (3d) 1, [1981] 1 S.C.R. 753 (S.C.C.) at p. 851, (the *Patriation Reference*):

This Court, since its inception, has been active in reviewing the constitutionality of both federal and provincial legislation. This role has generally been concerned with the interpretation of the express terms of the *B.N.A. Act*. However, on occasions, this Court has had to consider issues for which the *B.N.A. Act* offered no answer. In each case, this Court has denied the assertion of any power which would offend against the basic principles of the Constitution.

It may be noted that the above instances of judicially developed legal principles and doctrines share several characteristics. First, none is to be found in express provisions of the British North America Acts or other constitutional enactments. Second, all have been perceived to represent constitutional requirements that are derived from the federal character of Canada's Constitution. Third, they have been accorded full legal force in the sense of being employed to strike down legislative enactments. Fourth, each was judicially developed in response to a particular legislative initiative in respect of which it might have been observed, as it was

> by Dickson J. in the Amax (supra) case at p. 591, that: "There are no Canadian constitutional law precedents addressed directly to the present issue...".

11 These passages, which are cited by Professor Monahan in his article *Is the Pearson Airport Legislation Unconstitutional? The Rule of Law as a Limit on Contract Repudiation by Government*[3] represent, it seems to me, the gist of the position advanced by the plaintiff, which is that the Constitution includes not only the constitutional documents themselves[4] but also those constitutional principles which underlie the documents. That is particularly so when those principles are expressly recognized in the constitutional documents, as the rule of law is in the preamble to the *Charter*. Where there is a gap in the constitutional documents, it can be supplied by reference to the underlying principles, as suggested by the Supreme Court in the extract from the *Patriation Reference* quoted above. In the present case, the absence of specific reference in the constitutional documents to control of arbitrariness by Parliament is said to justify invocation of the rule of law to strike down the legislation in question.

12 A possible illustration of the principle referred to by Professor Monahan is found in *Wells v. Newfoundland* (1999), 177 D.L.R. (4th) 73, [1999] S.C.J. No. 50 (S.C.C.), a case of a holder of office during good behaviour whose office was abolished. Wells was appointed Commissioner (Consumer Representative) of the Public Utilities Board. His appointment was during good behaviour to age 70. Some four and one half years after his appointment, the Newfoundland legislature abolished the Public Utilities Board, and with it, Well's office. The legislation did not speak to the issue of compensation for Mr. Wells but by Cabinet Directive, the government dictated that Wells should receive no compensation. The Supreme Court held that the legislature had the right to abolish the office and to deprive Wells of compensation, but since it failed to do so by legislation, his rights survived:

> At the cost of repetition, there is no question that the Government of Newfoundland had the authority to restructure or eliminate the Board. There is a crucial distinction, however, between the Crown legislatively avoiding a contract, and altogether escaping the legal consequences of doing so. While the legislature may have the extraordinary power of passing a law to specifically deny compensation to an aggrieved individual with whom it has broken an agreement, clear and explicit statutory language would be required to extinguish existing rights previously conferred on that party. ...
>
> It is eye-catching that the Vice-Chairman of the Resource Legislation Review Committee of the Newfoundland House of Assembly suggested that the new Act be entitled " The Get Rid of Andy Wells Bill": Newfoundland: Proceedings of the Resource Legislation Review Committee, December 14, 1989, at L7. The government was free to pass such a bill and they were equally free to pass a bill which would have explicitly denied the respondent compensation (see *Welch v. New Brunswick* (1991), 116 N.B.R. (2d) 262 (Q.B.), for an

explicit bar to compensation). However, since no such act was passed, the respondent's basic contractual rights to severance pay remain.

13 While the case supports the plaintiff's position in the sense of saying that the rule of law requires that the Government will honour its obligations [5], it is in fact a strong statement in support of the defendant's position. The decision appears to recognize explicitly the Legislature's right to pass legislation without restriction, even if passed in circumstances highly suggestive of bad faith ("the *Get Rid of Andy Wells Bill*").

14 The defendant relies upon two decisions for her position on the issue of the rule of law. The first is the decision of the Saskatchewan Court of Appeal in *Bacon v. Saskatchewan Crop Insurance Corp.*, [1999] 11 W.W.R. 51, 180 Sask. R. 20 (Sask. C.A.). In that case, a group of individuals who had contractual claims against the Saskatchewan Crop Insurance Corporation challenged the validity of legislation passed by the Saskatchewan legislature abrogating their rights and extinguishing their claims for breach of contract. At trial, Laing J. found that the rule of law applied to the Government and Legislature of Saskatchewan so as to invalidate arbitrary legislation but went on to find that the legislation was not arbitrary and dismissed the action. The Saskatchewan Court of Appeal rejected the notion that the rule of law was a discrete ground under which legislation could be invalidated. It found that arbitrary *administrative* action could be remedied by the superiour courts exercising their supervisory function; arbitrary legislative action which could not otherwise be challenged pursuant to the division of powers or the *Charter*, could be challenged at the ballot box. The following passage reflects the judgment of the Court on this issue:

> I am unable to accept that these justices of the Supreme Court [in the *Reference re Secession of Quebec*], whilst providing an analysis of our federal system, were at the same time engaged in changing that system. That is particularly so when we are not talking of a subtle or marginal change, but one which would reduce the supremacy of Parliament by subjecting it to the scrutiny of superior court judges to be sure it did not offend the rule of law and if it did, to determine whether it was an arbitrary action. If the Supreme Court of Canada meant to embrace such a doctrine, I would expect it would see the need to say so very clearly in a case where that was the issue before them. This is particularly so when they are not only cognizant of the many cases in various jurisdictions acknowledging the supremacy of Parliament, but must also be aware of their own previous judgments which have endorsed that principle ...

15 The second case relied upon by the defendant is the decision of McKeown J in *Singh v. Canada (Attorney General)*, [1999] 4 F.C. 583, 170 F.T.R. 215 (Fed. T.D.) affirmed [2000] F.C.J. No. 4 (Fed. C.A.) where my colleague carefully canvassed the jurisprudence and concluded that unwritten constitutional norms cannot be used to invalidate legislation. McKeown J. reviewed the numerous comments in various Supreme Court judgments where the role of unwritten constitutional principles was discussed, including those where judicial restraint in the use of such

unwritten principles was advocated by the Supreme Court. He concluded that none of the unwritten principles cited to him, federalism, separation of powers, judicial independence or rule of law justified setting aside legislation enacted by Parliament acting within the jurisdiction conferred upon it by the Constitution. The essence of his position is found in the following extract from the headnote to the case:

> Legislation enacted which is contrary to the division of powers as set out in the *Constitution Act, 1867* is ultra vires the enacting legislature and has always been subject to a declaration of invalidity by the courts. The enactment of the *Constitution Act, 1982* added a second ground on which a court may declare legislation invalid. The applicants argued that the largely unwritten foundational and organizing principles of the *Constitution Act, 1867* provide a third ground, in addition to the division of powers and the *Charter*, on which a court may rely to invalidate legislation enacted by Parliament or by the provincial legislatures. The Supreme Court of Canada has concluded that unwritten constitutional norms may be used to fill a gap in the express terms of the constitutional text or used as interpretative tools where a section of the Constitution is not clear. But the principles of judicial review do not enable a court to strike down legislation in the absence of an express provision of the Constitution which is contravened by the legislation in question. There was no requisite express constitutional provision herein. Moreover there was no gap in the Constitution to be filled. These largely unwritten constitutional norms were not sufficient, in and of themselves, to invalidate otherwise properly enacted legislation.

16 McKeown's conclusions were approved and his reasoning further developed in the Federal Court of Appeal. Strayer J.A., writing for the Court, reviewed jurisprudence on parliamentary supremacy and concluded that it remained part of our constitutional law, except to the extent that Parliament was bound by the terms of the Constitution acts. He went on to consider the effect of the unwritten constitutional principles and concluded, relying on *Bacon* , *supra*, that an unwritten principle, including the rule of law, could not be used to strike down legislation which was within Parliament's legislative competence and which did not offend the *Charter*.

17 There is another case dealing with Parliament's ability to legislate in circumstances where some irregularity is alleged. In *Turner v. R.*, [1992] 3 F.C. 458, 149 N.R. 218 (Fed. C.A.), Turner sued the Federal crown alleging that it had negligently passed legislation which adversely affected his interests in litigation which was pending at the time the legislation was enacted. The legislation had retroactive effect and deprived Turner of a defence to a claim against him, thereby injuring him. The Federal Court of Appeal found that the claim was not justiciable on the basis of parliamentary sovereignty. There are points of distinction, for example Turner alleged that Parliament was tortiously misled while PSAC alleges Parliament acted arbitrarily, Turner sought damages where PSAC seeks a declaration of invalidity. However, the Court's conclusion "that Parliament has been induced to enact legislation by the tortious acts of Ministers of the Crown is not justiciable" [6] addresses Parliament's susceptibility to judicial oversight. It is not conclusive of this case because

arbitrariness and bad faith stand on a different footing than negligence but it does show insofar as negligence and procedural unfairness are in issue, Parliament is not subject to judicial scrutiny.

18 Can it be said, on the basis of the decision of the Saskatchewan Court of Appeal in *Bacon* , supra, and the decision of the Federal Court of Appeal in *Singh* , *supra*, that this matter has been "fully settled in the jurisprudence". It is clear that the Saskatchewan Court of Appeal rejected the notion that Parliamentary supremacy had been reduced by "subjecting it to the scrutiny of superior court judges to be sure it [the legislation] did not offend the rule of law and if it did, to determine whether it was an arbitrary action." This is the very thesis advance by the plaintiff. The Federal Court of Appeal adopted the position taken by the Saskatchewan Court of Appeal.

19 I find that the decision of the Federal Court of Appeal in *Singh* , supra, would be sufficient to dispose of the plaintiff's claim on an application for summary judgment. However, the test on an application to strike a claim for failure to disclose a cause of action is somewhat different. As noted above, the fact of the existence of a good defence does not entitle the defendant to succeed in such an application because the issue is not the success of the application but whether the plaintiff's grievance is one known to law. The Court could therefore dismiss an application to strike which would have succeeded had it been brought as an application for summary judgment.

20 Is this a case of a claim to which there is a good defence or is it a claim which is unknown to law? This case appears to be on the boundary between the two possibilities. On the basis of the conventional view that Parliament's sovereignty is limited only by the division of powers in the *Constitution Act, 1867* and the enumerated rights in the *Canadian Charter of Rights and Freedoms*, I find that the plaintiff does not have a cause of action arising from breach of the rule of law. I am fortified in this view by the fact that both the Saskatchewan Court of Appeal and the Federal Court of Appeal have come to the same conclusion. Those portions of the plaintiff's claim claiming a declaration of invalidity based upon a breach of the rule of law will be struck.

21 The second ground advanced by the plaintiff is the alleged infringement of the freedom of expression of the members, who were obliged to cease picketing, an activity which serves an expressive function, and of the officers of the plaintiff who were required to make certain statements to the membership about the validity of communications with respect to the strike.

22 The plaintiff relies upon the decision of the Supreme Court of Canada in *K Mart Canada Ltd. v. U.F.C.W., Local 1518* (1999), [1999] 2 S.C.R. 1083, [1999] S.C.J. No. 44 (S.C.C.) , for the proposition that picketing is expressive behaviour which is protected by the *Charter*.

> Picketing is an important form of expression in our society and one that is constitutionally protected. In *B.C.G.E.U.* Dickson C.J. held that picketing is an "essential component of a labour relations regime founded on the right to bargain collectively and to take collective action" (p. 230). Dickson C.J. referred to *Harrison v. Carswell* [page1111], [1976] 2 S.C.R. 200, where a majority of this Court stated at p. 219:

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> Society has long since acknowledged that a public interest is served by permitting union members to bring economic pressure to bear upon their respective employers through peaceful picketing. ...

23 The plaintiff says that there is, in addition, a difference in kind between a restriction on picketing and a requirement that union leaders say certain things to their membership, things which they may find highly objectionable. That form of enforced speech is an infringement of freedom of expression.

24 The defendant says first that it is established that there is no constitutional right to bargain collectively or to strike. *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at p. 409-410, (1987), 38 D.L.R. (4th) 161 (S.C.C.). It then says bargaining and strike action are not, in and of themselves, forms of expression. *Syndicat des travailleurs & travailleuses des postes c. Canada (Procureur général)* (24 mars 1999), Doc. C.S. Montréal 500-05-039212-988 (C.S. Que.). Finally, the defendant relies upon *Delisle c. Canada (Sous-procureur général)*, [1999] 2 S.C.R. 989, [1999] S.C.J. No. 43 (S.C.C.) for the proposition that the government has no obligation to enable expression; it must simply refrain from limiting it except in justifiable ways.

> The appellant and certain interveners in particular argue that the exclusion of RCMP members from the PSSRA violates the members' freedom of expression and right to equality. The reasoning that applies to the issue of freedom of association also applies here. As I said before, except in exceptional circumstances, freedom of expression imposes only an obligation that Parliament not interfere (see in this regard *Native Women's Assn. of Canada v. Canada*, *supra*), and the exclusion of RCMP members therefore cannot violate it,, para 38

25 Earlier in the judgment, the government's role vis-à-vis freedom of expression is expressed as follows:

> With respect to freedom of expression, this principle was articulated by this Court in *Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1035:
>
> > The traditional view, in colloquial terms, is that the freedom of expression contained in s. 2(b) prohibits gags, but does not compel the distribution of megaphones.

26 While these propositions may address the plaintiff's position on the question of the restriction in its member's freedom of expression, in the passive sense, it does not address the question of the coercion on the part of the plaintiff's leadership to make certain announcements to their membership. Freedom of expression can be compared to freedom of religion about which Dickson J. said the following in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.):

> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he

would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason,from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices.

27 The legislation in question here includes among its provisions, the following:

> The bargaining agent and each officer and representative of the bargaining agent:
>
> > a) shall forthwith on the coming into force of this Act, give notice to every employee that, by reason of that coming into force,
> >
> > > i) any declaration, authorization or direction to go on strike given to them before that coming into force has become invalid, and
> > >
> > > ii) government services are forthwith to be resumed and every employee when so required, is forthwith to resume the duties of that employee's employment.

28 It is apparent that this is not a case of interfering with speech but of imposing a positive obligation to express certain views with which the plaintiff's representatives may very well find offensive.

29 The Statement of Claim does not expressly plead that the legislation is invalid for compelling speech which is offensive to PSAC and its officers. There is reference to forced speech in paragraph 23 of the Statement of Claim but in the context of the rule of law.

30 I am not prepared to dismiss this portion of the claim on procedural grounds. In the interests of having the real issues between the parties before the Court, an order will issue striking the portions of the claim dealing with freedom of expression unless within 30 days the plaintiff moves to amend the claim to allege that paragraph 17(a)(i) is a violation of its right to freedom of expression as guaranteed in subsection 2(b) of the *Charter*.

Order

IT IS HEREBY ORDERED THAT:

> 1) - Paragraphs 1(a), and 23 of the plaintiff's Statement of Claim are struck.
>
> 2) - The balance of the claim will be struck effective 30 days from the date of this order unless the plaintiff moves within the said thirty days for an order granting it leave to amend its Statement of Claim to allege that paragraph 17(a)(i) is a violation of the rights of its officers

guaranteed by subsection 2(b) of the *Charter* and such leave is granted, whether before or after the expiry of the said 30-day period.

Motion granted in part.

Footnotes

1 Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, *with a Constitution similar in principle to that of the United Kingdom*: ... (emphasis added)

2 Whereas Canada is founded upon principles that recognize the supremacy of God *and the rule of law*: ... (emphasis added)

3 (1995) Osgoode Hall Law Journal Vol. 33 No 3 p. 411

4 The *Constitution Act, 1867* and the *Constitution Act, 1982* which includes the *Charter*

5 In a nation governed by the rule of law, we assume that the government will respect its obligations *unless it specifically exercises its power not to*. ... To argue the opposite is to say that government is bound only by its whim, not its word. In Canada this is unacceptable, and does not accord with the nation's understanding of the relationship between the state and its citizens. (emphasis added)

6 p. 462

2016 CAF 44, 2016 FCA 44
Federal Court of Appeal

Sport Maska Inc. v. Bauer Hockey Corp.

2016 CarswellNat 265, 2016 CarswellNat 7138, 2016 CAF 44, 2016 FCA 44, 140 C.P.R. (4th) 11, 263 A.C.W.S. (3d) 565, 480 N.R. 387

Sport Maska Inc. dba Reebok-CCM Hockey, Appellant and Bauer Hockey Corp., Respondent and Easton Sports Canada Inc., Respondent

M. Nadon, J.D. Denis Pelletier, Johanne Gauthier JJ.A.

Heard: September 15, 2015
Judgment: February 9, 2016
Docket: A-402-14

Proceedings: affirming *Bauer Hockey Corp. v. Easton Sports Canada Inc.* (2014), 2014 CarswellNat 3359, 463 F.T.R. 91, 2014 CF 853, 2014 CarswellNat 3775, 2014 FC 853, Sean Harrington J. (F.C.)

Counsel: Christopher Van Barr, for Appellant
François Guay, Jean-Sébastien Dupont, for Respondent

***M. Nadon J.A.*:**

I. Introduction

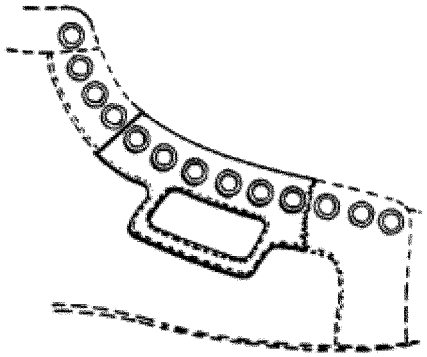
1 In this appeal, Sports Maska Inc. dba Reebok-CCM Hockey ("CCM") challenges the judgment (2014 FC 853 (F.C.)) of Harrington J. (the "Judge") of the Federal Court dated September 8, 2014 pursuant to which he dismissed CCM's motion which sought to overturn the June 20, 2014 order (2014 FC 594) of Prothonotary Morneau (the "Prothonotary") denying CCM's motion for leave to intervene in proceedings commenced by the respondent Bauer Hockey Corp. ("Bauer") in Federal Court File T-1036-13.

2 For the reasons that follow, I would dismiss the appeal.

II. Facts

3 CCM, Bauer and Easton Sports Canada Inc. ("Easton") are competitors in the hockey equipment industry. Bauer is the current owner of the trade-mark referred to as the "SKATES

EYESTAY Design" registered under number TMA361,722 (the "'722 registration", the "trade-mark" or the "mark").



Graphic 1

4 On January 11, 2010, pursuant to a request made by Easton, the Registrar of Trade-marks (the "Registrar") issued a notice under section 45 of the *Trade-marks Act*, R.S.C. 1985 c. T-13 (the "Act") requiring Bauer to furnish evidence of use of the SKATES EYESTAY Design during the three year period preceding the date of the notice.

5 On January 12, 2011, Bauer brought an action against Easton, *inter alia*, for infringement of the '722 registration (in Federal Court File: T-51-11). On December 21, 2012, Bauer launched a similar action against CCM (in Federal Court File: T-311-12).

6 On April 5, 2013, the Registrar ordered that the '722 registration be expunged from the Register because of her finding that the mark had not been used, as registered, in the relevant time frame. On June 11, 2013, Bauer filed, pursuant to section 56 of the Act, a notice of application appealing the Registrar's decision in which Easton was named as a respondent (in Federal Court File: T-1036-13) ("Bauer's application").

7 On February 13, 2014, Bauer and Easton reached an agreement pursuant to which Bauer agreed to discontinue its infringement action against Easton and the latter agreed to abandon its contestation of Bauer's application of the Registrar's decision.

8 On April 7, 2014, CCM filed a motion in the Federal Court seeking leave to intervene in Bauer's application.

9 On April 9, 2014, CCM filed its statement of defence and counterclaim in Federal Court File: T-311-12.

10 On April 30, 2014, Bauer filed its reply and defence to CCM's counterclaim arguing, *inter alia*, that CCM was barred from attacking its trade-mark by reason of an agreement concluded on February 21, 1989 between CCM and Bauer's predecessors in title. More particularly, CCM and Canstar Sports Group and Canstar Sports Inc. ("Canstar"), predecessors in title to Bauer, reached an

agreement pursuant to which CCM undertook to withdraw its opposition to trade-mark application 548,351, filed on September 9, 1985 by Warrington Inc. (to whom Canstar succeeded in title), which led to the '722 registration on November 3, 1989. In a letter dated February 24, 1989, counsel for CCM wrote to the Registrar to advise that its client, the opponent, would not object to the use and registration of the trade-mark in association with the wares identified in the trade-mark application.

III. Decisions Below

A. The Prothonotary's Decision

11 In his decision of June 20, 2014, the Prothonotary, who was the case management judge assigned to Bauer's application and the related actions brought by Bauer against Easton and CCM for infringement of the trade-mark, dismissed CCM's motion, brought under Rule 109 of the *Federal Courts Rules*, SOR/98-106 (the "Rules"), for leave to intervene in Bauer's application.

12 The Prothonotary began his analysis by pointing out that the effect of granting leave to CCM would be to substitute CCM as a respondent for the absent Easton. This was not, according to the Prothonotary, how Rule 109 should be used. In so saying, the Prothonotary referred to this Court's decision in *Canada (Attorney General) v. Siemens Enterprise Communications Inc.*, 2011 FCA 250, 423 N.R. 248 (F.C.A.) ("*Siemens*") where, in his view, this Court held that Rule 109 was not meant to be used so as to allow an intervener to substitute itself as a respondent.

13 The Prothonotary then addressed CCM's argument that the interests of justice militated in favour of granting it leave to intervene so as to provide the Court with a different view of the case. The Prothonotary dealt with CCM's argument by referring, with approval, to Madam Prothonotary Tabib's decision in *Genencor International Inc. v. Canada (Commissioner of Patents)*, 2007 FC 376, 55 C.P.R. (4th) 395 (F.C.) (*"Genencor"*) where she made the point that even if it was useful for the Court to have an opponent in a patent proceeding, the Court could nevertheless carry out its duties without an opposing side.

14 The Prothonotary then turned to Bauer's argument that its agreement with Easton should be respected, and that it not be jeopardized by allowing CCM to substitute itself as a respondent in lieu of Easton. The Prothonotary indicated that he fully agreed with that argument.

15 The Prothonotary then addressed CCM's argument that there was a public interest component in section 45 proceedings. He rejected this argument and again referred to Prothonotary Tabib's decision in *Genencor* where the learned Prothonotary, albeit on a question of registration of intellectual property and not section 45 proceedings, held that there was no public interest involved in allowing an intervention so as to ensure that untenable or invalid intellectual property registrations not be maintained.

16 Finally, the Prothonotary turned to Bauer's submission that because CCM in its counterclaim to the infringement action in Federal Court File T-311-12 had raised the invalidity of the '722 registration on the same grounds as those relied on by the Registrar in expunging the mark at issue, it had raised in its defence to CCM's counterclaim the fact that CCM was barred, by reason of its 1989 agreement with Bauer, from attacking the '722 registration. This led the Prothonotary to make the comment that "[i]t would appear that said argument by Bauer would not be possible to make against CCM in the Appeal should the latter be granted intervener status" (paragraph 13 of the Prothonotary's decision).

17 The Prothonotary then referred to my colleague Stratas J.A.'s reasons in *Canada (Attorney General) v. Pictou Landing Band Council*, 2014 FCA 21, [2015] 2 F.C.R. 253 (F.C.A.) ("*Pictou Landing*") where, at paragraph 11, he sets forth those factors which he considers relevant in determining whether intervention should be granted to a proposed intervener. In light of the factors set out in *Pictou Landing*, the Prothonotary concluded that by reason of what he referred to as the "full debate already ongoing in File T-311-12", the first two factors were met but that factors III, IV and V were not met.

18 This led the Prothonotary to opine that, on balance, CCM should not be allowed to intervene in the section 45 proceedings which were "well under way" (paragraph 16 of the Prothonotary's reasons). Consequently, he dismissed CCM's motion to intervene with costs.

B. The Federal Court's Decision

19 The Judge began by addressing the standard of review which should be applied in reviewing the Prothonotary's decision. In his view, because the questions on a motion to intervene were not vital to the final issue of the case, the Prothonotary's decision should be reviewed in accordance with the principles set out by this Court in *Merck & Co. v. Apotex Inc.*, 2003 FCA 488, [2004] 2 F.C.R. 459 (F.C.A.), at paragraph 19. Thus, it was his task to determine whether the Prothonotary had exercised his discretion based upon a wrong principle or upon a misapprehension of the facts.

20 The Judge then briefly reviewed the facts and turned to the factors which were to guide him in determining whether leave should be granted. In that regard, he referred to this Court's decision in *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)* (1989), [1990] 1 F.C. 90, [1989] F.C.J. No. 707 (Fed. C.A.) ("*Rothmans, Benson & Hedges*") where the Court, in allowing the appeals before it, affirmed the correctness of the factors, i.e. six factors relevant to the determination of a leave to intervene application, enunciated by the trial judge, Rouleau J. of the Federal Court ((1989), [1990] 1 F.C. 74, 29 F.T.R. 267 (Fed. T.D.), at paragraph 12).

21 After setting out Rouleau J.'s six factors, the Judge turned to Stratas J.A.'s reasons in *Pictou Landing* and cited paragraph 11 thereof where my colleague sets forth the factors which, in his view, are relevant to present day litigation. The Judge then remarked that the relevant factors, as

set out in *Rothmans, Benson & Hedges* and in *Pictou Landing*, were not to be taken, in his words, *au pied de la lettre.* He also indicated that this Court's decision in *Siemens* was not to be taken as an absolute bar to a motion to intervene, adding that he did not feel that it was necessary to carry out a detailed analysis based on the factors of *Rothmans, Benson & Hedges* and *Pictou Landing*. He then pointed out that Stratas J.A.'s reasons in *Pictou Landing* were those of a single motions judge and thus not binding on this Court, adding that this Court was reluctant to reverse itself, citing for that proposition our decision in *Miller v. Canada (Attorney General)*, 2002 FCA 370, [2002] F.C.J. No. 1375 (Fed. C.A.) ("*Miller*"), at paragraph 8.

22 The Judge then turned to the merits of the motion before him. In his view, there could be no doubt that CCM had an interest in Bauer's application for judicial review of the Registrar's decision and that CCM's intervention would be useful to the Court in that no one was opposing Bauer in the proceedings. He then stated that the Prothonotary was clearly wrong in considering the settlement agreement between Bauer and Easton.

23 He then turned his attention to the question of whether the Prothonotary had downplayed the public interest aspect of the Register. He pointed to a number of decisions, both of this Court and of the Federal Court, to make the point that there was a public interest aspect in proceedings arising under section 45 of the Act. However, in his view, the public interest aspect of these proceedings did not rank as high as the public interest aspect of cases, for example, where constitutional issues were raised. On this point, the Judge concluded that the Court "might well benefit from CCM's intervention as it would give a different perspective, in the sense that Easton is giving no perspective at all" (paragraph 29 of the Judge's reasons).

24 All of this led the Judge to conclude that although the Prothonotary had been wrong to consider the agreement between Bauer and Easton, that error was not fatal as he was satisfied that the Prothonotary would, in any event, have come to the same conclusion. The Judge then made the point that the better forum in which CCM could advance its arguments was in the action for infringement between it and Bauer. Thus, in the Judge's view, the Prothonotary had not wrongly exercised his discretion upon a wrong principle or upon a misapprehension of facts. Hence, he dismissed CCM's appeal.

IV. Issues and Standard of Review

25 In my opinion, there are two issues raised in this appeal:

(1) What are the applicable criteria to decide whether to grant intervener status to CCM?

(2) Was the Judge wrong in not interfering with the Prothonotary's decision?

26 There is no dispute between the parties that a prothonotary's decision ought to be disturbed by a judge only where it is clearly wrong, in the sense that the exercise of discretion was based

upon a wrong principle or a misapprehension of the facts. Consequently, in the present matter, we should not interfere with the Judge's decision unless there were grounds justifying his intervention, or if he arrived at his decision on a wrong basis or was plainly wrong (*Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450 (S.C.C.), at paragraph 18).

V. Parties Submissions

A. CCM's Submissions

27 CCM argues that the Prothonotary's decision was based upon wrong principles and a misapprehension of the facts thus constituting grounds for the Judge to set his order aside. CCM finds numerous errors in the Prothonotary's decision that can be divided into the following three categories:

(1) Misapplying this Court's decision in Siemens

28 In applying the *Pictou Landing* criteria, the Prothonotary concluded that criteria III, IV and V had not been met. Criteria III relates to the different and valuable perspective that an intervener should advance. The Prothonotary held that CCM would only be replacing Easton as a respondent and for that finding, relied on this Court's decision in *Siemens*. CCM argues, however, that the rule put forward in *Siemens* was only "directed to the particular mischief of duplication" (CCM's memorandum of fact and law, paragraph 32). In CCM's view, there would be no duplication in this case given that Easton undertook not to participate in the judicial review.

(2) Finding no public interest in section 45 proceedings / Failing to appreciate that it is in the interests of justice that the Court hear both sides of the issue / Finding intervention inconsistent with Rule 3

29 The *Pictou Landing* criteria IV and V purport to ensure that the intervention is in the interests of justice and that it would advance the imperatives set forth in Rule 3 which provides that the Rules are to be interpreted and applied so as to secure "the just, most expeditious and least expensive determination of every proceeding on its merits". CCM argues that there is a public interest in ensuring the accuracy of the Register as a public record of trade-marks: "[t]he fact that an applicant under s. 45 is not even required to have an interest in the matter (...) speaks eloquently to the public nature of the concerns the section is designed to protect" (CCM's memorandum of fact and law, paragraph 39, quoting *Meredith & Finlayson v. Canada (Registrar of Trade Marks)*, [1991] F.C.J. No. 1318, 40 C.P.R. (3d) 409 (Fed. C.A.) (*"Meredith"*)).

30 CCM asserts that it was an error on the part of the Prothonotary to refuse to grant it leave to intervene on the basis that there was a "full debate already ongoing" between itself and Bauer because of the different questions at issue in the section 45 proceedings and in the infringement

action. Moreover, the existence of another efficient means to submit a question to the Court was held to be irrelevant in *Pictou Landing*.

(3) Giving credence to Bauer's settlement with Easton

31 This private agreement plays no role in considering whether CCM should be given the right to intervene. The Judge agreed with CCM on this point and found that the Prothonotary was clearly wrong in taking the settlement into account.

32 CCM submits that the Judge identified a number of "errors" in the Prothonotary's decision: the settlement should not have been taken into account, there is a public aspect to the Trade-marks Register, *Siemens* is not an absolute bar to intervention and the Court would be better served if someone were present to defend the expungement decision (CCM's memorandum of fact and law, paragraph 21). In addition, CCM says that the Judge "erred in implying that the decision in Pictou Landing reverses the Federal Court of Appeal decision in Rothmans" (CCM's memorandum of fact and law, paragraph 71). CCM says that *Pictou Landing* simply updates and evolves the *Rothmans, Benson & Hedges* factors. Accordingly, the Judge's decision was plainly wrong.

B. Respondent's Submissions

33 Bauer argues that the Judge's decision not to intervene is not fundamentally wrong given that the Prothonotary turned his mind to the applicable factors and did not misapprehend the facts. The sole error found by the Judge was the effect to be given to the settlement between it and Easton, and he was not satisfied that "without referring to that settlement, [the Prothonotary] would have come to a different conclusion" (Bauer's memorandum of fact and law, paragraph 48, quoting the Judge's decision at paragraph 30).

34 Contrary to what is suggested by CCM, the Judge's decision was not based upon a finding that the infringement action would be a forum more appropriate for CCM's case, but rather on a rightful application of the standard of review. Bauer further argues that even greater deference should be given to the Prothonotary's decision for he was the Case Management Judge and was "intimately familiar" with the history and details of the matter. In Bauer's view, "CCM must demonstrate that the Judge 'erred in a fundamental way' in refusing to disturb the Prothonotary's decision, in that the latter was the 'clearest case of misuse of judicial discretion'" (Bauer's memorandum of fact and law, paragraph 42).

35 Bauer further says that the list of factors to consider in a motion for intervention were "originally developed in Rothmans some 25 years ago and has since then been reiterated on several occasions" (Bauer's memorandum of fact and law, paragraph 53). Bauer argues that the new test set out in *Pictou Landing* must not be applied to this case because it was created by a judge alone and is therefore not binding. Bauer points out that the "traditional"*Rothmans, Benson & Hedges*

factors were applied by the Federal Court in a trade-mark expungement case posterior to *Pictou Landing* (*Coors Brewing Co. v. Anheuser-Busch LLC*, 2014 FC 318, 123 C.P.R. (4th) 340 (F.C.)).

36 Bauer also stresses that the motion to intervene is late (CCM only launched it after it learned that Bauer and Easton had reached an agreement), that there is no public interest in a section 45 proceeding, that unopposed cases of this kind are commonplace in the Federal Court, and that CCM is already attacking the validity of the '722 registration in the infringement action. Finally, Bauer argues that CCM undertook, in an agreement signed in 1989, not to object to the use or registration of the '722 registration. It is thus arguably breaching this agreement.

VI. Analysis

A. What are the applicable criteria to decide whether to grant CCM leave to intervene?

37 I begin by noting that there appears to be a certain amount of confusion as to the governing jurisprudence on the question of motions for leave to intervene since the decision of my colleague Stratas J.A. in *Pictou Landing*. It is my view, which I do not believe is contentious, that the decision of a panel of this Court has precedence over that of a single judge of the Court sitting as a motions judge. My colleague recognized as much in his reasons: see *Pictou Landing* at paragraph 8. This means that the governing case is *Rothmans, Benson & Hedges*.

38 That said, I wish to make it clear that this panel, or for that matter any other panel of the Court, cannot prevent a single motions judge from expressing his view of the law if he is so inclined. In my view, parties may use a single motions judge's reasoning, if they wish, and make it part of their argument in order to convince the Court that it should change or modify its case law. But all should be aware that a single judge's opinion does not change the law until it is adopted by a panel of the Court.

39 A comparison of *Rothmans, Benson & Hedges* factors and *Pictou Landing* shows that the main differences between the two are the removal of the "lack of any other reasonable means" factor (*Rothmans, Benson & Hedges* third factor) and of the "ability of the Court to hear the case without the intervener" factor (*Rothmans, Benson & Hedges* sixth factor), as well as the addition of the "compliance with procedural requirements" factor (*Pictou Landing* first factor), and the "consistency with Rule 3" factor (*Pictou Landing* fifth factor). These differences are not, in my respectful view, of any substance. In effect, "compliance with procedural requirements" will generally always be a relevant consideration and the "consistency with Rule 3" factor can always be considered under the "interests of justice" factor (*Rothmans, Benson & Hedges* fifth factor).

40 I do not disagree with Stratas J.A.'s comments in *Pictou Landing* that the existence of another appropriate forum is not necessarily a reason to refuse a proposed intervention that can be helpful to the Court. It obviously depends on the relevant circumstances. It is also undeniable that the Court, in most cases, is able to hear and decide a case without an intervener and that the "more

salient question is whether the intervener will bring further, different and valuable insights and perspectives that will assist the Court in determining the matter" (*Pictou Landing*, paragraph 9, last bullet). This requirement is, in essence, what Rule 109(2)(*b*) requires. In any event, as Stratas J.A. recognized at paragraph 7 of his reasons, he could have reached the same result by applying the *Rothmans, Benson & Hedges* factors and ascribing little weight to the factors which he did not find relevant.

41 In my opinion, the minor differences between the *Rothmans, Benson & Hedges* factors and those of *Pictou Landing* do not warrant that we change or modify the factors held to be relevant in *Rothmans, Benson & Hedges*. As the *Rothmans, Benson & Hedges* factors are not meant to be exhaustive, they allow the Court, in any given case, to ascribe the weight that the Court wishes to give to any individual factor.

42 The criteria for allowing or not allowing an intervention must remain flexible because every intervention application is different, i.e. different facts, different legal issues and different contexts. In other words, flexibility is the operative word in dealing with motions to intervene. In the end, we must decide if, in a given case, the interests of justice require that we grant or refuse intervention. Nothing is gained by adding factors to respond to every novel situation which motions to intervene bring forward. In my view, the *Rothmans, Benson & Hedges* factors are well tailored for the task at hand. More particularly, the fifth factor, i.e. "[a]re the interests of justice better served by the intervention of the proposed third party?" is such that it allows the Court to address the particular facts and circumstances of the case in respect of which intervention is sought. In my view, the *Pictou Landing* factors are simply an example of the flexibility which the *Rothmans, Benson & Hedges* factors give to a judge in determining whether or not, in a given case, a proposed intervention should be allowed.

43 To conclude on this point, I would say that the concept of the "interests of justice" is a broad concept which not only allows the Court to consider the interests of the Court but also those of the parties involved in the litigation.

B. Was the Judge wrong in not interfering with the Prothonotary's decision?

44 In determining the second question before us, it must be kept in mind that our task is not to decide whether we believe that CCM meets the relevant factors for intervention and thus that leave should have been granted, but whether the Judge was wrong in refusing to interfere with the Prothonotary's decision. To that task I now turn.

45 So the question is: should the Judge have interfered with the Prothonotary's order? CCM says that the Prothonotary made a number of errors which should have justified his intervention. First, it says that the Prothonotary misapplied *Siemens*.

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46 I begin by saying that CCM's motion is not, in reality, a motion for leave to intervene. It is, in effect, a motion which seeks to allow CCM to become the respondent, in lieu of Easton, in Bauer's application. In that respect, CCM's motion is similar to that made by West Atlantic Systems ("WAS") in*Siemens* where WAS sought to intervene in an application for judicial review filed by the Attorney General following a decision of the Canadian International Trade Tribunal (the "CITT") which was unfavourable to the Department of Public Works and Government Services. More particularly, the CITT determined that the procurements at issue were deficient and failed to comply with Article 1007(1) of the *North American Free Trade Agreement*.

47 Siemens Enterprises Communications Inc. ("Siemens"), which had filed a number of complaints with the CITT and which had fully participated in the proceedings before that tribunal, chose not to participate in the Attorney General's judicial review application. WAS, which had unsuccessfully attempted to participate in the proceedings before the CITT, sought to obtain leave from this Court to intervene in the judicial review proceedings. In denying WAS' motion, Mainville J.A., writing for the Court, made the following comments at paragraph 4 of his reasons.

> By its motion, WAS is attempting to substitute itself for Siemens as the respondent in this judicial review application. WAS seeks to challenge the application under a proposed order of the Court which would, for all intents and purposes, grant it a status equivalent to that of a respondent in these proceedings. The rules permitting interventions are intended to provide a means by which persons who are not parties to the proceedings may nevertheless assist the Court in the determination of a factual or legal issue related to the proceedings (Rule 109(2)*b*) of the *Federal Courts Rules*). These rules are not to be used in order to replace a respondent by an intervener, nor are they a mechanism which allows a person to correct its failure to protect its own position in a timely basis.
>
> [emphasis added]

48 CCM argues that the Prothonotary erred in relying on *Siemens* because our decision in that case "should be understood to be directed to the particular mischief of duplication" (paragraph 32 of CCM's memorandum of fact and law). In my respectful view, this argument is without merit as there was no question of duplication in *Siemens* since there was no respondent in the judicial review proceedings as Siemens had decided not to participate.

49 Considering that our Court in *Siemens* held that Rule 109 should not be used to substitute a new respondent in the proceedings, it cannot be said, in my view, that the Prothonotary was wrong to consider, as a relevant factor, that the purpose of CCM's motion was to substitute itself as a respondent in lieu of Easton. However, I agree with the Judge that *Siemens* does not, *per se*, constitute an absolute bar to a motion to intervene.

50 Second, CCM says that the Prothonotary was in error in holding that there was no public interest in section 45 proceedings sufficient to support its intervention in Bauer's application. More particularly, it says that the Prothonotary was wrong to rely on Prothonotary Tabib's decision in*Genencor* which dealt with an entirely different matter, adding that "[t]here is a public interest in ensuring the accuracy of the Register as a public record of trade-marks" (CCM's memorandum of fact and law, paragraph 41).

51 CCM also says that the Prothonotary erred in holding that Bauer's judicial review proceedings could be disposed of without its participation, adding that the Prothonotary again erred in relying on *Genencor*. CCM says that both the Rules and section 45 of the Act envisage the participation of the requesting party in section 45 proceedings and any appeal taken therefrom. In CCM's view, it can be said that there is an expectation that in any appeal from a section 45 decision, the Court will have the benefit of an appellant and a respondent. Thus, CCM says that the Judge ought to have intervened in that the Prothonotary was wrong to find that there was no public interest in section 45 proceedings and that the matter could be heard without its participation.

52 Before determining whether the Prothonotary erred, as argued by CCM, it is important to have a brief look at section 45 and the proceedings which arise from it. Pursuant to section 45, the Registrar may at any time and at the written request of any person, give notice to the registered owner of a trade-mark requiring it to show, by way of an affidavit or a statutory declaration, that the mark was used in Canada during the three years preceding the notice.

53 In making a determination as to whether or not the mark was used in the time frame provided by section 45, the only evidence admissible before the Registrar is the aforementioned affidavit or statutory declaration. It is on the basis of that evidence and the parties' representations that the Registrar must decide whether or not there has been use of the mark as required by section 45.

54 Following the Registrar's decision, an appeal may be taken before the Federal Court pursuant to section 56 of the Act and new evidence may be submitted to the Court in addition to the evidence already adduced before the Registrar. If the new evidence could have materially affected the Registrar's decision, then the Court must consider the matter *de novo* and reach its own conclusion on the issues to which the new evidence pertains.

55 The purpose of section 45 proceedings is to remove registrations which have fallen into disuse. The burden of proof on the registered owner is not a heavy one. In *Locke v. Osler, Hoskin & Harcourt LLP*, 2011 FC 1390, 98 C.P.R. (4th) 357 (F.C.), O'Keefe J. stated at paragraph 23 that "[t]he threshold to establish use is relatively low and it is sufficient if the applicant establishes a prima facie case of use". It has also been said that the purpose of section 45 of the Act is to remove deadwood from the Register (see *Eclipse International Fashions Canada Inc. c. Shapiro Cohen*, 2005 FCA 64, 348 N.R. 86 (F.C.A.), at paragraph 6). In *Dart Industries Inc. v. Baker & McKenzie LLP*, 2013 FC 97, 426 F.T.R. 98 (Eng.) (F.C.), at paragraph 13, O'Keefe J. commented

that "[p]roceedings under section 45 of the Act are summary and administrative in nature". Finally, in *Meredith*, Huguessen J.A., writing for this Court, made these comments, at page 412, regarding section 45 proceedings:

> Section 45 provides a simple and expeditious method of removing from the register marks which have fallen into disuse. It is not intended to provide an alternative to the usual *inter partes* attack on a trade mark envisaged by s. 57. The fact that an applicant under s. 45 is not even required to have an interest in the matter (the respondent herein is a law firm) speaks eloquently to the *public* nature of the concerns the section is designed to protect.
>
> Subsection 45(2) is clear: the Registrar may only receive evidence tendered by or on behalf of the registered owner. Clearly it is not intended that there should be any trial of a contested issue of fact, but simply an opportunity for the registered owner to show, if he can, that his mark is in use or if not, why not.
>
> An appeal to the Court, under s. 56 does not have the effect of enlarging the scope of the inquiry or, consequentially, of the evidence relevant thereto. We cannot improve on the words of Thurlow C.J., speaking for this Court, in *Plough (Canada) Ltd. v. Aerosol Fillers Inc.* (1980), 53 C.P.R. (2d) 62 at p. 69, [1981], 1 F.C. 679, 34 N.R. 39, quoting with approval the words of Jackett P. in *Broderick & Bascom Rope Co. v. Registrar of Trade Marks* (1970), 62 C.P.R. 268.:
>
> > In my view, evidence submitted by the party at whose instance the s-s. 44(1) [now 45(1)] notice was sent is not receivable on the appeal from the Registrar any more than it would have been receivable before the Registrar. On this point, I would adopt the view expressed by Jackett P. in *Broderick Bascom Rope Co. v. Registrar of Trade Marks*, *supra*, when he said at p. 279:...
>
> [emphasis added]

56 In my view, the Prothonotary ought to have considered that there was a public interest component in section 45 proceedings. In concluding as he did, the Prothonotary relied on *Genencor* for support. However, I note from paragraphs 3 and 7 of *Genencor* that Prothonotary Tabib made a clear distinction between the nature of the proceedings before her and those which arise under section 45 of the Act. More particularly, in refusing to grant intervener status to the proposed intervener, she pointed out that the provisions at issue before her, namely sections 48.1 to 48.5 of the *Patent Act*, R.S.C., 1985, c. P-4 were not similar to those arising under section 45 in that they did not give third parties the right to challenge patents by way of a summary process in the way that section 45 allowed third parties to challenge trade-marks.

57 Section 45 proceedings contemplate the participation of persons with no interest whatsoever in the existence of a given trade-mark. The provision allows anyone to initiate a section 45 notice, to submit representations to the Registrar and in the case of an appeal, to either launch the appeal

or to participate as a respondent in that appeal. As this Court said at page 412 in *Meredith*, this "speaks eloquently to the public nature of the concerns the section is designed to protect", i.e. removing from the Registrar marks which have fallen into disuse. Thus, it necessarily follows, in my view, that the nature of the proceedings under section 45 is a relevant consideration in determining whether or not intervener status should be given to a third party, such as CCM in the present matter.

58 In coming to that view, I am mindful of the arguments put forward by Bauer in response to CCM's arguments on this issue. In particular, I am mindful of Bauer's arguments that *Genencor* is relevant, that *Meredith* had to be understood in its proper context, i.e. that the public nature of section 45 had to do with the fact that any member of the public could initiate a section 45 notice, that, as in *Genencor*, there is no overriding public interest in ensuring that invalid trade-marks are not maintained on the public register, that proceedings arising under section 45 do not usually involve complicated legal questions but, to the contrary, usually pertain to simple well known legal principles resulting from an extensive body of jurisprudence and that proceedings under section 45 are commonplace in the Federal Court.

59 However, the fact that there is a public aspect to section 45 proceedings does not elevate these proceedings to a level comparable to cases that, in the words of the Judge at paragraph 26 of his reasons, "affect large segments of the population or raise constitutional issues". Thus, the public nature of section 45 proceedings must be balanced against other relevant considerations which, in my respectful view, must be considered in the present matter. As I will explain shortly, the existence of a public interest component in section 45 does not, in the present matter, outweigh other considerations which militate against granting intervention. In my view, when all of the relevant factors are considered, the public nature of section 45 proceedings does not tip the scale in CCM's favour. In other words, a proper balancing of all the relevant factors leads me to conclude that the Prothonotary did not err in refusing to allow CCM to intervene.

60 I now turn to these other considerations.

61 The first consideration is the agreement entered into between Bauer and CCM wherein CCM undertook and agreed not to object to Bauer's use or registration of the trade-mark at issue. On the basis of this agreement, Bauer asserts that CCM is contractua lly barred from attacking the validity of its trade-mark. It says that this argument can be put forward in its defence against CCM's counterclaim in Federal Court File T-311-12 and will constitute one of the issues to be determined by the Federal Court in that file. However, Bauer says that if intervener status is given to CCM, it will be unable to raise the issue in the context of section 45 proceedings in that the Federal Court "will merely be reviewing the decision of the Registrar to expunge Bauer's Trademark registration applying the appropriate standard of review" (Bauer's memorandum of fact and law, paragraph 113).

62 I should point out that the aforesaid agreement between CCM and Bauer was considered by our Court in *Bauer Hockey Corp. v. Sport Maska Inc.*, 2014 FCA 158 (F.C.A.) where it held that the judge below had erred in striking certain portions of Bauer's amended statement of claim. More particularly, our Court was of the view that Bauer's amended allegations, which relied in part on the aforesaid agreement, were such that it could not be said that its claim for punitive damages had no reasonable prospect of success. In other words, it was not plain and obvious, in the Court's view, that the amended statement of claim disclosed no reasonable cause of action with respect to punitive damages.

63 The Prothonotary, at paragraph 13 of his reasons, considered this point concluding that "it would appear that said argument by Bauer would not be possible to make against CCM in the appeal should the latter be granted intervener status". It is clear, in my view, that this is one of the considerations which led the learned Prothonotary to conclude that intervention should not be granted to CCM. In considering Bauer's contractual arrangements with CCM as relevant in the determination of whether intervener status should be granted, the Prothonotary did not err. I would go further and say that it would have been an error on his part not to give consideration to this matter.

64 The other consideration which, in my view, militates against granting intervener status to CCM is the existence of litigation between Bauer and CCM in Federal Court File T-311-12. In that file, Bauer has instituted proceedings against CCM claiming that CCM has infringed its trade-mark and CCM has counter-claimed seeking a declaration that the trade-mark is invalid. In seeking the invalidity of the trade-mark, CCM says at paragraph 25 of its Statement of Defence and Counterclaim:

> 25 [...] Bauer does not use the [Trademark] as a trade-mark; rather, the [Trademark] is merely a decorative border or surround on the skate to highlight the BAUER word mark. To the extent that the [Trademark] or the Floating Skate's Eyestay Design have ever appeared on Bauer's skates, they have always been in combination with the BAUER word mark. [...]

65 The above assertion by CCM is similar to paragraph 13 of the Registrar's decision where she said:

> [13] I find that the addition of the word element "BAUER" IS A DOMINANT ELEMENT OF THE [Trademark] as used. As such, the [Trademark] as used is no longer simply a design mark but is clearly composed of two elements — an eyestay design and the word BAUER. As for the use of BAUER within the design mark, I am not convinced that the public would likely perceive it as a separate trade-mark from the [Trademark] at issue. Such additional matter would detract from the public's perception of the use of the trade-mark "SKATES'S EYESTAY DESIGN" *per se*

66 Bauer says that its use of the trade-mark at the time that Easton requested that the Registrar send a section 45 notice is the same as that when it reached its agreement with CCM approximately 30 years ago. In its reply and defence to CCM's counterclaim, Bauer also says, as I have just indicated, that CCM is contractually barred from challenging its trade-mark.

67 The Prothonotary was of the view that the litigation in Court File T-311-12 was a factor which had to be considered in determining whether intervener status should be given to CCM. At paragraph 15 of his reasons, the Prothonotary referred to those proceedings by saying that there was a "full debate already ongoing in File T-311-12 — a dynamic not present in Pictou Landing". The Judge shared the Prothonotary's view and said at paragraph 31 of his reasons that "[t]he validity of the trade-mark is in issue in the litigation between Bauer and CCM in docket T-311-12. That is the forum in which CCM should make its case".

68 In my view, there was no error in so concluding on the part of the Prothonotary and the Judge. I agree with Bauer's assertion that allowing CCM to intervene would not, in any event, necessarily simplify and expedite the ongoing dispute over Bauer's trade-mark. However, I need not go into this in greater detail since both the Prothonotary and the Judge, exercising their respective discretions, were of the view that litigation in File T-311-12 was a relevant consideration in determining whether CCM should be allowed to intervene. I can see no basis on which I could conclude that it was wrong on their part to take the ongoing litigation between the parties as a relevant factor. Again, I am of the view that it would have been an error not to take such litigation into consideration.

69 CCM further submits, as it did before the Judge, that the Prothonotary erred in considering Bauer's settlement with Easton. As I indicated earlier, the Judge agreed with CCM but was satisfied that the Prothonotary's error was inconsequential. I am also of that view. In any event, it is my opinion that Bauer's agreement with CCM and the existence of litigation in Federal Court File T-311-12 clearly outweigh all other considerations in this file.

70 Although I believe that this is sufficient to dispose of the appeal, I will nonetheless briefly examine the specific factors enunciated in *Rothmans, Benson & Hedges* in the light of the evidence before us.

71 First, is CCM directly affected by the outcome of the section 45 proceedings? The answer is that it is affected, in a certain way. More particularly, if the Registrar's decision is upheld, Bauer's trade-mark will be expunged and that conclusion will be helpful to CCM in Bauer's infringement action. However, it is clear to me, in the circumstances of this case, that the purpose of CCM's attempt to intervene is to gain a tactical advantage. In so saying I do not intend to criticize CCM. I am simply making what I believe to be a realistic observation of what is going on in the file.

72 As to the second factor, i.e. whether there exists a justiciable issue and a veritable public interest, I have already dealt with this in addressing CCM's arguments concerning the public nature of section 45 proceedings.

73 As to the third factor, i.e. whether there is a lack of any other reasonable or efficient means to submit the question at issue before the Court, the answer is no. The question raised in the section 45 proceedings is, albeit in a different setting, also raised in the litigation conducted by the parties in Federal Court File: T-311-12. Preventing CCM from intervening in the section 45 proceedings will not cause it any prejudice other than the loss of a tactical advantage. In any event, CCM can and could have requested the Registrar to give Bauer a section 45 notice at any time. It chose not to do so for reasons which are of no concern to us. Whether it did not request the Registrar to give such a notice because of its agreement with Bauer not to object to Bauer's use or registration of the trade-mark is a question which I need not address.

74 With regard to the fourth factor, i.e. whether the position of the proposed intervener can be adequately defended by one of the parties, the answer is no in that there is no party to the case other than Bauer. The position which CCM wishes to advance is that which Easton put forward, with success, before the Registrar and which it would have defended in the appeal before the Federal Court.

75 As to the sixth factor, i.e. can the Court hear and decide the case on its merits without the proposed intervener, the answer is yes. The fact that there would be no respondent does not prevent the Federal Court from performing its task in the circumstances. There can be no doubt that a respondent would be helpful to the Court but, in the circumstances, this factor does not tip the scale in favour of CCM. In any event, that was the conclusion arrived at by the Prothonotary and I can see no basis to disturb it.

76 To repeat myself, I am satisfied that when all of the relevant considerations are taken in, the interests of justice are better served by not allowing CCM to intervene.

VII. Conclusion

77 For these reasons, I conclude that the Judge made no error in refusing to interfere with the Prothonotary's decision. Consequently, I would dismiss the appeal but, in the circumstances, without costs.

***J.D. Denis Pelletier J.A.*:**

I agree.

***Johanne Gauthier J.A.*:**

I agree.

Appeal dismissed.

2018 FCA 199
Federal Court of Appeal

Wenham v. Canada (Attorney General)

2018 CarswellNat 6152, 2018 C.E.B. & P.G.R. 8296 (headnote only), 2018 FCA 199, 298 A.C.W.S. (3d) 251, 429 D.L.R. (4th) 166, 48 Admin. L.R. (6th) 22

BRUCE WENHAM (Appellant) and ATTORNEY GENERAL OF CANADA (Respondent)

David Stratas, D.G. Near, J.M. Woods JJ.A.

Heard: January 9, 2018
Judgment: November 1, 2018
Docket: A-212-17

Proceedings: reversing *Wenham v. Canada (Attorney General)* (2017), 2017 CF 658, 2017 CarswellNat 8851, 2017 FC 658, 2017 CarswellNat 3265, Ann Marie McDonald J. (F.C.)

Counsel: David Rosenfeld, Brittany Tovee, for Appellant
Melanie Toolsie, Negar Hashemi, for Respondent

***David Stratas J.A.*:**

1 Mr. Wenham appeals from the order of the Federal Court (per McDonald J.): 2017 FC 658 (F.C.). The Federal Court denied Mr. Wenham's motion to certify his application for judicial review as a class proceeding.

2 In this Court, Mr. Wenham submits that the Federal Court's order is undermined by several legal errors. He asks this Court to make the order the Federal Court should have made: to certify his application as a class proceeding.

3 I agree with Mr. Wenham. I would set aside the order of the Federal Court, grant Mr. Wenham's motion and make an order certifying the application as a class proceeding.

A. Background

4 Mr. Wenham's application for judicial review seeks to quash a compensation program established by the Government of Canada for victims of the drug, Thalidomide.

5 Mr. Wenham alleges that he is one of the victims. He says his mother took Thalidomide and this caused him to be born with severe bilateral deformities to his arms. But, thus far, he has been denied compensation.

6 In the late 1950's and early 1960's many mothers took Thalidomide to combat nausea and morning sickness. Only later was it discovered that using Thalidomide in the first trimester of pregnancy could cause deformities in children.

7 In 1990, by Order in Council, the Government of Canada established the Extraordinary Assistance Plan for Thalidomide Victims: *HIV-Infected Persons and Thalidomide Victims Assistance Order*, P.C. 1990-4/872. Under this plan, qualified persons received a lump-sum payment.

8 Many considered the compensation provided under the plan to be inadequate. In response, in 2015, the Government of Canada revised the plan. Under the revised plan, the Thalidomide Survivors Contribution Program, qualifying persons received a one-time payment of $125,000 and an annual lifetime pension of $25,000 to $100,000 depending on the level of disability.

9 Under the revised plan, persons could qualify for benefits if they had received payments under the 1990 plan or if they applied before May 31, 2016 and qualified under the 1990 plan. Importantly, however, they had to satisfy certain documentary proof requirements.

10 In his application, Mr. Wenham targets these requirements. To qualify, benefits-seekers had to show the following:

- verifiable information showing a settlement with the drug company;
- listing on an existing government registry of Thalidomide victims;
- documentary proof that Thalidomide was ingested during the first trimester of pregnancy; by virtue of a later direction, the Government of Canada limited the documentary proof to the following: doctor's prescriptions, hospital or medical records, hospital birth records, or an affidavit from persons with direct knowledge, such as the physician who prescribed the drug.

11 Mr. Wenham applied under the revised plan. In support, he submitted several affidavits. One was from a geneticist who provided an expert opinion on the causal link between his deformities and Thalidomide exposure. The geneticist did not have direct knowledge and so his affidavit did not satisfy the documentary proof requirements. Accordingly, Mr. Wenham's application for benefits was rejected.

12 Mr. Wenham was not alone. In all, 168 people were rejected because they failed to satisfy the documentary proof requirements.

13 In his application for judicial review, Mr. Wenham contends that the eligibility and documentary proof requirements and the resulting rejections of applications for benefits are unreasonable in the administrative law sense.

14 Soon after he brought his application for judicial review, Mr. Wenham brought a motion to certify it as a class proceeding on behalf of all the others whose applications were rejected for failure to satisfy the documentary proof requirements.

B. The governing provisions of the Federal Courts Rules

15 The Federal Courts, unlike the courts of some other jurisdictions, allow for applications for judicial review to be prosecuted as class proceedings.

16 Rule 334.12 of the *Federal Courts Rules*, SOR/98-106 provides for this. It expressly permits a member of a class of persons to start an action or an application on behalf of the members of the class. But the class action or application, as the case may be, can only be prosecuted as a class proceeding if it is certified as such. Certification is obtained by way of motion.

17 For certification, five requirements must be met:

> (a) the pleadings disclose a reasonable cause of action;
>
> (b) there is an identifiable class of two or more persons;
>
> (c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;
>
> (d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and
>
> (e) there is an adequate representative plaintiff or applicant.

(Rule 334.16(1) of the *Federal Courts Rules*.)

18 The Federal Court found that Mr. Wenham failed to satisfy any of these requirements.

19 In this Court, Mr. Wenham submits that the Federal Court committed errors of law and palpable and overriding errors. In his view, the Federal Court should have found that he met all five requirements and, as a result, should have certified his application as a class proceeding.

C. Analysis

20 In my view, owing to legal errors, the order of the Federal Court cannot stand: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.); *Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331 (F.C.A.).

21 Applying proper legal principles, including clear holdings on point from the Supreme Court, and making the order the Federal Court should have made, I find that Mr. Wenham has satisfied all five certification requirements and so I would grant his motion for certification and certify his application as a class proceeding.

(1) Reasonable cause of action (Rule 334.16(1)(a))

22 The reasonable cause of action requirement under Rule 334.16(1)(*a*) is identical to similar requirements found in the class proceedings legislation of other jurisdictions. Cases in those jurisdictions suggest that the reasonable cause of action requirement is best expressed in the negative: if the cause of action in the proceeding sought to be certified would not survive a motion to strike, certification must be denied. This reflects the common sense position that there is no sense certifying a proceeding that is doomed to fail.

23 The Supreme Court has repeatedly confirmed this. In the words of the Supreme Court, "the requirement [in class proceedings] that the pleadings disclose a cause of action" is of course governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is "plain and obvious" that no claim exists: *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68, [2001] 3 S.C.R. 158 (S.C.C.) at para. 25; see also *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, [2011] 2 S.C.R. 261 (S.C.C.) at para. 20 and *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57, [2013] 3 S.C.R. 477 (S.C.C.) at para. 63.

24 Therefore, to determine the requirement of a reasonable cause of action under Rule 334.16(1)(*a*), we must look to the jurisprudence on when a pleading should be struck for failure to disclose a cause of action. The leading case is *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 (S.C.C.). There, the Supreme Court articulated the test as follows (at para. 17):

> This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate*; *Hunt*; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

25 This Court put it this way:

> For the purposes of the first criterion - that the pleadings disclose a reasonable cause of action - the principles are the same as those applicable on a motion to strike. The facts alleged in the statement of claim are assumed to be true, and no evidence may be considered. The test is whether it is "plain and obvious" that the pleadings, assuming the facts pleaded to be true, disclose no reasonable cause of action.

(*R. v. John Doe*, 2016 FCA 191 (F.C.A.) at para. 23.)

26 These judicial expressions of the test and Rule 334.16(1)(*a*) refer to a "reasonable cause of action." The word "reasonable" is regrettable: it has every potential to mislead.

27 Here, it misled the Federal Court. The Federal Court asked itself "whether a reasonable case exists" and whether the application "has a reasonable chance of success" (at paras. 18 and 45). Elsewhere, it described its task as making "a preliminary assessment of the strength of the proposed class proceeding" (at para. 25). These are not the tests.

28 Quite aside from the above authorities, the Supreme Court has warned that on a certification motion, a court is not to resolve conflicting facts and evidence and assess the strength of the case. Rather the task is simply a threshold one: can the proceeding go forward as a class proceeding? See *Pro-Sys Consultants*, above at paras. 99 and 102.

29 The phrase "reasonable cause of action" is not an invitation to a court to assess the odds of a cause of action ultimately succeeding, and to let it go forward if there is only, say, a 3:1 chance against evidence coming forward that will clinch the claim. Wagering on whether the cause of action will cross the finish line is no part of the court's task.

30 In *Imperial*, above, the Supreme Court spoke against such an approach (at paras. 23 and 25):

> Before us, Imperial and the other tobacco companies argued that the motion to strike should take into account, not only the facts pleaded, but the possibility that as the case progressed, the evidence would reveal more about Canada's conduct and role in promoting the use of low-tar cigarettes. This fundamentally misunderstands what a motion to strike is about. It is not about evidence, but the pleadings. The facts pleaded are taken as true. Whether the evidence substantiates the pleaded facts, now or at some future date, is irrelevant to the motion to strike. The judge on the motion to strike cannot consider what evidence adduced in the future might or might not show. To require the judge to do so would be to gut the motion to strike of its logic and ultimately render it useless.
>
> . . . . .
>
> Related to the issue of whether the motion should be refused because of the possibility of unknown evidence appearing at a future date is the issue of speculation. The judge on a motion to strike asks if the claim has any reasonable prospect of success. In the world of

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> abstract speculation, there is a mathematical chance that any number of things might happen. That is not what the test on a motion to strike seeks to determine. Rather, it operates on the assumption that the claim will proceed through the court system in the usual way — in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedent. The question is whether, considered in *the context of the law and the litigation process*, the claim has no reasonable chance of succeeding.
>
> [emphasis in original]

31 Reasonableness, as it is understood in other contexts, does not enter into it. The test is whether a cause of action has been pleaded that is not plain and obvious to fail.

32 The foregoing authorities all concern actions, not applications. The case at bar concerns an application. Is the threshold for striking an application different than that for striking an action?

33 No. In motions to strike applications for judicial review, this Court uses the same threshold. It uses the "plain and obvious" threshold commonly used in motions to strike actions, sometimes also called the "doomed to fail" standard. Taking the facts pleaded as true, the Court examines whether the application:

> ...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 117at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286at paragraph 6; *cf. Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

(*JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue*, 2013 FCA 250, [2014] 2 F.C.R. 557 (F.C.A.) at para. 47.)

34 To determine whether an application for judicial review discloses a cause of action, the Court must first read the notice of application to get at its "real essence" and "essential character" by "reading it holistically and practically without fastening onto matters of form": *JP Morgan* at paras. 49-50.

35 There are three distinct, analytical stages to an application for judicial review and it is useful to keep them front of mind: *Canada (Attorney General) v. Boogaard*, 2015 FCA 150, 474 N.R. 121 (F.C.A.) at paras. 35-37; *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 (F.C.A.) at paras. 26-28. Whether or not Mr. Wenham's application is certified as a class proceeding, these stages remain.

36 An application can be doomed to fail at any of the three stages:

I. *Preliminary objections*. An application not authorized under the *Federal Courts Act*, R.S.C., 1985, c. F-7 or not aimed at public law matters may be quashed at the outset: *JP Morgan* at para. 68; *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26; *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605. Applications not brought on a timely basis may be barred: section 18.1(2) of the *Federal Courts Act*. Judicial reviews that are not justiciable may also be barred: *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4, 379 D.L.R. (4th) 737. Other possible bars include res judicata, issue estoppel and abuse of process (*Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 ; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77), the existence of another available and adequate forum for relief (prematurity) (*Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, [2011] 2 F.C.R. 332; *JP Morgan* at paras. 81-90) and mootness (*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342).

II. *The merits of the review*. Administrative decisions may suffer from substantive defects, procedural defects or both. Substantive defects are evaluated using the methodology in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; procedural defects are evaluated largely by applying the factors in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193. In certain circumstances, the application is doomed to fail at this stage right at the outset. For example, an application based on procedural defects that have been waived has no chance of success: *Irving Shipbuilding Inc. v. Canada (Attorney General)*, [2010] 2 F.C.R. 488, 314 D.L.R. (4th) 340.

III. *Relief*. In some cases, the relief sought is not available in law (*JP Morgan* at paras. 92-94) and so the application can be quashed in whole or in part on that basis.

37 As part of her submissions concerning Rules 334.16(1)(*b*) through (*e*), the respondent raises the objections of justiciability and the thirty-day, extendable limitation period in subsection 18.1(2) of the *Federal Courts Act*. In particular, she emphasizes the importance of the limitation period in the Court's consideration of the "preferable procedure" requirement in Rule 334.16(1)(*d*). She does not raise these objections as part of her submissions concerning the "reasonable cause of action" requirement in Rule 334.16(1)(*a*).

38 This misconceives their analytical role in applications for judicial review. As noted above, both of these are fatal, preliminary objections to judicial review. They belong in the first stage of analysis. If these objections are established, they extinguish any asserted cause of action — in other words, if they are established, there can be no "reasonable cause of action" within the meaning of Rule 334.16(1)(*a*).

39 Therefore, these objections are properly considered under Rule 334.16(1)(*a*). Assuming they have some potential merit, further evidence is required, and the application is certified as

a class proceeding, they may potentially qualify as common issues for the Court to determine. Further, as the respondent suggests, on a certification motion, they may also bear upon the Court's consideration of Rules 334.16(1)(*b*) through (*e*), in particular "preferable procedure" under Rule 334.16(1)(*d*).

40 But first and foremost, these objections should be examined under Rule 334.16(1)(*a*) to see if they are fatal to the application.

(a) The thirty-day, extendable limitation period: Federal Courts Act, subsection 18.1(2)

41 In many cases, an application for judicial review must be commenced within thirty days after communication of the decision to the applicant: subsection 18.1(2) of the *Federal Courts Act*. But a party can move for an extension of time.

42 Extensions of time are granted when they are in the interests of justice. Where an application for judicial review is brought by one or more individual applicants, four questions guide this inquiry: see, *e.g.*, *Larkman v. Canada (Department of Indian Affairs and Northern Development)*, 2012 FCA 204, 433 N.R. 184 (F.C.A.) at para. 61 and many other cases such as *Grewal v. Canada (Minister of Employment & Immigration)*, [1985] 2 F.C. 263 (Fed. C.A.). They are:

(1) Did the moving party have a continuing intention to pursue the application?

(2) Is there some potential merit to the application?

(3) Has the Crown been prejudiced from the delay?

(4) Does the moving party have a reasonable explanation for the delay?

43 While these four questions appropriately guide the analysis and implement the policies intended by Parliament under subsection 18.1(2) when an *individual* applies for an extension of time, class proceedings are different. The nature, process and purposes of class proceedings suggest that these four questions are not suitable for class proceedings. In particular:

• A class proceeding is not a collection of individual proceedings; it is a proceeding on behalf of a class of people *instead* of individual proceedings;

• The requirement that the application have some potential merit is entirely captured by the first branch of the certification test which asks whether there is a reasonable cause of action: Rule 334.16(1)(*a)*.

• Requiring that class members demonstrate a continuing intention to pursue a class action is antithetical to the very nature of a class action. Class proceedings open the doors of justice to those who, for judicially recognized reasons, have no intention — let alone a continuing intention — to venture into the world of litigation: *Western Canadian Shopping Centres Inc.*

v. Dutton, 2001 SCC 46, [2001] 2 S.C.R. 534at para. 28; *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949at para. 27.

• Out-of-time class members would likely cite access to justice considerations as a reasonable explanation for the delay, the fourth *Larkman* question. But these access to justice considerations are already integrated into the preferability inquiry: *Fischer* at paras. 27-38. If time barred applicants cannot point to a real access to justice concern (*i.e*. a reasonable explanation for the delay), it is hard to conceive how the class proceeding will be preferable to other alternatives.

44 Thus, the accepted test for individuals seeking an extension of time to bring an application for judicial review under subsection 18.1(2) of the *Federal Courts Act* must be re-modeled for class proceedings. How do we go about this?

45 First, it is important to recognize that subsection 18.1(2) of the *Federal Courts Act* is different from many other statutory limitation periods that are hard-and-fast and non-extendable. When dealing with a hard-and-fast, non-extendable statutory limitation period, the Court will have to deal with timeliness issues on an individual basis — for instance, where the limitation period depends on when class members subjectively discovered the claim: *e.g.*, *Knight v. Imperial Tobacco Canada Ltd.*, 2006 BCCA 235, 267 D.L.R. (4th) 579 (B.C. C.A.), at paras. 33-36; *Smith v. Inco Ltd.*, 2011 ONCA 628, 107 O.R. (3d) 321 (Ont. C.A.), at paras. 164-165.

46 Subsection 18.1(2) of the *Federal Courts Act* has no constraining language requiring that an extension of time be considered on an individual-by-individual basis. Granting an extension under subsection 18.1(2) simply depends on whether "the interests of justice [will] be served" — something quite determinable on a class-wide basis.

47 To do so, we must get back to the overriding concept that governs the granting of extensions of time under the subsection — the purposes Parliament intended to be advanced by subsection 18.1(2). *Larkman* helpfully furthers our understanding of those purposes.

48 This Court has repeatedly held that the "overriding consideration is that the interests of justice be served": *Larkman* at paras, 62, 90; *Grewal v. Canada (Minister of Employment & Immigration)*, [1985] 2 F.C. 263, 63 N.R. 106 (Fed. C.A.) at pp. 278-279; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41, 359 N.R. 156 (F.C.A.) at para. 33.

49 In deciding whether to grant the extension of time, courts must weigh and balance two competing concepts: on the one hand, the advancement of access to justice, the desirability of determinations on their merits, and the fulfillment of the purposes of a class proceeding, and on the other hand, preventing potential prejudice to the Crown and the public interest represented by it.

50 Extensions of time enhance access to justice. Many applicants will be out-of-time because of the financial, psychological and/or social barriers to justice: *Fischer* at para. 27. Allowing these time-barred applicants to join a class proceeding simply opens a door to redress that would have been available and pursued in a timely fashion but for these impediments to justice. Extensions of time also further the goal of behaviour modification. If shielded by strictly enforced limitation periods, powerful public entities can ignore their obligations to Canadians, including the lawful operation of administrative regimes, and be improperly immunized from review: *Western Canadian Shopping Centres*, above at para. 29; *Canada (Citizenship and Immigration) v. Tennant*, 2018 FCA 132 (F.C.A.).

51 The greater the barriers to justice or need for behaviour modification, the more willing a court should be to grant the extension.

52 Courts must also factor in the practical realities of advancing a class proceeding. Class proceedings are complex and cannot be commenced hastily. Classes must be defined with an eye to precision, representative applicants must be selected carefully and detailed and comprehensive litigation plans need to be carefully developed. As a result, in some circumstances, delays at the outset of class proceedings will be unavoidable.

53 However, even if the nature and purposes of class actions heavily favour the granting of an extension of time in the particular circumstances of a case, countervailing interests still fall to be weighed and balanced.

54 The factors to be considered come in many varieties. *Larkman* provided a non-exhaustive list (at paras. 76-79, 87-88), and others can be discerned from the purposes underlying subsection 18.1(2) of the *Federal Courts Act*:

> • The danger of missing witnesses and documents and failing memories. However, if, in the circumstances, the Crown was on notice that a particular administrative scheme is under attack, it can prepare accordingly. For example, here, the Crown has already litigated a similar challenge to the program a little more than a year ago: *Fontaine v. Canada (Attorney General)*, 2017 FC 431.
>
> • The need for government and the public to have finality and certainty concerning decisions taken under statutory mandates. As *Larkman* put it (at para. 87), Parliament has nominated thirty days as the default deadline and when the thirty day deadline expires and no judicial review has been launched against a decision or order, parties normally ought to be able to proceed on the basis that the decision or order will stand. An out-of-time class proceeding can undercut the goals of finality and certainty.

• Whether there has been detrimental reliance on the decision under attack. After decisions are made, matters need to move forward confidently without the fear of late applications for judicial review "pop[ping] up like a jack-in-the-box, long after the parties have received the decision and have relied upon it.": *Larkman* at para. 88.

• The general effect upon the public. The broader and deeper the impact on the general public, the greater the need for finality and certainty. *Larkman* offered the example of an environmental assessment of a project of general public benefit. An all-too-permissive approach to the granting of an extension of time can interfere with the interests of the proponent of the project being assessed and the wider public who need to know whether the decision is final.

• The general effect upon the government. For example, if this class sought retroactive support payments, and this came as a surprise to the government, this may unfairly saddle it — operating a voluntary benefits scheme in good faith — with large unanticipated costs caused solely by the applicant's delay: see, in a different context, some of the parallels and discussion in *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429 . Making retroactive payments stretching back for a year or two before commencement of the judicial review may promote access to justice and behaviour modification but the scales may tip in the other direction if certain out-of-time applicants sought retroactive yearly payments dating back to ten or twenty years ago.

• The presence of good faith and good reasons for the class proceeding. The class proceeding should not be an artifice to get around the usual test for an extension of time for individuals under subsection 18.1(2) of the *Federal Courts Act*.

• The factors used for individuals under subsection 18.1(2) of the *Federal Courts Act*, such as their intentions and the circumstances behind any delay. Some of these may advance the Court's consideration whether the proceeding is consistent with purposes served by subsection 18.1(2) of the *Federal Courts Act*.

55 There may be other factors based on the purposes underlying the limitation period in subsection 18.1(2) of the *Federal Courts Act*.

56 The evidentiary record before the Court on this certification motion does not preclude the granting of an extension of time. Thus, it cannot be said that it is plain and obvious that the application cannot succeed.

57 Nevertheless, whether an extension of time should be granted under subsection 18.1(2) of the *Federal Courts Act* remains a live issue. It should be stated as a common issue and should be tried.

(b) Is the application justiciable?

58 The Federal Court held that the application was not justiciable. I disagree. The Federal Court reached its conclusion by failing to follow the controlling authorities on this point. This was an error of law and this Court must intervene. The application raises issues that are justiciable.

59 The current governing authority in this Court on justiciability is *Hupacasath*, above, which drew directly from the Supreme Court of Canada's decision in *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481 (S.C.C.). Although *Hupacasath* was cited to the Federal Court and could not be distinguished, the Federal Court did not consider or apply it. Instead, the Federal Court relied heavily upon its own authority in *Fontaine*, above, a decision based in part upon justiciability but which did not cite this Court's decision in*Hupacasath* on that point. Thus, the validity of *Fontaine* is also suspect. It is trite that decisions of this Court that cannot be distinguished, such as*Hupacasath* in this case, bind the Federal Court. By not considering *Hupacasath*, the Federal Court committed an error of law.

60 Justiciability is best understood by the term used for it in the United States: the political questions objection. Some questions are so bereft of legal content and are "so political that courts are incapable or unsuited to deal with them, or should not deal with them in light of the time-honoured demarcation of powers between the courts and the other branches of government": *Hupacasath* at para. 62.

61 Very few cases fall within that category. Cases that are the normal grist for administrative law review — cases that raise issues of constitutionality legality, *vires*, reasonableness and procedural fairness based on administrative law authorities and settled doctrine — are almost always justiciable. In*Hupacasath*, this Court put it this way (at paras. 66-67):

> In judicial review, courts are in the business of enforcing the rule of law, one aspect of which is "executive accountability to legal authority" and protecting "individuals from arbitrary [executive] action": *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 at paragraph 70. Usually when a judicial review of executive action is brought, the courts are institutionally capable of assessing whether or not the executive has acted reasonably, *i.e.*, within a range of acceptability and defensibility, and that assessment is the proper role of the courts within the constitutional separation of powers: *Crevier v. A.G. (Québec) et al.*, [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. In rare cases, however, exercises of executive power are suffused with ideological, political, cultural, social, moral and historical concerns of a sort not at all amenable to the judicial process or suitable for judicial analysis. In those rare cases, assessing whether the executive has acted within a range of acceptability and defensibility is beyond the courts' ken or capability, taking courts beyond their proper role within the separation of powers. For example, it is hard to conceive of a court reviewing in wartime a general's strategic decision to deploy military forces in a particular way. See generally [*Operation Dismantle Inc. v. Canada*,

[1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481] at pages 459-460 and 465 [S.C.R.]; *Canada (Auditor General)*, [1989] 2 S.C.R. 49 at pages 90-91; *Reference Re Canada Assistance Plan*, [1991] 2 S.C.R. 525 at page 545; [*Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215, 199 D.L.R. (4th) 228 (C.A.)] at paragraphs 50-51.

These cases show that the category of non-justiciable cases is very small. Even in judicial reviews of subordinate legislation motivated by economic considerations and other difficult public interest concerns, courts will still assess the acceptability and defensibility of government decision-making, often granting the decision-maker a very large margin of appreciation. For that reason, it is often said that in such cases an applicant must establish an "egregious" case: see, *e.g.*, *Thorne's Hardware v. Canada*, [1983] 1 S.C.R. 106 at page 111, 143 D.L.R. (3d) 577; *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810at paragraph 28. But the matter is still justiciable.

62 The narrowness of the objection of justiciability is shown by the facts of the leading Supreme Court case on point, *Operation Dismantle*, above. The applicant sought to strike down a decision by the Government of Canada to allow the testing of American cruise missiles over Canada's north. Without more, the objection of justiciability might have been live, as the decision drew upon quintessentially political factors, such as Canada's relations and defence arrangements with the United States. However, the applicant claimed that the decision affected security of the person rights under section 7 of the Charter. This transformed the proceeding from a challenge over purely political matters, something not adjudicated upon by the courts, to an adjudication of constitutional rights, something well within the bailiwick of the courts.

63 In this case, the challenge is to the reasonableness of a decision to limit the availability of benefits to a particular group of claimants and to narrow the evidence that will be considered. As explained in*Hupacasath*, these are very much the sort of things that courts in their judicial review role can assess. Indeed, several other decisions of a sort similar to the case at bar involving government policies have been seen as justiciable: see, *e.g.*, *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299, 341 D.L.R. (4th) 710 (F.C.A.); *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2, 137 D.L.R. (3d) 558 (S.C.C.); *Dassonville-Trudel (Guardian ad litem of) v. Halifax Regional School Board*, 2004 NSCA 82, 50 R.F.L. (5th) 311 (N.S. C.A.). In saying this, it is useful to remember that justiciability is different from deference and should not be confused with it.

64 Therefore, in this case, the objection based on justiciability does not lie.

65 Overall, I find that a reasonable cause of action in administrative law lies. Put negatively, it cannot be said that it is plain and obvious that this application is doomed to fail. I find that the requirement for certification under Rule 334.16(1)(*a*) is met.

(2) Identifiable class (Rule 334.16(1)(b))

66 Mr. Wenham must show that "there is an identifiable class of two or more persons." He proposed the following class definition: "all individuals whose applications to the Thalidomide Survivors Contribution Program were rejected on the basis of failing to provide the required proof of eligibility."

67 The Federal Court held that this certification requirement was not met because there was not an identifiable class "with sufficient connection to Mr. Wenham's circumstances" in order to meet the Rule 334.16(1)(*b*) requirement. Elsewhere, the Federal Court held that this requirement was not met because the relief sought by Mr. Wenham was limited to a review of the decision to refuse his eligibility (at para. 28). In the same vein, it noted that "the basis upon which the other denials [of benefits] were made is not known, and they may vary significantly from, or have no connection to, the reasons for the denial of Mr. Wenham's claim" and the "only record before this Court" is Mr. Wenham's claim and his specific circumstances (at paras. 28-29).

68 The Federal Court's requirement of "sufficient connection to Mr. Wenham's circumstances" is unknown to class actions law. Perhaps the Federal Court was conflating the test for class definition with the test for the existence of common issues. And, fairly characterized, Mr. Wenham's notice of motion for certification alleges that the grounds set out in his notice of application apply to all class members. Finally, the record before the Federal Court was much broader than the Federal Court realized and spoke of the application of the eligibility criteria for the program applying to all class members. These were all errors of law that permit us to intervene.

69 All that is required is "some basis in fact" supporting an objective class definition that bears a rational connection to the common issues and that is not dependent on the outcome of the litigation: *Western Canadian Shopping Centres*, above at para. 38; *Hollick* at paras. 19 and 25. Here, that requirement is satisfied.

(3) Common issues of law and fact (Rule 334.16(1)(c))

70 Mr. Wenham proposed two common issues:

> A. Is the establishment and/or application of the Evidentiary Criteria or Documentary Proof Requirements by Canada in the Thalidomide Contribution Program unlawful pursuant to section 18.1(4) of the *Federal Courts Act*?
>
> B. If A. is answered in the affirmative, what remedies is the Class entitled to?

71 The Federal Court rejected issue A. because of the Federal Court's *Fontaine* decision. As mentioned above, *Fontaine* was not the controlling authority.

72 Further, the task under this part of the certification determination is not to determine the common issues, especially not without a full record and full legal submissions on the issue, but

rather to assess whether the resolution of the issue is necessary to the resolution of each class member's claim. Specifically, the test is as follows:

> The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significant of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.

(*Western Canadian Shopping Centres*, above at para. 39; see also *Dell'Aniello c. Vivendi Canada inc.*, 2014 SCC 1, [2014] 1 S.C.R. 3 (S.C.C.) at paras. 41 and 44-46.)

73 The Federal Court did not apply this authority in its consideration of proposed common issues A. and B.

74 On proposed issue B., the Federal Court rejected it because it sought a remedy outside the jurisdiction of the Court. Elsewhere, it added that "the ordinary remedy, if a party is successful, would be to send the matter back for redetermination" (at para. 34). But this was the very remedy claimed by Mr. Wenham in his notice of application. Common issue B. only asks what remedy is appropriate in the circumstances.

75 Applying the law as stated by the Supreme Court to the matter before us, I conclude that common issues A. and B. are necessary, substantial components to the resolution of each class member's claim. As will been seen, in formulating the common issues, I shall tweak them to make them more closely accord with the administrative law jurisprudence relevant to the relief sought in the notice of application. But, overall, I conclude that the Rule 336.16(1)(*c*) requirement is met.

(4) Preferable procedure (Rule 334.16(1)(d))

76 The Federal Court did not refer to and did not apply the test for preferable procedure outlined by the Supreme Court of Canada. In this way, it erred in law.

77 The test, from *Hollick* at paras. 27-31, is well-summarized in Mr. Wenham's memorandum as follows:

(a) the preferability requirement has two concepts at its core:

(i) first, whether the class proceeding would be a fair, efficient and manageable method of advancing the claim; and

(ii) second, whether the class proceeding would be preferable to other reasonably available means of resolving the claims of class members;

(b) this determination requires an examination of the common issues in their context, taking into account the importance of the common issues in relation to the claim as a whole; and

(c) the preferability requirement can be met even where there are substantial individual issues; the common issues need not predominate over individual issues.

78 The preferability of a class proceeding must be "conducted through the lens of the three principal goals of class action, namely judicial economy, behaviour modification and access to justice": *Fischer* at para. 22.

79 Judicial economy is a key consideration in this case. Right now there are a number of similar judicial reviews either completed or pending: *Fontaine*, above; *Briand c. Canada (Procureur général)*, T-1584-16 [2017 CarswellNat 6575 (F.C.)]; *Rodrigue c. Canada (Procureur général)*, T-1712-16; [2018 CarswellNat 821 (F.C.)] *Declavasio v. Canada (Attorney General)*, 17-T-13; *Porto v. Canada (Attorney General)*, 17-T-14. Merging these claims into a class proceeding promotes judicial economy. Rather than have the respondent and this Court subjected to a smattering of diffuse attacks on the program all circling around the same legal and factual issues, a single proceeding can provide the applicants with one fair shot at marshaling all of the relevant jurisprudence, legal principles and documentary evidence to best advance their claim. This will avoid duplicitous proceedings, with the threat of inconsistent or conflicting judicial assessments.

80 Mr. Wenham proposes a class proceeding as the preferred procedure. Another available procedure is a test case. At first glance, a test case presents an appealing and perhaps simpler route.

81 However, the preferability analysis must also consider access to justice considerations. Here, those considerations outweigh any potential efficiencies associated with a test case.

82 What are the access to justice issues here? Like most legal proceedings, the economics of litigation are often intimidating: *Fischer* at para. 27. While there is no direct evidence of Mr. Wenham or the other applicants' economic capacities, it is uncontroversial that disabled individuals face "persistent social and economic disadvantage" placing barriers to education and the labour force and, as a result, directly impacting their earning capacity: *Eldridge v. British Columbia*

(Attorney General), [1997] 3 S.C.R. 624, 151 D.L.R. (4th) 577 (S.C.C.) at para. 56. Certainly some of the proposed class face economic barriers to pursuing this litigation.

83 And physical disability, in and of itself, has also been consistently recognized as a barrier to justice favouring the certification of a class proceeding: *Fischer* at para. 27; *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184 (S.C.C.) at para. 39; *Cloud v. Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667, 73 O.R. (3d) 401 (Ont. C.A.) at para. 87; *Pearson v. Inco Ltd.* (2005), 261 D.L.R. (4th) 629, 78 O.R. (3d) 641 (Ont. C.A.) at para. 84; *Kenney v. Canada (Attorney General)*, 2016 FC 367 (F.C.), at para. 26.

84 These access to justice concerns are better served by the class proceeding. I offer several observations.

— I —

85 I will first consider the procedural benefits of a class proceeding, namely whether a class proceeding, in contrast to a test case, offers "a fair process to resolve their claims": *Fischer* at para. 24.

86 Pooling financial resources can make litigation feasible for class members that could not otherwise pursue an individual claim: *Hollick* at para. 15. Even if some applicants could bring individual claims, a class proceeding will reduce the financial burden and allow the applicants to invest in experienced class counsel and leading medical experts who can contribute to the Court's understanding of the matter. An individual applicant, strapped by their financial circumstances, may opt for shortcuts to cut down on expenses and, as a result, fall short of meeting his or her legal or evidentiary burdens.

87 Class proceedings also benefit from a "no costs" regime shielding all parties from a costs order absent misconduct or exceptional circumstances (Rule 334.39).

— II —

88 Class proceedings come uniquely equipped with detailed and extensive procedural rules and case management powers that can ease the burdens of litigation for a vulnerable group of applicants. In theory, a class could pool its resources together for the advancement of a test case. But this would rob the applicants of the carefully designed statutory playbook for class proceedings.

89 Test cases offer no procedural safeguards against the test applicant's conflicts of interest with other would-be class members, the possibility that would-be class members never learn about the existence of the test case, or class counsel exacting an exorbitant contingency fee or agreeing to a settlement that disregards a segment of the class. In a class proceeding under the *Federal Courts*

Rules, SOR/98-106, these issues, among others, are diligently monitored by class counsel under judicial scrutiny, shifting the burden off of the individual applicants who — either because of their financial or physical limitations — may not have the litigation savvy or stamina to protect their interests: see Rules 334.16(1)(*e*)(iii) (requiring no conflicts of interest for representative applicant), 334.32 (requiring notice of certification to class members) 334.4 (approval of class counsel's fees), and 334.29 (settlement approval).

90 Class members also benefit from a different test for an extension of time under section 18.1(2) of the *Federal Courts Act*: see paras. 44-55, above. A test case would leave time-barred applicants to fend with a test for an extension of time disconnected from the purposes of class actions: access to justice, behaviour modification and judicial economy.

91 Procedural protections accrue to the respondent as well. Unlike test cases, a respondent could, with leave, examine a non-representative applicant and potentially expose a conflict, subclass or individual issue (Rule 334.22).

92 And, in the event individual issues emerge, the *Rules* empower judges with wide discretion to craft procedures for the resolution of those issues that can reflect the nature of the individual issues and the parties' capabilities and resources further facilitating access to justice (Rule 334.26).

— III —

93 So far I have focused on the procedural aspects of access to justice for the proposed class. But we must also consider the substantive aspects of access to justice in the class proceedings context, namely "whether the claimants will receive a just and effective remedy for their claims if established": *Fischer* at para. 24. Here, the potential for more just and effective remedial outcomes favours a class proceeding over a test case.

94 The sought after impact of a test case could be undercut by judicial minimalism. A judge may shy away from declaring broad principles of universal application without evidence of the circumstances of other applicants to the program. In the end, that judge may rely heavily on the particular circumstances of Mr. Wenham in deciding that the program's application to Mr. Wenham is reasonable or unreasonable. This would bring us back to square-one: a stream of contested applications for judicial review of the eligibility criteria now attempting to distinguish or analogize their facts to Mr. Wenham's circumstances.

95 Courts have preferred test cases over class actions where, for example, a class sought declaratory relief under section 52(1) of the *Constitution Act* because, in those cases, the desired result will unquestionably accrue to all members of the class: *Roach v. Canada (Attorney General)* (2009), 185 C.R.R. (2d) 215, 74 C.P.C. (6th) 22 (Ont. S.C.J.), at paras. 39-40 aff'd (2009), 84 C.P.C. (6th) 276 (Ont. Div. Ct.). While it is possible a similar outcome could be achieved in this

case if, the eligibility criteria were declared *ultra vires*, there are other outcomes which will not smoothly apply to all class members, as illustrated above.

96 A class proceeding guarantees that a wider set of facts will be put before a judge and force that judge to issue reasons with a view to broader considerations. What kind of evidence is being rejected by the program administrator? What are the common themes among those rejected? Are there exceptional circumstances causing the lack of documentary evidence in some cases? Engaging with these types of questions can ensure that any remedy ordered responds broadly to as many class members as possible.

97 Doing this also promotes judicial economy and finality. Consider one scenario where the eligibility criteria are declared unreasonable and must be re-drafted. Reasons enriched by a deeper factual background will assist Health Canada in re-drafting and re-administrating the program in a comprehensive manner. If the reasons are narrow and bare, an uninformed re-drafting process may simply spawn new applications challenging the new criteria, forcing the Federal Court to play "whack-a-mole" as new proceedings pop up on its docket.

— IV —

98 Class proceedings can also facilitate more creative and tailor-made settlement outcomes. For example, during the Indian Residential Schools settlement discussions, the government authorized an advance payment to survivors over sixty-five *prior* to a settlement agreement: Frank Iacobucci, "What Is Access to Justice in the Context of Class Actions?" (2011) 53 Sup. Ct. L.R. (2d) 17; J. Kalajdzic, ed., *Accessing Justice: Appraising Class Actions Ten Years After Dutton, Hollick & Rumley* (Toronto: Lexis Nexis Canada, 2011) at p. 22. Under the supervision and subject to the approval of a case management judge steeped in the parties' positions, class proceedings provide a fertile ground for creative yet fair outcomes.

— V —

99 As mentioned above, the objection based on subsection 18.1(2) of the *Federal Courts Act* will have to be considered in this class proceeding. In my view, this issue does not take away from the preferability of a class proceeding in this case. The issue whether this class proceeding is barred for lateness, determined by applying the test set out earlier in these reasons, can be considered on a class basis. In these circumstances, it does not work against the preferability of a class proceeding.

100 Overall, for the foregoing reasons, I consider the Rule 334.16(1)(*d*) preferable procedure requirement to be met in this case.

(5) Adequate representative applicant (Rule 334.16(1)(e))

101 The Federal Court found that Mr. Wenham would fairly and adequately represent the interests of the proposed class. However, it held that the litigation plan requirement in Rule 334.16(1)(*e*)(ii) was not met because it failed to address how the proceeding would deal with the limitation period issue and the evidentiary record.

102 The litigation plan need not deal with the limitation period issue. Following upon the above analysis, it will be a common issue to be decided at the trial of the common issues.

103 Mr. Wenham submits, and I agree, that the evidentiary record already before the Court can suffice and need not have been part of the litigation plan. In any event, the Federal Court overlooked that a litigation plan proposed in a certification motion is not cast in stone. Refusing to certify a litigation plan because of one alleged weakness is an error in law. A litigation plan is "a work in progress" and, in law, "whatever its flaws, it may be amended as the litigation proceeds": *Papassay v. Ontario*, 2017 ONSC 2023 (Ont. S.C.J.) at para. 106; see also *Cloud*, above at para. 95.

D. The certification order

104 Making the order the Federal Court should have made, I would certify Mr. Wenham's application as a class proceeding. The particular terms of the order I would propose are in the next section of these reasons.

E. Proposed disposition

105 Therefore, I would allow the appeal, set aside the order of the Federal Court, grant the motion for certification and, making the order the Federal Court should have made, grant Mr. Wenham's motion. I would order that file T-1499-16 is certified as a class proceeding on the basis of the following common issues:

> 1. Is the proceeding barred by the limitation period in subsection 18.1(2) of the *Federal Courts Act*? To the extent that an extension of time is required, should one be granted?
>
> 2. If the proceeding is not barred by 1., is the establishment and application of the evidentiary criteria or documentary proof requirements in the Thalidomide Survivors Contribution Program incorrect or unreasonable, or otherwise unlawful?
>
> 3. If the answer to 2. is yes, what remedies is the Class entitled to?

106 I would appoint Mr. Wenham the representative applicant for the class. I would approve the litigation plan proposed by Mr. Wenham. I would order that no other class proceedings based upon the facts giving rise to this proceeding may be commenced without leave. I would approve the form, content and method of dissemination of notice to the class. I would also order that the amended notice of application dated November 3, 2016 be amended by adding the heading

"Proposed Class Proceeding" pursuant to Rule 334.12(1) of the Rules. I would also direct that any further order or direction concerning the conduct of the class proceeding shall be made by the Federal Court.

***D.G. Near J.A.*:**

I agree

***J.M. Woods J.A.*:**

I agree

Appeal allowed.

2000 CarswellNat 947
Federal Court of Canada — Appeal Division

Zündel v. Citron

2000 CarswellNat 3268, 2000 CarswellNat 947, [2000] 4 F.C. 225, [2000] F.C.J. No. 679, 183 F.T.R. 160 (note), 189 D.L.R. (4th) 131, 256 N.R. 201, 25 Admin. L.R. (3d) 113, 38 C.H.R.R. D/88, 97 A.C.W.S. (3d) 723

Sabina Citron, Toronto Mayor's Committee on Community and Race Relations, The Attorney General of Canada, The Canadian Human Rights Commission, Canadian Holocaust Remembrance Association, Simon Wiesenthal Centre, Canadian Jewish Congress and League for Human Rights of B'Nai Brith, Appellants and Ernst Zundel and Canadian Association for Free Expression Inc., Respondents

Isaac, Robertson, Sexton JJ.A.

Heard: April 4, 2000
Judgment: May 18, 2000 *
Docket: A-253-99

Proceedings: reversing (1999), 3 F.C. 409, 165 F.T.R. 113, (sub nom. Zündel v. Canada (Attorney General)(No. 9)) 35 C.H.R.R. D/354 (Federal Court of Canada — Appeal Division)

Counsel: *Jane S. Bailey*, for Appellants, Sabina Citron, Canadian Holocaust Remembrance Association.
Andrew A. Weretelnyk, for Appellant, Toronto Mayor's Committee on Community and Race Relations.
Richard Kramer, for Appellant, Attorney General of Canada.
René Duval, for Appellant, Canadian Human Rights Commission.
Robyn M. Bell, for Appellant, Simon Wiesenthal Centre.
Joel Richler and *Judy Chan*, for Appellant, Canadian Jewish Congress.
Marvin Kurz, for Appellant, League for Human Rights of B'Nai Brith.
Douglas Christie and *Barbara Kulaszka*, for Respondent, Ernst Zündel.
Gregory Rhone, for Respondent, Canadian Association for Free Expression Inc.

The judgment of the court was delivered by *Sexton J.A.*:

Introduction

1 Ms. Devins is a member of the Canadian Human Rights Tribunal (the "Tribunal") that is hearing a complaint brought against Ernst Zündel. At issue in this appeal is whether Ms. Devins is subject to a reasonable apprehension of bias, stemming from a now twelve-year old press release that was issued by the Ontario Human Rights Commission (the "Commission" or "Ontario Human Rights Commission") when Ms. Devins was a member of that Commission, in which the Commission, among other things, applauded a court ruling that found Mr. Zündel to be guilty of publishing false statements that denied the Holocaust.

Background Facts

2 On May 11, 1988, a jury found Mr. Zündel to be guilty of wilfully publishing a pamphlet called "Did Six Million Really Die?" that he knew was false and that causes or is likely to cause injury or mischief to a public interest, contrary to s. 177 of the *Criminal Code*. [1]

3 Two days after the jury had reached its verdict, the Ontario Human Rights Commission issued the following press release:

> TIME/DATE: 10:32 Eastern Time May 13, 1988
>
> SOURCE: Ontario Human Rights Commission
>
> HEADLINE: *** HUMAN RIGHTS COMMISSION COMMENDS RECENT ZÜNDEL RULING***
>
> PLACELINE: TORONTO
>
> The Ontario Human Rights Commission commends the recent court ruling that found Ernst Zundel guilty of publishing false statements denying the Holocaust.
>
> "This decision lays to rest, once and for all, the position that is resurrected from time to time that the Holocaust did not happen and is, in fact, a hoax," said Chief Commissioner, Raj Anand. "We applaud the jury's decision since it calls for sanctions against a man responsible for contradicting the truth of the suffering experienced by the Jewish people, which was visited upon them solely because of their religion and ethnicity."
>
> Mr. Anand also stated that the decision is of broader significance in that it affirms not only the rights of Jews, but also of and [***sic***] other religious and ethnocultural groups to be free from the dissemination of false information that maligns them.

4 Mr. Zündel's criminal conviction was eventually overturned by the Supreme Court of Canada, which held that s. 177 of the *Criminal Code* [2] was contrary to the right of free expression

guaranteed by s. 2(b) of the *Charter*, and that the infringement could not be saved by s. 1 of the *Charter*.[3]

5 Approximately four years after the Supreme Court overturned Mr. Zündel's conviction, two complainants laid complaints with the Canadian Human Rights Commission. The complainants said that they believed that an Internet website operated by Mr. Zündel would be "likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination," contrary to subsection 13(1) of the *Canadian Human Rights Act*.[4] A panel of the Canadian Human Rights Tribunal was appointed to inquire into the complaints. Reva E. Devins was one of three persons appointed to determine the complaint.

6 At the inquiry, which commenced on May 26, 1997, the Canadian Human Rights Commission relied heavily on the "Did Six Million Really Die?" pamphlet that had been published on Mr. Zündel's website. This pamphlet was the same one that had led to the earlier criminal charges and to the press release issued by the Ontario Human Rights Commission.

7 After approximately forty days of hearings, Mr. Zündel requested that the Tribunal fax him the biographies of the three Tribunal members. Approximately one week after the biographies had been faxed to him, counsel for Mr. Zündel located the press release while searching Quicklaw Systems' databases. That same day, counsel for Mr. Zündel brought a motion before the Tribunal, seeking to dismiss the s. 13(1) complaints on the basis that Ms. Devins was subject to a reasonable apprehension of bias.

The Tribunal's Decision

8 The Tribunal rejected Mr. Zündel's motion. It concluded that the press release had been made by the then Chief Commissioner of the Ontario Human Rights Commission, not by the Commission or by Ms. Devins personally. Moreover, the Tribunal added, the statements was arguably within the Chief Commissioner's statutory mandate. These factors, the Tribunal held, made it difficult to understand how the press release could be said to create a reasonable apprehension of bias on the part of the Chief Commissioner, or that any bias could then be imputed to Ms. Devins. In any event, the Tribunal held that even if Mr. Zündel's submission had any merit, it held that it was "totally inappropriate at this late state for this matter to be advanced."[5] The Tribunal reasoned that because the statement had been made long before the hearing had commenced, Mr. Zündel could have raised the bias allegation at the outset of the proceedings. In so doing, the Tribunal implied that Mr. Zündel had waived his right to raise an allegation of reasonable apprehension of bias. Mr. Zündel sought judicial review of the Tribunal's decision to the Federal Court — Trial Division.

The Federal Court — Trial Division's Decision

9 In his decision, the Motions Judge held that the press release was a "gratuitous political statement" [6] that made "a specific damning statement" [7] against Mr. Zündel, which was "thoroughly inappropriate for the Chair of the Ontario Commission" [8] to do. He held that "an institution with adjudicative responsibilities has no legitimate purpose in engaging in such public condemnation." [9]

10 The Motions Judge reasoned that because the press release stated that "*the Ontario Human Rights Commission* commends the present court ruling," [10] and that "*we* applaud the jury's decision," [11] the Chair purported to speak on behalf of all members of the Commission, including Ms. Devins. The Motions Judge added that it would be a "reasonable conclusion to reach that at the time the statement was made, the members of the Ontario Commission held a strong actual bias" [12] against Mr. Zündel. Nevertheless, he concluded that by the time the Canadian Human Rights Tribunal was convened to inquire into the s. 13(1) complaint, there was "insufficient evidence to find present actual bias" [13] against Ms. Devins.

11 The Motions Judge concluded that even though the statement was released some ten years before Ms. Devins was called to inquire into the s. 13(1) complaint brought against Mr. Zündel, a reasonably informed bystander would apprehend that the "extreme impropriety" [14] of the press release would make her subject to a reasonable apprehension of bias.

12 The Motions Judge rejected the Tribunal's decision that Mr. Zündel had waived his right to bring the bias complaint by not bringing it at the outset of the Tribunal's proceedings. The Motions Judge accepted Mr. Zündel's evidence that he was not aware of the press release until shortly before the bias allegation was brought.

13 Even though he concluded that Ms. Devins was subject to a reasonable apprehension of bias, the Motions Judge declined to prohibit the remaining member of the Tribunal from continuing to hear and to ultimately determine the complaint. He held that because the *Canadian Human Rights Act* permits one Tribunal member to complete an already-commenced hearing where other appointed members are unable to continue, [15] the one remaining member of the panel could continue to hear and decide the complaint.

14 Ms. Citron and the other appellants now appeal the Motion Judge's decision that Ms. Devins was subject to a reasonable apprehension of bias. They have not appealed the Motion Judge's decision that Mr. Zündel did not waive his right to raise the bias allegation by not bringing it at the outset of the Tribunal's proceedings. Mr. Zündel has cross-appealed one aspect of the Motion Judge's decision, arguing that the Motions Judge should have quashed the Tribunal's proceedings in their entirety.

Issues

1. Was the finding of the Motions Judge that there was a reasonable apprehension of bias on the part of Ms. Devins unreasonable, based on erroneous considerations, reached on wrong principle, or reached as a result of insufficient weight having been given to relevant matters?

2. Was the Motions Judge correct in holding that, if there was a reasonable apprehension of bias, the Tribunal could continue with the hearing?

Analysis

1. The Reasonable Apprehension of Bias Test

15 In *R. v. S. (R.D.)*, [16] Cory J. stated the following manner in which the reasonable apprehension of bias test should be applied:

> The apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. [...] [The] test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter though — conclude [...] [17]

16 He held that the test contained a two-fold objective element: "the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case." [18]

Does the press release address the same issue as the complaint before the Canadian Human Rights Tribunal?

17 On appeal, Mr. Zündel submits that a reasonable bystander would conclude that the press release, which attributes certain statements directly to the Ontario Human Rights Commission, and not merely to the Chair of that Commission, would cause Ms. Devins (who was a member of the Ontario Human Rights Commission when the press release was issued) to be subject to a reasonable apprehension of bias. Mr. Zündel submits that the criminal charges upon which the press release was based were directly in relation to his publication "Did Six Million Really Die?", the very same pamphlet that Mr. Zündel had reproduced on his website and that led to the s. 13(1) human rights complaint that Ms. Devins and the other two members of the Tribunal were asked to determine.

18 In my view, the press release draws a distinction between statements made by the Ontario Human Rights Commission, and statements made by Mr. Anand, the Chair of the Ontario Human

Rights Commission. The only statements contained in the press release that are directly attributed to the Ontario Human Rights Commission are the following:

> (i) The Ontario Human Rights Commission commends the recent court ruling that found Ernst Zundel guilty of publishing false statements denying the Holocaust;
>
> (ii) We applaud the jury's decision since it calls for sanctions against a man responsible for contradicting the truth of the suffering experienced by the Jewish people, which was visited upon them solely because of their religion and ethnicity.

19 The criminal charge that the Ontario Human Rights Commission addressed in the press release was s. 177 of the *Criminal Code*, later renumbered to s. 181. The section states:

> 181. Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

20 By contrast, s. 13(1) of the *Canadian Human Rights Act* states:

> 13 (1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

21 In *Canada (Human Rights Commission) v. Taylor*, [19] Dickson C.J. held that "s. 13(1) [of the *Canadian Human Rights Act*] provides no defences to the discriminatory practice it describes, and most especially does not contain an exemption for truthful statements." [20] He concluded that "[...] the *Charter* does not mandate an exception for truthful statements in the context of s. 13(1) of the *Canadian Human Rights Act*." [21]

22 The press release was made in response to a criminal charge that did afford a defence of truthfulness ("[...] that he knows is false.") [22] The statements attributed to the Ontario Human Rights Commission simply criticize Mr. Zündel for denying the truthfulness of the Holocaust. By contrast, in a s. 13(1) complaint, the truth or non-truthfulness of statements is immaterial to whether the complaint is substantiated. Consequently, the issue faced by the jury in 1988 is different from the issue faced by the Canadian Human Rights Tribunal.

23 Shortly stated, the essence of the offence in section 177 of the *Criminal Code* was that the statement was false and that it could or would likely cause injury or mischief to a public interest. Thus, the truth of the statement would provide a complete defence. On the other hand, the essence

of the complaint before the Canadian Human Rights Tribunal is that certain people were exposed to hatred or contempt. The truth of the statement would provide no defence.

24 The only statement contained in the press release that might be material to the s. 13(1) complaint is the following:

> Mr. Anand also stated that the decision is of broader significance in that it affirms not only the rights of Jews, but also of and [***sic***] other religious and ethnocultural groups to be free from the dissemination of false information that maligns them.

25 It could be argued that the statement reproduced above states that the information disseminated by Mr. Zündel exposes Jews to hatred, the essence of a s. 13(1) complaint. However, in my view, an informed person, viewing the matter realistically and practically — and having thought the matter through — would conclude that the press release draws a distinction between statements made by the Ontario Human Rights Commission (*i.e.* "the *Ontario Human Rights Commission* commends [...]" or "*we* applaud [...]") and statements made by Raj Anand, the Chief Commissioner of the Ontario Human Rights Commission. The statement reproduced above is attributed to Mr. Anand, and not to the Commission as a whole. Accordingly, I do not think that a reasonable and informed observer would conclude that the above statement should be attributed to Ms. Devins.

26 Counsel for Mr. Zündel relied heavily on the Ontario Divisional Court's judgment in *Dulmage v. Ontario (Police Complaints Commissioner)*[23] to demonstrate that statements made by one member of an organization can be used to demonstrate that a different member of that organization is subject to a reasonable apprehension of bias.

27 In *Dulmage*, the president of the Mississauga chapter of the Congress of Black Women of Canada had been appointed to a Board of Inquiry pursuant to Ontario's *Police Services Act*.[24] The Board was appointed to investigate a complaint that a public strip search had taken place, contrary to the manner provided in the Metropolitan Toronto Police Force's regulations. Approximately one year before the president of the Mississauga chapter of the Congress of Black Women of Canada was appointed to the Board, the vice-president of the Toronto chapter of that organization was reported to have publicly stated that the strip search incident at issue was "not an 'isolated case' and reflects the 'sexual humiliation and abuse of black women.'"[25] In a different statement, the vice-president recommended "an RCMP investigation of [the] incident,"[26] and urged that the then-Chief of the Metropolitan Toronto Police Force resign, saying that "Chief McCormack has clearly demonstrated an inability to give effective leadership to the Police Force."[27]

28 In its decision, the Divisional Court concluded that the president who had been appointed to the Board of Inquiry was subject to a reasonable apprehension of bias. O'Brien J. held:

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> [...] Inflammatory statements dealing with this very incident involved in this inquiry were made by an officer of the Congress of Black Women of Canada. Those statements were made in Toronto, closely adjacent to the City of Mississauga. They deal with an incident which received significant public attention. The statements referred to the incident as an "outrage" and called for the suspension of the officers involved. Those officers were the very ones involved in this hearing. Ms. Douglas was the president of the Mississauga chapter of the same organization. [28]

29 Similarly, in his dissenting reasons (although not on this point), Moldaver J. held that "the remarks themselves related, at least in part, to the critical issue which the board was required to decide." [29]

30 In my view, *Dulmage* is distinguishable because the statements at issue in *Dulmage* dealt with the very question at issue before the Board of Inquiry, whereas the statements made by the Ontario Human Rights Commission address an issue that is immaterial to the s. 13(1) Tribunal inquiry that Ms. Devins has been asked to determine.

31 I think the House of Lords' decision in *R. v. Bow Street Metropolitan Stipendiary Magistrate* [30] can be distinguished on a similar basis. In that appeal, the House of Lords vacated the earlier order it had made in *R. v. Bow Street Metropolitan Stipendiary Magistrate* [31] because Lord Hoffman, one of the members who heard the appeal, had links to an intervener (Amnesty International) that had argued on the appeal at the House of Lords.

32 When Lord Hoffman heard the appeal at issue in *R. v. Bow Street Metropolitan Stipendiary Magistrate*, he had been a Director and Chairperson of Amnesty International Charity Limited. That corporation was charged with undertaking charity work for Amnesty International, the entity that had intervened in *R. v. Bow Street Metropolitan Stipendiary Magistrate*.

33 The type of bias at issue in *R. v. Bow Street Metropolitan Stipendiary Magistrate* was characterized by Lord Browne-Wilkinson as "where the judge is disqualified because he is a judge in his own cause." [32] Lord Browne-Wilkinson then held that "if the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a Director of a company, *in promoting the same causes in the same organisation as is a party to the suit*." [33] Lord Browne-Wilkinson highlighted that "the facts of this present case are exceptional," [34] holding that "the critical elements are (1) that [Amnesty International] was a party to this appeal; [...] (3) the judge was a Director of a charity closely allied to [Amnesty International] and sharing, in this respect, [Amnesty International's] objects." [35] He concluded that "only in cases where a judge is taking an active role as trustee or Director of a

charity which is closely allied to *and acting with a party to the litigation* should a judge normally be concerned either to recuse himself or disclose the position to the parties." [36]

34 Accordingly, *R. v. Bow Street Metropolitan Stipendiary Magistrate* is not analogous to this appeal. It might be so if the Ontario Human Rights Commission was a party to the proceedings before the Tribunal. Since it was not, I do not think that *R. v. Bow Street Metropolitan Stipendiary Magistrate* demonstrates that Ms. Devins is subject to a reasonable apprehension of bias.

Other Errors Made by the Motions Judge

35 I now turn to other alleged errors made by the Motions Judge. In my view, he committed the following errors, each of which I address at greater length below:

1. He failed to address the presumption of impartiality;

2. He failed to consider whether the press release demonstrated an objectively justifiable disposition;

3. He failed to properly connect Ms. Devins to the press release;

4. He failed to give appropriate weight to the passage of time;

5. He erred in concluding that the Ontario Human Rights Commission was an adjudicative body and had no legitimate purpose in making the press release;

6. He erred in concluding that a doctrine of "corporate taint" exists.

Presumption of impartiality

36 In my view, the Motions Judge erred by failing to take into account the principle that a member of a Tribunal will act fairly and impartially, in the absence of evidence to the contrary. In *R. v. S. (R.D.)*, Cory J. held that "the reasonable person must be an *informed* person, with knowledge of all the relevant circumstances, including 'the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold'." [37] He added that "the threshold for a finding of real or perceived bias is high," [38] and that "a real likelihood of probability of bias must be demonstrated, and that a mere suspicion is not enough." [39] Further, Cory J. held that "the onus of demonstrating bias lies with the person who is alleging its existence." [40]

37 In *Beno v. Canada (Somalia Inquiry Commission)*, [41] this Court held that there is a presumption that a decision-maker will act impartially. [42] Similarly, in *E.A. Manning Ltd. v. Ontario (Securities Commission)*, [43] the Ontario Court of Appeal held, in the context of a bias

allegation levelled against a securities commission, that "it must be presumed, in the absence of any evidence to the contrary, that the Commissioners will act fairly and impartially in discharging their adjudicative responsibilities and will consider the particular facts and circumstances of each case." [44] And in *Finch v. Assn. of Professional Engineers & Geoscientists (British Columbia)*, [45] the British Columbia Court of Appeal held that it must be assumed, "unless and until the contrary is shown, that every member of this committee will carry out his or her duties in an impartial manner and consider only the evidence in relation to the charges before the panel." [46]

Failure to consider whether the press release demonstrated an objectively justifiable disposition

38 In *R. v. S. (R.D.)*, Cory J. offered a useful definition of the word "bias." He held that "bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues." [47] He added that "not every favourable or unfavourable disposition attracts the label of prejudice." [48] He held that where particular unfavourable dispositions are "objectively justifiable," [49] such dispositions would not constitute impermissible bias. He offered "those who condemn Hitler" [50] as examples of objectively justifiable dispositions and, therefore, such comments do not give rise to a reasonable apprehension of bias on the part of the speaker.

39 In the Supreme Court's judgment that overturned Mr. Zündel's criminal conviction for publishing the "Did Six Million People Really Die?" pamphlet, McLachlin J. (as she then was) referred to Mr. Zündel's beliefs as "admittedly offensive," [51] while Cory and Iacobucci JJ. described the pamphlet as part of a "genre of anti-Semitic literature" [52] that "makes numerous false allegations of fact." [53] In light of these statements, how could it *not* be objectively justifiable for the Ontario Human Rights Commission and its Chair to have made similar statements regarding the same pamphlet in their press release?

Failure to connect Ms. Devins to the press release

40 The Motions Judge held that it would be a reasonable conclusion to think that at the time the press release was issued, both the Chair of the Ontario Human Rights Commission and its members held a strong actual bias (*i.e.* and not just a reasonable apprehension of bias) as against Mr. Zündel.

41 He later held that "the passage of time does not eradicate the fact that Ms. Devins is reasonably attributed with strong actual bias." [54] However, from the Motion Judge's reasons, it appears that he took Ms. Devins' present denial of bias into account to conclude that at the time the Tribunal was appointed to inquire into the s. 13(1) complaint, there was "insufficient evidence to find present actual bias by Ms. Devins against the applicant." [55]

42 In my view, the Motions Judge's reasons confuse the passage of time with Ms. Devins' actual connection to the press release. There was no evidence that Ms. Devins was aware of the press release, let alone agreed with or was party to its issuance so as to demonstrate actual bias at the time the press release was issued. Similarly, there was no evidence of conduct of Ms. Devins from which one could infer a reasonable apprehension of bias later.

Failure to give appropriate weight to the passage of time

43 In the instant matter now on appeal, the Motions Judge attributed little or no weight to the time that had passed between the date the press release was issued and the date on which Ms. Devins was appointed to determine the complaint launched against Mr. Zündel. He held that "the passage of time does not eradicate the fact that Ms. Devins is reasonably attributed with strong actual bias." [56]

44 In so doing, I think the Motions Judge failed to give appropriate weight to the amount of time that had passed between the date on which the press release was issued and the date Ms. Devins was asked to hear the s. 13(1) complaint. In *Dulmage*, referred to earlier in these reasons, Moldaver J. concluded that the impugned board member was subject to a reasonable apprehension of bias in part because the press conference during which the statements were made had only taken place one year before the board hearing, a period of time that he did not consider to be "sufficient to expunge the taint left in the wake of these remarks." [57]

45 In the instant appeal, the Tribunal at issue was appointed some nine years after the press release was issued: a much greater time lag than was at issue in *Dulmage*, and one that, along with the other factors considered in this judgment, I consider to be sufficient to expunge any taint of bias that might have existed by reason of the press release.

Error in concluding that a doctrine of "corporate taint" exists

46 By concluding that all members of the Ontario Human Rights Commission would be biased by reason of the press release, the Motions Judge appeared to conclude that there is a doctrine of corporate "taint," a taint that is said to paint all members of a decision-making body with bias in certain circumstances. In *Bennett v. British Columbia (Securities Commission)*, [58] the British Columbia Court of Appeal rejected the doctrine of corporate taint. It held:

> We wish to add one further observation and that is as to the target of a bias allegation. Bias is an attitude of mind unique to an individual. An allegation of bias must be directed against a particular individual alleged, because of the circumstances, to be unable to bring an impartial mind to bear. No individual is identified here. Rather, the effect of the submissions is that all of the members of the commission appointed pursuant to s. 4 of the *Securities Act*, regardless

> of who they may be, are so tainted by staff conduct that none will be able to be an impartial judge. Counsel were unable to refer us to a single reported case where an entire tribunal of unidentified members had been disqualified from carrying out statutory responsibilities by reason of real or apprehended bias. We think that not to be surprising. The very proposition is so unlikely that it does not warrant serious consideration. [59]

47 Similarly, in *Laws v. Australian Broadcasting Tribunal*, [60] Australia's High Court concluded that the doctrine of corporate taint did not exist, absent circumstances that permit an inference to be drawn that all members of an administrative tribunal authorized or approved statements or conduct that gave rise to a reasonable apprehension of bias on the part of one of its members. In *Laws*, three members of the Australian Broadcasting Tribunal conducted a preliminary investigation of Mr. Laws, and concluded that he had breached broadcasting standards. The Director of the Tribunal's Programs Division later gave an interview in which she repeated the conclusions made by the three Tribunal members. Mr. Laws sought an order prohibiting the entire Tribunal from later holding a formal hearing to determine whether it should exercise regulatory powers against Mr. Laws. His application was brought on the basis that the prejudgment expressed by the three members who had conducted the preliminary investigation and the statements made by the Director of the Programs Division served to taint the entire Tribunal.

48 Australia's High Court rejected Mr. Laws' application. It held:

> However, though it might be correct to regard the interview as a corporate act, it was not necessarily an act done on behalf of each of the individual members of the corporation. The circumstances are not such as to justify the drawing of an inference that each of the individual members of the tribunal authorised the interview or approved of its content. At best, from the appellant's viewpoint, it might be inferred that the three members of the tribunal who made the decision of 24 November so authorised or approved the interview. [61]

49 These decisions, I think, demonstrate that there is no doctrine of corporate taint. I prefer the reasoning in these decisions to the implication drawn by the majority in the *Dulmage* decision that such a taint could be said to exist. [62]

50 As I have previously explained in these reasons, I do not think that the proviso contained in the paragraph reproduced above from the *Laws* decision applies in the circumstances of this appeal: one cannot draw an inference that each of the individual members of the Ontario Human Rights Commission authorized the entire press release that was issued. To the extent that the members of the Commission could be said to have authorized certain statements contained in the press release, any such statements are immaterial to the complaint that Ms. Devins has been asked to determine.

The Supreme Court of Canada's Judgment in Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)

51 Counsel for the appellants relied on the Supreme Court of Canada's judgment in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)* [63] for the proposition that the Ontario Human Rights Commission was engaged in a policy-making function at the time the press release was issued and therefore the statements contained in the press release were subject to a much lower standard of impartiality.

52 In *Newfoundland Telephone*, Andy Wells was appointed to a Board that was responsible for the regulation of the Newfoundland Telephone Company Limited. After he was appointed to the Board, and after the Board had scheduled a public hearing to examine Newfoundland Telephone's costs, Mr. Wells made several strong statements against Newfoundland Telephone's executive pay policies. Mr. Wells was one of five who sat on that hearing. Counsel for Newfoundland Telephone objected to Mr. Wells' participation at the hearing, arguing that the strong statements Mr. Wells had made demonstrated that he was subject to a reasonable apprehension of bias.

53 In *Newfoundland Telephone*, Cory J. recognized that administrative decision-makers were subject to varying standards of impartiality. He held that "those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts," [64] while boards with popularly-elected members are subject to a "much more lenient" standard. [65] He added that administrative boards that deal with matters of policy should not be subject to a strict application of the reasonable apprehension of bias test, since to do so "might undermine the very role which has been entrusted to them by the legislature." [66] Accordingly, he held that "a member of a board which performs a policy formation function should not be susceptible to a charge of bias simply because of the expression of strong opinions prior to the hearing." [67]

54 Accordingly, Cory J. held that, had the following statement been made before the Board's hearing date was set, it would not amount to impermissible bias: "[s]o I want the company hauled in here — all them fat cats with their big pensions — to justify (these expenses) under the public glare [...] I think the rate payers have a right to be assured that we are not permitting this company to be too extravagant." He supported that conclusion in the following manner:

> That comment is no more than a colourful expression of an opinion that the salaries and pension benefits seemed to be unreasonably high. It does not indicate a closed mind. Even Wells' statement that he did not think that the expenses could be justified, did not indicate a closed mind. However, should a commissioner state that, no matter what evidence might be disclosed as a result of the investigation, his or her position would not change, this would indicate a closed mind. [68]

55 In *Newfoundland Telephone*, Cory J. held that once a board member charged with a policy-making function is then asked to sit on a hearing, "a greater degree of discretion is required

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of a member."[69] Once a hearing date was set, Cory J. held that the board members at issue in *Newfoundland Telephone* had to "conduct themselves so that there could be no reasonable apprehension of bias."[70] In other words, a person who is subject to the "closed mind" standard can later be required to adhere to a stricter "reasonable apprehension of bias" standard.

56 Counsel for the appellants have seized on these aspects of Cory J.'s judgment in *Newfoundland Telephone*, to demonstrate that the Motions Judge erred by concluding that when the Ontario Human Rights Commission issued the press release, it was engaged in adjudicative functions, and was therefore required to abide by a high standard of impartiality. Instead, counsel for the appellants argue that the Ontario Human Rights Commission was engaged in a policy-making function when it issued the press release, and was therefore subject to a much lower standard of impartiality.

57 While I agree that the Motions Judge erred when he concluded that the Ontario Human Rights Commission was engaged in an adjudicative role when it issued the press release, I do not agree with the further implications sought to be drawn by the appellants.

58 When the press release was issued by the Ontario Human Rights Commission, it was charged with the following functions:

> 28. It is the function of the Commission,
>
> > (a) to forward the policy that the dignity and worth of every person be recognized and that equal rights and opportunities be provided without discrimination that is contrary to law;
> >
> > (b) to promote an understanding and acceptance of and compliance with this Act; [...]
> >
> > (d) to develop and conduct programs of public information and education and undertake, direct and encourage research designed to eliminate discriminatory practices that infringe rights under this Act; [...][71]

59 Subsections 28(a), (b) and (d) demonstrate that the Ontario Human Rights Commission is vested with policy-making functions and with an obligation to educate and to inform the public. Accordingly, I do not agree with the Motion Judge's conclusion that the press release issued by the Ontario Human Rights Commission was "thoroughly inappropriate." Rather, the statement was consistent with its statutory obligation, *inter alia*, "to forward the policy that the dignity and worth of every person be recognized."

60 However, I do not think that the *Newfoundland Telephone* case provides much assistance to the appellants. In my view, one should bear in mind that in *Newfoundland Telephone*, the Board

was specifically charged with dual functions: investigatory ones and adjudicative ones. Among its investigatory powers, the Board was permitted to "make all necessary examinations and enquiries to keep itself informed as to the compliance by public utilities with the provisions of law," [72] to "enquire into any violation of the laws or regulations in force," [73] to "summarily investigate [...] whenever the Board believes that any rate or charge is unreasonable or unjustly discriminatory [...]." [74] In the same breath, the Board was permitted to hold hearings "if, after any summary investigation, the Board becomes satisfied that sufficient grounds exist to warrant a formal hearing [...]." [75] Accordingly, the statute specifically envisaged that Board members who had acted in an investigatory capacity could later act as adjudicators. Indeed, in *Newfoundland Telephone*, Cory J. held that even when the Board at issue in that appeal was required to abide by the reasonable apprehension of bias standard, the standard "need not be as strict for this Board dealing with policy matters as it would be for a board acting solely in an adjudicative capacity."

61 By contrast, the Canadian Human Rights Tribunal is vested with no policy functions or with dual functions: it is simply charged with the adjudication of human rights complaints. Accordingly, unlike *Newfoundland Telephone*, there is no statutory authority for the proposition that Parliament specifically envisaged that members of the Canadian Human Rights Tribunal would have engaged in policy-making functions with regard to the very same issues that they would later be asked to adjudicate.

Conclusion on Bias

62 In my view, the Motions Judge erred when he concluded that Ms. Devins was subject to a reasonable apprehension of bias. I would set aside his decision, and remit the matter to the Canadian Human Rights Tribunal.

2. Was the Motions Judge correct in holding that, if there was a reasonable apprehension of bias, the Tribunal could continue with the hearing?

63 In the event I am wrong on the first issue it is necessary to deal with the second issue: namely, whether the Motions Judge erred by concluding that even though Ms. Devins was subject to a reasonable apprehension of bias, the remaining member of the Tribunal could continue to determine the as-yet undetermined complaint at issue before the Canadian Human Rights Tribunal.

64 In my view, the Motions Judge erred by concluding that where a reasonable apprehension of bias is proven, the remaining members of the Tribunal could continue to hear and determine the complaint. At the time the bias allegation was raised, the panel of which Ms. Devins was a member had sat for some fourty days, and had made approximately 53 rulings. Counsel for Mr. Zündel argued that each one of those rulings was contrary to the result for which he had argued.

65 Viewed in this light, I cannot see how the Tribunal's proceedings could somehow be remedied merely by virtue of there being one remaining member of the Tribunal who could determine the complaint. How could one ever know whether the Tribunal's ultimate decision was somehow affected by one or more of the Tribunal's rulings? How could one ever know whether the biased member had expressed her preliminary views on the merits of the complaint before she was ordered to be recused from the proceedings? And how could one ever know whether those consultations might have somehow affected the remaining member's decisions on the interlocutory rulings? These concerns, I think, demonstrate that where one member of an administrative tribunal is subject to a reasonable apprehension of bias and a number of serious interlocutory orders have been made over the course of a lengthy hearing, the tribunal's proceedings should be quashed in their entirety, even though a statutory provision on its face permits the tribunal to proceed with fewer members where a member is, for some reason, unable to proceed.

66 My conclusions are supported by Cory J.'s reasons in *R. v. S. (R.D.)*, where he held:

> If a reasonable apprehension of bias arises, it colours the entire trial proceedings and it cannot be cured by the correctness of the subsequent decision. See *Newfoundland Telephone, supra*, at p. 645; see also *Curragh, supra*, at para. 6. Thus, the mere fact that the judge appears to make proper findings of credibility on certain issues or comes to the correct result cannot alleviate the effects of a reasonable apprehension of bias arising from other words or conduct of the judge. In the context of an application to disqualify a judge from sitting in a particular lawsuit, it has been held that where there is a reasonable apprehension of bias, "it is impossible to render a final decision resting on findings as to credibility made under such circumstances." [76]

Conclusion

67 I would allow the appeal, with costs and set aside the order of the Motions Judge dated April 13, 1999 and remit the matter back to the Tribunal for completion of the hearing.

Appeal allowed, cross-appeal dismissed, and matter remitted to tribunal.

Footnotes

* Leave to appeal refused (December 14, 2000), Doc. 28008 (S.C.C.).

1 R.S.C. 1985, c. C-46.

2 By the time the Supreme Court heard Mr. Zündel's appeal, s. 177 of the *Criminal Code* had been renumbered to s. 181.

3 [1992] 2 S.C.R. 731 (S.C.C.), at 778, *per* McLachlin J. (as she then was).

4 R.S.C. 1985, c. H-6.

5 Appeal Book, p. 74.

6 *Zündel v. Citron*, [1999] 3 F.C. 409 (Fed. T.D.) at 421.

7 *Zündel v. Citron*, *Ibid.*

8 *Zündel v. Citron*, *Ibid.*

9 *Zündel v. Citron*, *Ibid.*

10 *Zündel v. Citron*, *Ibid.* (emphasis in original).

11 *Zündel v. Citron*, *Ibid.* (emphasis in original).

12 *Zündel v. Citron*, *Ibid.*

13 *Zündel v. Citron*, *Ibid.*, p. 422.

14 *Zündel v. Citron*, *Ibid.*

15 The Motions Judge never specifically identified the provision of the *Canadian Human Rights Act* on which he relied.

16 [1997] 3 S.C.R. 484 (S.C.C.).

17 *Ibid.*, p. 530.

18 *R. v. S. (R.D.)*, *Ibid.*, p. 531.

19 [1990] 3 S.C.R. 892 (S.C.C.).

20 *Canada (Human Rights Commission) v. Taylor*, *Ibid.*, p. 934.

21 *Canada (Human Rights Commission) v. Taylor*, *Ibid.*, p. 935.

22 Subsection 177 (which was later renumbered to s. 181) stated that "every one who wilfully publishes a statement, tale or news that *he knows is false* and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years" (emphasis added).

23 (1994), 21 O.R. (3d) 356 (Ont. Div. Ct.).

24 R.S.O. 1990, c. P.15.

25 *Dulmage*, *supra* at p. 360.

26 *Dulmage*, *Ibid.*

27 *Dulmage*, *Ibid.*, p. 361.

28 *Ibid.*, p. 363 (emphasis added).

29 *Dulmage*, *Ibid.*, p. 365.

30 [1999] 2 W.L.R. 272 (U.K. H.L.).

31 [1998] 4 ALL E.R. 897 (U.K. H.L.).

32 *R. v. Bow Street Metropolitan Stipendiary Magistrate*, *supra* at para. 30.

33 *R. v. Bow Street Metropolitan Stipendiary Magistrate*, *Ibid.*, para. 37 (emphasis added).

34 *R. v. Bow Street Metropolitan Stipendiary Magistrate*, *Ibid.*, para. 40.

35 *R. v. Bow Street Metropolitan Stipendiary Magistrate*, *Ibid.*

36 *R. v. Bow Street Metropolitan Stipendiary Magistrate*, *Ibid.* (emphasis added).

37 *R. v. S. (R.D.)*, *supra* at 531 (emphasis in original).

38 *R. v. S. (R.D.)*, *Ibid.*, p. 532.

39 *R. v. S. (R.D.)*, *Ibid.*, p. 531.

40 *R. v. S. (R.D.)*, *Ibid.*

41 [1997] 2 F.C. 527 (Fed. C.A.).

42 *Beno v. Canada (Somalia Inquiry Commission)*, *Ibid.*, p. 542.

43 (1995), 23 O.R. (3d) 257 (Ont. C.A.), application for leave to appeal to S.C.C. dismissed August 17, 1995 [reported:(1995), 8 C.C.L.S. 242n (S.C.C.)].

44 *E.A. Manning Ltd. v. Ontario (Securities Commission)*, *Ibid.*, p. 267.

45 [1996] 5 W.W.R. 690 (B.C. C.A.).

46 *Finch v. Assn. of Professional Engineers & Geoscientists (British Columbia)*, *Ibid.*, p. 704.

47 *R. v. S. (R.D.)*, *supra* at p. 528.

48 *R. v. S. (R.D.)*, *Ibid.*

49 *R. v. S. (R.D.)*, *Ibid.*

50 *R. v. S. (R.D.)*, *Ibid.*

51 *R. v. Zündel*, *supra* at 743.

52 *R. v. Zündel*, *Ibid.*, p. 779.

53 *R. v. Zündel*, *Ibid.*, p. 781.

54 *Zündel*, *supra* at p. 422.

55 *Zündel*, *Ibid.*

56 *Zündel*, *Ibid.*

57 *Dulmage*, *supra* at p. 365.

58 (1992), 69 B.C.L.R. (2d) 171 (B.C. C.A.).

59 *Ibid.*, p. 181.

60 (1990), 93 A.L.R. 435 (Australian H.C.).

61 *Ibid.*, p. 445.

62 In his dissenting reasons, Moldaver J. appeared to recognize that no such doctrine exists. He held that "a member need not automatically withdraw solely because of statements made by a representative of an affiliated community organization about issues before the board" (at 363). Later in his judgment, he repeated the point, holding:
Lest there be any doubt about it, I wish to emphasize that mere association, either past or present, on the part of a board member with an organization, which, by its very nature, might be said to favour one side or the other, will not of itself satisfy the test for reasonable apprehension of bias (at 366).

63 [1992] 1 S.C.R. 623 (S.C.C.).

64 *Newfoundland Telephone*, *Ibid.*, p. 638.

65 *Newfoundland Telephone*, *Ibid.*

66 *Newfoundland Telephone*, *Ibid.*

67 *Newfoundland Telephone*, *Ibid.*, p. 639.

68 *Ibid.*, p. 642-643.

69 *Newfoundland Telephone*, *Ibid.*, p. 643.

70 *Newfoundland Telephone*, *Ibid.*, p. 644.

71 *Human Rights Code*, S.O. 1981, c. 53.

72 *The Public Utilities* Act, R.S.N. 1970, c. 322, as am. by S.N. 1979, c. 30, s. 1, s. 14.

73 *Ibid.*, s. 15.

74 *Ibid.*, s. 79.

75 *Ibid.*, s. 85.

76 *Ibid.*, p. 526.