

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

- and -

CANADIAN TRANSPORTATION AGENCY

Respondent

**MOTION RECORD OF THE PROPOSED INTERVENER,
THE NATIONAL AIRLINES COUNCIL OF CANADA,
FOR LEAVE TO INTERVENE**

(in writing)

Volume 3 of 3

Authorities

April 27, 2020

PATERSON, MacDOUGALL LLP
Barristers, Solicitors
Box 100, Suite 900
1 Queen Street East
Toronto, Ontario
M5C 2W5

Clay S. Hunter LS#: 31896M
E-mail: CHunter@pmlaw.com
Tel: (416) 643-3324
Fax: (416) 366-3743

Counsel for the Proposed Intervener,
The National Airlines Council of Canada

EX PARTE

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

- and -

CANADIAN TRANSPORTATION AGENCY

Respondent

INDEX**Volume 1 of 3****Notice of Motion, Pleadings and Affidavits**

Tab	Description	Page No.
1.	Notice of Motion , dated April 27, 2020	1
	Pleadings:	
2.	Order, dated April 16, 2020	7
3.	Affidavit of Mike McNaney , sworn April 27, 2020	11
	Exhibit "A": Air Canada News Release, dated April 21, 2020	16
	Exhibit "B": Air Transat News Release, dated March 18, 2020	18
	Exhibit "C": WestJet Update, dated April 19, 2020	21
	Exhibit "D": News Release, dated April 9, 2020, provided by Chorus Aviation Inc. regarding its subsidiary Jazz Aviation	24
4.	Affidavit of Nicola Colville , sworn April 24, 2020	27
	Exhibit "A": IATA Updated Impact Statement, dated April 14, 2020	31
	Exhibit "B": IATA Updated Impact Statement, dated April 16, 2020	41

Exhibit "C":	IATA COVID-19 Canada Economic Impact Analysis, dated April 22, 2020	56
Exhibit "D":	IATA Press Release, dated April 14, 2020	63
5. Affidavit of Jiwan Son, sworn April 27, 2020		66
Exhibit "A":	Excerpt from Organization and mandate section of Canadian Transportation Agency website, printed April 24, 2020	71
Exhibit "B":	Statement on Vouchers, dated March 25, 2020	74
Exhibit "C":	Important Information for Travellers During COVID-19, March 18, 2020	76
Exhibit "D":	FAQs: Statement on Vouchers, April 22, 2020	81
Exhibit "E":	Determination No. A-2020-42, March 13, 2020	84
Exhibit "F":	Determination No. A-2020-47, March 25, 2020	88
Exhibit "G":	Order No. 2020-A-32, March 18, 2020	91
Exhibit "H":	Order No. 2020-A-37, March 25, 2020	94
Exhibit "I":	Repealed - Interim Order to Prevent Certain Persons from Boarding Flights to Canada due to COVID-19, undated	97
Exhibit "J":	PC Number: 2020-0157 - Minimizing the Risk of Exposure to COVID-19 Coronavirus Disease in Canada Order (Prohibition of Entry into Canada), March 18, 2020	108
Exhibit "K":	Repealed - Interim Order to Prevent Certain Persons from Boarding Flights to Canada due to COVID-19, No. 2, March 20, 2020	117
Exhibit "L":	PC Number: 2020-0161 - Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from the United States), March 20, 2020	128
Exhibit "M":	PC Number: 2020-0162 - Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from any Country other than the United States), March 22, 2020	139

Exhibit "N":	Repealed - Interim Order to Prevent Certain Persons from Boarding Flights to Canada due to COVID-19, No. 3, March 24, 2020	150
Exhibit "O":	PC Number: 2020-0175 - Minimizing the Risk of Exposure to COVID-19 in Canada Order (Mandatory Isolation), March 24, 2020	161
Exhibit "P":	PC Number: 2020-0184 - Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from any Country other than the United States), March 26, 2020	174
Exhibit "Q":	PC Number: 2020-0185 - Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from the United States), March 26, 2020	189
Exhibit "R":	Repealed - Interim Order to Prevent Certain Persons from Boarding Flights in Canada due to COVID-19, March 27, 2020	200
Exhibit "S":	Interim Order to Prevent Certain Persons from Boarding Flights to Canada due to COVID-19, No. 6, April 17, 2020	209
Exhibit "T":	Interim Order to Prevent Certain Persons from Boarding Flights in Canada due to COVID-19, No. 3, April 17, 2020	223
Exhibit "U":	"Aviation measures in response to COVID-19" posted on the Transport Canada website and modified April 2, 2020	238
Exhibit "V":	Statement of Claim in Court file number T-428-20, Donaldson v. Swoop et al., issued March 27, 2020	252
Exhibit "W":	Notice of Civil Claim in Court file number VLC-S-S-203759, Donaldson v. Swoop et al., issued March 27, 2020	266
Exhibit "X":	Motion for Permission to Commence Class Action Proceedings in Court file number 500-06-001052-204, Lachaine v. Air Transat A.T. et al., issued March 23, 2020	285

Volume 2 of 3

**Written Representations and
Schedule "A" – Statutes and Regulations**

Tab	Description	Page No.
6.	Written Representations , dated April 27, 2020	303
A.	<i>Federal Court Rules</i> , S.O.R./98-106	331
B.	<i>Canada Transportation Act</i> , S.C. 1996, c. 10	340
C.	<i>Federal Courts Act</i> , R.S.C., 1985, c. F-7	350
D.	<i>Air Passenger Protection Regulations</i> , SOR/2019-150	354

Volume 3 of 3

Authorities

Tab	Description	Page No.
7.	<i>VIA Rail Canada Inc. v. Canadian Transportation Agency</i> , 2005 FCA 79 (CanLII)	360
8.	<i>Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)</i> , [1990] 1 F.C. 74 (F.T.D.); aff'd. [1990] 1 F.C. 90 (C.A.)	416
9.	<i>Sports Maska Inc. v. Bauer Hockey Corp.</i> , 2016 FCA 44	423
10.	<i>Canada (Attorney General) v. Pictou Landing Band Council</i> , 2014 FCA 21	452
11.	<i>Prudential Steel Ltd. v. Bell Supply Company</i> , 2015 FC 1243 (CanLII)	469
12.	<i>Prudential Steel Ltd. v. Bell Supply Company</i> , 2016 FCA 282 (CanLII), [2017] 3 FCR 165	486
13.	<i>Democracy Watch v. Conflict of Interest and Ethics Commissioner</i> , 2009 FCA 15	499
14.	<i>Pieters v. Canada (Attorney General)</i> , 2007 FC 556 (CanLII)	507
15.	Decision No. 307-C-A-2015, Canadian Transportation Agency	522

16.	Decision No. 398-C-A-2014, Canadian Transportation Agency	534
17.	<i>RJR-MacDonald Inc. v. Canada (Attorney General)</i> , 1994 CanLII 117 (SCC)	539
18.	<i>Unilin Beheer B.V. v. Triforest Inc.</i> , 2017 FC 76 (CanLII)	583
19.	<i>Namgis First Nation v. Canada (Fisheries, Oceans and Coast Guard)</i> , 2018 FC 334 (CanLII)	653
20.	<i>R. v. Canadian Broadcasting Corp.</i> , 2018 SCC 5 (CanLII), [2018] 1 SCR 196	693
21.	<i>Glooscap Heritage Society v. Canada (National Revenue)</i> , 2012 FCA 255 (CanLII)	715

TAB 7

A-238-04
2005 FCA 79

A-238-04
2005 CAF 79

VIA Rail Canada Inc. (*Appellant*)

VIA Rail Canada Inc. (*appelante*)

v.

c.

Canadian Transportation Agency and Council of
Canadians with Disabilities (*Respondents*)

L'Office des transports du Canada et Le Conseil des
Canadiens avec déficiences (*intimés*)

INDEXED AS: VIA RAIL CANADA INC. v. CANADA
(TRANSPORTATION AGENCY) (F.C.A.)

RÉPERTORIÉ: VIA RAIL CANADA INC. c. CANADA (OFFICE DES
TRANSPORTS) (C.A.F.)

Federal Court of Appeal, Décary, Sexton and Evans
J.J.A.—Toronto, November 22, 2004; Ottawa, March 2,
2005.

Cour d'appel fédérale, juges Décary, Sexton et Evans,
J.C.A.—Toronto, 22 novembre 2004; Ottawa, 2 mars
2005.

Transportation — Appeal from Canadian Transportation Agency decisions finding concerns raised by Council of Canadians with Disabilities re: VIA's Renaissance passenger rail cars constituting undue obstacles to mobility of persons in wheelchairs, ordering VIA take corrective measures — Canada Transportation Act, s. 172(1) entitling Agency to inquire into matters relating to design, construction, modification of means of transportation — Agency not exceeding jurisdiction — Determination of whether obstacles undue requiring examination of transportation network as whole — Relevant principles to be kept in mind in conducting such examination set out in VIA Rail Canada Inc. v. National Transportation Agency — Agency's analysis when faced with complaint such as that in case at bar dictated by Act, s. 5 — Sexton, Décary J.J.A. of opinion Agency's consideration of alterations to Renaissance cars only, rather than flexibility of network as a whole to cope with undue obstacles found in Renaissance cars, patently unreasonable — Failure to balance costs of improvements against interests of VIA, and failure to balance interests of all disabled persons, VIA, Government of Canada, Canadian public, non-disabled persons, taking into account money available and cost to average citizen, patently unreasonable — Agency not providing VIA with sufficient time to respond to questions, including those related to costs — Balancing of interests not possible until true cost of changes known — Agency wrong to conclude no evidence supporting VIA's opinion network could address obstacles found to exist — Appeal allowed — Per Evans J.A.: Agency's conclusion obstacles undue, balancing of Act, s. 5 factors, not patently unreasonable.

Transports — Appel à l'encontre des décisions de l'Office des transports du Canada qui a conclu, par suite des préoccupations soulevées par le Conseil des Canadiens avec déficiences à l'égard des voitures de chemin de fer de passagers Renaissance de VIA, que celles-ci constituaient des obstacles abusifs aux possibilités de déplacement de personnes en fauteuil roulant et qui a ordonné à VIA de prendre des mesures correctrices — L'art. 172(1) de la Loi sur les transports au Canada donne à l'Office le droit d'enquêter sur des questions liées à la conception, à la construction ou à la modification des moyens de transport — L'Office n'a pas outrepassé sa compétence — En ce qui concerne la question de savoir s'il y a des obstacles abusifs, on doit examiner l'ensemble du réseau de transport — Les principes pertinents à garder à l'esprit lors d'un tel examen sont énoncés dans l'arrêt VIA Rail Canada c. Office national des transports — L'analyse de l'Office, lorsqu'il fait face à une plainte comme celle en l'espèce, est commandée par l'art. 5 de la Loi — Les juges Sexton et Décary, J.C.A. sont d'avis que l'examen par l'Office des modifications aux voitures Renaissance seulement, plutôt que d'examiner la flexibilité du réseau dans son ensemble pour faire face aux obstacles abusifs découverts dans les voitures Renaissance, était manifestement déraisonnable — L'omission de pondérer les coûts des améliorations en fonction des intérêts de VIA ainsi que l'omission de pondérer les intérêts de toutes les personnes ayant une déficience, de VIA, du gouvernement du Canada, du public canadien et des personnes n'ayant pas de déficience, en prenant en compte l'argent disponible et le coût pour le citoyen ordinaire, étaient manifestement déraisonnables — L'Office n'a pas donné à VIA suffisamment de temps pour répondre aux questions, y compris celles liées aux coûts — La pondération des intérêts n'est possible qu'une fois que le vrai coût des changements est connu — L'Office a eu tort de conclure qu'il n'y avait aucune preuve pour étayer l'opinion de VIA selon laquelle son réseau pouvait remédier aux obstacles constatés — Appel accueilli — Le juge Evans,

Construction of Statutes — Canada Transportation Act, s. 172(1) giving Canadian Transportation Agency ability to inquire into matter in relation to which regulation could be made pursuant to s. 170(1) — Act, s. 170(1) allowing Agency to make regulations eliminating undue obstacles from transportation network, including regulations respecting design, construction, modification of means of transportation — Act, s. 172(1) thus entitling Agency to inquire into matters relating to design, construction, modification of means of transportation — Agency correctly determining jurisdiction.

Administrative Law — Judicial Review — Certiorari — Procedural fairness — Within Canadian Transportation Agency's discretion to refuse oral hearing for VIA to explain difficulties in responding to show cause order, but failure to provide VIA with more time to respond in writing to show cause order, present information, cost estimates violating procedural fairness, justifying setting aside of decision — Duty to take official notice — Agency wrong to conclude no evidence supporting opinion network capable of addressing obstacles found to exist, should have made use of expertise relating to rail transportation matters when considering VIA's network — Per Evans J.A.: Agency not required to supplement evidence on record, should normally be able to decide matter on basis of material put before it by parties.

This was an appeal from two decisions (the preliminary and final decisions) of the Canadian Transportation Agency (Agency) determining that concerns raised by the Council for Canadians with Disabilities (CCD) in regard to VIA's newly purchased Renaissance passenger rail cars constituted undue obstacles to the mobility of persons with disabilities, i.e. persons in wheelchairs, and ordering VIA to take corrective measures to eliminate those obstacles.

In its preliminary decision, the Agency found that 14 of the CCD's 46 concerns were undue obstacles, and directed VIA to address the findings (show cause order). In its final decision, the Agency found that VIA's response to the show cause order had been inadequate and directed VIA to take corrective measures by re-designing and re-constructing certain aspects of the Renaissance cars. That decision was

J.C.A.: La conclusion de l'Office selon laquelle les obstacles étaient abusifs et sa pondération relativement aux facteurs énumérés à l'art. 5 de la Loi n'étaient pas manifestement déraisonnables.

Interprétation des lois — L'art. 172(1) de la Loi sur les transports au Canada confère à l'Office des transports du Canada le pouvoir d'enquêter sur toute question relative à l'un des domaines visés à l'art. 170(1) — L'art. 170(1) de la Loi permet à l'Office de prendre des règlements afin d'éliminer tous obstacles abusifs dans le réseau de transport, y compris des règlements régissant la conception, la construction ou la modification des moyens de transport — L'art. 172(1) de la Loi donne donc à l'Office le droit d'enquêter sur des questions liées à la conception, à la construction ou à la modification des moyens de transport — L'Office a correctement tranché la question de sa compétence.

Droit administratif — Contrôle judiciaire — Certiorari — Équité procédurale — L'Office des transports du Canada avait le pouvoir discrétionnaire de refuser une audience à VIA pour qu'elle explique les difficultés rencontrées pour répondre à l'ordonnance de justification, mais l'omission d'accorder à VIA plus de temps pour répondre par écrit à cette ordonnance ainsi que pour présenter les renseignements et l'estimation des coûts constituait un manquement à l'équité procédurale justifiant l'annulation de la décision — Obligation de prendre connaissance d'office — L'Office a eu tort de conclure qu'il n'y avait aucune preuve pour étayer l'opinion selon laquelle le réseau était en mesure de remédier aux obstacles constatés et il aurait dû utiliser son expertise relative aux questions de transport ferroviaire lorsqu'il a examiné le réseau de VIA — Le juge Evans, J.C.A.: L'Office n'était pas tenu de compléter la preuve au dossier, car il devrait normalement être en mesure de trancher une question sur la base des documents que les parties lui ont présentés.

Il s'agissait d'un appel interjeté à l'encontre de deux décisions (la décision préliminaire et la décision définitive) de l'Office des transports du Canada (l'Office) qui a décidé, par suite des préoccupations soulevées par le Conseil des Canadiens avec déficiences (le CCD) à l'égard des voitures de chemin de fer de passagers Renaissance nouvellement acquises par VIA, que celles-ci constituaient des obstacles abusifs aux possibilités de déplacement des personnes ayant une déficience, en particulier les personnes en fauteuil roulant, et qui a ordonné à VIA de prendre des mesures correctrices afin d'éliminer ces obstacles.

Dans sa décision préliminaire, l'Office a conclu que 14 des 46 points soulevés par le CCD étaient des obstacles abusifs et a enjoint à VIA de répondre aux conclusions (ordonnances de justification). Dans sa décision définitive, l'Office a conclu que la réponse de VIA à l'ordonnance de justification avait été inadéquate et a enjoint à VIA de prendre des mesures correctrices en reprenant la conception et en reconstruisant

stayed pending the outcome of this appeal.

Held, the appeal should be allowed.

Per Sexton J.A. (Décary J.A. concurring): The issue of whether the Agency lacked jurisdiction to inquire under section 172 of the *Canada Transportation Act* unless an actual incident occurred wherein a disabled individual encountered an undue obstacle to his or her mobility was determined based on the standard of correctness.

The Agency did not exceed its jurisdiction. Subsection 172(1) of the Act entitles the Agency to inquire into matters relating to design, construction or modification of the means of transportation, which it did. Unfortunately, the nature of the CCD's application (which suggested an interference with VIA's decision making) led the Agency to focus virtually exclusively on the potential obstacles to the mobility in the Renaissance cars, and not on the VIA network as a whole and on ways in which the Renaissance cars could be incorporated into the network.

The preliminary decision was rendered more than two years after the CCD's application was filed. This may illustrate that the legislature did not intend that issues of the present magnitude be pursued under section 172. However, interpreting the statute according to its present provisions, the Agency's determination of its jurisdiction was correct.

And the Agency did not treat the Rail Code as mandatory, thus exceeding its jurisdiction. It did however find that the Code served as a useful reference point.

The issue of whether the Agency erred in finding the alleged obstacles to be undue was determined on the basis of patent unreasonableness.

The undue analysis can only be conducted by an examination of the transportation network as a whole. The relevant principles that should be considered when conducting such an analysis were discussed in *VIA Rail Canada Inc. v. National Transportation Agency (Lemonde)*, and section 5 of the Act dictates the analysis that the Agency must go through when faced with a complaint by disabled persons in connection with the facilities of a transportation service provider.

The Agency erred in confining itself to considering only alterations to the Renaissance cars rather than considering

certain éléments des voitures Renaissance. Un sursis d'exécution de cette décision a été accordé en attendant le résultat du présent appel.

Arrêt: l'appel doit être accueilli.

Le juge Sexton, J.C.A. (le juge Décary, J.C.A. souscrivant à ses motifs): La question soulevée comme quoi l'Office n'avait pas compétence pour enquêter en vertu de l'article 172 de la *Loi sur les transports au Canada*, sauf en cas d'incident réel dans lequel une personne ayant une déficience rencontrait un obstacle abusif à ses possibilités de déplacement, a été tranchée selon la norme de la décision correcte.

L'Office n'a pas outrepassé sa compétence. Le paragraphe 172(1) de la Loi donne à l'Office le droit d'enquêter sur des questions liées à la conception, à la construction ou à la modification des moyens de transport, ce qu'il a fait. Malheureusement, la nature de la demande du CCD (qui donne à penser qu'il y a eu une ingérence dans le processus de décision de VIA) a conduit l'Office à mettre presque exclusivement l'accent sur les obstacles potentiels aux possibilités de déplacement dans les voitures Renaissance, et non pas sur l'ensemble du réseau de VIA et sur les moyens par lesquels les voitures Renaissance pouvaient être incorporées dans le réseau.

La décision préliminaire a été rendue plus de deux ans après le dépôt de la demande du CCD. Cela peut illustrer le fait qu'il n'était pas dans l'intention de la législature que des litiges de cette ampleur soient poursuivis dans le cadre de l'article 172. Toutefois, en interprétant la loi conformément à ses dispositions actuelles, la décision de l'Office quant à sa compétence était correcte.

En plus, l'Office n'a pas traité le code ferroviaire comme étant impératif et n'a donc pas outrepassé sa compétence. Il a toutefois conclu que les normes du code ferroviaire constituaient un point de référence utile.

La question de savoir si l'Office avait commis une erreur en concluant que les présumés obstacles étaient abusifs a été tranchée selon la norme de la décision manifestement déraisonnable.

L'analyse du caractère abusif ne peut être effectuée qu'au moyen d'un examen du réseau de transport dans son ensemble. On a discuté des principes pertinents dont on devrait tenir compte lorsqu'on procède à une telle analyse dans l'arrêt *VIA Rail Canada c. Office national des transports (Lemonde)* et l'article 5 de la Loi commande l'analyse à laquelle l'Office doit procéder lorsqu'il fait face à une plainte de personnes ayant une déficience relativement aux installations offertes par un fournisseur de services de transport.

L'Office a commis une erreur en se limitant à n'examiner que des modifications aux voitures Renaissance plutôt que

whether VIA's network could be flexible enough to accommodate persons in wheelchairs. In its preliminary decision, the Agency only conducted a cursory analysis of one aspect of the network, notwithstanding VIA's repeated expressions that it needed to consider the network, rather than just the Renaissance cars, and none of the questions VIA was directed to answer in the show cause order addressed its network. It was a serious error for the Agency to consider that the sole remedy was to have VIA structurally modify the Renaissance cars. VIA should have been allowed to remedy the obstacles by means of its network. And if the Agency had any concerns about VIA's ability to meet the needs of disabled persons in the future, it should have said so in the show cause order rather than speculate about this ability. The Agency's failure to properly consider VIA's network as a whole was patently unreasonable. The proper approach was that which the dissenting member of the Agency took, i.e. whether VIA's network was able to cope with any undue obstacles found in the Renaissance cars.

The Agency failed to balance the costs of the improvements ordered against the interests of VIA. It concluded that there was no compelling evidence of economic impediments in funding the changes before it addressed the changes to be made to the Renaissance cars and before asking VIA to obtain estimates of these costs. This was patently unreasonable.

The Agency failed to balance the interests of persons with disabilities other than wheelchair users without taking into account the total amount of money which could realistically be available.

It is of the utmost importance for all disabled persons, VIA, the Government of Canada and the Canadian public that before costs of the magnitude envisioned in the case at bar are incurred (these costs were set out in an affidavit that was filed subsequent to the final decision), that the Agency reconsider its decision, taking into account the total costs of the changes ordered as well as the other factors to be balanced as set out in the *Lemondé* decision.

The balancing of the various interests at stake could only be done once the true cost of the changes was known. VIA indicated to the Agency that it could not respond to the show cause order adequately in the time allotted. The Agency did not provide VIA with more time to respond, and when it ordered its final corrective measures in the final decision, the Agency did not have comprehensive third-party estimates as to the total cost of the changes requested. This failure to provide VIA with

d'examiner la question de savoir si le réseau de VIA pouvait être assez flexible pour s'adapter aux personnes en fauteuil roulant. Dans sa décision préliminaire, l'Office n'a procédé qu'à une analyse superficielle relativement à un aspect du réseau, malgré le fait que VIA a répété à plusieurs reprises qu'il devait prendre en compte le réseau, et non seulement les voitures Renaissance, et aucune des questions auxquelles l'ordonnance de justification enjoignait à VIA de répondre ne concernait son réseau. Il s'agissait d'une erreur grave pour l'Office de considérer que la seule mesure correctrice était de faire en sorte que VIA modifie la structure des voitures Renaissance. On aurait dû permettre à VIA de supprimer les obstacles au moyen de son réseau. Et si l'Office était préoccupé au sujet de la capacité de VIA de répondre aux besoins des personnes ayant une déficience dans l'avenir, il aurait dû le mentionner dans l'ordonnance de justification au lieu de spéculer au sujet de cette capacité. L'omission par l'Office d'examiner de façon appropriée le réseau de VIA dans son ensemble était manifestement déraisonnable. La bonne démarche est celle qu'a prise le membre dissident de l'Office, c.-à-d. de se poser la question de savoir si le réseau de VIA était en mesure de faire face aux obstacles abusifs constatés dans les voitures Renaissance.

L'Office n'a pas pondéré les coûts des améliorations ordonnées en fonction des intérêts de VIA. Il a conclu qu'il n'y avait pas de preuve indiscutable d'empêchements économiques au financement des changements avant d'avoir traité des changements à apporter aux voitures Renaissance et avant d'avoir demandé à VIA d'obtenir une estimation de ces coûts. C'était manifestement déraisonnable.

L'Office n'a pas pondéré les intérêts des personnes ayant une déficience mais n'utilisant pas de fauteuil roulant, sans prendre en compte le montant d'argent total susceptible, d'un point de vue réaliste, d'être disponible.

Avant que les coûts de l'ampleur envisagée en l'espèce soient encourus (ces coûts ont été établis dans un affidavit qui fut déposé à la suite de la délivrance de la décision définitive), il est fort important pour l'ensemble des personnes ayant une déficience, pour VIA, pour le gouvernement du Canada et pour le public canadien que l'Office réexamine sa décision en tenant compte des coûts totaux des changements ordonnés de même que des autres facteurs à pondérer, énoncés dans la décision *Lemondé*.

La pondération des différents intérêts en jeu ne pouvait être faite qu'une fois que le vrai coût des changements était connu. VIA avait mentionné à l'Office qu'elle ne pourrait pas répondre de manière adéquate à l'ordonnance de justification dans le délai alloué. L'Office n'a pas donné à VIA plus de temps pour répondre et, lorsqu'il a ordonné ses mesures correctrices définitives dans la décision définitive, l'Office ne disposait pas de l'estimation complète d'un tiers quant au coût

more time to respond constituted a denial of procedural fairness justifying that the decision be set aside.

The Agency failed to consider the interests of non-disabled persons. Expenses must not be so high that VIA has to increase its fares and average citizens cannot afford to travel. The Agency did not have the necessary information as to costs to make this determination. Its decision was thus patently unreasonable.

The Agency was wrong to conclude that there was no evidence to support VIA's opinion that its network could address obstacles that were found to exist in the Renaissance cars, and, given its mandate, its expertise and the fact that VIA has come before it on numerous occasions, the Agency should have made use of its expertise relating to rail transportation matters when considering VIA's network.

It was within the Agency's discretion to refuse to grant an oral hearing to permit VIA to explain the difficulties in responding to the show cause order. This refusal was not patently unreasonable. However, as previously mentioned, it was incumbent on the Agency to allow sufficient time for VIA to present the information and estimates to it.

In its factum, the Agency addressed issues relating to the facts and merits of VIA's position, thus becoming an adversary in an appeal of its own decision, which it could not do. The Agency should take note of this for future proceedings.

Per Evans J.A. (concurring): The Agency's decisions could not stand, but for different reasons. The Agency's conclusion that the obstacles to the mobility of persons in wheelchairs presented by the Renaissance cars were undue, and its balancing of the factors in section 5 of the Act, was not patently unreasonable. The only error warranting the intervention of this Court was the Agency's failure to afford a reasonable opportunity to VIA to address issues crucial to the ultimate determination of the CCD's application. The Agency's preliminary order should have specifically invited VIA to submit evidence that would enable the Agency to determine if the obstacles to mobility were undue when considered in the context of VIA's network. And the Agency's final order should have invited VIA to submit a third party estimate of the costs of the modifications and an assessment of their feasibility from an engineering perspective.

total des changements qu'il a demandés. Cette omission de donner à VIA plus de temps pour répondre constituait un déni de l'équité procédurale justifiant l'annulation de la décision.

L'Office n'a pas tenu compte des intérêts des personnes n'ayant pas de déficience. Les dépenses ne doivent pas être élevées au point que VIA soit obligée d'augmenter ses tarifs et que les citoyens ordinaires ne puissent pas se permettre de voyager. L'Office ne disposait pas, pour rendre cette décision, des renseignements nécessaires quant aux coûts. Sa décision était donc manifestement déraisonnable.

L'Office a eu tort de conclure qu'il n'y avait aucune preuve pour étayer l'opinion de VIA selon laquelle son réseau pouvait remédier aux obstacles constatés dans les voitures Renaissance et, étant donné son mandat, son expertise ainsi que le fait que VIA a comparu devant lui à de nombreuses reprises, l'Office aurait dû utiliser son expertise relative aux questions de transport ferroviaire lorsqu'il a examiné le réseau de VIA.

L'Office avait le pouvoir discrétionnaire de refuser d'accorder une audience pour permettre à VIA d'expliquer les difficultés rencontrées pour répondre à l'ordonnance de justification. Ce refus n'était pas manifestement déraisonnable. Toutefois, comme il a déjà été mentionné, il incombait à l'Office de donner à VIA suffisamment de temps pour lui présenter les renseignements et les estimations.

Dans son mémoire, l'Office a abordé des questions en litige concernant les faits et le bien-fondé de la position de VIA, devenant ainsi un adversaire dans un appel de sa propre décision, ce qu'il ne pouvait pas faire. L'Office devrait en prendre note en vue des futures instances.

Le juge Evans, J.C.A. (motifs concourants): Les décisions de l'Office ne pouvaient être maintenues, mais pour des motifs différents. La conclusion de l'Office selon laquelle les obstacles aux possibilités de déplacement des personnes en fauteuil roulant constatés dans les voitures Renaissance étaient abusifs et sa pondération relativement aux facteurs énumérés à l'article 5 de la Loi n'étaient pas manifestement déraisonnables. La seule erreur justifiant l'intervention de la Cour était l'omission de l'Office de donner à VIA une possibilité raisonnable de traiter des questions cruciales pour la décision ultime relativement à la demande du CCD. L'ordonnance préliminaire de l'Office aurait dû inviter expressément VIA à présenter des éléments de preuve qui auraient permis à l'Office de décider si les obstacles aux possibilités de déplacement étaient abusifs à la lumière du contexte du réseau de VIA. De plus, l'ordonnance définitive de l'Office aurait dû inviter VIA à présenter une estimation des coûts préparée par un tiers relativement aux modifications ainsi qu'une évaluation de leur faisabilité d'un point de vue technique.

As to whether the Agency should have supplemented the evidence on the record by resorting to its institutional knowledge, it could be very onerous to impose such a general obligation on specialist administrative agencies. The Agency should normally be able to decide a matter on the basis of the material put before it by the parties.

Quant à la question de savoir si l'Office aurait dû compléter la preuve au dossier en ayant recours à sa connaissance institutionnelle, il pourrait s'avérer très onéreux d'imposer une telle obligation générale aux organismes administratifs spécialisés. L'Office devrait normalement être en mesure de trancher une question sur la base des documents que les parties lui ont présentés.

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

Canada Transportation Act, S.C. 1996, c. 10, ss. 5, 16(1), 27, 28, 29, 31, 36, 41, 170, 172.
National Transportation Agency General Rules, SOR/88-23, ss. 38, 40.

LOIS ET RÉGLEMENTS CITÉS

Loi sur les transports au Canada, L.C. 1996, ch. 10, art. 5, 16(1), 27, 28, 29, 31, 36, 41, 170, 172.
Règles générales de l'Office national des transports, DORS/88-23, art. 38, 40.

CASES JUDICIALLY CONSIDERED

APPLIED:

VIA Rail Canada Inc. v. National Transportation Agency, [2001] 2 F.C. 25; (2000), 193 D.L.R. (4th) 357; 26 Admin. L.R. (3d) 1; 261 N.R. 184 (C.A.).

JURISPRUDENCE CITÉE

DÉCISION APPLIQUÉE:

VIA Rail Canada Inc. c. Office national des transports, [2001] 2 C.F. 25; (2000), 193 D.L.R. (4th) 357; 26 Admin. L.R. (3d) 1; 261 N.R. 184 (C.A.).

CONSIDERED:

In the matter of an application filed with the National Transportation Agency by Jean Lemonde, on behalf of Minkami (Club de mini Basket-ball en fauteuil roulant "Les Kamikazes"), concerning difficulties encountered on a December 1993 round trip with VIA Rail Canada Inc. — Decision No. 791-R-1995 and Order No. 1995-R-491, both dated November 28, 1995, Decision No. 479-AT-R-2002; *Canadian Pacific Railway Co. v. Canada (Transportation Agency)*, [2003] 4 F.C. 558; (2003), 307 N.R. 378; 2003 FCA 271; *Northwestern Utilities Ltd. et al. v. City of Edmonton*, [1979] 1 S.C.R. 684; (1978), 12 A.R. 449; 89 D.L.R. (3d) 161; 7 Alta. L.R. (2d) 370; 23 N.R. 565.

DÉCISIONS EXAMINÉES:

Relative à la demande déposée auprès de l'Office national des transports par Jean Lemonde, au nom de Minkami (Club de mini Basket-ball en fauteuil roulant «Les Kamikazes»), concernant les difficultés qu'il a eues au cours d'un voyage aller-retour avec VIA Rail Canada Inc. en décembre 1993 — Décision n° 791-R-1995 et Arrêté n° 1995-R-491, tous deux datés du 28 novembre 1995, Décision n° 479-AT-R-2002; *Cie de chemin de fer Canadien Pacifique c. Canada (Office des transports)*, [2003] 4 C.F. 558; (2003), 307 N.R. 378; 2003 CAF 271; *Northwestern Utilities Ltd. et autre c. Ville d'Edmonton*, [1979] 1 R.C.S. 684; (1978), 12 A.R. 449; 89 D.L.R. (3d) 161; 7 Alta. L.R. (2d) 370; 23 N.R. 565.

REFERRED TO:

Dr. Q v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226; (2003), 223 D.L.R. (4th) 599; [2003] 5 W.W.R. 1; 11 B.C.L.R. (4th) 1; 48 Admin. L.R. (3d) 1; 179 B.C.A.C. 170; 302 N.R. 34; 2003 SCC 19; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; (1999), 174 D.L.R. (4th) 193; 14 Admin. L.R. (3d) 173; 1 Imm. L.R. (3d) 1; 243 N.R. 22.

DÉCISIONS CITÉES:

Dr Q c. College of Physicians and Surgeons of British Columbia, [2003] 1 R.C.S. 226; (2003), 223 D.L.R. (4th) 599; [2003] 5 W.W.R. 1; 11 B.C.L.R. (4th) 1; 48 Admin. L.R. (3d) 1; 179 B.C.A.C. 170; 302 N.R. 34; 2003 CSC 19; *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817; (1999), 174 D.L.R. (4th) 193; 14 Admin. L.R. (3d) 173; 1 Imm. L.R. (3d) 1; 243 N.R. 22.

AUTHORS CITED

Canadian Transportation Agency. Code of Practice. Passenger Rail Car Accessibility and Terms and

DOCTRINE CITÉE

Office des transports du Canada. Codes de pratiques. Accessibilité des voitures de chemin de fer et conditions

Conditions of Carriage by Rail of Persons with Disabilities. Ottawa: Minister of Public Works and Government Services, February 1998.

APPEAL from decisions (Decision No. 175-AT-R-2003; Decision No. 620-AT-R-2003) of the Canadian Transportation Agency that concerns raised by the Council for Canadians with Disabilities regarding VIA's Renaissance passenger rail cars constituted undue obstacles to the mobility of persons in wheelchairs, and ordering VIA to take corrective measures to eliminate those obstacles. Appeal allowed.

APPEARANCES:

John A. Campion, Annie M. Finn and Nicole D. Samson for appellant.
Inge Green and Elizabeth C. Barker for respondent Canadian Transportation Agency.
J. David Baker and Sarah Godwin for respondent Council of Canadians with Disabilities.

SOLICITORS OF RECORD:

Fasken Martineau DuMoulin LLP, Toronto, for appellant.
 Canadian Transportation Agency, Legal Services Directorate, for respondent Canadian Transportation Agency.
Bakerlaw, Toronto, for respondent Council of Canadians with Disabilities.

The following are the reasons for judgment rendered in English by

[1] SEXTON J.A.: This is an appeal from two decisions of the Canadian Transportation Agency (the Agency), wherein it was determined that concerns raised by the Council for Canadians with Disabilities (the CCD) in regard to VIA Rail Canada Inc.'s (VIA) newly-purchased passenger rail cars (the Renaissance cars) constituted undue obstacles to the mobility of persons with disabilities (specifically persons in wheelchairs) and the consequent order for VIA to take corrective measures to eliminate those obstacles.

de transport ferroviaire des personnes ayant une déficience. Ottawa: Ministère des travaux publics et services gouvernementaux, février 1998.

APPEL à l'encontre de décisions (Décision n° 175-AT-R-2003; Décision n° 620-AT-R-2003) de l'Office des transports du Canada qui a décidé, par suite des préoccupations soulevées par le Conseil des Canadiens avec déficiences à l'égard des voitures de chemin de fer de passagers Renaissance de VIA, que celles-ci constituaient des obstacles abusifs aux possibilités de déplacement des personnes en fauteuil roulant et qui a ordonné à VIA de prendre des mesures correctrices afin d'éliminer ces obstacles. Appel accueilli.

ONT COMPARU:

John A. Campion, Annie M. Finn et Nicole D. Samson pour l'appelante.
Inge Green et Elizabeth C. Barker pour l'intimé l'Office des transports du Canada.
J. David Baker et Sarah Godwin pour l'intimé le Conseil des Canadiens avec déficiences.

AVOCATS INSCRITS AU DOSSIER:

Fasken Martineau DuMoulin s.r.l., Toronto, pour l'appelante.
 L'Office des transports du Canada, Direction des services juridiques pour l'intimé l'Office des transports du Canada.
Bakerlaw, Toronto, pour l'intimé le Conseil des Canadiens avec déficiences.

Ce qui suit est la version française des motifs du jugement rendus par

[1] LE JUGE SEXTON, J.C.A.: Il s'agit d'un appel interjeté à l'encontre de deux décisions de l'Office des transports du Canada (l'Office), dans lesquelles il a été décidé, par suite des préoccupations soulevées par le Conseil des Canadiens avec déficiences (le CCD) à l'égard des voitures de chemin de fer de passagers (les voitures Renaissance) nouvellement acquises par VIA Rail Canada Inc. (VIA), que celles-ci constituaient des obstacles abusifs aux possibilités de déplacement des personnes ayant une déficience (en particulier les

Facts

[2] On December 1, 2000, VIA purchased 139 Renaissance cars for \$139 million, which increased the size of its fleet by approximately one third. These cars had been developed in Europe in 1990 and had been designed for fast overnight service between Europe and the northern regions of the United Kingdom through the Channel Tunnel. However, the original contract was halted in 1998 and the trains were offered for sale at what VIA considered to be a bargain price. VIA purchased the Renaissance cars and at the time of purchase, the cars were fully designed and partially assembled such that they would be ready for use after final assembly.

[3] Upon learning of VIA's plans, on December 4, 2000, the CCD applied to the Agency for interim relief pursuant to sections 27 and 28 of the *Canada Transportation Act*, S.C. 1996, c. 10 (the CTA) and for a final order pursuant to subsection 172(1). Specifically, the CCD, believing that the sale had not yet been completed and without having personally inspected the Renaissance cars, asked the Agency to delay or stop VIA from purchasing them because they were not accessible for persons in wheelchairs. The CCD asked the Agency to examine the Renaissance cars to determine whether they contained "undue obstacles" to the mobility of such persons.

[4] Since VIA had already purchased the Renaissance cars, the Agency did not attempt to stop the purchase. It instead proceeded to consider whether the Renaissance cars constituted undue obstacles to persons in wheelchairs by undertaking an examination of the Renaissance cars. Except for a one-day oral hearing on April 8, 2002, the proceeding consisted entirely of letter submissions and responses by the parties and the Agency. Similarly, the Agency rendered most of its decisions on various issues by letter.

personnes en fauteuil roulant) avec l'ordonnance conséquente pour que VIA prenne des mesures correctrices afin d'éliminer ces obstacles.

Les faits

[2] Le 1^{er} décembre 2000, VIA a acquis 139 voitures Renaissance pour un montant de 139 millions de dollars, ce qui a accru la taille de son parc d'environ un tiers. Ces voitures avaient été fabriquées en Europe en 1990 et elles avaient été conçues pour assurer un service de nuit rapide entre l'Europe et les régions septentrionales du Royaume-Uni en passant par le tunnel sous la Manche. Toutefois, il fut mis un terme au contrat original en 1998 et les trains ont été mis en vente à un prix que VIA considérait comme une aubaine. VIA a acheté les voitures Renaissance et, au moment de l'achat, la conception des voitures était achevée et elles étaient partiellement assemblées de telle sorte qu'elles seraient en état de servir après l'assemblage final.

[3] Ayant été mis au courant des projets de VIA, le 4 décembre 2000, le CCD a présenté à l'Office une demande visant à obtenir des mesures provisoires en vertu des articles 27 et 28 de la *Loi sur les transports au Canada*, L.C. 1996, ch. 10 (la LTC), et une ordonnance définitive en vertu du paragraphe 172(1). Plus particulièrement, croyant que la vente n'avait pas encore été complétée et sans avoir procédé en personne à une inspection des voitures Renaissance, le CCD a demandé à l'Office d'en retarder ou d'en interrompre l'achat par VIA parce qu'elles n'étaient pas accessibles pour les personnes en fauteuil roulant. Le CCD a demandé à l'Office d'examiner les voitures Renaissance afin de déterminer si elles contenaient des «obstacles abusifs» aux possibilités de déplacement de ces personnes.

[4] Puisque VIA avait déjà acheté les voitures Renaissance, l'Office n'a pas tenté d'interrompre la vente. Il a plutôt examiné la question de savoir si les voitures Renaissance constituaient des obstacles abusifs pour les personnes en fauteuil roulant en entreprenant un examen des voitures Renaissance. À l'exception d'une audience d'une journée tenue le 8 avril 2002, l'instance fut entièrement constituée d'un échange de lettres d'observations et de réponses entre les parties et l'Office. De même, l'Office a rendu la plupart de ses décisions sur diverses questions par lettre.

[5] This has been a lengthy and involved proceeding. It commenced on December 4, 2000 and the Agency rendered its final decision more than 2 years and 9 months later, on October 29, 2003. In the record, there were approximately 47 letters from the CCD, 57 letters from VIA, 10 from the Agency and 71 letter decisions and orders issued by the Agency. The matters adjudicated by letter largely dealt with production of documents, timeliness of responses, inspection of the Renaissance cars and Agency jurisdiction.

[5] Ce fut une instance longue et complexe. Elle a débuté le 4 décembre 2000 et l'Office a rendu sa décision définitive plus de 2 ans et 9 mois plus tard, soit le 29 octobre 2003. Dans le dossier, il y avait environ 47 lettres provenant du CCD, 57 lettres de VIA, 10 de l'Office ainsi que 71 lettres de décision et d'ordonnances délivrées par l'Office. Les questions sur lesquelles il a été statué par lettre traitaient dans une large mesure de la production de documents, de la célérité des réponses, de l'inspection des voitures Renaissance et de la compétence de l'Office.

[6] The proceeding culminated with two decisions, both of which are the subject of this appeal.

[6] L'instance a culminé avec deux décisions, lesquelles font toutes les deux l'objet du présent appel.

Preliminary Decision

La décision préliminaire

[7] On March 27, 2003, the Agency issued Decision No. 175-AT-R-2003 [*Application by the Council of Canadians with Disabilities pursuant to subsection 172(1) of the Canada Transportation Act, S.C. 1996, c. 10, regarding the level of accessibility of VIA Rail Canada Inc.'s Renaissance passenger rail cars*] (the preliminary decision), being a decision of the majority of a three-member panel. At issue were 46 concerns raised by the CCD regarding the accessibility of the Renaissance cars. The Agency inspected the Renaissance cars and issued this decision containing its preliminary findings. Of the 46 items raised by the CCD, the Agency found 14 of them to be "undue obstacles". The preliminary decision is lengthy and detailed and took over two years to be released. After the Agency had made the preliminary findings regarding certain features of the Renaissance cars, it directed VIA to specifically address the findings in its direction to show cause (the show cause order), wherein VIA was directed to file answers to nine complex questions within 60 days from the date of the decision. VIA subsequently filed a response to the show cause order and the Agency, finding the response to be inadequate, gave VIA an additional 60 days to provide further response.

[7] Le 27 mars 2003, l'Office a rendu la décision n° 175-AT-R-2003 [*Demande présentée par le Conseil des Canadiens avec déficiences en vertu du paragraphe 172(1) de la Loi sur les transports au Canada, au sujet du niveau d'accessibilité des voitures de chemin de fer de passagers Renaissance de VIA Rail Canada Inc.*] (la décision préliminaire), laquelle constituait une décision de la majorité d'une formation de trois membres. Elle concernait 46 préoccupations soulevées par le CCD concernant l'accessibilité des voitures Renaissance. L'Office a inspecté les voitures Renaissance et a rendu cette décision contenant ses conclusions préliminaires. L'Office a conclu que 14 des 46 points soulevés par le CCD étaient des «obstacles abusifs». La décision préliminaire est longue et détaillée et il a fallu plus de deux ans pour la publier. Après que l'Office eut tiré les conclusions préliminaires concernant certaines caractéristiques des voitures Renaissance, il a enjoint à VIA de répondre spécifiquement aux conclusions dans sa demande de justification (l'ordonnance de justification), dans laquelle on a enjoint à VIA de déposer des réponses à neuf questions complexes dans les 60 jours de la date de la décision. VIA a par la suite déposé une réponse à l'ordonnance de justification et l'Office, en concluant que la réponse était inadéquate, a donné à VIA un délai additionnel de 60 jours pour fournir une autre réponse.

[8] The third and dissenting member, Richard Cashin, did not find any of the obstacles to be "undue". However, Mr. Cashin retired before the Agency rendered

[8] Pour le troisième membre, Richard Cashin, qui était dissident, aucun des obstacles n'était «abusifs». Toutefois, M. Cashin a pris sa retraite avant que l'Office

its final findings but the Agency's decision making process was unaffected, since two members constitute a quorum pursuant to subsection 16(1) of the CTA.

tire ses conclusions définitives, mais cela n'a pas influé sur le processus décisionnel de l'Office puisque, selon le paragraphe 16(1) de la LTC, le quorum est constitué de deux membres.

Final Decision

La décision définitive

[9] Decision No. 620-AT-R-2003 [*Application by the Council of Canadians with Disabilities, regarding the level of accessibility of Via Rail Canada Inc.'s Renaissance passenger rail cars—Final findings related to Decision No. 175-AT-R-2003*] (the final decision) was issued on October 29, 2003. Here, the Agency made final determinations on its preliminary findings of undue obstacles. As one of the preliminary issues in this decision, the Agency found that VIA's response to the show cause order had been inadequate.

[9] La décision n° 620-AT-R-2003 [*Demande présentée par le Conseil des Canadiens avec déficiences au sujet du niveau d'accessibilité des voitures de chemin de fer de passagers Renaissance de VIA Rail Canada Inc.—Constatations finales de la décision n° 175-AT-R-2003*] (la décision définitive) a été rendue le 29 octobre 2003. Dans cette décision, l'Office a tiré des conclusions définitives concernant ses conclusions préliminaires relativement aux obstacles abusifs. En réponse à une des questions préliminaires dans le cadre de cette décision, l'Office a conclu que la réponse de VIA à l'ordonnance de justification avait été inadéquate.

[10] After addressing the specific undue obstacles, the Agency directed VIA to take corrective measures by re-designing and re-constructing certain aspects of the Renaissance cars that were placed in service. The Agency required that VIA, within 60 days of the date of the final decision, submit its plan for the timing of the implementation of the modifications as required in the final decision.

[10] Après avoir examiné les obstacles abusifs précis, l'Office a enjoint à VIA de prendre des mesures correctrices en reprenant la conception et en reconstruisant certains éléments des voitures Renaissance qui étaient en service. L'Office a exigé que VIA soumette, dans les 60 jours de la date de la décision définitive, son plan de mise en œuvre des modifications exigées par la décision définitive.

[11] After the final decision was released, VIA brought a motion to stay both the preliminary and final decisions pending this Court's decision on the motion for leave to appeal. The stay was granted by order dated December 19, 2003 and renewed on June 10, 2004.

[11] Après la publication de la décision définitive, VIA a présenté une requête en sursis d'exécution tant de la décision préliminaire que de la décision définitive en attendant que la Cour statue sur la requête en autorisation d'appel. Le sursis d'exécution a été accordé par une ordonnance datée du 19 décembre 2003 et a été renouvelé le 10 juin 2004.

[12] Leave to appeal to the Federal Court of Appeal was granted by order dated March 10, 2004 on the following grounds:

[12] L'autorisation d'en appeler à la Cour d'appel fédérale a été accordée par une ordonnance datée du 10 mars 2004 pour les moyens suivants:

(a) The Agency committed errors of law and jurisdiction by undertaking an examination of an alleged design problem in the train set or consist comprising Renaissance cars, rather than examining an alleged physical problem encountered by an actual passenger with disabilities. The Agency, therefore, erred in law and

a) L'Office a commis des erreurs de droit et de compétence en entreprenant l'examen d'un problème de conception allégué dans le train ou la rame comprenant des voitures Renaissance, plutôt que d'examiner un problème physique qu'aurait rencontré un passager réel ayant une déficience. L'Office a donc commis une erreur

exceeded its jurisdiction in adjudicating a complaint under section 172 of the *Canada Transportation Act* on hypothetical facts upon which there could be no finding of any "obstacle".

de droit et a outrepassé sa compétence en se prononçant sur une plainte en vertu de l'article 172 de la *Loi sur les transports au Canada* d'après des faits hypothétiques sur lesquels on ne pourrait conclure à l'existence de quelque «obstacle».

(b) Even if the Agency could have found, in the circumstances of this case, that one or more features of the Renaissance cars constituted an obstacle to the mobility of persons with disabilities, it erred in law in finding such obstacles to be "undue". The Agency failed to apply the correct legal test in its determination of "undueness".

b) Même si l'Office avait pu conclure, dans les circonstances de l'espèce, que l'une ou plusieurs des caractéristiques des voitures Renaissance constituaient des obstacles aux possibilités de déplacement des personnes ayant une déficience, il a commis une erreur de droit en concluant que ces obstacles étaient «abusifs». L'Office n'a pas appliqué le bon critère juridique pour décider du «caractère abusif».

(c) The Agency's order is patently unreasonable because it is not rationally connected to any finding of undue obstacle open on the facts of this case.

c) L'ordonnance de l'Office est manifestement déraisonnable parce qu'elle n'a pas de lien rationnel avec une conclusion quant à un obstacle abusif pouvant être fondée sur les faits de l'espèce.

(d) The Agency erred in law and exceeded its jurisdiction by failing to afford VIA Rail its rights of natural justice and procedural fairness.

d) L'Office a commis une erreur de droit et a outrepassé sa compétence en niant à VIA Rail ses droits relativement à la justice naturelle et à l'équité procédurale.

VIA's Arguments

Les arguments de VIA

[13] VIA's submissions consisted of four arguments. First, it argued that the Agency's jurisdiction pursuant to section 172 to consider the existence of obstacles is derived from actual incidents involving disabled passengers. If no such incident or complaint has occurred, VIA maintains that the Agency's only recourse is to pass regulations under section 170. These regulations must be approved by the Governor in Council. Here, there was no complaint nor incident and the Agency did not pass regulations. Therefore, VIA maintains that the Agency was without jurisdiction to make such an order.

[13] Les observations de VIA comprenaient quatre arguments. Premièrement, elle a fait valoir que la compétence de l'Office, en vertu de l'article 172, pour examiner l'existence d'obstacles découle d'incidents réels impliquant des passagers ayant une déficience. Selon VIA, en l'absence d'incident ou de plainte, le seul recours de l'Office est de prendre des règlements en vertu de l'article 170. Ces règlements doivent être approuvés par le gouverneur en conseil. En l'espèce, il n'y a eu aucune plainte ni incident et l'Office n'a pris aucun règlement. Par conséquent, VIA maintient que l'Office n'avait pas compétence pour rendre une telle ordonnance.

[14] Second, VIA submits that the Agency failed in its determination of whether an undue obstacle exists in the network as a whole. Such an analysis requires a balancing exercise, to be done while taking into account the criteria from section 5 of the CTA, which VIA maintains the Agency failed to undertake.

[14] Deuxièmement, VIA soutient que l'Office n'a pas tranché la question de savoir s'il existait un obstacle abusif dans l'ensemble du réseau. Une telle analyse exige qu'un exercice de pondération soit effectué en tenant compte des critères de l'article 5 de la LTC, ce que, selon VIA, l'Office n'a pas fait.

[15] VIA says that a wrong result by the Agency, that the Renaissance cars had undue obstacles was unavoidable, due to the Agency having asked itself the wrong question. The correct conclusion would have addressed whether there are undue obstacles in the network as a whole.

[15] VIA affirme qu'il était inévitable que l'Office en arrive à un mauvais résultat, selon lequel les voitures Renaissance avaient des obstacles abusifs, parce qu'il s'était posé la mauvaise question. La bonne conclusion aurait répondu à la question de savoir s'il y avait des obstacles abusifs dans l'ensemble du réseau.

[16] Third, VIA argued that the remedy ordered by the Agency was not rationally connected to the undue obstacles found. Rather, VIA found the Agency's order to be disproportionate and excessive since it bore no relationship to the minor impediments to the mobility of persons in wheelchairs. The Agency ordered corrective measures, regardless of the cost, disregarding the need for a network that is economical, efficient, adequate, viable and available to serve the needs of all travellers.

[16] Troisièmement, VIA a fait valoir que les mesures correctrices ordonnées par l'Office n'avaient pas de lien rationnel avec les obstacles abusifs constatés. Selon VIA, l'ordonnance de l'Office était plutôt disproportionnée et excessive puisqu'elle était sans rapport avec les entraves mineures aux possibilités de déplacement des personnes en fauteuil roulant. L'Office a ordonné des mesures correctrices, sans égard au coût, en ne tenant pas compte de la nécessité pour un réseau d'être rentable, efficace, bien adapté, viable et accessible afin de répondre aux besoins de tous les voyageurs.

[17] Fourth, VIA submits that its procedural fairness rights were denied when the Agency refused to grant an oral hearing. Accordingly, VIA argued that the Agency's order should be quashed and the matter remitted back to it.

[17] Quatrièmement, VIA soutient que l'Office lui a nié ses droits relatifs à l'équité procédurale lorsqu'il a refusé de tenir une audience. Par conséquent, VIA a fait valoir que l'ordonnance de l'Office devrait être annulée et que l'affaire devrait lui être renvoyée.

Legislation

La législation

[18] There are several provisions of the CTA that must be set out:

[18] Il convient de citer plusieurs dispositions de la LTC:

5. It is hereby declared that a safe, economic, efficient and adequate network of viable and effective transportation services accessible to persons with disabilities and that makes the best use of all available modes of transportation at the lowest total cost is essential to serve the transportation needs of shippers and travellers, including persons with disabilities, and to maintain the economic well-being and growth of Canada and its regions and that those objectives are most likely to be achieved when all carriers are able to compete, both within and among the various modes of transportation, under conditions ensuring that, having due regard to national policy, to the advantages of harmonized federal and provincial regulatory approaches and to legal and constitutional requirements,

5. Il est déclaré que, d'une part, la mise en place d'un réseau sûr, rentable et bien adapté de services de transport viables et efficaces, accessibles aux personnes ayant une déficience, utilisant au mieux et aux moindres frais globaux tous les modes de transport existants, est essentielle à la satisfaction des besoins des expéditeurs et des voyageurs—y compris des personnes ayant une déficience—en matière de transports comme à la prospérité et à la croissance économique du Canada et de ses régions, et, d'autre part, que ces objectifs sont plus susceptibles de se réaliser en situation de concurrence de tous les transporteurs, à l'intérieur des divers modes de transport ou entre eux, à condition que, compte dûment tenu de la politique nationale, des avantages liés à l'harmonisation de la réglementation fédérale et provinciale et du contexte juridique et constitutionnel:

(a) the national transportation system meets the highest practicable safety standards,

a) le réseau national des transports soit conforme aux normes de sécurité les plus élevées possible dans la pratique;

- (b) competition and market forces are, whenever possible, the prime agents in providing viable and effective transportation services,
- (c) economic regulation of carriers and modes of transportation occurs only in respect of those services and regions where regulation is necessary to serve the transportation needs of shippers and travellers and that such regulation will not unfairly limit the ability of any carrier or mode of transportation to compete freely with any other carrier or mode of transportation,
- (d) transportation is recognized as a key to regional economic development and that commercial viability of transportation links is balanced with regional economic development objectives so that the potential economic strengths of each region may be realized,
- (e) each carrier or mode of transportation, as far as is practicable, bears a fair proportion of the real costs of the resources, facilities and services provided to that carrier or mode of transportation at public expense,
- (f) each carrier or mode of transportation, as far as is practicable, receives fair and reasonable compensation for the resources, facilities and services that it is required to provide as an imposed public duty,
- (g) each carrier or mode of transportation, as far as is practicable, carries traffic to or from any point in Canada under fares, rates and conditions that do not constitute
- (i) an unfair disadvantage in respect of any such traffic beyond the disadvantage inherent in the location or volume of the traffic, the scale of operation connected with the traffic or the type of traffic or service involved,
- (ii) an undue obstacle to the mobility of persons, including persons with disabilities,
- (iii) an undue obstacle to the interchange of commodities between points in Canada, or
- (iv) an unreasonable discouragement to the development of primary or secondary industries, to export trade in or from any region of Canada or to the movement of commodities through Canadian ports, and
- (h) each mode of transportation is economically viable,
- and this Act is enacted in accordance with and for the attainment of those objectives to the extent that they fall within
- b) la concurrence et les forces du marché soient, chaque fois que la chose est possible, les principaux facteurs en jeu dans la prestation de services de transport viables et efficaces;
- c) la réglementation économique des transporteurs et des modes de transport se limite aux services et aux régions à propos desquels elle s'impose dans l'intérêt des expéditeurs et des voyageurs, sans pour autant restreindre abusivement la libre concurrence entre transporteurs et entre modes de transport;
- d) les transports soient reconnus comme un facteur primordial du développement économique régional et que soit maintenu un équilibre entre les objectifs de rentabilité des liaisons de transport et ceux de développement économique régional en vue de la réalisation du potentiel économique de chaque région;
- e) chaque transporteur ou mode de transport supporte, dans la mesure du possible, une juste part du coût réel des ressources, installations et services mis à sa disposition sur les fonds publics;
- f) chaque transporteur ou mode de transport soit, dans la mesure du possible, indemnisé, de façon juste et raisonnable, du coût des ressources, installations et services qu'il est tenu de mettre à la disposition du public;
- g) les liaisons assurées en provenance ou à destination d'un point du Canada par chaque transporteur ou mode de transport s'effectuent, dans la mesure du possible, à des prix et selon des modalités qui ne constituent pas:
- (i) un désavantage injuste pour les autres liaisons de ce genre, mis à part le désavantage inhérent aux lieux desservis, à l'importance du trafic, à l'ampleur des activités connexes ou à la nature du trafic ou du service en cause,
- (ii) un obstacle abusif à la circulation des personnes, y compris les personnes ayant une déficience,
- (iii) un obstacle abusif à l'échange des marchandises à l'intérieur du Canada,
- (iv) un empêchement excessif au développement des secteurs primaire ou secondaire, aux exportations du Canada ou de ses régions, ou au mouvement des marchandises par les ports canadiens;
- h) les modes de transport demeurent rentables.
- Il est en outre déclaré que la présente loi vise la réalisation de ceux de ces objectifs qui portent sur les questions relevant de

the purview of subject-matters under the legislative authority of Parliament relating to transportation.

la compétence législative du Parlement en matière de transports.

...

[...]

28. (1) The Agency may in any order direct that the order or a portion or provision of it shall come into force

28. (1) L'Office peut, dans ses arrêtés, prévoir une date déterminée pour leur entrée en vigueur totale ou partielle ou subordonner celle-ci à la survenance d'un événement, à la réalisation d'une condition ou à la bonne exécution, appréciée par lui-même ou son délégué, d'obligations qu'il aura imposées à l'intéressé; il peut en outre y prévoir une date déterminée pour leur cessation d'effet totale ou partielle ou subordonner celle-ci à la survenance d'un événement.

- (a) at a future time,
- (b) on the happening of any contingency, event or condition specified in the order, or
- (c) on the performance, to the satisfaction of the Agency or a person named by it, of any terms that the Agency may impose on an interested party,

and the Agency may direct that the whole or any portion of the order shall have force for a limited time or until the happening of a specified event.

(2) L'Office peut prendre un arrêté provisoire et se réserver le droit de compléter sa décision lors d'une audience ultérieure ou d'une nouvelle demande.

(2) The Agency may, instead of making an order final in the first instance, make an interim order and reserve further directions either for an adjourned hearing of the matter or for further application.

29. (1) The Agency shall make its decision in any proceedings before it as expeditiously as possible, but no later than one hundred and twenty days after the originating documents are received, unless the parties agree to an extension or this Act or a regulation made under subsection (2) provides otherwise.

29. (1) Sauf indication contraire de la présente loi ou d'un règlement pris en vertu du paragraphe (2) ou accord entre les parties sur une prolongation du délai, l'Office rend sa décision sur toute affaire dont il est saisi avec toute la diligence possible dans les cent vingt jours suivant la réception de l'acte introductif d'instance.

(2) The Governor in Council may, by regulation, prescribe periods of less than one hundred and twenty days within which the Agency shall make its decision in respect of such classes of proceedings as are specified in the regulation.

(2) Le gouverneur en conseil peut, par règlement, imposer à l'Office un délai inférieur à cent vingt jours pour rendre une décision à l'égard des catégories d'affaires qu'il indique.

...

[...]

31. The finding or determination of the Agency on a question of fact within its jurisdiction is binding and conclusive.

31. La décision de l'Office sur une question de fait relevant de sa compétence est définitive.

...

[...]

36. (1) Every regulation made by the Agency under this Act must be made with the approval of the Governor in Council.

36. (1) Tout règlement pris par l'Office en vertu de la présente loi est subordonné à l'agrément du gouverneur en conseil.

(2) The Agency shall give the Minister notice of every regulation proposed to be made by the Agency under this Act.

(2) L'Office fait parvenir au ministre un avis relativement à tout règlement qu'il entend prendre en vertu de la présente loi.

...

[...]

41. (1) An appeal lies from the Agency to the Federal Court of Appeal on a question of law or a question of jurisdiction on

41. (1) Tout acte—décision, arrêté, règle ou règlement—de l'Office est susceptible d'appel devant la Cour d'appel fédérale

leave to appeal being obtained from that Court on application made within one month after the date of the decision, order, rule or regulation being appealed from, or within any further time that a judge of that Court under special circumstances allows, and on notice to the parties and the Agency, and on hearing those of them that appear and desire to be heard.

(2) No appeal, after leave to appeal has been obtained under subsection (1), lies unless it is entered in the Federal Court of Appeal within sixty days after the order granting leave to appeal is made.

(3) An appeal shall be heard as quickly as is practicable and, on the hearing of the appeal, the Court may draw any inferences that are not inconsistent with the facts expressly found by the Agency and that are necessary for determining the question of law or jurisdiction, as the case may be.

(4) The Agency is entitled to be heard by counsel or otherwise on the argument of an appeal.

...

170. (1) The Agency may make regulations for the purpose of eliminating undue obstacles in the transportation network under the legislative authority of Parliament to the mobility of persons with disabilities, including regulations respecting

(a) the design, construction or modification of, and the posting of signs on, in or around, means of transportation and related facilities and premises, including equipment used in them;

(b) the training of personnel employed at or in those facilities or premises or by carriers;

(c) tariffs, rates, fares, charges and terms and conditions of carriage applicable in respect of the transportation of persons with disabilities or incidental services; and

(d) the communication of information to persons with disabilities.

(2) Regulations made under subsection (1) incorporating standards or enactments by reference may incorporate them as amended from time to time.

(3) The Agency may, with the approval of the Governor in Council, make orders exempting specified persons, means of transportation, services or related facilities and premises from the application of regulations made under subsection (1).

sur une question de droit ou de compétence, avec l'autorisation de la cour sur demande présentée dans le mois suivant la date de l'acte ou dans le délai supérieur accordé par un juge de la cour en des circonstances spéciales, après notification aux parties et à l'Office et audition de ceux d'entre eux qui comparaissent et désirent être entendus.

(2) Une fois l'autorisation obtenue en application du paragraphe (1), l'appel n'est admissible que s'il est interjeté dans les soixante jours suivant le prononcé de l'ordonnance l'autorisant.

(3) L'appel est mené aussi rapidement que possible; la cour peut l'entendre en faisant toutes inférences non incompatibles avec les faits formellement établis par l'Office et nécessaires pour décider de la question de droit ou de compétence, selon le cas.

(4) L'Office peut plaider sa cause à l'appel par procureur ou autrement.

[...]

170. (1) L'Office peut prendre des règlements afin d'éliminer tous obstacles abusifs, dans le réseau de transport assujéti à la compétence législative du Parlement, aux possibilités de déplacement des personnes ayant une déficience et peut notamment, à cette occasion, régir:

a) la conception et la construction des moyens de transport ainsi que des installations et locaux connexes—y compris les commodités et l'équipement qui s'y trouvent—, leur modification ou la signalisation dans ceux-ci ou leurs environs;

b) la formation du personnel des transporteurs ou de celui employé dans ces installations et locaux;

c) toute mesure concernant les tarifs, taux, prix, frais et autres conditions de transport applicables au transport et aux services connexes offerts aux personnes ayant une déficience;

d) la communication d'information à ces personnes.

(2) Il peut être précisé, dans le règlement qui incorpore par renvoi des normes ou des dispositions, qu'elles sont incorporées avec leurs modifications successives.

(3) L'Office peut, par arrêté pris avec l'agrément du gouverneur en conseil, soustraire à l'application de certaines dispositions des règlements les personnes, les moyens de transport, les installations ou locaux connexes ou les services qui y sont désignés.

...

[...]

172. (1) The Agency may, on application, inquire into a matter in relation to which a regulation could be made under subsection 170(1), regardless of whether such a regulation has been made, in order to determine whether there is an undue obstacle to the mobility of persons with disabilities.

172. (1) Même en l'absence de disposition réglementaire applicable, l'Office peut, sur demande, enquêter sur toute question relative à l'un des domaines visés au paragraphe 170(1) pour déterminer s'il existe un obstacle abusif aux possibilités de déplacement des personnes ayant une déficience.

(2) Where the Agency is satisfied that regulations made under subsection 170(1) that are applicable in relation to a matter have been complied with or have not been contravened, the Agency shall determine that there is no undue obstacle to the mobility of persons with disabilities.

(2) L'Office rend une décision négative à l'issue de son enquête s'il est convaincu de la conformité du service du transporteur aux dispositions réglementaires applicables en l'occurrence.

(3) On determining that there is an undue obstacle to the mobility of persons with disabilities, the Agency may require the taking of appropriate corrective measures or direct that compensation be paid for any expense incurred by a person with a disability arising out of the undue obstacle, or both.

(3) En cas de décision positive, l'Office peut exiger la prise de mesures correctives indiquées ou le versement d'une indemnité destinée à couvrir les frais supportés par une personne ayant une déficience en raison de l'obstacle en cause, ou les deux.

ANALYSIS

ANALYSE

Jurisdiction

La compétence

[19] VIA argued that the Agency lacked jurisdiction to inquire under section 172 of the CTA unless an actual incident occurred wherein a disabled individual encountered an undue obstacle to his or her mobility. Accordingly, if no incident has occurred, VIA maintains that the Agency had no jurisdiction to look into a matter.

[19] VIA a fait valoir que l'Office n'avait pas compétence pour enquêter en vertu de l'article 172 de la LTC, sauf en cas d'incident réel dans lequel une personne ayant une déficience rencontrait un obstacle abusif à ses possibilités de déplacement. Par conséquent, sans incident, VIA maintient que l'Office n'avait pas compétence pour examiner une affaire.

[20] Rather, VIA argued that the Agency's only jurisdiction to act in this matter was to determine potential undue obstacles pursuant to section 170, which permits the Agency to make regulations to eliminate undue obstacles in the network.

[20] Au lieu de cela, VIA a fait valoir que la seule compétence de l'Office pour agir dans le cadre de la présente affaire était de dégager les obstacles abusifs potentiels en vertu de l'article 170, lequel permet à l'Office de prendre des règlements pour éliminer les obstacles abusifs dans le réseau.

[21] The parties agreed that there had been no previous case in which the Agency had purported to act under section 172 where no incident had occurred.

[21] Les parties ont convenu qu'il n'y avait eu aucune affaire antérieure dans laquelle l'Office était censé agir en vertu de l'article 172 alors qu'aucun incident n'était survenu.

Jurisdictional Question: Standard of Review

Question de compétence: la norme de contrôle

[22] When the Court is reviewing decisions of administrative tribunals, the pragmatic and functional approach must be applied. (See *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1

[22] Lorsque la Cour examine des décisions de tribunaux administratifs, il faut appliquer la méthode pragmatique et fonctionnelle. (Voir l'arrêt *Dr Q c. College of Physicians and Surgeons of British*

S.C.R. 226, at paragraph 25). The factors to be considered in this approach are the (1) presence or absence of a privative clause or statutory right of appeal; (2) expertise of the tribunal; (3) purpose of the legislation and the provision; and (4) nature of the question.

[23] First, section 41 of the CTA contains a statutory right of appeal with leave from a decision of the Agency, which suggests a less deferential standard of review. In fact, this Court, in commenting on the statutory right of appeal in the CTA on questions of law or jurisdiction, has decided that once leave is granted, the Agency should be allocated a lower level of deference (*Canadian Pacific Railway Co. v. Canada (Transportation Agency)*, [2003] 4 F.C. 558 (C.A.), at paragraph 17 (*Canadien Pacific Railway*)).

[24] The second factor, relative expertise, is a comparison of the court's expertise to that of the administrative tribunal's and calls for greater deference when the tribunal has more expertise in the particular subject-matter than the court (*Dr. Q*, at paragraph 28). Here, the Agency had to determine its jurisdiction to deal with this problem through the interpretation of sections 170 and 172 of the CTA. As this Court determined in *Canadian Pacific Railway*, questions of statutory interpretation are within the expertise of the courts, so this also calls for a less deferential standard of review (*Canadian Pacific Railway*, paragraph 18).

[25] The third factor is the purpose of the legislation and the provision at issue. The Agency implements the regulatory provisions of the CTA, which provide for more deference to the Agency. However, the provisions at issue are contained in Part V of the CTA and have a human rights aspect to them (Agency's preliminary decision, at page 15). Therefore, a lower level of deference is required (*Canadian Pacific Railway*, paragraph 19).

[26] Finally, the nature of the question must be determined. Questions of statutory interpretation are legal and therefore militate in favour of less deference (*Dr. Q*, at paragraph 34).

Columbia, [2003] 1 R.C.S. 226, au paragraphe 25). Les facteurs à prendre en compte dans le cadre de cette méthode sont 1) la présence ou l'absence dans la loi d'une clause privative ou d'un droit d'appel; 2) l'expertise du tribunal; 3) l'objet de la loi et de la disposition; 4) la nature de la question.

[23] Premièrement, l'article 41 de la LTC contient un droit d'appel avec autorisation à l'encontre d'une décision de l'Office, ce qui implique une norme de contrôle accordant moins de déférence. En fait, en commentant le droit d'appel dans la LTC sur des questions de droit ou de compétence, la Cour a décidé qu'une fois que l'autorisation était accordée, on devait démontrer un degré de déférence moindre à l'égard de l'Office (*Cie de chemin de fer Canadien Pacifique c. Canada (Office des transports)*, [2003] 4 C.F. 558 (C.A.), au paragraphe 17 (*Canadien Pacifique*)).

[24] Le deuxième facteur, l'expertise relative, est une comparaison entre l'expertise de la cour et celle du tribunal administratif et demande une plus grande déférence lorsque le tribunal a plus d'expertise que la cour dans une matière particulière (*Dr Q*, au paragraphe 28). En l'espèce, l'Office devait trancher la question de sa compétence pour aborder ce problème en interprétant les articles 170 et 172 de la LTC. Comme la Cour l'a décidé dans l'arrêt *Canadien Pacifique*, les questions d'interprétation de la loi relèvent de l'expertise des cours, de sorte que cela demande également une norme de contrôle accordant moins de déférence (*Canadien Pacifique*, au paragraphe 18).

[25] Le troisième facteur est l'objet de la loi et de la disposition en cause. L'Office met en œuvre les dispositions réglementaires de la LTC, lesquelles prévoient plus de déférence à son égard. Toutefois, les dispositions en cause se trouvent dans la partie V de la LTC et comportent un aspect relatif aux droits de la personne (décision préliminaire de l'Office, à la page 15). Par conséquent, cela nécessite un degré de déférence moindre (*Canadien Pacifique*, au paragraphe 19).

[26] Enfin, il faut déterminer la nature de la question. Les questions d'interprétation de la loi sont des questions de droit et donnent donc lieu à moins de déférence (*Dr Q*, au paragraphe 34).

[27] Taken together, the factors point to a correctness standard on the jurisdictional question.

[27] Pris ensemble, les facteurs indiquent que c'est la norme de la décision correcte qui s'impose concernant la question de compétence.

Interpretation of CTA

L'interprétation de la LTC

[28] In my view, section 172 of the CTA should not be interpreted as suggested by VIA.

[28] À mon avis, l'article 172 de la LTC ne devrait pas être interprété de la façon proposée par VIA.

[29] Subsection 172(1) gives the Agency the ability to inquire, upon application, into a matter in relation to which a regulation could be made pursuant to subsection 170(1). Subsection 170(1) allows the Agency to make regulations in order to eliminate undue obstacles from the transportation network, including regulations respecting the design, construction or modification of the means of transportation.

[29] Le paragraphe 172(1) donne à l'Office l'habilité à enquêter, sur demande, concernant une question pour laquelle un règlement pourrait être pris en vertu du paragraphe 170(1). Ce paragraphe permet à l'Office de prendre des règlements dans le but de supprimer les obstacles abusifs du réseau de transport, y compris des règlements concernant la conception, la construction ou la modification des moyens de transport.

[30] Thus, the Agency, pursuant to subsection 172(1), can inquire into matters relating to design, construction or modification of the means of transportation, which is exactly what the Agency undertook to do in the present case. Therefore, I believe the Agency did not exceed its jurisdiction in undertaking the inquiry.

[30] Ainsi, l'Office, en vertu du paragraphe 172(1), peut enquêter sur des questions liées à la conception, à la construction ou à la modification des moyens de transport, ce qui constitue exactement ce que l'Office a entrepris de faire en l'espèce. Par conséquent, je crois que l'Office n'a pas outrepassé sa compétence en entreprenant l'enquête.

[31] VIA further argued that allowing the Agency to act pursuant to section 172, where no incident had occurred, permitted it to interfere with the planning and operation of the railway. VIA submitted that its board of directors must be free to act without consulting the Agency in matters relating to the purchase and design of rail equipment. To allow this, VIA argued, would be to allow the Agency to "intrude into the boardroom of the company".

[31] VIA a ajouté que le fait de permettre à l'Office d'agir en vertu de l'article 172, alors qu'aucun incident n'était survenu, lui permettait de s'ingérer dans la planification et l'exploitation du chemin de fer. VIA a soutenu que son conseil d'administration devait avoir la liberté d'agir sans consulter l'Office dans des questions liées à l'achat et à la conception du matériel de chemin de fer. Selon VIA, le fait de permettre cela équivalait à permettre à l'Office de [TRADUCTION] «faire intrusion dans la salle du conseil de la société».

[32] While I do not believe that the Agency exceeded its jurisdiction in this case for the reasons given, I do note, with concern, the danger suggested by counsel for VIA. The fact that the CCD, upon learning that VIA was considering the purchase of the Renaissance cars, and prior to even having had the opportunity to inspect the cars themselves, sought an order directing VIA not to enter into any agreement or to take any steps to purchase the Renaissance cars, does suggest an interference with VIA's decision making. While I am unable to find that

[32] Bien que je ne crois pas que l'Office ait outrepassé sa compétence en l'espèce pour les motifs mentionnés, je souligne, avec inquiétude, le danger invoqué par les avocats de VIA. Le fait que le CCD, après avoir appris que VIA considérait l'achat des voitures Renaissance et avant d'avoir eu la possibilité d'inspecter lui-même les voitures, a sollicité une ordonnance enjoignant à VIA de ne pas conclure d'entente ou de ne prendre aucune mesure pour acheter les voitures Renaissance donne à penser qu'il y a eu une

the Agency lacked the jurisdiction to consider the CCD's application here, it does seem to me that the nature of the CCD's application resulted in the Agency focussing virtually exclusively on the potential obstacles to the mobility in the cars the CCD believed still had to be purchased. This in turn resulted in the Agency failing to focus on the obstacles in the VIA network as a whole, as will be seen later. This has been indeed unfortunate because it led to the Agency's failure to focus on ways in which the Renaissance cars could be incorporated into VIA's network so the undue nature of the obstacles could be avoided.

[33] It may well be that the Agency should have declined to commence an investigation based on the information which it had received from the CCD—that is—that VIA had not actually purchased the cars. Arguably the commencement of the investigation was premature. If the cars had not yet been purchased then they could not create an obstacle. Subsection 172(1) provides that the Agency may start an inquiry in order to determine whether "there is an undue obstacle to the mobility of persons with disabilities". There could hardly be said to be an obstacle if the cars had not yet been purchased. However, the fact was that VIA had already purchased the cars so the objection to prematurity would have been academic.

[34] It is also worth noting that section 29 of the CTA envisions expeditious hearings with decisions being delivered within 120 days after commencement of the proceedings. The present hearing commenced with the CCD's application which was filed on December 4, 2000. The preliminary decision was rendered on March 27, 2003, more than two years and 80 interim decisions and rulings later. This perhaps illustrates that the legislature did not intend that issues of the present magnitude be pursued under section 172. Nevertheless the statute must be interpreted according to its current provisions. Accordingly, the Agency's determination of its jurisdiction was correct.

ingérence dans le processus de décision de VIA. Bien que je ne sois pas en mesure de conclure que l'Office n'avait pas la compétence pour examiner la demande du CCD en l'espèce, il me semble que la nature de la demande du CCD a fait en sorte que l'Office mette presque exclusivement l'accent sur les obstacles potentiels aux possibilités de déplacement dans les voitures que le CCD croyait devoir encore être achetées. Cela a ensuite fait en sorte que l'Office ne mette pas l'accent sur les obstacles dans l'ensemble du réseau de VIA, comme nous le verrons plus loin. Ce fut vraiment malheureux parce que cela a conduit l'Office à ne pas mettre l'accent sur les moyens par lesquels les voitures Renaissance pouvaient être incorporées dans le réseau de VIA, pour ainsi permettre d'éviter que les obstacles aient un caractère abusif.

[33] Il se peut fort bien que l'Office ait dû refuser d'entreprendre une enquête en se fondant sur les renseignements qu'il avait reçus du CCD, à savoir que VIA n'avait pas encore acheté les voitures. On peut soutenir que l'enquête avait débuté prématurément. Si les voitures n'avaient pas encore été achetées, elles ne pouvaient donc pas créer un obstacle. Le paragraphe 172(1) prévoit que l'Office peut débiter une enquête pour déterminer «s'il existe un obstacle abusif aux possibilités de déplacement des personnes ayant une déficience». On pouvait difficilement dire qu'il s'agissait d'un obstacle si les voitures n'avaient pas encore été achetées. Toutefois, VIA avait effectivement déjà acheté les voitures, de sorte que l'objection relative à la prématurité aurait été académique.

[34] Il convient également de souligner que l'article 29 de la LTC envisage des audiences expéditives comprenant la délivrance des décisions dans les 120 jours du début de l'instance. La présente audience a débuté avec la demande du CCD, laquelle a été déposée le 4 décembre 2000. La décision préliminaire a été rendue le 27 mars 2003, plus de deux ans ainsi que 80 décisions et règlements provisoires plus tard. Cela illustre peut-être le fait qu'il n'était pas dans l'intention de la législature que des litiges de cette ampleur soient poursuivis dans le cadre de l'article 172. La loi doit néanmoins être interprétée conformément à ses dispositions actuelles. Par conséquent, la décision de l'Office quant à sa compétence était correcte.

[35] As an additional jurisdictional argument, VIA maintained that in its identification of potential obstacles, the Agency treated the Rail Code (February 1998, *Code of Practice. Passenger Rail Car Accessibility and Terms and Conditions of Carriage by Rail of Persons with Disabilities*), which provides voluntary goals and objectives of the industry, as mandatory, and enforced it against VIA. This was said to be beyond the Agency's jurisdiction. I do not accept that argument since in my view, the Rail Code was not treated as mandatory by the Agency. The Agency indicates at various places that the Rail Code is "voluntary and not legally binding" (Agency's preliminary decision, at page 20) and therefore does not rely exclusively on it when making its undue obstacle findings (Agency's preliminary decision, at page 22). The Agency does, however, find that the standards in the Rail Code serve as a "useful reference point" (Agency's preliminary decision, at page 22).

The undue analysis

[36] It was incumbent on the Agency to balance the various interests referred to in section 5 when undertaking its undue analysis, before requiring expenditure of money to reconstruct or reconfigure the Renaissance cars. The issue of "undue" was discussed in *VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25 (C.A.) (*Lemonde*). In *Lemonde*, the Court said [at paragraph 39]:

In determining whether the obstacle was undue, the Agency should have first considered the aim of the *National Transportation Act, 1987*. This is found in section 3(1) (now section 5), which provides that the national transportation network should be, *inter alia*, economic, efficient, viable and effective. [Underlining added.]

Thus the undue analysis can only be conducted by an examination of the transportation network as a whole.

[37] Keeping this in mind, the Court in *Lemonde* set out the following principles to be considered in conducting the undue analysis.

[35] À titre d'argument de compétence additionnel, VIA a maintenu que lorsqu'il a dégagé les obstacles potentiels, l'Office a traité le code ferroviaire (*Code de pratiques. Accessibilité des voitures de chemin de fer et conditions de transport ferroviaire des personnes ayant une déficience*, février 1998), lequel stipule les buts et les objectifs volontaires de l'industrie, comme étant impératif et l'a appliqué à l'encontre de VIA. On a affirmé que cela allait au-delà de la compétence de l'Office. Je n'accepte pas cet argument puisque, à mon avis, le code ferroviaire n'a pas été traité comme étant impératif par l'Office. Celui-ci mentionne à différents endroits que le code ferroviaire «fait appel à la bonne volonté des intervenants et n'a pas force obligatoire» (décision préliminaire de l'Office, à la page 22) et il ne s'appuie donc pas exclusivement sur ce code pour tirer ses conclusions quant aux obstacles abusifs (décision préliminaire de l'Office, à la page 24). L'Office conclut toutefois que les normes du code ferroviaire constituent un «point de référence utile» (décision préliminaire de l'Office, à la page 24).

L'analyse du caractère abusif

[36] Lorsqu'il a entrepris son analyse du caractère abusif, il incombait à l'Office de soupeser les différents intérêts mentionnés à l'article 5 avant d'exiger que de l'argent soit dépensé pour reconstruire ou transformer les voitures Renaissance. On a discuté de la question du «caractère abusif» dans l'arrêt *VIA Rail Canada Inc. c. Office national des transports*, [2001] 2 C.F. 25 (C.A.) (*Lemonde*). Dans l'arrêt *Lemonde*, la Cour a déclaré [au paragraphe 39]:

Pour déterminer si l'obstacle était indu, l'Office aurait dû d'abord examiner l'objet poursuivi par la *Loi de 1987 sur les transports nationaux*. Cet objet est exposé au paragraphe 3(1) [maintenant l'article 5], qui prévoit que le réseau de transport national devrait être, entre autres choses, rentable, bien adapté, viable et efficace. [Non souligné dans l'original.]

Ainsi, l'analyse du caractère abusif ne peut être effectuée qu'au moyen d'un examen du réseau de transport dans son ensemble.

[37] Cela dit, dans l'arrêt *Lemonde*, la Cour a énoncé les principes suivants dont on doit tenir compte lorsqu'on procède à l'analyse du caractère abusif:

- undueness is a relative concept;
- the approach to defining undueness is a contextual one; it must be defined in light of the aim of the relevant legislation;
- an assessment of the consequences if the undue thing is allowed to remain in place can be useful;
- there is a requirement to balance the interests of the various parties, who, in proceedings of this nature, are usually persons with disabilities, VIA and the Canadian public;
- the transportation network must serve the needs of all travellers, including those with disabilities; and
- the needs of non-disabled passengers and those of disabled passengers may be inconsistent, which leads to the Agency having to undertake a balancing of interests such that the satisfaction of one interest does not create disproportionate hardship affecting the other interest.

[38] A proper balancing of these factors when considering the entire transportation network will, of course, involve the issue of the costs of the changes to the Renaissance cars and the issue of the impact on other travellers. I will consider each of these issues separately.

Standard of Review

[39] The standard of review analysis requires more deference here. The Agency's expertise is rooted in regulatory matters. Also, section 5 of the CTA is polycentric, meaning that it requires the Agency to balance competing principles. The finding of undue obstacles and the costs of remedying such obstacles are factual findings and the CTA contains a strong privative clause at section 31, calling for deference to the Agency when it comes to findings of fact (CTA, section 31). Also, the application of section 5 to the issues raised in this case involve questions of mixed fact and law. All these factors, in my opinion, suggest a high level of deference, bringing the standard of review on the question of undueness and the balancing of interests to be one of patent unreasonableness.

- le caractère abusif est une notion relative;
- la façon d'établir le caractère abusif est d'examiner le contexte; il doit se définir en fonction de l'objet de la législation pertinente;
- une évaluation des conséquences qu'entraîne l'omission de supprimer la chose abusive peut être utile;
- cela implique la pondération des intérêts des diverses parties, lesquelles, dans des instances de cette nature, sont habituellement des personnes ayant une déficience, VIA et le public canadien;
- le réseau de transport doit répondre aux besoins de tous les voyageurs, y compris ceux ayant une déficience;
- les besoins de passagers n'ayant pas de déficience et ceux des passagers qui en ont peuvent être incompatibles, ce qui amène l'Office à devoir entreprendre une pondération des intérêts afin que la satisfaction d'un intérêt ne crée pas de préjudice disproportionné à l'égard de l'autre intérêt.

[38] Une pondération correcte de ces facteurs lors de l'examen du réseau de transport en entier impliquera, bien sûr, la question des coûts des changements à apporter aux voitures Renaissance et la question des répercussions sur les autres voyageurs. J'examinerai chacune de ces questions séparément.

La norme de contrôle

[39] L'analyse de la norme de contrôle exige plus de déférence en l'espèce. L'expertise de l'Office trouve sa source dans les questions de réglementation. Aussi, l'article 5 de la LTC est polycentrique, c'est-à-dire qu'il exige que l'Office pondère des principes opposés. La constatation d'obstacles abusifs et les coûts pour supprimer ces obstacles sont des conclusions de fait et la LTC contient une clause privative rigoureuse à l'article 31, exigeant de la déférence à l'égard de l'Office lorsqu'il s'agit de conclusions de fait (LTC, à l'article 31). Aussi, l'application de l'article 5 aux questions soulevées en l'espèce implique des questions mixtes de fait et de droit. À mon avis, l'ensemble de ces facteurs donnent à penser qu'il faut faire preuve d'un degré élevé de déférence, ce qui fait que la norme de contrôle

concernant la question du caractère abusif et la pondération des intérêts est celle de la décision manifestement déraisonnable.

Undue Obstacles and Network Analysis

[40] Section 5 of the CTA dictates that the Agency, when faced with a complaint by disabled persons in connection with the facilities offered by a transportation service provider, must go through the following analysis. First, it must determine if there is an obstacle to the mobility of disabled persons. Second, it must examine the whole network of the transportation service provider with a view to determining whether the network itself provides relief such that the obstacle cannot be said to be undue. Where the network does not provide such relief, the Agency must then consider the possible improvements to the network (including possible alternative transportation) which can eliminate or alleviate the undue obstacle. In considering the improvements to be ordered, the Agency must undertake a balancing exercise that takes into account the interests of disabled persons, non-disabled persons, the transportation service provider, as well as the economic well-being and growth of Canada.

[41] Obviously the cost of any improvement ordered is crucial. Similarly, the transportation service provider may be totally unable to fund the improvements. If the costs are excessive, the fares may have to be increased to a point where the average person cannot afford to travel.

[42] In the present case, VIA is subsidized by the federal government, which may be unwilling or unable to fund VIA to the extent of all the improvements ordered. The interests of all disabled persons must also be considered. There are many other disabilities such as blindness, deafness, cardiac conditions, asthmatic conditions, etc. All of these require different facilities. One must not be favoured to the detriment of another. Thus, such consideration cannot be limited to those in wheelchairs. It is also clear that not every railway car and

Les obstacles abusifs et l'analyse du réseau

[40] L'article 5 de la LTC commande à l'Office, lorsqu'elle fait face à une plainte de personnes ayant une déficience relativement aux installations offertes par un fournisseur de services de transport, de procéder à l'analyse qui suit. Premièrement, il doit déterminer s'il existe un obstacle aux possibilités de déplacement des personnes ayant une déficience. Deuxièmement, il doit examiner le réseau du fournisseur de services de transport en entier dans le but de trancher la question de savoir si le réseau offre, en soi, des mesures correctrices de telle sorte qu'on ne peut pas qualifier l'obstacle d'abusif. Lorsque le réseau n'offre pas de telles mesures correctrices, l'Office doit alors examiner les améliorations possibles à apporter au réseau (y compris les autres moyens de transport possibles) qui peuvent écarter ou aplanir l'obstacle abusif. En examinant les améliorations à ordonner, l'Office doit entreprendre un exercice de pondération qui tient compte des intérêts des personnes ayant une déficience, des personnes qui n'en ont pas, du fournisseur de services de transport, de même que de la prospérité et de la croissance économique du Canada.

[41] Le coût de toute amélioration ordonnée est manifestement décisif. De même, le fournisseur de services de transport peut être dans l'incapacité totale de financer les améliorations. Si les coûts sont excessifs, il peut s'avérer nécessaire d'augmenter les tarifs au point où le consommateur moyen ne pourra se permettre de voyager.

[42] En l'espèce, VIA est subventionnée par le gouvernement fédéral, lequel peut ne pas vouloir ou ne pas pouvoir financer VIA pour l'ensemble des améliorations ordonnées. Il faut également tenir compte des intérêts de toutes les personnes ayant une déficience. Il existe de nombreuses autres déficiences telles que la cécité, la surdité, l'état cardiaque, l'état asthmatique, etc. Elles exigent toutes des installations différentes. On ne doit pas en favoriser une au détriment d'une autre. Ainsi, un tel examen ne peut être limité aux personnes qui sont

not even every train can be fully equipped to cope with all forms of disability. The cost of so doing would be so great that the transportation service would be unlikely to survive. At the very least, its viability would be severely jeopardized.

en fauteuil roulant. Il est également clair qu'on ne peut équiper complètement chaque voiture de chemin de fer et même pas chaque train pour faire face à toutes les formes de déficience. Le coût ainsi engendré serait si élevé que les services de transport ne survivraient probablement pas. À tout le moins, leur viabilité serait gravement compromise.

[43] In my view, the Agency in the present case made the following errors:

[43] À mon avis, l'Office a commis les erreurs suivantes en l'espèce:

I. In attempting to resolve the undue obstacles which it found for travel by persons in wheelchairs, it confined itself to considering only alterations to the Renaissance cars rather than considering whether VIA's network could be flexible enough to accommodate these disabilities;

I. En tentant de supprimer les obstacles abusifs qu'il a découverts pour le voyage des personnes en fauteuil roulant, il s'est limité à n'examiner que des modifications aux voitures Renaissance plutôt que d'examiner la question de savoir si le réseau de VIA pouvait être assez flexible pour s'adapter à ces déficiences;

II. It failed to conduct the necessary balancing exercise in that it:

II. Il n'a pas effectué l'exercice de pondération nécessaire en ce qu'il:

(a) failed to consider the interests of non-disabled persons;

a) n'a pas tenu compte des intérêts des personnes n'ayant pas de déficience;

(b) failed to balance the costs of the improvements ordered against the interests of VIA. Here it failed because it did not wait to receive the cost estimates which it had ordered VIA to prepare;

b) n'a pas pondéré les coûts des améliorations ordonnées en fonction des intérêts de VIA. Il a échoué en l'espèce parce qu'il n'a pas attendu de recevoir l'estimation des coûts qu'il avait ordonné à VIA de préparer;

(c) failed to balance the interests of persons with disabilities other than wheelchair users without taking into account the total amount of money which could realistically be available.

c) n'a pas pondéré les intérêts des personnes ayant une déficience mais n'utilisant pas de fauteuil roulant, sans prendre en compte le montant d'argent total susceptible, d'un point de vue réaliste, d'être disponible.

[44] As previously mentioned, the CCD's December 4 application to the Agency only focussed on the Renaissance cars. VIA responded to the Agency that it was the adequacy of the network that was in issue and that the network as a whole posed no undue obstacles to the mobility of persons with disabilities.

[44] Comme je l'ai déjà mentionné, la demande que le CCD a présentée à l'Office le 4 décembre visait uniquement les voitures Renaissance. VIA a répondu à l'Office que c'était le caractère adéquat du réseau qui était en cause et que le réseau dans son ensemble ne dressait aucun obstacle abusif aux possibilités de déplacement des personnes ayant une déficience.

[45] However, the CCD continued to focus its undue obstacle analysis on the Renaissance cars as opposed to the network as a whole. There are several examples of this. In his December 14, 2000 response to VIA's

[45] Toutefois, le CCD a continué de faire porter son analyse relative aux obstacles abusifs sur les voitures Renaissance plutôt que sur le réseau dans son ensemble. Il y a plusieurs exemples pour illustrer cela. Dans sa

December 12, 2000 letter that was sent to the Agency, David Baker, counsel for the CCD, replied:

Transport Canada officials and CTA officials who viewed the rolling stock [referring to the Renaissance cars], have not provided their opinion as to whether it meets even the voluntary Rail Code, let alone the "undue obstacle" standard in the Canada Transportation Act.

[46] Unfortunately, the Agency responded by also focussing on the Renaissance cars instead of the network. In a letter dated December 18, 2000 from the Agency to VIA, the Agency stated:

VIA Rail is required to submit to the Agency and provide a copy to CCD by January 3, 2001 its existing plan to make this rolling stock accessible for persons with disabilities.

[47] Similarly, in the Agency's January 24, 2001 letter to the CCD, the focus was again on the problems in the Renaissance cars as opposed to the whole network, since the Agency had only sought to determine the existence of undue obstacles in the Renaissance cars. Further in that letter, the Agency even considered issuing an interim order preventing VIA from entering into a contract to retrofit the cars, without any consideration of VIA's network. VIA responded that it was the network that should be considered.

[48] Therefore, it seems that from the beginning, the primary focus of the proceeding was on the Renaissance cars and not the transportation network. This mind set was carried out through both the preliminary and final decisions, both of which I will now analyse.

Preliminary decision of the Agency—did the Agency look at the network?

[49] In looking at the preliminary decision, it seems that the Agency knew that the network had to be considered, as is evidenced by the fact that it set out the appropriate undue obstacle analysis prior to looking at the facts. Nonetheless, the Agency's primary focus was on the design and features of the Renaissance cars

réponse du 14 décembre 2000 à la lettre du 12 décembre 2000 de VIA qui avait été expédiée à l'Office, M^e David Baker, avocat du CCD, a déclaré:

[TRADUCTION] Les fonctionnaires de Transport Canada et ceux de l'OTC qui ont vu le matériel roulant [faisant référence aux voitures Renaissance] n'ont pas donné leur avis quant à savoir s'il satisfaisait même au code ferroviaire volontaire, encore moins à la norme de l'«obstacle abusif» de la Loi sur les transports au Canada.

[46] Malheureusement, l'Office a répondu en mettant également l'accent sur les voitures Renaissance plutôt que sur le réseau. Dans une lettre de l'Office, datée du 18 décembre 2000, adressée à VIA, l'Office a déclaré:

[TRADUCTION] VIA Rail est tenue de présenter à l'Office, avec copie au CCD, d'ici le 3 janvier 2001 son plan en vigueur pour rendre ce matériel roulant accessible pour les personnes ayant une déficience.

[47] De même, dans la lettre du 24 janvier 2001 que l'Office a expédiée au CCD, l'accent fut encore mis sur les problèmes des voitures Renaissance par opposition au réseau en entier, puisque l'Office n'avait cherché qu'à déterminer l'existence d'obstacles abusifs dans les voitures Renaissance. En outre, dans cette lettre, l'Office a même considéré la délivrance d'une ordonnance provisoire empêchant VIA de conclure un contrat pour moderniser les voitures, indépendamment du réseau de VIA. Celle-ci a répondu que c'était le réseau qu'il fallait examiner.

[48] Par conséquent, il semble que dès le début, l'instance était centrée principalement sur les voitures Renaissance et non sur le réseau de transport. Cette attitude fut maintenue tant dans la décision préliminaire que dans la décision définitive, décisions que je vais maintenant analyser.

La décision préliminaire de l'Office—celui-ci a-t-il considéré le réseau?

[49] En examinant la décision préliminaire, il semble que l'Office savait qu'il devait considérer le réseau, comme le démontre le fait qu'il a établi l'analyse appropriée relative aux obstacles abusifs avant de regarder les faits. Néanmoins, l'Office était centré principalement sur la conception et les caractéristiques

as they apply to the mobility of persons who use wheelchairs.

des voitures Renaissance qui avaient des incidences sur les possibilités de déplacement des personnes utilisant un fauteuil roulant.

[50] At the commencement of the analysis on page 31, the Agency states:

[50] Au début de l'analyse, à la page 34, l'Office déclare:

When making a determination pursuant to section 172 of the CTA, the Agency must first determine whether there is an obstacle and, if there is an obstacle, whether that obstacle is undue. The following summarizes what the Agency may consider when determining whether the design of the Renaissance Cars and its features constitute obstacles to the mobility of persons with disabilities and whether any of the obstacles are undue.

Lorsqu'il procède à une détermination en vertu de l'article 172 de la LTC, l'Office doit d'abord établir l'existence d'un obstacle et, le cas échéant, si cet obstacle est abusif. On trouvera ci-dessous un résumé de ce que l'Office peut prendre en considération lorsqu'il détermine si la conception des voitures Renaissance et de leurs caractéristiques présente des obstacles aux possibilités de déplacement des personnes ayant une déficience et si un ou plusieurs de ces obstacles sont abusifs.

...

[...]

The Agency typically makes an obstacle determination in the context of whether or not a situation constituted an obstacle to the mobility of a person with a disability in a particular case. However, as previously discussed, given that CCD's application alleges obstacles to the mobility of persons with disabilities in the context of the design of the Renaissance Cars, the Agency's analysis of the alleged obstacles is based on the design and features of these rail cars. Specifically, the Agency's analysis focuses primarily on the design and features of the Renaissance Cars as they apply to the mobility of persons who use wheelchairs, given that the primary focus of CCD's application is whether the cars are accessible to persons who use wheelchairs. [Emphasis added.]

L'Office détermine l'existence d'obstacles dans un contexte situationnel, c'est-à-dire qu'il établit si une situation donnée constitue ou non un obstacle aux possibilités de déplacement d'une personne ayant une déficience. Toutefois, comme il a été expliqué précédemment, comme la demande du CCD porte sur des obstacles présumés aux possibilités de déplacement des personnes ayant une déficience dans le contexte de la conception des voitures Renaissance, l'analyse de ces obstacles présumés par l'Office repose sur la conception et les caractéristiques de ces voitures ferroviaires. Plus précisément, l'analyse de l'Office est centrée principalement sur la conception et les caractéristiques des voitures Renaissance qui ont des incidences sur les possibilités de déplacement des personnes qui utilisent un fauteuil roulant, puisque la préoccupation principale de la demande du CCD est l'accessibilité de ces voitures aux personnes qui utilisent un fauteuil roulant [Non souligné dans l'original.]

[51] While later, the Agency referred to VIA's network, it did not conduct anything approaching a thorough analysis. A cursory analysis of one aspect of the network is engaged by the Agency at one point but seems to be confined to an examination of sleeper facilities for persons in wheelchairs on VIA's system. The Agency should have always, upon coming to a determination that the Renaissance cars lacked certain features, turned to the network to see if persons in wheelchairs could nonetheless have been accommodated.

[51] Bien que l'Office ait plus tard fait référence au réseau de VIA, il n'a rien fait qui ressemble à une analyse approfondie. À un moment, l'Office a commencé une analyse superficielle relativement à un aspect du réseau, mais il semble l'avoir confinée à un examen des chambres pour les personnes en fauteuil roulant dans le réseau de VIA. En arrivant à une conclusion selon laquelle les voitures Renaissance ne possédaient pas certaines caractéristiques, l'Office aurait toujours dû se tourner vers le réseau pour voir si on aurait pu néanmoins satisfaire les personnes en fauteuil roulant.

[52] Throughout the preliminary decision, we see evidence of VIA's repeated expressions that the Agency

[52] Partout dans la décision préliminaire, nous voyons la preuve que VIA a répété à plusieurs reprises

needed to consider the network, rather than just the Renaissance cars. At page 32 of the preliminary decision, VIA's argument about the consideration of section 5 of the CTA is noted:

... the Agency must also consider and balance the interests of all passengers, the efficiency of rail transportation generally, the costs of operating VIA's passenger rail network and the economic viability of the railway company.

And again at pages 36-37, it is noted that VIA drew attention to its entire network. At page 37 of the preliminary decision, VIA is said to have submitted, specifically:

VIA asserts that the Renaissance trains are only a part of "the fleet of the future" as they will be operating together with its existing fleet and will continue to operate together with new trains that will be built "hopefully as the moneys become available as we meet our needs to all Canadians".

[53] Even when VIA submitted to the Agency that the Agency did not have enough evidence before it to look at the entire Canadian rail system (Agency's preliminary decision, at page 27), and that persons in wheelchairs have a greater number of options in their travel planning, which the Agency would have to consider if undertaking a network analysis, the Agency's response was (Agency's preliminary decision, at page 28):

As the Agency has repeatedly stated throughout these proceedings, it is considering whether certain features of the Renaissance Cars constitute undue obstacles arising out of the design of the Renaissance Cars.

[54] Before the Agency, the CCD took the position that having to take a different train at a different time from that chosen by the wheelchair person constitutes an undue obstacle. The CCD argued that if such persons' needs could not be accommodated on a Renaissance train of their choice, then their freedom to travel was restricted, which amounted to discrimination (Agency's preliminary decision, at page 37).

[55] In making this argument, the CCD overlooked the fact that in attempting to balance every interest, the system cannot afford to have every rail car equipped with

que l'Office devait prendre en compte le réseau, et non seulement les voitures Renaissance. À la page 35 de la décision préliminaire, on a souligné l'argument de VIA au sujet de la considération de l'article 5 de la LTC:

[...] l'Office doit également prendre en considération et sopeser les intérêts relatifs de tous les voyageurs, l'efficacité générale du transport ferroviaire, les coûts d'exploitation de VIA pour son réseau de transport ferroviaire de voyageurs et la rentabilité économique de la compagnie de chemin de fer.

Et encore une fois aux pages 40 et 41, on a souligné que VIA attirait l'attention sur l'ensemble de son réseau. À la page 41 de la décision préliminaire, on mentionne que VIA a précisément soumis ce qui suit:

VIA souligne que les trains Renaissance ne sont qu'une partie du «parc du futur», car ils seront exploités avec son parc existant et continueront d'être exploités avec de nouveaux trains qui seront construits, (traduction) «nous l'espérons, à mesure que des fonds seront générés par nos activités qui répondront aux besoins de tous les Canadiens».

[53] Même lorsque VIA a soumis à l'Office que celui-ci ne disposait pas de suffisamment d'éléments de preuve pour examiner l'ensemble du réseau ferroviaire canadien (décision préliminaire de l'Office, à la page 30) et que les personnes en fauteuil roulant avaient un plus grand nombre d'options dans leurs plans de voyage, ce dont l'Office devrait tenir compte s'il entreprenait une analyse du réseau, l'Office a répondu ceci [Décision préliminaire de l'Office, à la page 31]:

Comme l'Office l'a répété tout au long des présentes procédures, il examine si certaines caractéristiques des voitures Renaissance constituent des obstacles abusifs découlant de la conception de ces voitures.

[54] Devant l'Office, le CCD a pris la position selon laquelle le fait de devoir prendre un train différent à une heure différente de celle choisie par la personne en fauteuil roulant constituait un obstacle abusif. Le CCD a fait valoir que si les besoins de ces personnes ne pouvaient être satisfaits dans un train Renaissance de leur choix, leur liberté de voyager était ainsi limitée, ce qui équivalait à de la discrimination (décision préliminaire de l'Office, à la page 41).

[55] En formulant cet argument, le CCD a négligé le fait que, en tentant de pondérer chacun des intérêts, le réseau ne peut se permettre que chacune des voitures de

every type of mechanism to be able to address every type of disability. Although this would be ideal, the funds required to design, implement and maintain such a system are clearly not available.

Show Cause Order

[56] After the Agency made its preliminary findings regarding features in the Renaissance cars that constitute undue obstacles, it issued the show cause order. This order further shows that the Agency only looked at the Renaissance cars in order to determine the existence of undue obstacles. There, the Agency stated (Agency's preliminary decision, at page 143):

The Agency has made preliminary findings that the following features in the Renaissance Cars constitute undue obstacles to the mobility of persons with disabilities, including, and in particular, persons who use wheelchairs:

And again (at page 144):

In recognition of both the fact that this application is unique in nature in that it involves the consideration of the design of rail cars and the volume of submissions filed relating to the forty-six concerns raised by CCD, the Agency is providing VIA with the opportunity, by way of a direction to show cause, to specifically address the preliminary undue obstacles that have been determined by the Agency to exist in the Renaissance Cars.

[57] Further, the show cause order directed VIA to answer nine questions, none of which addressed VIA's network. Instead, each question was directed at the issues taken with the Renaissance cars. The questions were as follows [Agency's preliminary decision, at pages 145-146]:

- (a) VIA is required to identify the various methods of remedying each of the above listed obstacles in the Renaissance Cars. If VIA is of the opinion that it is not possible, because of structural reasons, to remedy an obstacle, VIA is required to clearly explain the reasons why it is of such an opinion and to provide supporting evidence from a Professional Engineer who has expertise in the design and manufacture of rail cars.
- (b) Where CCD has specifically identified a method(s) of remedying an obstacle, such as is the case for the

chemin de fer soit équipée de chacun des genres de mécanismes afin d'être en mesure de répondre aux besoins de chacun des genres de déficiences. Bien que cela soit l'idéal, les fonds requis pour concevoir, mettre en œuvre et entretenir un tel réseau ne sont clairement pas disponibles.

L'ordonnance de justification

[56] Après que l'Office a tiré ses conclusions préliminaires concernant les caractéristiques des voitures Renaissance qui constituaient des obstacles abusifs, il a rendu l'ordonnance de justification. Cette ordonnance démontre également que l'Office n'examinait que les voitures Renaissance dans le but de trancher la question de l'existence d'obstacles abusifs. Il y a déclaré (Décision préliminaire de l'Office, à la page 158):

L'Office a conclu, à titre préliminaire, que les caractéristiques ci-dessous des voitures Renaissance constituent des obstacles abusifs aux possibilités de déplacement des personnes ayant une déficience, notamment pour les personnes qui utilisent un fauteuil roulant:

Puis il a ajouté (à la page 159):

Compte tenu du caractère unique de la demande en cause, car elle exige l'examen de la conception des voitures ferroviaires, et du volume des mémoires et observations déposés relativement aux quarante-six préoccupations soulevées par le CCD, l'Office donne à VIA la possibilité, en lui signifiant une demande de justification, de remédier spécifiquement aux obstacles abusifs que l'Office a constatés, à titre préliminaire, dans les voitures Renaissance.

[57] En outre, l'ordonnance de justification enjoignait à VIA de répondre à neuf questions, dont aucune ne concernait le réseau de VIA. Chacune des questions visait plutôt les conclusions tirées au sujet des voitures Renaissance. Voici les questions [Décision préliminaire de l'Office, aux pages 159 à 161]:

- a) VIA doit fournir les diverses mesures correctives relatives à chacun des obstacles des voitures Renaissance énumérés ci-dessus. Si VIA est d'avis qu'il est impossible, en raison de limitations structurelles, de remédier à un obstacle, VIA doit clairement expliquer les raisons de cette opinion et fournir des preuves à l'appui provenant d'un ingénieur expert en matière de conception et de construction de voitures ferroviaires.
- b) Là où le CCD a proposé une ou plusieurs mesures correctives relatives à un obstacle, notamment pour le

wheelchair tie-down, VIA is required to give consideration to such method(s) and to indicate, in its response, whether it is of the opinion that such method(s) is structurally possible. If VIA is of the opinion that, because of structural reasons, such method(s) of remedying an obstacle is not possible, VIA is required to clearly explain the reasons why it is of such an opinion and to provide supporting evidence from a Professional Engineer who has expertise in the design and manufacture of rail cars.

- (c) VIA is further required to describe, in detail, in respect of each of the methods of remedying an obstacle that it identifies as being structurally possible (including those suggested by CCD), the various structural modifications that would be required, according to the stage of completion of the Renaissance Cars (i.e., shells, partially completed cars, and completed cars). VIA is required to provide a level of detail commensurate with what would be required in order to enable a Professional Engineer with expertise in the design and manufacture of rail cars to fully understand the various structural modifications and any other structural implications entailed in respect of the particular method of remedying the obstacle.
- (d) VIA is required to obtain from a third party an estimate of the cost of the various structural modifications that would be required in respect of each of the methods of remedying an obstacle identified by VIA as being possible, on a per car basis. The cost estimate must give consideration to the cost in respect of the cars that are completed, partially completed and uncompleted and must provide a level of detail sufficient to permit a full understanding of the cost estimate.
- (e) In the event that any of the methods of remedying an obstacle, which VIA has identified as being possible, would have structural implications for other areas in the Renaissance Cars, VIA is required to specify what these are in a level of detail commensurate with what would be required in order to enable a Professional Engineer with expertise in the design and manufacture of rail cars to fully understand the associated structural implications resulting from the method of remedying the obstacle.
- (f) In the event that any of the methods of remedying an obstacle, which VIA has identified as being possible, would have operational implications, VIA is required to specify in detail what these are so as to permit a full understanding of the operational implications resulting from the method of remedying the obstacle.
- (g) VIA is required, in respect of items (iv) and (vi) above, to clearly identify and quantify any one-time costs and ongoing operating expenses that VIA would incur as a
- dispositif de retenue pour fauteuil roulant, VIA doit les étudier et indiquer, dans sa réponse, si elle est d'avis que ces mesures correctives sont possibles, sur le plan structural. Si VIA est d'avis qu'en raison de questions structurales, ces mesures ne sont pas applicables, elle doit expliquer clairement les raisons de cette opinion et fournir des preuves à l'appui provenant d'un ingénieur expert en matière de conception et de construction de voitures ferroviaires.
- e) VIA doit aussi décrire, en détail, relativement à chacune des mesures correctives relatives à un obstacle qu'elle estime applicable (y compris celles que le CCD a suggérées), les diverses modifications structurales nécessaires, en fonction du stade d'achèvement des voitures Renaissance (c.-à-d. châssis, voitures partiellement terminées et voitures terminées). VIA doit fournir une description suffisamment détaillée pour permettre à un ingénieur expert en matière de conception et de construction de voitures ferroviaires de comprendre pleinement les diverses modifications structurales et toute autre conséquence d'ordre structural qu'implique une mesure corrective donnée.
- d) VIA doit obtenir d'une tierce partie une estimation des coûts relatifs aux diverses modifications structurales nécessaires relativement aux mesures correctives que VIA juge applicables, pour chaque voiture. Cette estimation doit être fournie pour chaque stade d'achèvement des voitures (châssis, partiellement terminées et terminées) et doit être suffisamment détaillée pour en permettre la pleine compréhension.
- e) Si l'une des mesures correctives relatives aux obstacles, que VIA a jugée applicable, avait des conséquences d'ordre structural pour d'autres zones des voitures Renaissance, VIA doit décrire ces conséquences de façon suffisamment détaillée pour permettre à un ingénieur expert en matière de conception et de construction de voitures ferroviaires de comprendre pleinement les diverses modifications structurales et toute autre conséquence d'ordre structural qu'implique une mesure corrective donnée.
- f) Si une des mesures correctives relatives aux obstacles, que VIA a jugée applicable, avait des conséquences sur le plan de l'exploitation, VIA doit décrire en détail ces conséquences pour en permettre la pleine compréhension.
- g) VIA doit, à l'égard des points d) et f) ci-dessus, définir et quantifier clairement tout coût ponctuel et toute dépense d'exploitation permanente qu'elle devra

result of making the modifications to remedy an obstacle.

assumer à la suite des modifications nécessaires pour remédier à un obstacle.

(h) If VIA is of the opinion that it cannot, from a financial perspective, afford the costs associated with remedying an obstacle, VIA is required to provide verifiable evidence to support its views. In this context, the Agency considers verifiable evidence to include financial information that is supported by VIA's financial records. The Agency is of the opinion that, of particular relevance are VIA's current audited and interim financial statements, its current cash flow projections and the underlying assumptions, and VIA's detailed business plan.

h) Si VIA est d'avis qu'elle ne peut, sur le plan financier, assumer les coûts reliés à l'élimination d'un obstacle, elle doit fournir des preuves vérifiables à l'appui de cette opinion. Dans ce contexte, l'Office considère comme des preuves vérifiables toute donnée financière étayée par les livres de VIA. L'Office est d'avis que les états financiers courants vérifiés et provisoires de VIA, ses prévisions de trésorerie et les hypothèses sous-jacentes et son plan d'activités détaillé constituent des documents pertinents.

(i) VIA is required, as part of its response to the Agency's direction to show cause, to submit a plan for the Agency's consideration that sets out how VIA can address the obstacles that exist in the Renaissance Cars over a reasonable period of time. While the Agency recognizes that there may be significant operational and economic implications resulting from the requirement for VIA to undertake modifications to the Renaissance Cars in order to remedy the obstacles, the Agency is of the opinion that such implications may be mitigated by planning the modifications to occur over time so as to minimize the impact on the operation of VIA's passenger rail network. For example, VIA could start addressing the obstacles by focussing on those Renaissance Cars which are shells and those which are partially completed. In this way, existing Renaissance Cars which contain the obstacles can be taken out of service over time and be replaced with new cars as they are fitted up or modified to address the obstacles.

i) VIA doit, dans le cadre de sa réponse à la demande de justification de l'Office, soumettre un plan à l'examen de l'Office qui indique comment VIA peut remédier aux obstacles existant dans les voitures Renaissance dans un délai raisonnable. Bien que l'Office reconnaisse qu'il puisse y avoir d'importantes conséquences d'ordre économique et opérationnel découlant de la nécessité pour VIA d'entreprendre des modifications aux voitures Renaissance pour remédier aux obstacles, l'Office est d'avis que ces conséquences peuvent être atténuées par l'échelonnement planifié des modifications de façon à en réduire au minimum les effets sur l'exploitation du réseau ferroviaire voyageurs de VIA. Par exemple, VIA pourrait commencer à remédier aux obstacles en commençant par les voitures Renaissance qui ne sont encore que des châssis et par celles qui ne sont que partiellement terminées. Ainsi, les voitures Renaissance existantes qui présentent les obstacles pourront être retirées du service au fil du temps et pourront être remplacées par de nouvelles voitures à mesure que ces dernières auront été terminées ou modifiées pour remédier aux obstacles.

VIA has sixty (60) days from the date of this Decision to file its answer to these questions, along with a copy to CCD, who will have thirty (30) days to file its reply, with a copy of VIA. Should VIA wish to respond at that point, it will have then fifteen (15) days to do so. In the absence of any or all of the above required information, the Agency will finalize its findings and determination based on the evidence on file.

VIA a soixante jours à compter de la date de la présente décision pour présenter sa réponse à ces questions, avec copie au CCD, qui aura trente jours pour déposer sa réplique, avec copie à VIA. Si VIA décide alors de répliquer à son tour au CCD, elle aura quinze jours pour le faire. À défaut de l'un ou l'autre des renseignements demandés, l'Office élaborera ses conclusions et déterminations définitives à partir de la preuve qui aura été déposée devant lui.

[58] The Agency chose its own procedure. Its choice was to issue a preliminary decision and a final decision. In the preliminary decision it imposed detailed and onerous obligations upon VIA for the purpose of remedying the obstacles which the Agency perceived for the people in wheelchairs who made use of Renaissance

[58] L'Office a choisi sa propre procédure. Son choix était de rendre une décision préliminaire et une décision définitive. Dans la décision préliminaire, il a imposé à VIA des obligations détaillées et lourdes aux fins de supprimer les obstacles rencontrés, selon l'Office, par les personnes en fauteuil roulant utilisant les voitures

cars. Indeed, it is obvious from the show cause order that the sole remedy considered by the Agency was to have VIA structurally modify the Renaissance cars. This was a serious error. The Agency should rather, having identified the obstacles, have allowed VIA to remedy the obstacles by means of its network. One remedy might be to modify the Renaissance cars but VIA should not have been confined to this remedy. If the Agency was going to adopt a procedure of compelling VIA to suggest remedies for the obstacles it should have directed VIA to respond with suggestions as to how its network could respond to the obstacles. Although the Agency also invited VIA to file any further information which it considered relevant, this hardly represented an invitation to address VIA's whole network. Indeed given the tremendous emphasis which the Agency had placed on modification of the Renaissance cars, VIA might reasonably have thought it was not being invited to submit further information about available network solutions.

[59] Also in the preliminary decision, the Agency opined about the probability of the Renaissance cars replacing the existing fleet in the future as the existing fleet retired from service, even though VIA argued to the contrary. If this was a concern, the Agency should have so expressed in the show cause order and directed VIA to address it. In the absence of this being addressed in the show cause order, it was dangerous for the Agency to speculate about the abilities of VIA's future trains to meet the needs of disabled persons.

Subsequent to preliminary decision but before final decision

[60] VIA submitted a letter with its internal cost estimates approximately 60 days after the Agency issued its preliminary decision. The Agency found VIA's response inadequate and gave VIA an additional 60 days to provide further response. In VIA's further response, it provided documents to substantiate the internal cost estimates it had submitted earlier and it objected to the

Renaissance. En fait, il ressort clairement de l'ordonnance de justification que la seule mesure correctrice considérée par l'Office était de faire en sorte que VIA modifie la structure des voitures Renaissance. Il s'agissait d'une grave erreur. L'Office aurait plutôt dû, après avoir dégagé les obstacles, permettre à VIA de les supprimer au moyen de son réseau. Le fait de modifier les voitures Renaissance constituait une des mesures correctrices possibles mais VIA n'aurait pas dû être limitée à cela. Si l'Office était pour adopter une procédure pour contraindre VIA à proposer des mesures correctrices concernant les obstacles, il aurait dû enjoindre à VIA de répondre en faisant des suggestions quant à la manière dont son réseau pourrait contourner les obstacles. Bien que l'Office ait également invité VIA à déposer tout autre renseignement qu'elle estimait pertinent, on ne saurait guère affirmer que cela constituait une invitation à traiter de l'ensemble de son réseau. En fait, compte tenu de l'insistance tenace manifestée par l'Office à l'égard de la modification des voitures Renaissance, VIA aurait pu raisonnablement penser qu'elle n'était pas invitée à présenter d'autres renseignements au sujet des solutions offertes par le réseau.

[59] Toujours dans la décision préliminaire, l'Office a exprimé l'avis qu'il était probable que les voitures Renaissance remplaceraient le parc existant dans l'avenir, au fur et à mesure que celui-ci serait retiré du service, même si VIA a fait valoir le contraire. S'il s'en préoccupait, l'Office aurait dû le mentionner dans l'ordonnance de justification et enjoindre à VIA de répondre à ces préoccupations. À défaut d'en traiter dans l'ordonnance de justification, il était dangereux pour l'Office de spéculer sur les capacités des futurs trains de VIA de répondre aux besoins des personnes ayant une déficience.

Après la décision préliminaire mais avant la décision définitive

[60] VIA a présenté une lettre contenant son estimation interne des coûts environ 60 jours après que l'Office a rendu sa décision préliminaire. L'Office a conclu que la réponse de VIA était inadéquate et il lui a accordé un délai additionnel de 60 jours pour fournir une autre réponse. Dans cette autre réponse, VIA a fourni des documents à l'appui de l'estimation interne des coûts

process, indicating that the time allotted was insufficient in which to render a response. In VIA's response to the Agency, it stated as follows:

VIA Rail takes the position with the greatest of respect to the Agency that the following factors limit the ability of VIA Rail to answer the questions in the way in which they are put by the Agency.

...

The reason for VIA Rail's objection to the present process, although it continues to attempt to fulfil the Agency's directions, is that it cannot be accomplished in the way the Agency has directed. For example, to make even the most minor change in railway rolling stock and provide costs requires structural, electrical and mechanical engineers. It also requires costing experts. In a simple process of redesign, the following engineering steps must be taken:

- (a) a detailed analysis of drawings;
- (b) stripping of various areas in the cars to validate actual design and identify space available and hidden components;
- (c) identify major risk items;
- (d) elaborate first potential solutions;
- (e) contact suppliers/vendors on long lead items and explore potential solutions with them;
- (f) define concept layouts;
- (g) review concepts with VIA Rail;
- (h) write technical description for heavily modified and new systems;
- (i) support negotiation phases with vendors;
- (j) [sic] do soft mock-up on problematic areas;
- (k) contract award to vendors;
- (l) reiteration of concepts and review with VIA Rail;
- (m) produce detail drawings for components;
- (n) issue requests to purchase raw materials and standard components;

qu'elle avait déjà présentée et elle s'est opposée au processus, mentionnant que le temps accordé était insuffisant pour donner une réponse. Dans la réponse qu'elle a donnée à l'Office, VIA a déclaré ce qui suit:

[TRADUCTION]

VIA Rail estime, en toute déférence pour l'Office, que les facteurs suivants limitent sa capacité de répondre aux questions de la manière dont l'Office les présente.

[...]

La raison pour laquelle VIA Rail s'oppose au présent processus, bien qu'elle continue de tenter de suivre les directives de l'Office, est qu'il ne peut aboutir de la manière indiquée par l'Office. Par exemple, pour effectuer même le moindre petit changement dans le matériel roulant ferroviaire et en fournir les coûts, cela requiert des ingénieurs de structures, des ingénieurs électriciens et des ingénieurs en mécanique. Cela exige également des experts en établissement des coûts. Dans le cadre d'un simple processus de reprise de la conception, il faut prendre les mesures d'ingénierie suivantes:

- a) analyser en détail les dessins;
- b) démonter les différentes parties dans les voitures pour valider la conception actuelle et dégager l'espace disponible et les composants cachés;
- c) dégager les éléments de risque majeurs;
- d) élaborer les premières solutions possibles;
- e) communiquer avec les fournisseurs/vendeurs concernant les articles à long délai de livraison et explorer les solutions possibles avec eux;
- f) définir les plans des concepts;
- g) examiner les concepts avec VIA Rail;
- h) écrire la description technique pour les systèmes considérablement modifiés et les nouveaux;
- i) apporter un soutien aux phases de négociation avec les vendeurs;
- j) [sic] faire une maquette préalable concernant les parties problématiques;
- k) attribuer les contrats aux vendeurs;
- l) réitérer les concepts et les examiner avec VIA Rail;
- m) produire des dessins détaillés des composants;
- n) délivrer les demandes d'achat des matières premières et des composants standard;

- (n) design review with vendors;
- (o) build a mock-up to validate final design;
- (p) support First Article Inspection of systems;
- (q) do final detail drawings for manufacturing and installation;

- n) examiner la conception avec les vendeurs;
- o) construire une maquette pour valider la conception définitive;
- p) apporter un soutien au contrôle des premiers articles de production des systèmes;
- q) faire les dessins de détail définitifs pour la fabrication et l'installation;

and

- (r) issue nomenclature.

- r) délivrer la nomenclature.

These steps will take much longer than the 60 day period allotted by the Agency to complete one design change. Multiple changes and alternatives as requested by the Agency make the task unmanageable and beyond the human resources of VIA Rail to complete in the time allotted.

Ces étapes exigeront plus de temps que le délai de 60 jours alloué par l'Office pour compléter un changement dans la conception. De multiples changements et solutions de rechange, comme en demande l'Office, sont impossibles à élaborer dans le temps prescrit pour les ressources humaines de VIA.

...

[...]

In any event, none of the various design alternatives sought by the Agency can be completed until one final solution has been decided upon and the lengthy process described above is completed.

De toute façon, aucune des différentes solutions de rechange relatives à la conception demandées par l'Office ne peut être complétée tant qu'une solution définitive n'aura pas été déterminée et que le long processus décrit ci-dessus n'aura pas été achevé.

...

[...]

(i) Finally, VIA Rail requests an oral hearing to explain these positions so that the Agency can be fully satisfied that it has all of the information presently available to VIA Rail.

h) enfin, VIA Rail demande que soit tenue une audience pour expliquer ces positions de telle sorte que l'Office peut être entièrement convaincu qu'il possède tous les renseignements dont dispose actuellement VIA Rail.

[61] The Agency did not grant an oral hearing and proceeded to give its final decision on October 29, 2003, in which, for the first time, it specified the actual changes to be made to the Renaissance cars.

[61] L'Office n'a pas tenu d'audience et elle a rendu sa décision définitive le 29 octobre 2003, dans laquelle, pour la première fois, il a précisé les changements concrets à apporter aux voitures Renaissance.

Final decision

La décision définitive

[62] In the final decision, although the Agency used the correct language at the commencement of its analysis by stating that a balance had to be struck between the rights of persons with disabilities and the transportation service provider in accordance with section 5 of the CTA (Agency's final decision, at page 19), it failed to conduct such an analysis. While the Agency did, in a cursory manner, examine VIA's financial status, this does not amount to a balancing of interests within the meaning of section 5 of the CTA.

[62] Dans la décision définitive, bien que l'Office se soit bien exprimé au début de son analyse en déclarant qu'il fallait effectuer une pondération entre les droits des personnes ayant une déficience et ceux du fournisseur de services de transport en conformité avec l'article 5 de la LTC (décision définitive de l'Office, à la page 20), il n'a pas réalisé une telle analyse. Quoique l'Office ait, d'une manière superficielle, examiné la situation financière de VIA, cela n'équivaut pas à une pondération des intérêts au sens de l'article 5 de la LTC.

Both decisions

[63] In my view, the Agency, having been asked by the CCD at the beginning of this proceeding, to halt the purchase of the Renaissance cars, failed to then look beyond the Renaissance cars to properly consider the whole network. The Agency's conclusion in the preliminary decision and its show cause order demonstrate that its primary focus was confined to the Renaissance cars and not on the network as a whole, which resulted in a failure to consider alternative actions that VIA could take to avoid or ameliorate the problem, such as providing alternative transportation or providing different trains at different times. The Agency's failure to properly consider VIA's network as a whole was patently unreasonable.

[64] Instead of focussing on the Renaissance cars, there were certain points the Agency should have addressed in the show cause order, which would have provided VIA with an opportunity to suggest other means of accommodating the problems. For example, the Agency should have requested more information as to the features in the Renaissance cars that were advantageous to persons with disabilities. If the Agency had asked, undoubtedly they would have been told that the Renaissance cars provided:

- (a) the availability of a wheelchair tie-down;
- (b) the use of a bedroom for a non-sighted passenger accompanied by a guide dog;
- (c) the use of a VIA-supplied purpose-built wheelchair, to allow wheelchair passengers to move throughout the train;
- (d) automatic doors between cars to assist in movement by persons with disabilities;
- (e) brail marking for sight impaired;
- (f) visual train information;
- (g) emergency warnings for hearing impaired; and

Les deux décisions

[63] À mon avis, le CCD lui ayant demandé, au début de l'instance, d'interrompre l'achat des voitures Renaissance, l'Office a ensuite omis de regarder au-delà des voitures Renaissance pour examiner de façon appropriée l'ensemble du réseau. Sa conclusion dans la décision préliminaire et son ordonnance de justification démontrent qu'il a mis exclusivement l'accent sur les voitures Renaissance et non sur le réseau dans son ensemble, ce qui l'a amené à ne pas tenir compte des autres mesures que VIA pouvait prendre pour contourner ou atténuer le problème, comme de fournir un transport de remplacement ou d'offrir différents trains à différentes heures. L'omission par l'Office d'examiner de façon appropriée le réseau de VIA dans son ensemble était manifestement déraisonnable.

[64] Au lieu de se centrer sur les voitures Renaissance, l'Office aurait dû traiter de certains éléments dans l'ordonnance de justification, ce qui aurait permis à VIA de proposer d'autres moyens de résoudre les problèmes. Par exemple, l'Office aurait dû demander plus de renseignements en ce qui concerne les caractéristiques des voitures Renaissance qui étaient à l'avantage des personnes ayant une déficience. Si l'Office l'avait fait, on lui aurait indubitablement dit que les voitures Renaissance offraient:

- a) la disponibilité d'un dispositif de retenue pour fauteuil roulant;
- b) l'utilisation d'une chambre pour un passager aveugle accompagné d'un chien-guide;
- c) l'utilisation d'un fauteuil roulant spécial, fourni par VIA, pour permettre aux passagers en fauteuil roulant de se déplacer dans le train;
- d) des portes automatiques entre les voitures pour aider les personnes ayant une déficience dans leurs déplacements;
- e) le marquage en braille pour les personnes ayant une déficience visuelle;
- f) de l'information visuelle relative au train;
- g) des signalisations d'urgence pour les personnes ayant une déficience auditive;

(b) moveable arm rests for mobility impaired. (See affidavit of John Marginson, sworn December 5, 2003. While the Marginson affidavit was not before the Agency during the proceedings, by order of Malone J.A. dated July 13, 2004, VIA was allowed to adduce fresh evidence before this Court. This order was never appealed.)

h) des accoudoirs mobiles pour les personnes ayant une mobilité réduite. (Voir l'affidavit de John Marginson, souscrit le 5 décembre 2003. Bien que l'Office n'ait pas eu à sa disposition l'affidavit de M. Marginson au cours de l'instance, VIA fut autorisée, par une ordonnance du juge Malone, J.C.A., datée du 13 juillet 2004, à produire de nouveaux éléments de preuve devant la Cour. On n'a jamais interjeté appel de cette ordonnance.)

[65] While the Agency focussed its analysis on obstacles in the Renaissance cars rather than the entire network, the dissenting member of the panel correctly focussed on whether VIA's network was able to cope with any undue obstacles found in the Renaissance cars. I believe he took the proper approach. At pages 148-149 of the preliminary decision, Mr. Cashin stated:

[65] Bien que l'Office ait centré son analyse sur les obstacles dans les voitures Renaissance plutôt que sur le réseau en entier, le membre dissident du tribunal s'est centré de façon appropriée sur la question de savoir si le réseau de VIA était en mesure de faire face aux obstacles abusifs constatés dans les voitures Renaissance. Je crois qu'il a appliqué la bonne démarche. Aux pages 163 à 165 de la décision préliminaire, M. Cashin a déclaré:

Upon making a finding that there are obstacles, it is then necessary again, pursuant to subsection 172(1) of the CTA, to consider whether those obstacles are undue. This analysis involves a balancing of the undueness factors set out by the parties. As set out by the Federal Court of Appeal in the Lemonde Decision, the Agency must take into account the context in which an allegation that an obstacle is undue is made. In this regard, I agree with VIA's argument that its network is the proper context for the Agency's undueness analysis. My assessment of the evidence and argument presented by the parties leads me to the preliminary conclusion that the obstacles found in respect of the Renaissance cars do not constitute undue obstacles to the mobility of persons with disabilities.

Après avoir déterminé la présence d'obstacles, il est encore nécessaire, conformément au paragraphe 172(1) de la LTC, d'évaluer si ces obstacles sont abusifs. Cette analyse comporte une pondération des facteurs présentés par les deux parties relativement au caractère abusif des obstacles. Comme l'a établi la Cour d'appel fédérale dans la cause Lemonde, l'Office doit prendre en considération le contexte dans lequel est présentée l'allégation d'obstacle abusif. À cet égard, je suis d'accord avec l'argument de VIA voulant que son réseau constitue le contexte approprié pour l'analyse du caractère abusif par l'Office. Mon évaluation de la preuve et des plaidoiries présentées par les parties m'amène à la conclusion préliminaire que les obstacles constatés relativement aux voitures Renaissance ne constituent pas des obstacles abusifs aux possibilités de déplacement des personnes ayant une déficience.

...

[...]

After reviewing VIA's submissions regarding its network, I can only conclude that there is no evidence that VIA's existing network, with the addition of the Renaissance cars, will not continue to provide appropriate services to persons with disabilities. In fact, VIA submitted that its current policies and practices that assist persons with disabilities will continue to apply, with the introduction of the new cars.

Après avoir examiné les observations de VIA concernant son réseau, je ne peux que conclure que rien ne prouve que son réseau existant, avec l'ajout des voitures Renaissance, ne continuera pas de fournir des services appropriés aux personnes ayant une déficience. En effet, VIA a fait valoir que ses politiques et méthodes sur l'assistance aux personnes ayant une déficience continueront de s'appliquer avec l'entrée en service des nouvelles voitures.

...

[...]

VIA advised that the Renaissance trains are a "special one-time purchase" and are not the trains of the future. VIA acknowledges that the Renaissance cars will not "meet all of the needs of those with disabilities" and that any obstacles

VIA a indiqué que les trains Renaissance constituent un «achat spécial ponctuel» et qu'ils ne représentent pas les trains du futur. VIA reconnaît que les voitures Renaissance ne pourront répondre à tous les besoins des personnes ayant une

alleged by CCD concerning the Renaissance trains are overcome by the "adequate provision of other transportation services provided on VIA Rail's network". In my view, this implies that VIA will address any obstacles related to the Renaissance cars by taking the appropriate measures to ensure that VIA's network continues to address the needs of persons with disabilities.

Although I recognize CCD's arguments concerning the impact of the obstacles identified by the Agency on persons with disabilities, I am of the view that there is no evidence that these obstacles will not be accommodated by VIA's network. The rights of persons with disabilities to have equivalent access to the federal transportation network does not mean identical access or the provision of the identical services that are available to other passengers but rather it implies the notion of accommodation and VIA, in my view, has demonstrated that even with the addition of the Renaissance cars, the interests of persons with disabilities will continue to be accommodated by VIA's network.

[66] The dissenting member retired before the final decision was rendered and did not participate in it.

Balancing of interests

Cost of remedying the obstacles

[67] In the show cause order, the Agency made preliminary findings as to the obstacles in the Renaissance cars it considered to be undue. At pages 143-144 of the preliminary decision, the Agency made the following findings:

The Agency has made preliminary findings that the following features in the Renaissance Cars constitute undue obstacles to the mobility of persons with disabilities, including, and in particular, persons who use wheelchairs:

1. Coach car

- (a) the lack of movable aisle armrests on the double seat side of the coach cars

2. Economy coach car

- (a) the width of the aisle between the two washrooms
- (b) the inadequate clear floor space of the wheelchair tie-down to accommodate a Personal Wheelchair and a service animal
- (c) the amount of manoeuvring space, including the lack of a 150 cm (59.06") turning diameter in the

déficiences et que tout obstacle dont le CCD allègue la présence à la suite de l'entrée en service de ces voitures sera compensé par la «fourniture adéquate d'autres services de transport offerts sur le réseau de VIA Rail». Selon moi, cela implique que VIA remédiera à tout obstacle concernant les voitures Renaissance en prenant les mesures appropriées pour veiller à ce que le réseau de VIA continue de répondre aux besoins des personnes ayant une déficience.

Bien que je reconnaisse la validité des arguments du CCD concernant les conséquences des obstacles constatés par l'Office pour les personnes ayant une déficience, j'estime que rien ne prouve que ces obstacles ne pourront être éliminés grâce au réseau de VIA. Les droits des personnes ayant une déficience de jouir de l'égalité d'accès au réseau des transports de compétence fédérale ne signifie pas un accès identique ou la prestation de services identiques qui sont offerts aux autres passagers, mais implique plutôt la notion d'accommodements et VIA, d'après moi, a montré que même avec l'ajout des voitures Renaissance, le réseau de VIA continuera de servir les intérêts des personnes ayant une déficience.

[66] Le membre dissident a pris sa retraite avant que la décision définitive soit rendue et il n'y a pas participé.

La pondération des intérêts

Les coûts associés à la suppression des obstacles

[67] Dans l'ordonnance de justification, l'Office a tiré des conclusions préliminaires quant aux obstacles des voitures Renaissance qu'il considérait abusifs. À la page 158 de la décision préliminaire, il a tiré les conclusions suivantes:

L'Office a conclu, à titre préliminaire, que les caractéristiques ci-dessous des voitures Renaissance constituent des obstacles abusifs aux possibilités de déplacement des personnes ayant une déficience, notamment pour les personnes qui utilisent un fauteuil roulant:

1. Voitures-coach

- a) absence d'accoudoirs mobiles côté couloir du côté des sièges doubles des voitures-coach

2. Voitures-coach de la classe économique

- a) largeur du couloir entre les deux toilettes
- b) aire de plancher dégagée inadéquate dans la zone du dispositif de retenue pour fauteuil roulant pour recevoir un fauteuil roulant personnel et un animal aidant
- c) insuffisance de l'espace de manœuvre, notamment en raison de l'absence d'une aire de rotation de 150 cm

- | | |
|--|--|
| <p>wheelchair tie-down area</p> <p>(d) the width of the bulkhead door</p> <p>(e) the lack of seating either beside or facing the wheelchair tie-down for an attendant</p> <p>(f) the insufficient space that will accommodate persons travelling with service animals</p> <p>3. <u>Complais</u></p> <p>(a) the Montréal-Toronto overnight train consist and the fact that there is no accessible washroom for persons using the wheelchair tie-down in the economy coach cars</p> <p>4. <u>Stairs</u></p> <p>(a) the riser heights and stair depths</p> <p>(b) the lack of closed stair risers</p> <p>5. <u>«Accessible suite»</u></p> <p>(a) the width of the doors in the “accessible suite”</p> <p>(b) the fact that a person with a disability will not be able to retain a Personal Wheelchair in the “accessible suite”</p> <p>(c) the insufficient space beside the toilet in the “accessible suite” to allow a person using a Personal Wheelchair to effect a side transfer to the toilet</p> <p>(d) the lack of a 150 cm (59.06”) turning diameter in the “accessible suite”</p> | <p>(59,06 po) de diamètre dans la zone du dispositif de retenue pour fauteuil roulant</p> <p>d) largeur de la porte de cloison</p> <p>e) absence de siège pour accompagnateur à côté ou en face du dispositif de retenue pour fauteuil roulant</p> <p>f) insuffisance de l'espace pour recevoir des personnes voyageant avec un animal aidant</p> <p>3. <u>Rames de trains</u></p> <p>a) la disposition des voitures de la rame de nuit Montréal-Toronto et l'absence de toilette accessible pour les personnes utilisant le dispositif de retenue pour fauteuil roulant dans les voitures-coach de la classe économique</p> <p>4. <u>Escaliers</u></p> <p>a) hauteur des contremarches et profondeur des marches</p> <p>b) absence de contremarches fermées</p> <p>5. <u>«Suite accessible»</u></p> <p>a) largeur des portes dans la «suite accessible»</p> <p>b) impossibilité pour une personne ayant une déficience de conserver son fauteuil roulant personnel dans la «suite accessible»</p> <p>c) insuffisance de l'espace à côté de la cuvette de toilette dans la «suite accessibles» pour permettre à une personne qui utilise un fauteuil roulant personnel d'effectuer un transfert latéral sur le siège de la cuvette</p> <p>d) absence d'une aire de rotation de 150 cm (59,06 po) de diamètre dans la «suite accessible»</p> |
|--|--|

[68] As noted above, VIA was unable to provide cost estimates prepared by a third party within the time allotted by the Agency, including the 60-day extension. As a result of this, the Agency rendered its final decision without such cost estimates. What the Agency did have and did consider was a cost estimate by a company called Pro-Sphere, which, according to the Agency, had been in the files of VIA, and were produced by VIA along with its letter indicating that it needed more time to comply with the Agency's order for production of more information. The problem with the Pro-Sphere report is that it provided estimates only on toilet configuration, which was only one of the 14 features found by the Agency to constitute undue obstacles. It is also not clear as to what expertise Pro-Sphere possessed

[68] Comme je l'ai déjà mentionné, VIA n'a pas été en mesure de fournir une estimation des coûts préparée par un tiers dans le délai alloué par l'Office, y compris la prorogation de 60 jours. Par conséquent, l'Office a rendu sa décision définitive sans disposer de cette estimation des coûts. Ce que l'Office avait et ce dont il a tenu compte, c'était une estimation des coûts effectuée par une société appelée Pro-Sphere, laquelle, selon l'Office, se trouvait dans les dossiers de VIA et avait été produite par celle-ci avec sa lettre mentionnant qu'elle avait besoin de plus de temps pour respecter l'ordonnance de l'Office concernant la production de renseignements additionnels. Le problème que pose le rapport de Pro-Sphere est qu'il ne fournit une estimation que pour la configuration des toilettes, ce qui n'était que l'une des

or for what purpose the estimates were prepared. Therefore, the Agency, in ordering its final corrective measures in the final decision, did not have comprehensive third-party estimates as to the total cost of the changes as it requested from VIA in the show cause order.

[69] Subsequent to the issuance of the final decision, VIA obtained much more detailed information about the costs from a train expert at Bombardier, Peter Schrum. He filed a 10-page affidavit attaching his 33-page report (affidavit of Peter Schrum, sworn December 5, 2003 at paragraph 3. This affidavit was also newly adduced into evidence before this Court by order of Malone J.A.) The Schrum affidavit analyses the steps required to complete the work. It describes the steps of the production process and the major areas of change directed by the Agency. It contains diagrams, hours estimated, plans, timing and risks. The report addressed each of the 10 corrective measures ordered by the Agency in its final decision and is the only objective third party report which comprehensively estimates the costs of all the changes ordered by the Agency.

[70] In his affidavit, Mr. Schrum said:

The re-construction of the cars, as directed by the Agency, make no engineering or production sense. Some of the directions of the Agency are laden with a number of complex and unknown structural, engineering, production and timing risks. I have done my best to complete the analysis needed for the engineering feasibility study and the preparation of the work up to the issuance of tenders and the completion of the work itself. My conclusions are qualified by a series of identified risks and a concern that there are unknown risks which will appear as the actual construction is carried out. Finally, there are a number of functions or costs which are not included in the calculations. To the extent possible I have applied an appropriate order of magnitude in order to estimate those costs.

14 caractéristiques qui, selon l'Office, constituaient des obstacles abusifs. Il n'est pas clair non plus en quoi consiste l'expérience possédée par Pro-Sphere ni pour quelles fins l'estimation a été préparée. En ordonnant ses mesures correctrices définitives dans la décision définitive, l'Office ne disposait donc pas de l'estimation complète d'un tiers quant au coût total des changements qu'il a demandés à VIA dans l'ordonnance de justification.

[69] À la suite de la délivrance de la décision définitive, VIA a obtenu des renseignements beaucoup plus détaillés au sujet des coûts de la part de M. Peter Schrum, un expert en trains chez Bombardier. Il a déposé un affidavit de 10 pages auquel était joint son rapport de 33 pages. (Affidavit de M. Peter Schrum, souscrit le 5 décembre 2003, au paragraphe 3. Cet affidavit a été également produit devant la Cour à titre de nouvel élément de preuve du fait de l'ordonnance du juge Malone, J.C.A.) L'affidavit de M. Schrum analyse les étapes nécessaires à l'achèvement des travaux. Il décrit les étapes du processus de production ainsi que les parties importantes visées par les changements ordonnés par l'Office. Il contient des diagrammes, une estimation des heures, des plans, un calendrier et les risques. Le rapport a traité de chacune des 10 mesures correctrices ordonnées par l'Office dans sa décision définitive et il s'agit du seul rapport objectif produit par un tiers qui présente une estimation complète des coûts de l'ensemble des changements ordonnés par l'Office.

[70] Dans son affidavit, M. Schrum a déclaré:

[TRADUCTION] La reconstruction des voitures, comme l'Office l'ordonne, n'a aucun sens tant sur le plan de l'ingénierie que sur celui de la production. Quelques-unes des directives de l'Office comportent un certain nombre de risques complexes et inconnus en rapport avec la structure, l'ingénierie, la production et le calendrier. J'ai fait de mon mieux pour compléter l'analyse requise pour l'étude de faisabilité sur les aspects techniques et la préparation des travaux jusqu'à la délivrance des soumissions et l'achèvement des travaux eux-mêmes. Mes conclusions reposent sur une série de risques dégagés et sur une préoccupation selon laquelle il existe des risques inconnus qui apparaîtront lorsque la construction sera réellement exécutée. Enfin, il y a un certain nombre de fonctions ou de coûts qui ne sont pas inclus dans les calculs. J'ai appliqué, dans la mesure du possible, un ordre de grandeur approprié dans le but d'estimer ces coûts.

[71] He then estimated the total costs of changes ordered by the Agency to be in the order of \$48 million. However, he then said:

The \$48 million figure does not take into account structural changes which are unknown and a highly complex risk factor. In this regard, the service cars may be feasible from an engineering and production perspective. It may be possible to complete all of the work with minor structural changes. For the coach cars, they will need major structural changes for much of the work. These major structural changes are so complex that they cannot be fully mapped out until work begins. For example, moving the seat to the floor level requires a new seat, a new attachment, re-engineering of the floor, a new mounting attachment and load-path changes in the floor itself. The new washroom in the coach car requires structural changes in the coach car itself, both the floor, the flooring structure and other possible parts. It is also necessary to re-route or re-work the plumbing, the holding tanks, the electrical system, the air conditioning system, the battery underneath the train and other major structural changes. None of these changes are included in the \$48 million cost and may not be possible from an engineering perspective. The costs could go as high as \$92 million if structural problems arise.

In addition, the total cost excludes all detailed engineering of components.

[72] It should be pointed out that the CCD, upon receiving the Schrum report, filed a report of their own by a Mr. Ron Woollam, which, while critical of the Schrum report, does not in itself make clear estimates of the total costs involved in making the changes ordered by the Agency.

[73] The Agency, in the preliminary decision, before undertaking any such balancing, concluded that VIA had failed to provide "compelling evidence of economic impediments to addressing any undue obstacles found to exist in the Renaissance Cars" (Agency's preliminary decision, at page 46). The Agency came to this conclusion before it had even defined the changes to be made to the Renaissance cars. At this point, it would not have been possible for

[71] Il a ensuite estimé les coûts totaux des changements ordonnés par l'Office comme étant de l'ordre de 48 millions de dollars. Il a toutefois ajouté:

[TRADUCTION] Le chiffre de 48 millions de dollars ne tient pas compte des changements structuraux qui sont inconnus ni d'un facteur de risque d'une grande complexité. À cet égard, les voitures de service peuvent être réalisables au point de vue de l'ingénierie et de la production. Il peut être possible de compléter l'ensemble des travaux avec des changements structuraux mineurs. En ce qui a trait aux voitures-coach, elles nécessiteront des changements structuraux majeurs pour une grande partie des travaux. Ces changements structuraux majeurs sont si complexes qu'ils ne peuvent être complètement élaborés avant que les travaux commencent. Par exemple, le fait de déplacer le siège au niveau des planchers exige un nouveau siège, un nouveau point d'ancrage, un réaménagement du plancher, un nouveau point d'ancrage pour le montage et des changements relatifs au schéma de contraintes dans le plancher lui-même. Les nouvelles toilettes dans la voiture-coach exigent des changements structuraux dans la voiture-coach elle-même, tant en ce qui concerne le plancher que la structure de celui-ci ainsi que d'autres parties possibles. Il est également nécessaire de détourner ou de retravailler la plomberie, les réservoirs d'eaux usées, le système électrique, le système de conditionnement d'air, la batterie sous le train et d'autres changements structuraux majeurs. Aucun de ces changements n'est compris dans le coût de 48 millions de dollars et cela peut s'avérer impossible d'un point de vue technique. Les coûts pourraient s'élever jusqu'à 92 millions de dollars en cas de problèmes structuraux.

En plus, le coût total exclut l'ensemble des études techniques détaillées des composants.

[72] Il convient de souligner que, après avoir reçu le rapport Schrum, le CCD a déposé son propre rapport préparé par un M. Ron Woollam, lequel, bien qu'il critique le rapport Schrum, ne fait pas, en soi, d'estimation claire des coûts totaux qu'impliquent les changements ordonnés par l'Office.

[73] Dans la décision préliminaire, avant d'entreprendre une telle pondération, l'Office a conclu que VIA n'avait pas fourni de «prouve indiscutable d'empêchements économiques aux mesures correctives pour remédier à tout obstacle abusif constaté dans les voitures Renaissance» (décision préliminaire de l'Office, à la page 51). L'Office en est venue à cette conclusion avant même d'avoir défini les changements à apporter aux voitures Renaissance. À ce moment-là, il n'aurait pas

anyone to know the costs involved.

[74] Similarly, the Agency found that there was no evidence of economic impediments preventing VIA from addressing the obstacles in the Renaissance cars (Agency's preliminary decision, at page 46) at the beginning of the analysis in the preliminary decision, before it required VIA to obtain the estimated cost for the various structural modifications in the show cause order. Having reached the conclusion that there was no compelling evidence of economic impediments in funding the changes before asking VIA to obtain estimates of these costs is patently unreasonable. One cannot conclude that VIA can afford to pay for the changes without knowing the cost of these changes.

[75] The Agency therefore determined that there were no economic impediments before it addressed the changes to be made to the Renaissance cars and before it asked for cost estimates.

[76] In my view, it is of utmost importance not just to persons in wheelchairs, but to all other disabled persons, VIA, the Government of Canada and the Canadian public, that before costs of the magnitude envisioned by the Schrum report are incurred, that the Agency reconsider its decision, taking into account the total costs of the changes ordered as well as the other factors to be balanced, as set out in the *Lemondé* decision.

[77] As it has been said, it is absolutely necessary to balance the various interests under section 5 of the CTA. This can only be done once the true cost of the changes is known. VIA had indicated to the Agency that it could not respond to the show cause order adequately in the time allotted. It is clear to me that VIA had a valid point. The amount of detail required by the Agency in its show cause order was very great and more time should have been provided for VIA to respond. The Agency's failure to provide such opportunity to VIA, in my view, constitutes a denial of procedural fairness justifying that its decision be set aside with a direction to reconsider the matter.

été possible pour personnes de connaître les coûts impliqués.

[74] De même, au début de l'analyse dans la décision préliminaire, l'Office a conclu qu'il n'y avait aucune preuve d'empêchements économiques faisant en sorte que VIA ne puisse supprimer les obstacles dans les voitures Renaissance (décision préliminaire de l'Office, à la page 51) avant d'exiger, dans l'ordonnance de justification, que VIA obtienne une estimation des coûts concernant les diverses modifications structurales. Le fait d'avoir tiré la conclusion qu'il n'y avait aucune preuve indiscutable d'empêchements économiques au financement des changements avant de demander à VIA d'obtenir une estimation de ces coûts est manifestement déraisonnable. On ne peut conclure que VIA peut se permettre de payer pour les changements sans connaître le coût de ces changements.

[75] L'Office a donc décidé qu'il n'y avait aucun empêchement économique avant de traiter des changements à apporter aux voitures Renaissance et avant de demander une estimation des coûts.

[76] À mon avis, avant que les coûts de l'ampleur envisagée par le rapport Schrum soient encourus, il est fort important, non seulement pour les personnes en fauteuil roulant, mais aussi pour l'ensemble des autres personnes ayant une déficience, pour VIA, pour le gouvernement du Canada et pour le public canadien, que l'Office réexamine sa décision en tenant compte des coûts totaux des changements ordonnés de même que des autres facteurs à pondérer, énoncés dans la décision *Lemondé*.

[77] Comme cela a été mentionné, il est absolument nécessaire de pondérer les différents intérêts en vertu de l'article 5 de la LTC. Cela ne peut être fait qu'une fois que le vrai coût des changements est connu. VIA avait mentionné à l'Office qu'elle ne pourrait pas répondre de manière adéquate à l'ordonnance de justification dans le délai alloué. Il m'apparaît clairement que VIA avait un argument valable. La quantité de détails exigés par l'Office dans son ordonnance de justification était très grande et on aurait dû accorder à VIA plus de temps pour répondre. L'omission de la part de l'Office d'offrir une telle possibilité à VIA constitue, à mon avis, un déni de l'équité procédurale justifiant l'annulation de sa

Impact on other travellers

[78] In an undue burden analysis, the interests of the various parties must be balanced. However, at page 40 of the preliminary decision, the Agency said:

With respect to VIA's opinion that the Agency must consider its network against the actual number of passengers with disabilities who travel on it, the Agency is of the opinion that such a factor is not determinative. As discussed, the Agency is of the opinion that Part V of the CTA is, by its nature, human rights legislation, which is specifically aimed at protecting the rights of a minority group; namely, persons with disabilities.

[79] In the above quotation, it is unclear as to whether the Agency dismissed as a consideration the fact that, of the passengers travelling by rail, only 0.5% of them were disabled in 1995 according to the Agency (Agency's preliminary decision, at page 40) and 0.0611% in 2003, according to VIA. In either event, the figure representing disabled passengers travelling by rail is small. While I am in agreement that the fact that passengers with disabilities constitute a small percentage of all passengers cannot be taken to justify totally inadequate facilities for disabled people, the numbers must nonetheless be taken into consideration.

[80] It must be noted that although the carrier is obliged to take into account the needs of disabled persons, the needs of non-disabled persons must also be taken into account because the system must function and be available for all users. Part of the balancing analysis requires a consideration of the monies necessary to keep the system running. If expenses are so high that VIA has to increase its fares and average citizens cannot afford to travel, then the objectives in section 5 of the CTA cannot be met.

[81] In my view, without having the necessary information as to costs before it while rendering its final

décision avec une directive visant un nouvel examen de l'affaire.

Les répercussions sur les autres voyageurs

[78] Dans une analyse relative au caractère abusif, il faut pondérer les intérêts des différentes parties. Toutefois, à la page 44 de la décision préliminaire, l'Office a déclaré:

En ce qui a trait à l'opinion de VIA voulant que l'Office doive considérer son réseau en fonction du nombre réel de personnes ayant une déficience qui ont voyagé à bord de ses trains, l'Office est d'avis que ce facteur n'est pas déterminant. Comme il est mentionné plus haut, l'Office est d'avis que la partie V de la LTC est, de par sa nature même, un texte législatif qui traite des droits de la personne, visant spécifiquement à protéger les droits d'un groupe minoritaire, c'est-à-dire les personnes ayant une déficience.

[79] Dans la précédente citation, on ne sait pas trop si l'Office a rejeté en tant que considération le fait que, des passagers voyageant par chemin de fer, seulement 0,5 p. 100 d'entre eux avaient une déficience en 1995 selon l'Office (décision préliminaire de l'Office, à la page 44) et 0,0611 p. 100 en 2003, selon VIA. Quoi qu'il en soit, le chiffre représentant les passagers ayant une déficience qui voyagent par chemin de fer est minime. Bien que je convienne que le fait que les passagers ayant une déficience constituent un pourcentage minime de l'ensemble des passagers ne peut pas servir à justifier des installations complètement inadéquates pour les personnes ayant une déficience, les chiffres doivent néanmoins être pris en considération.

[80] Il faut souligner que, bien que le transporteur soit obligé de tenir compte des besoins des personnes ayant une déficience, les besoins de celles n'en ayant pas doivent également être pris en compte parce que le réseau doit fonctionner et être accessible à l'ensemble des utilisateurs. Une partie de l'analyse relative à la pondération exige que l'on prenne en compte les sommes nécessaires pour assurer l'exploitation du réseau. Si les dépenses sont élevées au point que VIA doit augmenter ses tarifs et que les citoyens ordinaires ne puissent pas se permettre de voyager, les objectifs de l'article 5 de la LTC ne peuvent donc pas être atteints.

[81] À mon avis, le fait de ne pas disposer des renseignements nécessaires quant aux coûts au moment

decision and by failing to consider the cost and the impact on other travellers, the Agency's decision is patently unreasonable.

Agency expertise

[82] In the preliminary decision, the Agency concluded that there was no evidence to support VIA's opinion that its network could address obstacles that were found to exist in the Renaissance cars. Specifically, at page 38 of the preliminary decision, the Agency found:

Furthermore, the Agency finds that there is no evidence on the record that supports VIA's opinion that its existing fleet or its network, generally, will address obstacles that may be found to exist in the Renaissance Cars.

[83] However, there was some evidence in relation to VIA's belief that it could accommodate persons in wheelchairs. For example, there was evidence before the Agency as to VIA's network features. VIA's network has various policies in place specifically designed for the accommodation and comfort of persons with disabilities, including policies regarding wheelchair handling, where VIA service agents are trained in providing assistance and equipment for persons with disabilities.

[84] The Agency also said that VIA had not submitted any evidence about its alternative transportation policy. This fails to note that the Agency is a tribunal with expertise in areas of railway transportation policy. This expertise is the reason deference is shown to the Agency by the courts. In Decision No. 479-AT-R-2002 [*In the matter of an application filed with the National Transportation Agency by Jean Lemonde, on behalf of Minikami (Club de mini Basket-ball en fauteuil roulant "Les Kamikazes"), concerning difficulties encountered on a December 1993 round trip with VIA Rail Canada Inc.—Decision No. 791-R-1995 and Order No. 1995-R-491, both dated November 28, 1995*] dated more than one year prior to the final decision, the Agency reviewed VIA's transportation network when it was considering a complaint about an undue obstacle and noted the following about its own mandate:

de rendre sa décision définitive et l'omission de tenir compte du coût et des répercussions sur les autres voyageurs rendent la décision de l'Office manifestement déraisonnable.

L'expertise de l'Office

[82] Dans la décision préliminaire, l'Office a conclu qu'il n'y avait aucune preuve pour étayer l'opinion de VIA selon laquelle son réseau pouvait remédier aux obstacles constatés dans les voitures Renaissance. Plus précisément, à la page 42 de la décision préliminaire, l'Office a conclu:

De plus, il constate qu'aucune preuve au dossier ne vient étayer l'opinion du transporteur voulant que son parc ferroviaire existant ou son réseau existant, dans leur ensemble, permettront d'éliminer des obstacles qui pourraient se présenter dans les voitures Renaissance.

[83] Toutefois, il y avait certains éléments de preuve relativement à la croyance de VIA selon laquelle elle pouvait satisfaire les personnes en fauteuil roulant. Par exemple, l'Office disposait d'éléments de preuve quant aux caractéristiques du réseau de VIA. Ce réseau a diverses politiques en place dans le but précis d'accueillir confortablement les personnes ayant une déficience, y compris des politiques concernant la prise en charge de fauteuils roulants, alors que le personnel de VIA est formé pour offrir de l'aide et de l'équipement aux personnes ayant une déficience.

[84] L'Office a également affirmé que VIA n'avait présenté aucun élément de preuve au sujet de sa politique sur les transports spéciaux. Cela néglige le fait que l'Office est un tribunal possédant une expertise dans des domaines relatifs à la politique sur le transport par chemin de fer. C'est cette expertise qui justifie la déférence dont font preuve les cours à l'égard de l'Office. Dans la décision n° 479-AT-R-2002 [*Relative à la demande déposée auprès de l'Office national des transports par Jean Lemonde, au nom de Minikami (Club de mini Basket-ball en fauteuil roulant «Les Kamikazes»), concernant les difficultés qu'il a eues au cours d'un voyage aller-retour avec VIA Rail Canada inc. en décembre 1993—Décision n° 791-R-1995 et Arrêté n° 1995-R-491, tous deux datés du 28 novembre 1995*], remontant à plus d'un an avant la décision définitive, l'Office a examiné le réseau de transport de

It is worth noting that the tribunal's consideration of the matter of accessible transportation predates the 1988 amendments in that the first accessible transportation matter was considered in 1980 when the RTC entertained the application filed by Clariss Kelly, a person with a disability who uses a wheelchair, against VIA under section 281 of the then Railway Act which required railway tariff provisions to not be prejudicial to the public interest.

[85] The Agency noted the same fact at page 28 of the preliminary decision:

Concerning expertise, the Agency has the necessary expertise to deal with this complaint. The first accessible transportation matter was considered in 1980, prior to the enactment of specific accessible transportation provisions in the legislation. . . .

...

Specifically, the Agency has addressed complaints where, among others, issues pertaining to aisle widths and accessible washrooms have been examined. In terms of the balancing process, the Agency has examined economic considerations, carrier policies and transportation alternatives offered by the transportation provider. [Emphasis added.]

[86] While my views on this point are not necessary for my decision, I would say, by way of *obiter dicta*, that given the Agency's mandate, its expertise and the fact that VIA has come before it on numerous occasions, the Agency should have made use of its expertise relating to rail transportation matters when considering VIA's network. Accordingly, while there may not have been extensive evidence submitted by VIA (because the Agency's focus was on the Renaissance cars), the Agency is required to draw on its expertise for its decisions. That is the purpose of having an expert tribunal and of the Courts giving deference to its decisions.

VIA's right to an oral hearing

[87] As previously mentioned, subsequent to receiving the show cause order in the preliminary decision, VIA

VIA alors qu'il prenait en considération une plainte au sujet d'un obstacle abusif et il a fait remarquer ce qui suit concernant son propre mandat:

Il vaut la peine de mentionner que l'examen de la question des transports accessibles par le tribunal date d'avant les modifications de 1988 en ce sens que c'est en 1980 que la question des transports accessibles a été examinée pour la première fois, lorsque le Comité a entendu la plainte déposée par Clariss Kelly, personne ayant une déficience qui utilise un fauteuil roulant, contre VIA aux termes de l'article 281 de la Loi sur les chemins de fer qui stipulait que les dispositions des tarifs des compagnies de chemin de fer ne devaient pas porter préjudice à l'intérêt public.

[85] L'Office a souligné le même fait à la page 31 de la décision préliminaire:

Sur le plan de l'expertise, l'Office est suffisamment expert pour traiter la présente plainte. La première question de transports accessibles a été examinée en 1980, avant l'adoption de dispositions spécifiques sur les transports accessibles dans la législation [. . .]

[. . .]

Plus précisément, l'Office s'est penché sur des plaintes où son examen a touché notamment des questions de largeur des couloirs et de toilettes accessibles. Sur le plan de l'appréciation des intérêts en jeu, l'Office a examiné les arguments économiques, les politiques des transporteurs et les solutions de rechange proposées par le fournisseur de services de transport. [Non souligné dans l'original.]

[86] Bien que mon opinion sur ce point ne soit pas nécessaire à l'égard de ma décision, je dirais, au moyen de remarques incidentes, qu'étant donné son mandat, son expertise et le fait que VIA a comparu devant lui à de nombreuses reprises, l'Office aurait dû utiliser son expertise relative aux questions de transport ferroviaire lorsqu'il a examiné le réseau de VIA. Par conséquent, bien que VIA n'ait peut-être pas présenté une preuve abondante (du fait que l'Office mettait l'accent sur les voitures Renaissance), l'Office est tenu de se fonder sur son expertise pour rendre ses décisions. C'est la raison pour laquelle il existe un tribunal expert et que les cours font preuve de déférence à l'égard de ses décisions.

Le droit de VIA à une audience

[87] Comme je l'ai déjà mentionné, après avoir reçu l'ordonnance de justification dans la décision prélimi-

requested an oral hearing to explain *inter alia* the difficulties in responding to the show cause order. This oral hearing was denied.

[88] VIA's position was that the Agency's decisions would have a significant impact upon VIA and therefore, VIA should have been afforded full procedural rights. Full procedural rights, in many instances, require an oral hearing, especially where the issues cannot be resolved on the basis of the documentary evidence alone. Here, VIA requested an oral hearing in order to fully present its arguments on the show cause order and has now stated that the failure by the Agency to grant the oral hearing deprived the Agency of evidence that was necessary for the proper rendering of its final decision. Therefore, VIA submits that when procedural rights have been denied, the proper remedy is for the court to quash the decision and remit the matter back to the administrative decision maker.

[89] In noting that the content of the duty of fairness is flexible and depends on the context of the statute at issue (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraph 22 (*Baker*)), it is my view that the Agency had the right to exercise its discretion in deciding whether to grant an oral hearing. It has discretion in the conduct of its own affairs (*Baker*, at paragraph 27) and neither the CTA nor the Agency's General Rules (*National Transportation Agency General Rules*, SOR/88-23, section 38) require it to hold an oral hearing. Specifically, sections 38 and 40 of the General Rules state:

38. The Agency may make any order, decision, ruling or direction or give any leave, sanction or approval otherwise than by holding an oral hearing.

40. Procedural decisions shall be made on the basis of material filed with the Agency and without an oral hearing unless a party demonstrates that the interests of justice require the holding of an oral hearing.

naire, VIA a demandé qu'une audience soit tenue afin d'expliquer, entre autres choses, les difficultés rencontrées pour répondre à cette ordonnance. On a refusé de tenir l'audience.

[88] La position de VIA était que les décisions de l'Office auraient des répercussions importantes sur elle et que, par conséquent, elle aurait dû bénéficier de tous les droits procéduraux. Ceux-ci, dans de nombreux cas, exigent une audience, en particulier lorsque les questions ne peuvent être réglées sur la seule base de la preuve documentaire. En l'espèce, VIA a demandé une audience dans le but de présenter entièrement ses arguments concernant l'ordonnance de justification et elle déclare maintenant que l'omission de la part de l'Office d'accorder l'audience a privé celui-ci des éléments de preuve qui lui étaient nécessaires pour que sa décision définitive soit rendue de façon appropriée. Par conséquent, VIA soutient que lorsque des droits procéduraux ont été niés, la réparation appropriée est l'annulation de la décision par la cour et le renvoi de l'affaire au décideur administratif.

[89] En soulignant que le contenu de l'obligation d'équité est souple et qu'il repose sur le contexte de la loi en cause (*Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, au paragraphe 22 (*Baker*)), je suis d'avis que l'Office avait le droit d'exercer son pouvoir discrétionnaire en tranchant la question de savoir s'il devait accorder une audience. Il possède un pouvoir discrétionnaire relativement à la conduite de ses propres affaires (*Baker*, au paragraphe 27) et ni la LTC ni les Règles générales de l'Office (*Règles générales de l'Office national des transports*, DORS/88-23, article 38) n'exigent qu'il tienne une audience. En particulier, les articles 38 et 40 des Règles générales prévoient:

38. L'Office peut prendre un arrêté ou une décision ou donner une directive, une autorisation, une sanction ou une approbation autrement qu'en tenant une audience.

[...]

40. Les décisions en matière de procédure sont prises sur la foi de la documentation et des pièces déposées auprès de l'Office et sans la tenue d'une audience, à moins qu'une partie ne démontre qu'il y a lieu, dans l'intérêt de la justice, de tenir une audience.

[90] Therefore, the Agency's decision regarding the refusal to grant an oral hearing is one which it has the discretion to make. It cannot be said that this decision was patently unreasonable.

[90] Par conséquent, la décision de l'Office concernant le refus d'accorder une audience en est une qu'elle avait le pouvoir discrétionnaire de rendre. On ne peut affirmer que cette décision était manifestement déraisonnable.

[91] I do not wish, however, in saying this, to be taken as saying that VIA did not need further opportunity and more leeway to present the information and estimates to the Agency pursuant to its direction in the show cause order. While it was within the discretion of the Agency to require that this be done by letter, it was incumbent on the Agency to allow sufficient time to permit this to be done.

[91] Je ne souhaite toutefois pas, en disant ceci, que ce soit interprété comme une affirmation selon laquelle VIA n'avait pas besoin d'une autre possibilité et d'une plus grande marge de manœuvre pour présenter les renseignements et les estimations à l'Office suivant sa directive dans l'ordonnance de justification. Bien que l'Office ait eu le pouvoir discrétionnaire d'exiger que cela soit fait au moyen d'une lettre, il lui incombait d'accorder suffisamment de temps pour permettre que cela soit fait.

Standing of the Agency before this Court

La qualité de l'Office pour agir devant la Cour

[92] The Agency filed a factum in this appeal and appeared to make oral argument. In its factum, the Agency addressed not only the questions of its jurisdiction and standard of review, which it was entitled to do, but also other issues relating to the facts and merits of VIA's position. I quote some excerpts from the Agency's factum as examples:

[92] L'Office a déposé un mémoire dans le présent appel et il a comparu pour formuler une argumentation orale. Dans son mémoire, l'Office n'a pas seulement traité des questions relatives à sa compétence et à la norme de contrôle, ce qu'il avait le droit de faire, mais il a également abordé d'autres questions en litige concernant les faits et le bien-fondé de la position de VIA. Je cite certains extraits du mémoire de l'Office à titre d'exemples:

It is respectfully submitted that, as evidenced by the March and October Decisions, the Agency conducted a careful balancing of the undue factors, as raised by the parties. . . It is respectfully submitted that, based on the evidence that was provided by the parties, the Agency's analyses were appropriate and reasonable in the circumstances.

[TRANSLATION] Nous soutenons respectueusement que, comme l'ont démontré les décisions de mars et d'octobre, l'Office a minutieusement pondéré les facteurs relatifs au caractère abusif, soulevés par les parties [. . .] Nous soutenons respectueusement que, en se fondant sur les éléments de preuve présentés par les parties, les analyses de l'Office étaient appropriées et raisonnables dans les circonstances.

...

[. . .]

A. Paragraph 70(a): The Agency respectfully submits that it finds it surprising that VIA was unable to obtain expert evidence on the projected costs of conducting redesign and reconstruction work until after the Agency rendered its final decision when the Agency had clearly set out in the March Decision the preliminary undue obstacle findings that it had made.

A. Paragraphe 70a): L'Office soutient respectueusement qu'il trouve surprenant que VIA n'ait été en mesure d'obtenir une preuve d'expert concernant les coûts projetés relativement aux travaux de reprise de la conception et de reconstruction qu'après que l'Office eut rendu sa décision définitive, alors que l'Office avait clairement énoncé dans la décision de mars les conclusions préliminaires qu'il avait tirées quant aux obstacles abusifs.

E. Paragraph 70(e): . . . Many of the corrective measures that VIA has been directed to undertake will, in addition

E. Paragraphe 70e): [. . .] Bon nombre des mesures correctrices qu'on avait ordonné à VIA de prendre, en

to benefiting passengers with disabilities who use wheelchairs, also benefit other passengers with and without disabilities. For example, an accessible washroom will benefit many passengers as will moveable aisle armrests and thus the number of passengers benefiting from the Agency's Decision is greater than the 0.061% that VIA sets out in this paragraph.

plus de profiter aux passagers ayant une déficience qui utilisent un fauteuil roulant, profiteront également aux autres passagers ayant ou n'ayant pas de déficience. Par exemple, des toilettes accessibles profiteront à de nombreux passagers tout comme les accoudoirs mobiles côté couloir et le nombre de passagers profitant ainsi des décisions de l'Office sera plus grand que le 0,061 p. 100 énoncé par VIA dans ce paragraphe.

...

[...]

In conclusion, the Agency respectfully submits that it recognizes the requirements of natural justice and fairness in its decision-making process and that VIA was not denied the opportunity to properly present its case before the Agency.

En conclusion, l'Office soutient respectueusement qu'il reconnaît les exigences de la justice naturelle et de l'équité dans le cadre de son processus décisionnel et que VIA ne s'est pas vue refuser la possibilité de présenter correctement ses arguments devant l'Office.

[93] From these excerpts, it appears that the Agency has entered into the fray and become an adversary in this matter. This is to be regretted. The statements of Estey J. in *North Western Utilities Ltd. et al. v. City of Edmonton*, [1979] 1 S.C.R. 684, at pages 709-710 are apposite.

[93] Il ressort de ces extraits que l'Office est desoendu dans l'arène et qu'il est devenu un adversaire dans cette affaire. Cela est regrettable. Il est à propos de citer les énoncés du juge Estey dans l'arrêt *North Western Utilities Ltd. et autre c. Ville d'Edmonton*, [1979] 1 R.C.S. 684, aux pages 709 à 710:

This appeal involves an adjudication of the Board's decision on two grounds both of which involve the legality of administrative action. One of the two appellants is the Board itself, which through counsel presented detailed and elaborate arguments in support of its decision in favour of the Company. Such active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties. The Board is given a clear opportunity to make its point in its reasons for its decision, and it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court, in complete adversarial confrontation with one of the principals in the contest before the Board itself in the first instance.

Aux fins de ce pourvoi, l'analyse de la décision de la Commission doit se fonder sur deux considérations concernant l'une et l'autre la légalité d'un acte administratif. L'une des deux appelantes est la Commission elle-même; son avocat a présenté une argumentation détaillée et approfondie à l'appui de la décision de la Commission en faveur de la Compagnie. Une participation aussi active ne peut que jeter le discrédit sur l'impartialité d'un tribunal administratif lorsque l'affaire lui est renvoyée ou lorsqu'il est saisi d'autres procédures concernant des intérêts et des questions semblables ou impliquant les mêmes parties. La Commission a tout le loisir de s'expliquer dans ses motifs de jugement et elle a outrepassé de façon inacceptable la réserve dont elle aurait dû faire preuve lorsqu'elle a participé aux procédures comme partie à part entière, en opposition directe à une partie au litige dont elle avait eu à connaître en première instance.

It has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction.

Cette Cour, à cet égard, a toujours voulu limiter le rôle du tribunal administratif dont la décision est contestée à la présentation d'explications sur le dossier dont il était saisi et d'observations sur la question de sa compétence, même lorsque la loi lui confère le droit de comparaître.

...

[...]

In the sense the term has been employed by me here, "jurisdiction" does not include the transgression of the authority of a tribunal by its failure to adhere to the rules of natural justice. In such an issue, when it is joined by a party to

Au sens où j'ai employé ce mot ici, la «compétence» n'inclut pas la transgression du pouvoir d'un tribunal par l'observation des règles de justice naturelle. Dans un tel cas, lorsqu'une partie aux procédures devant ce tribunal est

proceedings before that tribunal in a review process, it is the tribunal which finds itself under examination. To allow an administrative board the opportunity to justify its action and indeed to vindicate itself would produce a spectacle not ordinarily contemplated in our judicial traditions.

[94] The Agency cannot be an adversary in a matter on appeal wherein the decisions being appealed were rendered by the Agency itself. The Agency should take note of this for future proceedings.

Conclusions

[95] For the reasons given, the appeal will be allowed with costs against the respondents, and this matter will be referred back to the Agency for reconsideration in accordance with these reasons.

DÉCARY J.A.: I agree.

The following are the reasons for judgment rendered in English by

EVANS J.A.:

A. INTRODUCTION

[96] I have had the great benefit of reading the careful reasons of my colleague Sexton J.A. and agree that neither the preliminary order nor the final order of the Agency can stand. However, I would dispose of the appeal on somewhat different bases.

[97] In my respectful view, the only error by the Agency warranting the intervention of this Court is its failure to afford a reasonable opportunity to VIA to address issues crucial to the ultimate determination of the CCD's application. First, the Agency's preliminary order should have specifically invited VIA to submit evidence that would enable the Agency to determine if the obstacles to mobility presented by the Renaissance cars were undue when considered in the context of VIA's network. Second, when it issued its "final" order specifying the modifications to the Renaissance cars that

également partie aux procédures de révision, c'est le tribunal lui-même qui fait l'objet de l'examen. Accorder au tribunal administratif la possibilité de défendre sa conduite et en fait de se justifier donnerait lieu à un spectacle auquel nos traditions judiciaires ne nous ont pas habitués.

[94] L'Office ne peut pas être un adversaire dans une affaire en appel dans laquelle les décisions faisant l'objet de l'appel ont été rendues par l'Office lui-même. Celui-ci devrait en prendre note en vue des futures instances.

Conclusions

[95] Pour les motifs exposés, l'appel sera accueilli avec dépens à l'encontre des intimés et la présente affaire sera renvoyée à l'Office pour nouvel examen en conformité avec ces motifs.

LE JUGE DÉCARY, J.C.A.: Je souscris aux présents motifs.

Ce qui suit est la version française des motifs du jugement rendu par

LE JUGE EVANS, J.C.A.:

A. INTRODUCTION

[96] J'ai eu le grand avantage de prendre connaissance des motifs soigneusement étayés de mon collègue le juge Sexton, J.C.A., et je souscris à son opinion selon laquelle ni l'ordonnance préliminaire ni l'ordonnance définitive de l'Office ne peuvent être maintenues. Toutefois, je suis d'avis de trancher l'appel sur des bases quelque peu différentes.

[97] À mon humble avis, la seule erreur commise par l'Office justifiant l'intervention de la Cour est son omission de donner à VIA une possibilité raisonnable de traiter des questions cruciales pour la décision ultime relativement à la demande du CCD. Premièrement, l'ordonnance préliminaire de l'Office aurait dû inviter expressément VIA à présenter des éléments de preuve qui auraient permis à l'Office de décider si les obstacles aux possibilités de déplacement constatés dans les voitures Renaissance étaient abusifs à la lumière du contexte du réseau de VIA. Deuxièmement, en rendant

it required, the Agency should have invited VIA to submit a third party estimate of the costs of the modifications and an assessment of their feasibility from an engineering perspective.

son ordonnance «définitive» qui précisait les modifications qu'il exigeait à l'égard des voitures Renaissance, l'Office aurait dû inviter VIA à présenter une estimation des coûts préparée par un tiers relativement aux modifications ainsi qu'une évaluation de leur faisabilité d'un point de vue technique.

[98] I am not persuaded, however, that, having considered VIA's submissions regarding its network, the Agency committed reversible error when it concluded in the preliminary decision that the obstacles to the mobility of persons in wheelchairs presented by the Renaissance cars were "undue". Nonetheless, a consideration of the network is so fundamental to any determination of whether an obstacle is undue, and the evidence on the issue before the Agency was so limited, and lacking in specificity, that the Agency ought to have invited VIA to demonstrate how it proposed to mitigate the obstacles in the Renaissance cars, thereby obviating the need to make the prescribed modifications to them.

[98] Je ne suis cependant pas convaincu que, ayant examiné les observations de VIA concernant son réseau, l'Office a commis une erreur susceptible de révision lorsqu'il a conclu dans la décision préliminaire que les obstacles aux possibilités de déplacement des personnes en fauteuil roulant constatés dans les voitures Renaissance étaient «abusifs». Néanmoins, un examen du réseau est si fondamental pour trancher la question de savoir si un obstacle est abusif et les éléments de preuve sur la question dont l'Office était saisi étaient si limités, et dépourvus de spécificité, que l'Office aurait dû inviter VIA à démontrer comment elle proposait d'aplanir les obstacles dans les voitures Renaissance, en éliminant ainsi le besoin d'y effectuer les modifications prescrites.

[99] In its preliminary decision, the Agency found that the design of the Renaissance cars constitutes an obstacle to the mobility of many persons whose disability requires them to use a personal wheelchair. I do not understand Sexton J.A. to require the Agency to revisit this issue. The evidence before the Agency was that these cars do not meet mandatory accessibility standards in other countries, such as the United States and the United Kingdom. This may explain why VIA was able to purchase them at what it regarded as a bargain price.

[99] Dans sa décision préliminaire, l'Office a conclu que la conception des voitures Renaissance constituait un obstacle aux possibilités de déplacement de nombreuses personnes dont la déficience les oblige à utiliser un fauteuil roulant personnel. Je ne crois pas que la position du juge Sexton, J.C.A., exige que l'Office revoie cette question. La preuve dont disposait l'Office démontrait que ces voitures n'étaient pas conformes aux normes d'accessibilité obligatoires dans d'autres pays tels que les États-Unis et le Royaume-Uni. Cela peut expliquer pourquoi VIA fut en mesure de les acheter pour un prix qui était considéré comme une aubaine.

[100] The undueness of the obstacles is the issue in dispute. As I have already indicated, I am not persuaded that the Agency's conclusion that the obstacles were undue was patently unreasonable, in view of the Agency's analysis of the issue, and of the general and limited information that VIA submitted to the Agency concerning the capacity of the network to mitigate the effect of the obstacles to travel presented by the Renaissance cars to passengers using personal wheelchairs. I am also doubtful whether VIA has established that the Agency's balancing of the factors listed in section 5 was patently unreasonable on the basis

[100] Le caractère abusif des obstacles constitue la question en litige. Comme je l'ai déjà mentionné, je ne suis pas convaincu que la conclusion de l'Office selon laquelle les obstacles étaient abusifs était manifestement déraisonnable, vu l'analyse faite par l'Office de la question ainsi que les renseignements généraux et limités que VIA a présentés à l'Office en rapport avec la capacité du réseau d'alléger l'effet des obstacles au déplacement constatés dans les voitures Renaissance pour les passagers utilisant un fauteuil roulant personnel. Je doute également que VIA ait établi que la pondération effectuée par l'Office relativement aux facteurs énumérés

of the evidence before it on the cost of the modifications that it ordered.

[101] The following three preliminary observations inform these conclusions. First, review for patent unreasonableness does not authorize the Court to intervene on the ground that it would have weighed the relevant factors and the evidence differently from the Agency. In its preliminary, or show cause decision, the Agency clearly did consider the undue nature of the obstacles in the context of the network as a whole. That the Agency's reasons sometimes make no reference to the network in the context of undue nature is explicable, in part at least, by the fact that the Agency was not satisfied, on the basis of the evidence submitted by VIA, that the network prevented the obstacles inherent in the design of the Renaissance cars from being undue. Not every shortcoming in the Agency's analysis will constitute patent unreasonableness.

[102] Second, I agree with my colleague's observation that, while it is not legally necessary for the Agency to wait until it has a specific complaint from a passenger who is unable to use the service ordinarily provided by a carrier between two points, the kind of generic complaint made in this case may prove difficult for the Agency to investigate, especially, as this case illustrates, when it comes to considering the undue nature of obstacles in the context of the network and the potential cost of modifications. The critical issues will often only come into focus towards the end of a lengthy administrative process.

[103] Third, in my view, the Agency's problems were compounded by an apparent lack of cooperation during the administrative process on the part of VIA. Any corporation in a regulated industry, including VIA Rail, is entitled to defend vigorously the interests of its shareholders and customers, as well as the public purse, from the imposition of regulatory burdens. Nonetheless, in viewing the limited material before the Agency on the network issue and the question of cost, I find it hard to avoid the conclusion that, if the Agency's analysis was based on incomplete information, VIA was, in part at

à l'article 5 était manifestement déraisonnable sur la base de la preuve dont il disposait concernant le coût des modifications qu'il avait ordonnées.

[101] Ces conclusions reposent sur les trois observations préliminaires suivantes. Premièrement, le contrôle selon la norme du caractère manifestement déraisonnable n'autorise pas la Cour à intervenir au motif qu'elle aurait apprécié les facteurs pertinents et la preuve d'une manière différente de celle de l'Office. Dans sa décision préliminaire, ou de justification, l'Office a clairement examiné le caractère abusif des obstacles dans le contexte du réseau dans son ensemble. Que les motifs de l'Office ne fassent parfois aucune référence au réseau dans le contexte du caractère abusif est explicable, du moins en partie, par le fait qu'il n'était pas convaincu, sur la base de la preuve présentée par VIA, que le réseau empêchait que les obstacles inhérents dans la conception des voitures Renaissance soient abusifs. Les lacunes dans l'analyse de l'Office n'auront pas toutes un caractère manifestement déraisonnable.

[102] Deuxièmement, je souscris à l'observation de mon collègue selon laquelle, bien que l'Office ne soit pas légalement tenu d'attendre de recevoir une plainte précise d'un passager qui n'est pas en mesure d'utiliser le service offert habituellement entre deux points par un transporteur, en raison du genre de plainte générique formulée en l'espèce, il peut s'avérer difficile pour l'Office d'enquêter, en particulier, comme la présente affaire le démontre, lorsque vient le temps de se pencher sur le caractère abusif des obstacles dans le contexte du réseau et du coût éventuel des modifications. Les questions cruciales n'apparaîtront souvent que vers la fin d'un long processus administratif.

[103] Troisièmement, à mon avis, les problèmes de l'Office étaient aggravés par un manque apparent de coopération de la part de VIA durant le processus administratif. N'importe quelle société dans une industrie réglementée, y compris VIA Rail, a le droit de défendre vigoureusement les intérêts de ses actionnaires et de sa clientèle, de même que les deniers publics, contre l'imposition de fardeaux réglementaires. Néanmoins, à la vue du peu de documents dont l'Office disposait concernant la question du réseau et celle du coût, il me semble difficile d'éviter de conclure que, si l'analyse de

least, the author of its own misfortune.

B. ISSUES AND ANALYSIS

(i) standard of review

[104] Sexton J.A. rightly points out that this Court may reverse the decisions on the basis of the Agency's determination of "undue" only if they are patently unreasonable, unless the Agency has erred in the interpretation of the statutory provisions relevant to the disposition of the CCD's complaint, or breached the duty of procedural fairness.

[105] The selection of the most deferential standard to review findings of undue is appropriate because of the multiplicity of factors and interests to be weighed, and the technical aspects of some of the issues. Decisions on these matters involve the exercise of discretion, based on the evidence and the statutory criteria, and are within the specialized mandate of the Agency.

(ii) the network issue

(a) duty of fairness

[106] As Sexton J.A. rightly emphasizes, it is settled law in this Court that whether an obstacle to the mobility of passengers with a disability is undue must be assessed in the context of the carrier's network. In other words, the Agency must inquire to what extent the carrier can accommodate passengers wishing to travel between two points on the network who are unable to access the mode of transport offered to passengers at large: *VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25 (F.C.A.).

[107] In view of the fundamental importance of considering the undue nature of the obstacles in the cars in the context of possible network solutions, the unsatisfactory nature of the evidence submitted by VIA, and the generic nature of the inquiry, the Agency was not

l'Office était fondée sur des renseignements incomplets, VIA serait, du moins en partie, l'artisan de son propre malheur.

B. QUESTIONS ET ANALYSE

i) la norme de contrôle

[104] Le juge Sexton, J.C.A., a à juste titre souligné que la Cour peut infirmer les décisions sur la base de la détermination par l'Office du « caractère abusif » que si elles sont manifestement déraisonnables, à moins que l'Office ait commis une erreur en interprétant les dispositions législatives pertinentes au règlement de la plainte du CCD ou qu'il ait manqué à l'obligation d'équité procédurale.

[105] Le choix de la norme accordant le plus de déférence pour contrôler les conclusions quant au caractère abusif est appropriée en raison de la multiplicité des facteurs et des intérêts à apprécier, ainsi que des aspects techniques de certaines des questions. Les décisions sur ces questions impliquent l'exercice d'un pouvoir discrétionnaire, basé sur la preuve ainsi que sur les critères légaux, et elles entrent dans le cadre du mandat spécialisé de l'Office.

ii) la question du réseau

a) l'obligation d'équité

[106] Comme le juge d'appel Sexton le souligne à juste titre, la jurisprudence de la Cour est constante comme quoi la question de savoir si un obstacle aux possibilités de déplacement des passagers ayant une déficience est abusif doit être appréciée dans le contexte du réseau du transporteur. Autrement dit, l'Office doit vérifier dans quelle mesure le transporteur peut satisfaire les passagers désirant voyager entre deux points sur le réseau et qui ne sont pas en mesure d'accéder au moyen de transport offert aux passagers en général: *VIA Rail Canada Inc. c. Office national des transports*, [2001] 2 C.F. 25 (C.A.F.).

[107] Vu l'importance fondamentale d'examiner le caractère abusif des obstacles dans les voitures dans le contexte des solutions possibles relatives au réseau, la nature insatisfaisante de la preuve présentée par VIA et la nature générique de l'enquête, l'Office n'avait pas le

entitled to regard the network issue as concluded when it issued its preliminary order.

[108] Accordingly, as a matter of fairness, and sound public administration, VIA was entitled to an opportunity to show whether, or how, it could address through its network the specific issues that had emerged during the process culminating in the preliminary decision. A brief invitation to VIA to submit any other information it thought relevant was included at the end of the Agency's preliminary order, which dealt in detail with problems in the structure and design of the cars, and VIA's obligations with respect thereto. This was insufficient to make it clear to VIA that it could make further submissions to the Agency on the network issue.

[109] The Agency should have ensured that VIA had an opportunity to provide information on two network issues: first, the network solutions that VIA proposed for passengers in personal wheelchairs who wished to travel on routes where VIA operated consists of Renaissance cars; second, as more Renaissance cars were brought into service, the likely effects on existing travel options of the redeployment and retirement of the older, more accessible cars.

[110] For example, VIA might have responded by advising the Agency whether it would (or could) ensure that, say, once or twice a week, it would put a consist of older cars on routes on which it normally ran Renaissance cars. Alternatively, in view of VIA's estimate of the small number of passengers unable to access the Renaissance cars, it might have proposed paying the cost, over and above the price of a rail ticket, of another mode of transportation.

(b) the Agency's network analysis

[111] The CCD's principal concern on the network issues identified in paragraph 109 was that, given their projected life span of 25-30 years, the 139 Renaissance cars purchased by VIA were likely, over time, to replace older, but more wheelchair-accessible cars on routes in

droit de considérer la question du réseau comme conclue lorsqu'il a rendu son ordonnance préliminaire.

[108] Par conséquent, par souci d'équité et d'une saine administration publique, VIA avait le droit d'avoir la possibilité de démontrer si, ou comment, elle pouvait, par son réseau, s'attaquer aux questions précises qui s'étaient posées au cours du processus qui avait abouti à la décision préliminaire. Une brève invitation faite à VIA de soumettre tout autre renseignement qu'elle estimait pertinent était incluse à la fin de l'ordonnance préliminaire de l'Office, laquelle traitait en détail des problèmes de structure et de conception des voitures, ainsi que des obligations de VIA à cet égard. Cela ne suffisait pas pour faire comprendre clairement à VIA qu'elle pouvait formuler des observations additionnelles à l'Office concernant la question du réseau.

[109] L'Office aurait dû s'assurer que VIA avait la possibilité de fournir des renseignements concernant deux questions relatives au réseau: premièrement, les solutions relatives au réseau proposées par VIA pour les passagers en fauteuil roulant personnel qui désiraient voyager sur des parcours où VIA exploitait des rames de voitures Renaissance; deuxièmement, comme plus de voitures Renaissance étaient mises en service, les effets probables sur les options de voyage existantes du redéploiement et du retrait des voitures plus vieilles et plus accessibles.

[110] Par exemple, VIA aurait pu répondre en avisant l'Office qu'elle s'assurerait (ou pourrait s'assurer) que, disons, une ou deux fois par semaine, elle mettrait une rame de voitures plus vieilles sur des parcours sur lesquels elle exploitait habituellement des voitures Renaissance. Subsidiairement, vu l'estimation faite par VIA du nombre minimum de passagers incapables d'accéder aux voitures Renaissance, elle aurait pu proposer de payer le coût, en sus du prix d'un billet de chemin de fer, d'un autre moyen de transport.

b) analyse du réseau de la part de l'Office

[111] La principale préoccupation du CCD concernant les questions relatives au réseau dégagées au paragraphe 109 était que, vu leur durée de vie prévue de 25 à 30 ans, les 139 voitures Renaissance achetées par VIA étaient susceptibles, au fil du temps, de remplacer les voitures

the corridor between Québec and Windsor. VIA had announced that, in 2003, it would replace its existing cars on the routes between Montréal and Halifax, and between Montréal and Gaspé, and use Renaissance cars to provide a day and overnight service. In addition, Renaissance cars are currently being used on the Toronto-Ottawa overnight service, as well as on the Montréal-Ottawa and Montréal-Québec routes.

[112] VIA had provided no information explaining how it would deal with these issues. Since the evidence before the Agency was that Renaissance cars could not be combined with other cars in the same consist, the obstacles presented by the Renaissance cars could not be mitigated by including in a consist one of the older, more accessible cars.

[113] Instead, the information provided to the Agency by VIA simply listed the range of options that it made generally available to accommodate passengers with disabilities. Thus, in its final written submission, dated February 18, 2002, VIA stated (Appeal Book, Vol. 6, page 2193):

The network design includes the reservation systems, the alternative transportation policy, ground services, special handling services, train accommodation, employee training and special service requests. The train accommodation includes all of VIA Rail's rolling stock. . . . The evidence in this regard indicates that VIA meets its obligations to passengers with in [sic] Canada, even without the Renaissance cars. With these cars there are more options for passengers with disabilities. [Emphasis added.]

It said also that Renaissance cars would form only a part of the "fleet of the future" and would operate with existing cars and with cars to be built in the future.

[114] The Agency's analysis of the network issue occupies four pages (Appeal Book, Vol. 1, pages 53-57),

plus vieilles, mais plus accessibles pour les fauteuils roulants, sur des parcours dans le corridor entre Québec et Windsor. VIA avait annoncé que, en 2003, elle remplacerait ses voitures existantes sur les parcours entre Montréal et Halifax ainsi qu'entre Montréal et Gaspé et qu'elle utiliserait des voitures Renaissance pour offrir un service de jour et de nuit. En plus, des voitures Renaissance sont actuellement utilisées pour le service de nuit entre Toronto et Ottawa, de même que sur les parcours entre Montréal et Ottawa ainsi qu'entre Montréal et Québec.

[112] VIA n'avait fourni aucun renseignement expliquant comment elle s'attaquerait à ces questions. Puisque la preuve dont disposait l'Office démontrait que les voitures Renaissance ne pouvaient pas être combinées avec d'autres voitures dans la même rame de train, les obstacles constatés dans les voitures Renaissance ne pouvaient pas être aplanis en incluant dans une rame de train une des voitures plus vieilles et plus accessibles.

[113] Au lieu de cela, les renseignements fournis à l'Office par VIA énuméraient tout simplement la gamme de solutions qu'elle a rendues généralement disponibles pour satisfaire les passagers ayant une déficience. Ainsi, dans sa dernière observation écrite, datée du 18 février 2002, VIA a déclaré (dossier d'appel, vol. 6, à la page 2193):

[TRADUCTION] La conception du réseau comprend les systèmes de réservation, la politique sur les transports spéciaux, des services au sol, des services de traitement spécial, de l'hébergement à bord des trains, de la formation des employés et des demandes de services spéciaux. L'hébergement à bord des trains comprend l'ensemble du matériel roulant de VIA Rail. . . . La preuve à cet égard démontre que VIA remplit ses obligations envers les passagers au Canada, même sans les voitures Renaissance. Avec ces voitures, il existe plus de solutions pour les passagers ayant une déficience. [Non souligné dans l'original.]

Elle a également affirmé que les voitures Renaissance ne formeraient qu'une partie du «parc du futur» et qu'elle exploiterait son réseau avec les voitures existantes et avec celles qui seront construites à l'avenir.

[114] L'analyse faite par l'Office de la question du réseau s'étend sur quatre pages (dossier d'appel, vol. 1,

or less than three per cent, of the reasons given for the preliminary decision. However, whether the reasons on the issue are sufficient to pass judicial scrutiny cannot be determined merely by their length, without also considering the nature and quantity of the information provided to the Agency.

aux pages 53 à 57), ou moins de trois pour cent, des motifs prononcés pour la décision préliminaire. Toutefois, la question de savoir si les motifs à ce sujet sont suffisants pour résister à l'examen judiciaire ne peut être tranchée simplement par leur longueur, sans examiner également la nature et la quantité des renseignements fournis à l'Office.

[115] In its analysis, the Agency set out the information contained in the sentence underlined in the above quote from VIA's written submissions, and noted VIA's assurance that all these arrangements would remain in place after the introduction of the Renaissance cars. The Agency also referred to the existence of VIA's communication system that enabled passengers to call in advance to discover their travel options, and to its contention that passengers with disabilities may not be able to travel on every train.

[115] Dans son analyse, l'Office a énoncé les renseignements contenus dans la phrase soulignée dans la précédente citation extraite des observations écrites de VIA et il a noté l'assurance donnée par VIA que l'ensemble de ces arrangements demeurerait en place après l'introduction des voitures Renaissance. L'Office a également fait référence à l'existence du système de communication de VIA qui permettait aux passagers d'appeler à l'avance pour connaître les solutions de voyage qui s'offraient à eux, ainsi qu'à son argument selon lequel les passagers ayant une déficience pouvaient ne pas être en mesure de voyager à bord de tous les trains.

[116] The Agency concluded that the evidence did not establish to its satisfaction that the existing fleet or the network would address the obstacles that it had found to exist in the Renaissance cars. First, it was of the view that, over time, cars in the existing fleet would be deployed from the Québec-Windsor corridor to routes in western Canada, or retired. This would reduce the options available for those unable to use the Renaissance cars. Moreover, the Agency also found (Appeal Book, Vol. 1, page 56) that, in view of the number purchased, and their life expectancy:

[116] L'Office a conclu que la preuve n'établissait pas à sa satisfaction que le parc existant ou le réseau contourneraient les obstacles qu'il a constatés dans les voitures Renaissance. Premièrement, il était d'avis que, au fil du temps, les voitures du parc existant seraient déployées du corridor Québec-Windsor vers des parcours de l'Ouest canadien, ou retirés. Cela réduirait les solutions disponibles pour ceux qui ne peuvent pas utiliser les voitures Renaissance. De plus, l'Office a également conclu (dossier d'appel, vol. 1, à la page 56) que, vu le nombre de voitures achetées et leur espérance de vie:

Renaissance cars will be the only cars in operation on some of VIA's routes in the near future and they will be a significant part of VIA's network for a considerable period of time.

[TRADUCTION] [...] les voitures Renaissance seront les seules voitures exploitées sur certaines lignes de VIA dans un avenir rapproché et qu'elles constitueront une partie importante du réseau de VIA pendant très longtemps.

In so finding, the Agency did not accept VIA's assertion that the introduction of the Renaissance cars would have no effect on existing travel options because they were intended to augment the size of the fleet.

En concluant ainsi, l'Office n'a pas accepté la prétention de VIA selon laquelle l'introduction des voitures Renaissance n'aurait aucun effet sur les solutions de voyage existantes parce qu'elle avait l'intention d'augmenter la taille du parc.

[117] Second, the Agency noted that neither the cars in the existing fleet, nor the Renaissance cars, have

[117] Deuxièmement, l'Office a fait remarquer que ni les voitures dans le parc existant ni les voitures

sleeper units accessible to personal wheelchair users, despite a previous commitment by VIA to improve the accessibility of its sleeping cars in order to comply with Rail Code standards.

Renaissance n'avaient des chambres accessibles pour les utilisateurs de fauteuil roulant personnel, malgré le fait que VIA s'était précédemment engagée à améliorer l'accessibilité de ses voitures-lits dans le but de se conformer aux normes du code ferroviaire.

[118] Third, as for the number of passengers with disabilities for whom some kind of accommodation is needed, the Agency concluded that VIA's figure was an underestimate. This was because VIA had not taken account of either the numbers unable to travel as a result of the inaccessible features of its cars, or the fact that the demand for accessible travel is likely to increase as the population ages and travel becomes more accessible.

[118] Troisièmement, quant au nombre de passagers ayant une déficience pour lesquels un certain genre d'installation est requis, l'Office a conclu que le chiffre de VIA constituait une sous-estimation. La raison en est que VIA n'avait pas tenu compte soit du nombre de personnes incapables de voyager à cause des caractéristiques inaccessibles de ses voitures, ou soit du fait que la demande pour les voyages accessibles est susceptible d'augmenter à mesure que la population vieillit et que les voyages deviennent plus accessibles.

[119] Patent unreasonableness is a standard of review that does not permit the Court to re-evaluate the material before the Agency, or even to subject the Agency's reasons to the somewhat probing examination that must be undertaken when reasonableness *simpliciter* is the applicable standard.

[119] Le caractère manifestement déraisonnable constitue une norme de contrôle qui ne permet pas à la Cour d'apprécier à nouveau les documents dont disposait l'Office, ou même d'assujettir les motifs de l'Office à l'examen assez poussé qui peut être entrepris lorsque la norme applicable est celle de la décision raisonnable *simpliciter*.

[120] In view of the evidence before it, and the quality of the analysis, the Agency's decision was not patently unreasonable. In my respectful opinion, it was rationally open to the Agency to conclude that, in the absence of more precise information from VIA as to how it would accommodate passengers through its existing fleet or its network on the routes where Renaissance cars would be deployed, the obstacles were undue.

[120] Vu la preuve dont il disposait ainsi que la qualité de l'analyse, la décision de l'Office n'était pas manifestement déraisonnable. À mon humble avis, l'Office pouvait raisonnablement conclure que, en l'absence de renseignements plus précis de la part de VIA quant à la façon dont elle satisferait les passagers par l'entremise de son parc existant ou de son réseau sur les parcours où les voitures Renaissance seraient déployées, les obstacles étaient abusifs.

[121] Further, it was not patently unreasonable for the Agency to reject VIA's assertion that present network options would continue to be available, despite the redeployment of cars to the west, and the retirement of aging cars, as Renaissance cars were brought into service. In view of counsel's submissions on the state of VIA's finances, the claim that VIA would be purchasing additional cars at some unspecified date in the future is too speculative a basis on which to reverse the Agency's finding regarding the continuation of existing options.

[121] En outre, il n'était pas manifestement déraisonnable pour l'Office de rejeter la prétention de VIA selon laquelle les solutions actuelles offertes par le réseau continuaient d'être disponibles, malgré le déploiement de voitures vers l'ouest et le retrait de voitures vieillissantes, au fur et à mesure que les voitures Renaissance étaient mises en service. Vu les observations des avocats au sujet de la situation financière de VIA, la prétention selon laquelle celle-ci achèterait des voitures additionnelles à une date indéterminée dans l'avenir constitue une hypothèse trop théorique pour justifier d'infirmier la conclusion de

(c) a duty to take official notice?

[122] VIA argues that the Agency should have supplemented the evidence on the record in this matter by resorting to its institutional knowledge of the range of options available through VIA's network. The argument is that, as an expert administrative tribunal, the Agency is required to take official notice of information that it had acquired about VIA's network in the course of conducting other proceedings. Presumably, this duty is subject, as a matter of procedural fairness, to the Agency's disclosing to the parties the information of which it has taken notice, and giving them an opportunity to comment on it.

[123] I cannot accept this argument for two reasons. First, it could be very onerous to impose a general obligation on specialist administrative agencies to resort to their institutional expertise or knowledge in order to remedy deficiencies in the information which, in a particular proceeding, a party provided about its business. It is one thing for the law to permit an agency, subject to considerations of procedural fairness, to supplement an administrative record from its specialist knowledge. It is quite another to oblige it to search its institutional memory for information that a party could have provided readily. In the absence of legal authority on the point, I would not impose such a potentially far-reaching duty on the Agency, which should normally be able to decide a matter on the basis of the material put before it by the parties in the very proceeding that is the subject of judicial review.

[124] Second, the information previously provided to the Agency about the policies and practices that VIA had developed to accommodate passengers with disabilities who require the use of a wheelchair does not seem to me to be materially different from that submitted to the Agency by VIA in this case. It is general in nature and

l'Office concernant la continuation des solutions existantes.

c) une obligation de prendre connaissance d'office?

[122] VIA fait valoir que l'Office aurait dû compléter la preuve au dossier dans la présente affaire en ayant recours à sa connaissance institutionnelle de la gamme de solutions disponibles par l'entremise du réseau de VIA. L'argument est le suivant: en tant que tribunal administratif expert, l'Office est tenu de prendre connaissance d'office des renseignements qu'il avait obtenus au sujet du réseau de VIA dans le cadre d'autres instances. Il est à croire que cette obligation est subordonnée, sur le plan de l'équité procédurale, à la divulgation aux parties de la part de l'Office des renseignements dont il a pris connaissance d'office et à l'occasion qui leur est donnée de formuler des commentaires à ce sujet.

[123] Je ne peux pas accepter cet argument pour deux raisons. Premièrement, il pourrait s'avérer très onéreux d'imposer une obligation générale aux organismes administratifs spécialisés d'avoir recours à leur expertise ou connaissance institutionnelle dans le but de remédier aux faiblesses des renseignements que, dans une instance en particulier, une partie a fournis au sujet de son entreprise. C'est une chose en droit que de permettre qu'un organisme, assujéti aux considérations de l'équité procédurale, complète un dossier administratif avec sa connaissance spécialisée. C'est tout à fait une autre chose que de l'obliger à rechercher dans sa mémoire institutionnelle des renseignements qu'une partie aurait pu facilement fournir. En l'absence d'une assise juridique à cet égard, je n'imposerais pas une obligation pouvant avoir une très grande portée à l'Office, lequel devrait normalement être en mesure de trancher une question sur la base des documents que les parties lui ont présentés dans l'instance même qui fait l'objet du contrôle judiciaire.

[124] Deuxièmement, les renseignements fournis précédemment à l'Office au sujet des politiques et des pratiques que VIA avait élaborées pour satisfaire les passagers ayant une déficience et qui doivent utiliser un fauteuil roulant ne me semblent pas considérablement différents de ceux présentés à l'Office par VIA on

does not address the specific accessibility issues raised for users of personal wheelchairs by the introduction of the Renaissance cars on routes in the corridor between Québec and Windsor, and by the redeployment or phasing out of the more accessible cars in the existing fleet.

l'espace. Ils sont de nature générale et ne règlent pas les questions précises d'accessibilité pour les utilisateurs de fauteuil roulant personnel soulevées par l'introduction des voitures Renaissance sur des parcours dans le corridor entre Québec et Windsor, ainsi que par le redéploiement ou l'élimination progressive des voitures plus accessibles dans le parc existant.

(iii) cost

iii) le coût

[125] In my opinion, the Agency acted in breach of the duty of procedural fairness when it failed to afford VIA an opportunity to respond to its "final" order specifying the modifications that it required VIA to make to the Renaissance cars. The opportunity given to VIA to respond to the preliminary decision was not adequate in view of VIA's submission that the information required from it would be too costly and time-consuming to produce: see, for example, the report to VIA from Bombardier (Appeal Book, Vol. 3, page 1192).

[125] À mon avis, l'Office a manqué à l'obligation d'équité procédurale lorsqu'il a omis d'accorder à VIA la possibilité de répondre à son ordonnance «définitive» précisant les modifications qu'elle devait apporter aux voitures Renaissance. La possibilité donnée à VIA pour répondre à la décision préliminaire n'était pas adéquate, compte tenu de l'observation de VIA selon laquelle la production des renseignements exigés d'elle serait trop coûteuse en temps et en argent; voir, par exemple, le rapport préparé par Bombardier pour VIA (dossier d'appel, vol. 3, à la page 1192).

[126] The onerous nature of the order in the Agency's preliminary decision is evident from paragraphs (a) through (i) of its order (Appeal Book, Vol. 1, page 145) which, among other things, require VIA to list and to cost the ways of removing the identified obstacles in the design and structure of the Renaissance cars. The Agency required VIA to retain an independent professional engineer with relevant expertise and to prepare a report on these matters. In addition, if it was not possible, in the view of the engineer, to make any of the prescribed modifications to the cars, the report to the Agency should explain the reasons why.

[126] La nature onéreuse de l'ordonnance dans la décision préliminaire de l'Office ressort de façon évidente des paragraphes a) à i) de son ordonnance (dossier d'appel, vol. 1, à la page 145) lesquels, entre autres choses, exigent de VIA qu'elle énumère les façons de supprimer les obstacles dégagés dans la conception et ainsi que dans la structure des voitures Renaissance et qu'elle en évalue le coût. L'Office a exigé de VIA qu'elle retienne les services d'un ingénieur professionnel indépendant possédant une expertise pertinente et qu'elle prépare un rapport concernant ces questions. En plus, au cas où il serait impossible, selon l'ingénieur, d'effectuer l'une ou l'autre des modifications prescrites sur les voitures, le rapport à l'Office devait expliquer les raisons de cet état de fait.

[127] There was no evidence before the Agency contradicting VIA's submission that compliance with the Agency's preliminary decision would be unduly onerous. The CCD's observation that VIA did not request another extension of time to enable it to submit the information required by the Agency does not respond to VIA's complaint that compliance would be too expensive.

[127] L'Office ne disposait d'aucune preuve contredisant l'observation de VIA selon laquelle il serait trop onéreux de se conformer à sa décision préliminaire. L'observation du CCD selon laquelle VIA n'avait pas demandé une autre prorogation de délai pour lui permettre de présenter les renseignements exigés par l'Office ne règle pas la plainte de VIA selon laquelle il serait trop coûteux de se conformer.

[128] In other words, the Agency's invitation to the parties to respond to the preliminary decision did not provide VIA with a reasonable opportunity to make submissions on costs and feasibility. In these circumstances, the Agency ought to have permitted VIA to submit a report on costs and feasibility after the Agency had identified the modifications to the Renaissance cars that it required in order to remove the obstacles that they had been found to contain.

C. CONCLUSIONS

[129] For these reasons, I would allow the appeal, set aside the preliminary and final orders of the Agency, and remit the matter to the Agency. I would direct the Agency to invite submissions from the parties on whether the obstacles that have been found to exist in the Renaissance cars are undue, having regard to: (i) the alternatives available through VIA's network for travellers unable to access Renaissance cars; (ii) the likely costs, and technical feasibility, of the corrective actions that it ordered VIA to take; and (iii) the other factors that section 5 requires the Agency to balance in making its determination of undue.

[128] Autrement dit, l'invitation que l'Office a faite aux parties de répondre à la décision préliminaire n'a pas donné à VIA une possibilité raisonnable de formuler des observations sur les coûts et la faisabilité. Dans ces circonstances, l'Office aurait dû permettre à VIA de présenter un rapport sur les coûts et la faisabilité après avoir précisé les modifications aux voitures Renaissance qu'il exigeait dans le but de supprimer les obstacles qu'il y avait constatés.

C. CONCLUSIONS

[129] Pour ces motifs, j'accueillerais l'appel, j'annulerais les ordonnances préliminaire et définitive de l'Office et je lui renverrais l'affaire. J'ordonnerais à l'Office d'inviter les parties à formuler des observations sur la question de savoir si les obstacles qui ont été constatés dans les voitures Renaissance sont abusifs, au regard: i) des solutions disponibles par l'entremise du réseau de VIA pour les voyageurs incapables d'accéder aux voitures Renaissance; ii) des coûts probables et de la faisabilité technique des mesures correctrices qu'il a ordonné à VIA de prendre; iii) des autres facteurs que l'Office doit pondérer en conformité avec l'article 5 pour tirer ses conclusions quant au caractère abusif.

TAB 8

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General), 1989 CarswellNat 594
 1989 CarswellNat 594, 1989 CarswellNat 663. [1989] F.C.J. No. 446. [1990] 1 F.C. 74...

Most Negative Treatment: Reversed in part

Most Recent Reversed in part: Rothmans, Benson & Hedges Inc. v. Canada (Attorney General) [1989 CarswellNat 600, 1989 CarswellNat 600F, 31 F.T.R. 239 (note), 17 A.C.W.S. (3d) 28, 45 C.R.R. 382, 103 N.R. 391, [1989] F.C.J. No. 707. [1990] 1 F.C. 90] (Fed. C.A., Aug 17, 1989)

1989 CarswellNat 594
 Federal Court of Canada — Trial Division

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)

1989 CarswellNat 594, 1989 CarswellNat 663, [1989] F.C.J. No. 446,
 [1990] 1 F.C. 74, 15 A.C.W.S. (3d) 323, 29 F.T.R. 267, 41 Admin. L.R. 102

ROTHMANS, BENSON & HEDGES INC. v. ATTORNEY GENERAL OF CANADA

Rouleau J.

Heard: April 7, 1989
 Judgment: May 19, 1989
 Docket: No. T-1416-88

Counsel: *E. Belohaba*, for plaintiff.
P. Fyraire, for defendant.
C.R. Thomson, for proposed intervenor.
R. Staley, for Institute of Canadian Advertising.
D. McDuff, agent for the Canadian Cancer Society.

Subject: Public; Constitutional; Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure

III Parties

III.8 Intervenors

III.8.a General principles

Constitutional law

XIV Procedure in constitutional challenges

XIV.2 Standing

Table of Authorities

Cases considered:

R. v. Seaboyer (1986), 50 C.R. (3d) 395 (Ont. C.A.) — *applied*

Schofield and Minister of Consumer & Commercial Relations, Re (1980), 28 O.R. (2d) 764, 19 C.P.C. 245, 112 D.L.R. (3d) 132 (C.A.) — *applied*

Service de limousine Murray Hill Ltée v. Québec (P.G.), 33 Admin. L.R. 99, [1988] R.J.Q. 1615, 15 Q.A.C. 146 — *applied*

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11 —

s. 7

s. 11(d)

Criminal Code, R.S.C. 1970, c. C-34 —

s. 246.6 [now R.S.C. 1985, c. C-46, s. 276]

s. 246.7 [now R.S.C. 1985, c. C-46, s. 277]

Tobacco Products Control Act, S.C. 1988, c. 20 [now R.S.C. 1985 (4th Supp.), c. 14].

Rules considered:

Federal Court Rules -

r. 5

Ontario, Rules of Civil Procedure —

r. 13.01

r. 13.02

APPLICATION for leave to be added as an intervenor in an action for a declaration.

Rouleau J.:

1 This is an application brought by the Canadian Cancer Society ("Society") seeking an order allowing it to intervene and participate in the action. The issue relates to an attack by the plaintiff on the constitutional validity of the *Tobacco Products Control Act*, S.C. 1988, c. 20, which prohibits the advertising of tobacco products in Canada.

2 The plaintiff, Rothmans, Benson & Hedges Inc., initiated this action by way of statement of claim filed on July 20, 1988 and amended on October 24, 1988.

3 The Canadian Cancer Society is described as the largest charitable organization dedicated to public health in Canada. As recently as 1987, it was made up of approximately 350,000 active volunteer members who were responsible for the raising of some \$50,000,000 annually, which money was primarily directed to health and related fields. The Society's primary object is cancer research; it is also involved in the distribution of scientific papers as well as pamphlets for the purpose of enlightening the general public of the dangers of the disease. For more than 50 years this organization has been the driving force investigating causes as well as cures. In the pursuit of its objectives, and, with the endorsement of the medical scientific community, it has been instrumental in establishing a correlation between the use of tobacco products and the incidence of cancer; its persistence has been the vehicle that generated public awareness to the danger of tobacco products. As a result of the Society's leadership and inspiration, the research results and the assembling of scientific data gathered from throughout the world, it has provided the authorities and its public health officials with the necessary or required evidence to press the government into adopting the legislation which is complained of in this action.

4 The applicant maintains that the constitutional facts underlying the plaintiff's amended statement of claim that will be adduced in evidence, analyzed and discussed before the Court are essentially related to health issues. It has special knowledge and expertise relating cancer to the consumption of tobacco products. It further contends that it has sources of information in this matter to which the other parties in the litigation may not have access.

5 The Canadian Cancer Society urges upon this Court that it has a "special interest" with respect to the issues raised in the litigation. That knowledge and expertise and the overall capacity of the applicant to collect, comment and analyze all the data related to cancer, tobacco products and the advertising of those products, would be helpful to this Court in the resolution of the litigation now before it. It is their opinion that it meets all the criteria set out in the jurisprudence which apply in cases where parties seek to be allowed to intervene.

6 The plaintiff, Rothmans, Benson & Hedges Inc., opposes the application for standing. It argues that prior to the promulgation of the *Tobacco Products Control Act* the Legislative Committee of the House of Commons and the Standing Senate Committee on Social Affairs and Technology held extensive hearings into all aspects of the proposed legislation. In the course of those hearings, the committees received written representations and heard evidence from numerous groups both in favour of and opposed to the legislation, including the applicant; that studies commissioned by the Cancer Society relevant to the advertising of tobacco products are all in the public domain; that no new studies relating directly to tobacco consumption and advertising have been initiated nor is it in possession of any document, report or study relating to the alleged relationship between the consumption of tobacco products and advertising that is not either in the public domain or accessible to anyone who might require it.

7 Finally, the plaintiff argues that the applicant's motion should be denied on the grounds that it is seeking to uphold the constitutionality of the *Tobacco Products Control Act* by means of the same evidence and arguments as those which will be put forward by the defendant, the Attorney General of Canada. Their intervention would unnecessarily lengthen the proceeding and it is open to the applicant to cooperate fully with the defendant by providing viva voce as well as documentary evidence in order to assist in providing the courts with full disclosure of all facts which may be necessary to decide the ultimate issue.

8 There is no Federal Court Rule explicitly permitting intervention in proceedings in the Trial Division. In the absence of a rule or provision providing for a particular matter, r. 5 allows the Court to determine its practice and procedure by analogy to other provisions of the Federal Court Rules or to the practice and procedure for similar proceedings on the Courts of "that province to which the subject matter of the proceedings most particularly relates."

9 Rule 13.01 of the *Ontario Rules of Civil Procedure* permits a person not a party to the proceedings who claims "an interest in the subject matter of the proceeding" to move for leave to intervene as an added party. The rule requires of the Court to consider "whether intervention will unduly delay or prejudice the determination of the rights of the parties to the proceedings." Rule 13.02 permits the Court to grant leave to a person to intervene as a friend of the Court without becoming a party to the proceeding. Such intervention is only permitted "for the purpose of rendering assistance to the Court by way of argument."

10 In addition to the gap rule, one must be cognizant of the principles of law which have been established by the jurisprudence in applications of this nature. In constitutional matters, and more particularly, in *Charter* issues, the "interest" required of a third party in order to be granted intervenor status has been widely interpreted in order to permit interventions on public interest issues. Generally speaking, the interest required to intervene in public interest litigation has been recognized by the Courts in an organization which is genuinely interested in the issues raised by the action and which possesses special knowledge and expertise related to the issues raised.

11 There can be no doubt as to the evolution of the jurisprudence in "public interest litigation" in this country since the advent of the *Charter*. The Supreme Court appears to be requiring somewhat less by way of connection to consider "public interest" intervention once they have been persuaded as to the seriousness of the question.

12 In order for the Court to grant standing and to justify the full participation of an intervenor in a "public interest" debate, certain criteria must be met and gathering from the more recent decisions the following is contemplated:

- (1) Is the proposed intervenor directly affected by the outcome?
- (2) Does there exist a justiciable issue and a veritable public interest?
- (3) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?
- (4) Is the position of the proposed intervenor adequately defended by one of the parties to the case?
- (5) Are the interests of justice better served by the intervention of the proposed third party?
- (6) Can the Court hear and decide the cause on its merits without the proposed intervenor?

13 The plaintiff has argued that adding a party would lengthen the proceedings and burden the courts unnecessarily, perhaps in some instances leading to chaos. In *Service de limousine Murray Hill Ltée c. Québec (P.G.)*, 33 Admin. L.R. 99, [1988] R.J.Q. 1615, 15 Q.A.C. 146, the Court noted that it was quite familiar with lengthy and complex litigation including a multiplicity of parties. This did not lead to injustice and would certainly provide the presiding Judge with additional points of view which may assist in enlightening it to determine the ultimate issue. Such an objection is really of very little merit.

14 I do not choose at this time to discuss in detail each of the criteria that I have outlined since they have all been thoroughly analyzed either individually or collectively in recent jurisprudence.

15 The courts have been satisfied that though a certain "public interest" may be adequately defended by one of the parties because of special knowledge and expertise, they nevertheless allowed the intervention.

16 As an example, in *R. v. Seaboyer* (1986), 50 C.R. (3d) 395 (Ont. C.A.), the Legal Education and Action Fund ("LEAF") applied to intervene in the appeal from a decision quashing the committal for trial on a charge of sexual assault on the grounds that subss. 246.6 and 246.7 of the *Criminal Code*, R.S.C. 1970, c. C-34 were inoperative because they infringed s. 7 and para. 11(d) of the *Charter*. LEAF is a federally incorporated body with an objective to secure women's rights to equal protection and equal benefit of the law as guaranteed in the *Charter* through litigation, education and research. The respondents opposed the application on the grounds that the interests represented by LEAF were the same as those represented by the Attorney General for Ontario, namely, the rights of victims of sexual assault, and that the intervention of LEAF would place a further and unnecessary burden on the respondents. The Court concluded that it should exercise its discretion and grant LEAF the right of intervention. In giving the Court's reasons for that decision, Howland C.J.O. stated as follows at 397-398:

Counsel for LEAF contended that women were most frequently the victims of sexual assault and that LEAF had a special knowledge and perspective of their rights and of the adverse effect women would suffer if the sections were held to be unconstitutional.

The right to intervene in criminal proceedings where the liberty of the subject is involved is one which should be granted sparingly. Here no new issue will be raised if intervention is permitted. It is a question of granting the applicant a right to intervene to illuminate a pending issue before the court. While counsel for LEAF may be supporting the same position as counsel for the Attorney General for Ontario, counsel for LEAF, by reason of its special knowledge and expertise, may be able to place the issue in a slightly different perspective which will be of assistance to the court.

17 Other courts have been even more emphatic in pointing out that when it comes to first-time *Charter* arguments, the Court should be willing to allow intervenors in order to avail itself of their assistance. This is especially true where those proposed intervenors are in a position to put certain aspects of an action into a new perspective which might not otherwise be considered by the Court or which might not receive the attention they deserve. In *Re Schofield and Minister of Consumer & Commercial Relations* (1980), 28 O.R. (2d) 764, 19 C.P.C. 245, 112 D.L.R. (3d) 132 (C.A.), Thorson J.A. made the following comments in this regard at 141 [D.L.R.]:

It seems to me that there are circumstances in which an applicant can properly be granted leave to intervene in an appeal between other parties, without his necessarily having any interest in that appeal which may be prejudicially affected in any 'direct sense', within the meaning of that expression as used by Le Dain, J., in *Rothmans of Pall Mall et al. v. Minister of National Revenue et al.* (1976) 67 D.L.R. (3d) 505, [1976] C.T.C. 339, and repeated with approval by Heald, J., in the passage in the *Solosky* case [infra] quoted by my colleague. As an example of one such situation, one can envisage an applicant with no interest in the outcome of an appeal in any such direct sense but with an interest, because of the particular concerns which the applicant has or represents, such that the applicant is in an especially advantageous and perhaps even unique position to illuminate some aspect or facet of the appeal which ought to be considered by the Court in reaching its decision but which, but for the applicant's intervention, might not receive any attention or prominence, given the quite different interests of the immediate parties to the appeal.

The fact that such situations may not arise with any great frequency or that, when they do, the Court's discretion may have to be exercised on terms and conditions such as to confine the intervenor to certain defined issues so as to avoid getting into the merits of the *lis inter partes*, does not persuade me that the door should be closed on them by a test which insists on the demonstration of an interest which is affected in the 'direct sense' earlier discussed, to the exclusion of any interest which is not affected in that sense.

18 Certainly, not every application for intervenor status by a private or public interest group which can bring different perspective to the issue before the Court should be allowed. However, other courts, and notably the Supreme Court of Canada, have permitted interventions by persons or groups having no direct interest in the outcome, but who possess an interest in the public law issues. In some cases, the ability of a proposed intervenor to assist the Court in a unique way in making its decision will overcome the absence of a direct interest in the outcome. What the Court must consider in applications such as the one now before it is the nature of the issue involved and the likelihood of the applicant being able to make a useful contribution to the resolution of the action, with no injustice being imposed on the immediate parties.

19 Applying these principles to the case now before me, I am of the opinion that the applicant should be granted intervenor status. Certainly, the Canadian Cancer Society has a genuine interest in the issues before the Court. Furthermore, the applicant has the capacity to assist the Court in its decision making in that it possesses special knowledge and expertise relating to the public interest questions raised, and in my view it is in an excellent position to put some of these issues in a different perspective from that taken by the Attorney General. The applicant has, after all, invested significant time and money researching the issue of advertising and its effects on tobacco consumption and I am of the opinion that it will be a most useful intervenor from the Court's point of view.

20 The jurisprudence has clearly established that in public interest litigation, the Attorney General does not have a monopoly to represent all aspects of public interest. In this particular case, I think it is important that the applicant be allowed to intervene in order to offset any perception held by the public that the interests of justice are not being served because of possible political influence being asserted on the government by those involved in the tobacco industry.

21 Finally, allowing the application by the Canadian Cancer Society will not unduly lengthen or delay the action nor will it impose an injustice or excessive burden on the parties involved. The participation by the applicant may well expand the evidence before the Court which could be of invaluable assistance.

22 Referring back to my criteria, I am convinced that the Canadian Cancer Society possesses special knowledge and expertise and has general interest in the issues before the Court. It represents a certain aspect of various interests in society which will be of assistance. It is a question of extreme importance to certain segments of the population which can be best represented in this debate.

23 For the foregoing reasons, the application by the Canadian Cancer Society for leave to be joined in the action by way of intervention as a defendant is granted. Costs to the applicant.

Application granted

1989 CarswellNat 600
Federal Court of Canada — Appeal Division

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)

1989 CarswellNat 600F, 1989 CarswellNat 600, [1989] F.C.J. No. 707, [1990] 1
F.C. 90, 103 N.R. 391, 17 A.C.W.S. (3d) 28, 31 F.T.R. 239 (note), 45 C.R.R. 382

**Rothmans, Benson & Hedges Inc. (Plaintiff) (Appellant) v. Attorney General of
Canada (Defendant) (Respondent) and Canadian Cancer Society (Intervenor)**

Rothmans, Benson & Hedges Inc. (Plaintiff) v. Attorney General of Canada (Defendant)

Hugessen, MacGuigan and Desjardins J.J.A.

Judgment: August 17, 1989
Docket: A-277-89; A-301-89

Counsel: *Edward P. Belohuba* and *Barbara L. Rutherford* for appellant.
Gerry N. Sparrow for respondent.
Karl Dehwaide and *Andre T. Mees* for intervenor.
Claude R. Thomson, Q.C. for Institute of Canadian Advertising.

Subject: Constitutional: Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure

III Parties

III.8 Intervenor

III.8.a General principles

Constitutional law

XIV Procedure in constitutional challenges

XIV.2 Standing

Table of Authorities

CASES JUDICIALLY CONSIDERED

REFERRED TO:

Re Canadian Labour Congress and Bhindi et al. (1985), 17 D.L.R. (4th) 193 (B.C.C.A.).

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.), ss. 1, 2(b).

Tobacco Products Control Act, S.C. 1988, c. 20.

The following are the reasons for judgment of the Court delivered orally in English by Hugessen J.A.:

1 These two appeals, which were heard together, are from orders made by Rouleau J. granting, in the case of the Canadian Cancer Society (CCS) [1990] 1 F.C. 74], and denying, in the case of the Institute of Canadian Advertising (ICA) [1990] 1 F.C. 84], leave to intervene in an action brought by Rothmans, Benson & Hedges Inc. (Rothmans) against the Attorney General of Canada attacking the constitutionality of the *Tobacco Products Control Act* (TPCA) (S.C. 1988, c. 20).

2 It is common ground that the plaintiff's attack is primarily Charter [*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.)] based, invoking the guarantee of freedom

of expression in paragraph 2(b). There can also be no doubt, given the prohibitions contained in the TPCA, that such attack is best met by a section 1 defence and that it is on the success or failure of the latter that the outcome of the action will depend.

3 We are all of the view that Rouleau J. correctly enunciated the criteria which should be applicable in determining whether or not to allow the requested interventions. This is an area in which the law is rapidly developing and in a case such as this, where the principal and perhaps the only serious issue is a section 1 defence to an attack on a public statute, there are no good reasons to unduly restrict interventions at the trial level in the way that courts have traditionally and properly done for other sorts of litigation. A section 1 question normally requires evidence for the Court to make a proper determination and such evidence should be adduced at trial (see *Re Canadian Labour Congress and Bhindi et al* (1985), 17 D.L.R. (4th) 193 (B.C.C.A.)). Accordingly we think that, in any event for the purpose of this case, Rouleau J. was right when he said [at page 79] "the interest required to intervene in public interest litigation has been recognized by the courts in an organization which is genuinely interested in the issues raised by the action and which possesses special knowledge and expertise related to the issues raised".

4 As far as the intervention by the CCS is concerned we have not been persuaded that Rouleau J. committed any reviewable error in finding that it met the test thus enunciated. It is our view, however, that the intervention by the CCS should be restricted to section 1 issues, that it be required to deliver a pleading or statement of intervention within ten days and permitted to call evidence and to present argument in support thereof at trial. Any questions relating to discovery or otherwise to matters of procedure prior to trial should be determined either by agreement between the parties or on application to the Motions Judge in the Trial Division. The appeal by Rothmans will therefore be allowed for the limited purpose only of varying the order as aforesaid.

5 As far as concerns the requested intervention by ICA we are of the view that justice requires that this application be granted as well. The Motions Judge recognized that ICA has an interest in the litigation but seemed to feel that its position and expertise were no different from that of the plaintiff Rothmans. With respect we disagree. The ICA's position in this litigation extends beyond the narrow question of advertising of tobacco products to more general questions relating to commercial free speech. In a section 1 assessment of the justification and reasonableness of limits imposed upon a Charter-guaranteed freedom that position may contribute importantly to the weighing and balancing process. Its appeal will therefore be allowed and leave to intervene granted on the same terms as those indicated above for the CCS.

6 In our view this is not a case for costs in either Division.

Solicitors of record:

Gowling, Strathy & Henderson, Toronto, for appellant,

Deputy Attorney General of Canada for respondent,

Martineau, Walker, Montréal, for intervenor,

Campbell, Godfrey & Lewtas, Toronto, for Institute of Canadian Advertising.

TAB 9

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160209

Docket: A-402-14

Citation: 2016 FCA 44

2016 FCA 44 (CanLII)

**CORAM: NADON J.A.
PELLETIER J.A.
GAUTHIER J.A.**

BETWEEN:

SPORT MASKA INC. dba REEBOK-CCM HOCKEY

Appellant

and

BAUER HOCKEY CORP.

Respondent

and

EASTON SPORTS CANADA INC.

Respondent

Heard at Montreal, on September 15, 2015.

Judgment delivered at Ottawa, Ontario, on February 9, 2016.

REASONS FOR JUDGMENT BY:

NADON J.A.

CONCURRED IN BY:

PELLETIER J.A.
GAUTHIER J.A.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160209

Docket: A-402-14

Citation: 2016 FCA 44

2016 FCA 44 (CanLII)

CORAM: NADON J.A.
PELLETIER J.A.
GAUTHIER J.A.

BETWEEN:

SPORT MASKA INC. dba REEBOK-CCM HOCKEY

Appellant

and

BAUER HOCKEY CORP.

Respondent

and

EASTON SPORTS CANADA INC.

Respondent

REASONS FOR JUDGMENT

NADON J.A.

I. Introduction

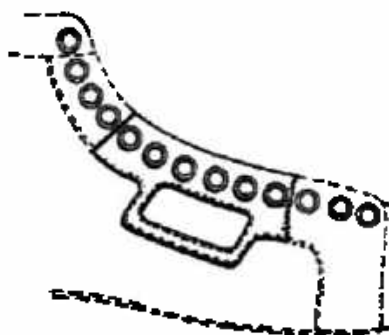
[1] In this appeal, Sports Maska Inc. dba Reebok-CCM Hockey ("CCM") challenges the judgment (2014 FC 853) of Harrington J. (the "Judge") of the Federal Court dated September 8, 2014 pursuant to which he dismissed CCM's motion which sought to overturn the June 20, 2014

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").



[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 Enterprises Communications Inc.*, 2011 FCA 250, 423 N.R. 248 ("*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 ("*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 First Nation*, 2014 FCA 21, [2015] 2 F.C.R. 253 (“*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, 2 F.C.R. 459, 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)*, [1990] 1 F.C. 90, [1989] F.C.J. No. 707 ("*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 ([1990] 1 F.C. 74, 29 F.T.R. 267, 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 ("*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, 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 (F.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).

[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.

2016 FCA 44 (CanLII)

[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*.

[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'

2016 FCA 44 (CanLII)

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, 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. v. Shapiro Cohen*, 2005 FCA 64, 348 N.R. 86, at paragraph 6). In *Dart Industries Inc. v. Baker & McKenzie LLP*, 2013 FC 97, 426 F.T.R. 98, 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 contractually 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 intervenor 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. Sports Maska*, 2014 FCA 158 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.

"M Nadon"

J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
Johanne Gauthier J.A."

FEDERAL COURT OF APPEAL**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

DOCKET: A-402-14

(APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE HARRINGTON DATED SEPTEMBER 8, 2014, DOCKET NUMBER T-1036-13)

STYLE OF CAUSE: SPORT MASKA INC. dba REEBOK-CCM HOCKEY v. BAUER HOCKEY CORP. and EASTON SPORTS CANADA INC.

PLACE OF HEARING: MONTREAL

DATE OF HEARING: SEPTEMBER 15, 2015

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: PELLETIER J.A.
GAUTHIER J.A.

DATED: FEBRUARY 9, 2016

APPEARANCES:

Christopher Van Barr FOR THE APPELLANT

François Guay FOR THE RESPONDENT
Jean-Sébastien Dupont

SOLICITORS OF RECORD:

Gowling Lafleur Henderson LLP FOR THE APPELLANT
Ottawa, Ontario

Smart & Biggar FOR THE RESPONDENT
Montreal, Québec

TAB 10

Federal Court of Appeal



Cour d'appel fédérale

Date: 20140129

Docket: A-158-13

Citation: 2014 FCA 21

Present: STRATAS J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

PICTOU LANDING BAND COUNCIL AND
MAURINA BEADLE

Respondents

Dealt with in writing without appearance of parties.
Order delivered at Ottawa, Ontario, on January 29, 2014.

REASONS FOR ORDER BY:

STRATAS J.A.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20140129

Docket: A-158-13

Citation: 2014 FCA 21

Present: STRATAS J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

PICTOU LANDING BAND COUNCIL AND
MAURINA BEADLE

Respondents

REASONS FOR ORDER

STRATAS J.A.

[1] Two motions to intervene in this appeal have been brought: one by the First Nations Child and Family Caring Society and another by Amnesty International.

[2] The appellant Attorney General opposes the motions, arguing that the moving parties have not satisfied the test for intervention under Rule 109 of the *Federal Courts Rules*, SOR/98-106. The respondents consent to the motions.

[3] Rule 109 provides as follows:

109. (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.

(2) Notice of a motion under subsection (1) shall

(a) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and

(b) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.

(3) In granting a motion under subsection (1), the Court shall give directions regarding

(a) the service of documents; and

(b) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.

109. (1) La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.

(2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir :

a) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;

b) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.

(3) La Cour assortit l'autorisation d'intervenir de directives concernant :

a) la signification de documents;

b) le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

[4] Below, I describe the nature of this appeal and the moving parties' proposed interventions in this appeal. At the outset, however, I wish to address the test for intervention to be applied in these motions.

[5] The Attorney General submits, as do the moving parties, that in deciding the motions for intervention I should have regard to *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 74 at paragraph 12 (T.D.), aff'd [1990] 1 F.C. 90 (C.A.), an off-applied authority: see, e.g., *CCH Canadian Ltd. v. Law Society of Upper Canada* (2000), 189 D.L.R. (4th) 125 (F.C.A.). *Rothmans, Benson & Hedges* instructs me that on these motions a list of six factors should guide my discretion. All of the factors need not be present in order to grant the motions.

[6] In my view, this common law list of factors, developed over two decades ago in *Rothmans, Benson & Hedges*, requires modification in light of today's litigation environment: *R. v. Salituro*, [1991] 3 S.C.R. 654. For the reasons developed below, a number of the *Rothmans, Benson & Hedges* factors seem divorced from the real issues at stake in intervention motions that are brought today. *Rothmans, Benson & Hedges* also leaves out other considerations that, over time, have assumed greater prominence in the Federal Courts' decisions on practice and procedure. Indeed, a case can be made that the *Rothmans, Benson & Hedges* factors, when devised, failed to recognize the then-existing understandings of the value of certain interventions: Philip L. Bryden, "Public Intervention in the Courts" (1987) 66 Can. Bar Rev. 490; John Koch, "Making Room: New Directions in Third Party Intervention" (1990) 48 U. T. Fac. L. Rev. 151. Now is the time to tweak the *Rothmans, Benson & Hedges* list of factors.

[7] In these reasons, I could purport to apply the *Rothmans, Benson & Hedges* factors, ascribing little or no weight to individual factors that make no sense to me, and ascribing more weight to

others. That would be intellectually dishonest. I prefer to deal directly and openly with the *Rothmans, Benson & Hedges* factors themselves.

[8] In doing this, I observe that I am a single motions judge and my reasons do not bind my colleagues on this Court. It will be for them to assess the merit of these reasons.

[9] The *Rothmans, Benson & Hedges* factors, and my observations concerning each, are as follows:

- *Is the proposed intervener directly affected by the outcome?* “Directly affected” is a requirement for full party status in an application for judicial review – *i.e.*, standing as an applicant or a respondent in an application for judicial review: *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2013 FCA 236. All other jurisdictions in Canada set the requirements for intervener status at a lower but still meaningful level. In my view, a proposed intervener need only have a genuine interest in the precise issue(s) upon which the case is likely to turn. This is sufficient to give the Court an assurance that the proposed intervener will apply sufficient skills and resources to make a meaningful contribution to the proceeding.
- *Does there exist a justiciable issue and a veritable public interest?* Whether there is a justiciable issue is irrelevant to whether intervention should be granted. Rather, it is relevant to whether the application for judicial review should survive in the first place. If there is no justiciable issue in the application for judicial review, the issue is

not whether a party should be permitted to intervene but whether the application should be struck because there is no viable administrative law cause of action: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250.

- *Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?* This is irrelevant. If an intervener can help and improve the Court's consideration of the issues in a judicial review or an appeal therefrom, why would the Court turn the intervener aside just because the intervener can go elsewhere? If the concern underlying this factor is that the intervener is raising a new question that could be raised elsewhere, generally interveners – and others – are not allowed to raise new questions on judicial review: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paragraphs 22-29.
- *Is the position of the proposed intervener adequately defended by one of the parties to the case?* This is relevant and important. It raises the key question under Rule 109(2), namely whether the intervener will bring further, different and valuable insights and perspectives to the Court that will assist it in determining the matter. Among other things, this can acquaint the Court with the implications of approaches it might take in its reasons.
- *Are the interests of justice better served by the intervention of the proposed third party?* Again, this is relevant and important. Sometimes the issues before the Court

assume such a public and important dimension that the Court needs to be exposed to perspectives beyond the particular parties who happen to be before the Court.

Sometimes that broader exposure is necessary to appear to be doing – and to do – justice in the case.

- *Can the Court hear and decide the case on its merits without the proposed intervener?* Almost always, the Court can hear and decide a case without the proposed intervener. 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.

[10] To this, I would add two other considerations, not mentioned in the list of factors in *Rothmans, Benson & Hedges*:

- *Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"?* For example, some motions to intervene will be too late and will disrupt the orderly progress of a matter. Others, even if not too late, by their nature may unduly complicate or protract the proceedings. Considerations such as these should now pervade the interpretation and application of procedural rules: *Hryniak v. Mauldin*, 2014 SCC 7.

- *Have the specific procedural requirements of Rules 109(2) and 359-369 been met?*
 Rule 109(2) requires the moving party to list its name, address and solicitor, describe how it intends to participate in the proceeding, and explain how its participation "will assist the determination of a factual or legal issue related to the proceeding." Further, in a motion such as this, brought under Rules 359-369, moving parties should file detailed and well-particularized supporting affidavits to satisfy the Court that intervention is warranted. Compliance with the Rules is mandatory and must form part of the test on intervention motions.

[11] To summarize, in my view, the following considerations should guide whether intervener status should be granted:

- I. Has the proposed intervener complied with the specific procedural requirements in Rule 109(2)? Is the evidence offered in support detailed and well-particularized? If the answer to either of these questions is no, the Court cannot adequately assess the remaining considerations and so it must deny intervener status. If the answer to both of these questions is yes, the Court can adequately assess the remaining considerations and assess whether, on balance, intervener status should be granted.

- II. Does the proposed intervener have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court?

- III. In participating in this appeal in the way it proposes, will the proposed intervener advance different and valuable insights and perspectives that will actually further the Court's determination of the matter?
- IV. Is it in the interests of justice that intervention be permitted? For example, has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court? Has the proposed intervener been involved in earlier proceedings in the matter?
- V. Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"? Are there terms that should be attached to the intervention that would advance the imperatives in Rule 3?

[12] In my view, these considerations faithfully implement some of the more central concerns that the *Rothmans, Benson & Hedges* factors were meant to address, while dealing with the challenges that regularly present themselves today in litigation, particularly public law litigation, in the Federal Courts.

[13] I shall now apply these considerations to the motions before me.

- I -

[14] The moving parties have complied with the specific procedural requirements in Rule 109(2). This is not a case where the party seeking to intervene has failed to describe with sufficient particularity the nature of its participation and how its participation will assist the Court: for an example where a party failed this requirement, see *Forest Ethics Advocacy Association, supra* at paragraphs 34-39. The evidence offered is particular and detailed, not vague and general. The evidence satisfactorily addresses the considerations relevant to the Court's exercise of discretion.

- II -

[15] The moving parties have persuaded me that they have a genuine interest in the matter before the Court. In this regard, the moving parties' activities and previous interventions in legal and policy matters have persuaded me that they have considerable knowledge, skills and resources relevant to the questions before the Court and will deploy them to assist the Court.

- III -

[16] Both moving parties assert that they bring different and valuable insights and perspectives to the Court that will further the Court's determination of the appeal.

[17] To evaluate this assertion, it is first necessary to examine the nature of this appeal. Since this Court's hearing on the merits of the appeal will soon take place, I shall offer only a very brief, top-level summary.

[18] This appeal arises from the Federal Court's decision to quash *Aboriginal Affairs and Northern Development Canada's* refusal to grant a funding request made by the respondent Band Council: *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342. The Band Council requested funding to cover the expenses for services rendered to Jeremy Meawasigc and his mother, the respondent Maurina Beadle.

[19] Jeremy is a 17-year-old disabled teenager. His condition requires assistance and care 24 hours a day. His mother served as his sole caregiver. But in May 2010 she suffered a stroke. After that, she could not care for Jeremy without assistance. To this end, the Band provided funding for Jeremy's care.

[20] Later, the Band requested that Canada cover Jeremy's expenses. Its request was based upon *Jordan's Principle*, a resolution passed by the House of Commons. In this resolution, Canada announced that it would provide funding for First Nations children in certain circumstances. Exactly what circumstances is very much an issue in this case.

[21] *Aboriginal Affairs and Northern Development Canada* considered this funding principle, applied it to the facts of this case, and rejected the Band Council's request for funding. The

respondents successfully quashed this rejection in the Federal Court. The appellant has appealed to this Court.

[22] The memoranda of fact and law of the appellant and the respondents have been filed. The parties raise a number of issues. But the two key issues are whether the Federal Court selected the correct standard of review and, if so, whether the Federal Court applied that standard of review correctly.

[23] The moving parties both intend to situate the funding principle against the backdrop of section 15 Charter jurisprudence, international instruments, wider human rights understandings and jurisprudence, and other contextual matters. Although the appellant and the respondents do touch on some of this context, in my view the Court will be assisted by further exploration of it.

[24] This further exploration of contextual matters may inform the Court's determination whether the standard of review is correctness or reasonableness. It will be for the Court to decide whether, in law, that is so and, if so, how it bears upon the selection of the standard of review.

[25] The further exploration of contextual matters may also assist the Court in its task of assessing the funding principle and whether Aboriginal Affairs was correct in finding it inapplicable or was reasonable in finding it inapplicable.

[26] If reasonableness is the standard of review, the contextual matters may have a bearing upon the range of acceptable and defensible options available to Aboriginal Affairs. The range of

acceptable and defensible options takes its colour from the context, widening or narrowing depending on the nature of the question and other circumstances: see *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at paragraphs 37-41 and see also *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436 at paragraph 22, *Canada (Attorney General) v. Abraham*, 2012 FCA 266 at paragraphs 37-50, and *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 at paragraphs 13-14. In what precise circumstances the range broadens or narrows is unclear – at this time it cannot be ruled out that the contextual matters the interveners propose to raise have a bearing on this.

[27] In making these observations, I am not offering conclusions on the relevance of the contextual matters to the issues in the appeal. In the end, the panel determining this appeal may find the contextual matters irrelevant to the appeal. At present, it is enough to say that the proposed interveners' submissions on the contextual matters they propose to raise – informed by their different and valuable insights and perspectives – will actually further the Court's determination of the appeal one way or the other.

– IV –

[28] Having reviewed some of the jurisprudence offered by the moving parties, in my view the issues in this appeal – the responsibility for the welfare of aboriginal children and the proper interpretation and scope of the relevant funding principle – have assumed a sufficient dimension of public interest, importance and complexity such that intervention should be permitted. In the

circumstances of this case, it is in the interests of justice that the Court should expose itself to perspectives beyond those advanced by the existing parties before the Court.

[29] These observations should not be taken in any way to be prejudging the merits of the matter before the Court.

– V –

[30] The proposed interventions are not inconsistent with the imperatives in Rule 3. Indeed, as explained above, by assisting the Court in determining the issues before it, the interventions may well further the “just...determination of [this] proceeding on its merits.”

[31] The matters the moving parties intend to raise do not duplicate the matters already raised in the parties’ memoranda of fact and law.

[32] Although the motions to intervene were brought well after the filing of the notice of appeal in this Court, the interventions will, at best, delay the hearing of the appeal by only the three weeks required to file memoranda of fact and law. Further, in these circumstances, and bearing in mind the fact that the issues the interveners will address are closely related to those already in issue, the existing parties will not suffer any significant prejudice. Consistent with the imperatives of Rule 3, I shall impose strict terms on the moving parties’ intervention.

[33] In summary, I conclude that the relevant considerations, taken together, suggest that the moving parties' motions to intervene should be granted.

[34] Therefore, for the foregoing reasons, I shall grant the motions to intervene. By February 20, 2014, the interveners shall file their memoranda of fact and law on the contextual matters described in these reasons (at paragraph 23, above) as they relate to the two main issues before the Court (see paragraph 22, above). The interveners' memoranda shall not duplicate the submissions of the appellant and the respondents in their memoranda. The interveners' memoranda shall comply with Rules 65-68 and 70, and shall be no more than ten pages in length (exclusive of the front cover, any table of contents, the list of authorities in Part V of the memorandum, appendices A and B, and the back cover). The interveners shall not add to the evidentiary record before the Court. Each intervener may address the Court for no more than fifteen minutes at the hearing of the appeal. The interveners are not permitted to seek costs, nor shall they be liable for costs absent any abuse of process on their part. There shall be no costs of this motion.

"David Stratas"

J.A.

Federal Court of Appeal



Cour d'appel fédérale

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-158-13

STYLE OF CAUSE: ATTORNEY GENERAL OF CANADA v. PICTOU LANDING BAND COUNCIL AND MAURINA BEADLE

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: STRATAS J.A.

DATED: JANUARY 29, 2014

WRITTEN REPRESENTATIONS BY:

Jonathan D.N. Tarlton
Melissa Chan FOR THE APPELLANT

Justin Safayeni
Kathrin Furniss FOR THE PROPOSED INTERVENER, AMNES'Y INTERNATIONAL

Katherine Hensel
Sarah Clarke FOR THE PROPOSED INTERVENER, FIRST NATIONS CHILD AND FAMILY CARING SOCIETY

SOLICITORS OF RECORD:

William F. Pentney
Deputy Attorney General of Canada FOR THE APPELLANT

Champ & Associates
Ottawa, Ontario

Stockwoods I.I.P
Toronto, Ontario

Hensel Barristers
Toronto, Ontario

FOR THE RESPONDENTS

FOR THE PROPOSED
INTERVENER, AMNESTY
INTERNATIONAL.

FOR THE PROPOSED
INTERVENER, FIRST NATIONS
CHILD AND FAMILY CARING
SOCIETY

TAB 11

Federal Court



Cour fédérale

Date: 20151223

Docket: T-2126-13

Citation: 2015 FC 1243

Ottawa, Ontario, December 23, 2015

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

**PRUDENTIAL STEEL LTD. AND ALGOMA
TUBES INC.**

Applicants

and

BELL SUPPLY COMPANY

Respondent

and

CANADA BORDER SERVICES AGENCY

Intervener

PUBLIC JUDGMENT AND REASONS

(Confidential Judgment and Reasons were issued on November 2, 2015)

I. INTRODUCTION

[1] Prudential Steel Ltd. and Algoma Tubes Inc. (the "Applicants") seek judicial review, pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the "Act") of a decision by Senior Program Officer Patrick Mulligan (the "Officer") of the Canada Border Services Agency (the "Agency" or "CBSA"), Anti-Dumping and Countervailing Directorate. In that decision, dated December 9, 2013, the Officer determined that certain seamless casing and tube products originating in China, but processed and finished in Indonesia, and imported to Canada would not be subject to an anti-dumping and countervailing duty because these goods were deemed to originate in Indonesia, not China.

[2] Prudential Steel Ltd. and Algoma Tubes Inc. form part of the domestic Oil Country Tubular Goods ("OCTG") industry, which produces green tube and OCTG in Canada.

[3] Bell Supply Co. (the "Respondent") is an American company based in Gainesville, Texas, which manufactures various materials used in the oil, gas and mining industries. Its product inventory includes OCTG.

[4] The CBSA is an Intervenor pursuant to an Order made on November 13, 2014. The CBSA is responsible for the administration of the *Special Import Measures Act*, R.S.C., 1985, c. S-15 ("SIMA"), which helps to protect Canadian industry from injury caused by the dumping and subsidizing of imported goods. The CBSA imposes duties on dumped and subsidized

imports to offset the price advantage, allowing Canadian industry to compete with the imported goods.

II. BACKGROUND

[5] On July 29, 2013, the Respondent made a request that the CBSA provide an advanced ruling on whether Chinese green tube, originating in China and processed and finished in Indonesia to form OCTG by P.T. Citra Tubindo Tbk. ("Citra Tubindo"), was subject to anti-dumping and countervailing duties when imported into Canada.

[6] The Respondent buys the green tubes in China and engages Citra Tubindo, an arm's length publicly traded company in Indonesia, to process and finish the tubes. This is done by heat-treatment, threading and coupling of the tubes. The tubes are then certified before being imported into Canada. The tubes fall under the category of OCTG. The Respondent retains title to the goods during the processing.

[7] The OCTG produced are American Petroleum Institute ("API") specification 5 CT, grade P110. Specifically, the goods at issue are:

- 2 3/8" 5.95 ft. P110 CT-K6 Tubing
- 2 7/8" 7.90 ft. P110 CT-K6 Tubing
- 4 1/2" 15.10 ft. HC P110 NSCC Casing
- 5 1/2" 20.00 ft. HC P110 NSCC Casing
- 5 1/2" 23.00 ft. HC P110 NSCC Casing

[8] The Respondent's request stated that the heating, testing and certification of the OCTG will be carried out in Indonesia, that the costs incurred in the transformation process are substantial and that the costs exceed the cost of the green tubes semi-finished input.

[9] The Respondent took the position that the goods are Indonesian OCTG and not the goods at issue in the Canadian International Trade Tribunal's ("CITT") Memorandum D15-2-51 entitled *Certain Seamless Carbon or Alloy Steel Oil and Gas Well Casing Originating in or Exported from the People's Republic of China*, and CITT's OCTG findings in Memorandum D15-2-56 entitled *Certain Oil Country Tubular Goods Originating in or Exported from the People's Republic of China*.

[10] Memorandum D15-2-51 was issued on August 29, 2008 after a CITT injury findings decision was issued on March 10, 2008. That decision described the subject goods as follows:

Seamless carbon or alloy steel oil and gas well casing, whether plain end, beveled, threaded or threaded and coupled, heat-treated or non-heat-treated, meeting American Petroleum Institute (API) specification 5CT, with an outside diameter not exceeding 11.75 inches (298.5 mm), in all grades, including proprietary grades, originating in or exported from the People's Republic of China.

[11] Memorandum D15-2-56 was issued on May 11, 2012, after a CITT injury findings decision was issued on March 23, 2010. In that decision, the subject goods were described as follows:

oil country tubular goods, made of carbon or alloy steel, welded or seamless, heat treated or non-heat-treated, regardless of end finish, having an outside diameter from 2 3/8 inches to 13 3/9 inches (60.3 mm to 339.7 mm), meeting or supplied to meet American Petroleum Institute (API) specification 5CT or equivalent standard,

in all grades, excluding drill pipe and excluding seamless casing up to 11 ¼ inches (298.5 mm) in outside diameter, originating in or exported from the People's Republic of China.

[12] The Respondent submitted more information related to its request for an advanced ruling on September 12, 2013. By letter dated October 4, 2013, the Officer asked for further information and the Respondent replied by letter submitted on October 11, 2013.

[13] The Respondent has been party to proceedings involving the same parties and issues before the United States Department of Commerce (DOC). The final decision of the DOC, issued February 7, 2014, determined that seamless unfinished OCTG made in China, and finished in third countries, were within the scope of two previously issued DOC Orders, which found that OCTG from China were subject to anti-dumping and countervailing duties.

III. DECISION UNDER REVIEW

[14] In his decision, the Officer advised that, after analysis of the information submitted in support of the request for an advanced ruling, he concluded that the goods that were the subject of the request were products originating in Indonesia and accordingly, were not subject to anti-dumping and countervailing duty upon importation into Canada.

[15] The Officer identified the goods in question as Chinese green tube, shipped to Indonesia and converted into seamless casing and tubing by a process of heat treatment, threading and coupling, and testing. The CBSA stated that green tube referred to unfinished pipe that had not

undergone the heat treatment and testing required to allow it to be certified as API 5 CT casing or tubing.

[16] The CBSA requested that before such products are imported, the Respondent provide the Anti-Dumping and Countervailing Directorate with more documents, including the following:

- 1) the purchase order, commercial invoice and mill certificate relating to the sale of green tube between the Chinese supplier and Bell Supply;
- 2) the commercial invoice and mill certificate relating to the processing of green tube into finished seamless casing and tubing products by Citra Tubindo; and
- 3) the commercial invoice issued by Bell Supply to the importer in Canada relating to the sale of finished seamless casing and tubing products.

[17] As well, in his decision, the Officer advised the Respondent that the CBSA reserved the right to contact Citra Tubindo as well as visit its facilities. He advised that the CBSA may verify information at the Respondent's premises, including a review of the green tube purchased in China and the processing of the tube.

[18] The confidential memorandum written by the Officer informs his decision. The Officer described the process used to transform the green tube to OCTG, noting that many processes are involved. He also considered the cost of transforming the green tube. For the seamless casing imports, the cost of the green tube represented XX%, XX%, XX% respectively, of the total

manufacturing cost of the finished product. For the tubing, the green tube cost XX% and XX% respectively.

[19] The Officer outlined the guiding principles for determining the rules of origin, specifically: change in tariff classification, substantial information by *ad valorem* percentage, and substantial information by manufacturing or processing operation.

[20] The Officer found that the goods would be classified under different harmonized system tariff classification levels after processing and finishing. Under the *ad valorem* percentage criterion, XX%, XX% and XX% of the total cost of the seamless casing manufacture went to processing and shipping. For the tubing products, the processing and shipping accounted for XX% and XX% of the total manufacture costs. The Officer concluded that this constitutes a substantial transformation.

[21] The Officer found that heat treatment and other processes involved in transforming the green tubes into finished products was a substantial transformation.

[22] The Officer considered the definition of OCTG in the CITT's decision on seamless casing and noted that, unlike the CITT decision on certain OCTG, green tubes were not included in the product definition. He concluded that the Respondent's seamless casing products did not fall under the product definition in the CITT injury findings on seamless casing from China.

[23] Finally, the Officer considered a past decision of the Anti-Dumping and Countervailing Directorate, which found that green tube purchased in China and processed in Indonesia would not be considered subject goods when imported into Canada. He considered the Statement of Reasons dated November 13, 1998, referred to by the Respondent in its request for the advanced ruling. That decision held that green tubes imported into Canada and processed in Canada would not fall within the definition of subject goods.

[24] The memorandum concluded that the products would be deemed to originate in Indonesia, and stated that the CBSA would take reasonable steps to ensure that the products are of Indonesian origin.

IV. DISCUSSION AND DISPOSITION

[25] The first issue raised in this application is the applicable standard of review.

[26] The second is whether the advanced ruling is amenable to judicial review. If so, did the CBSA commit a reviewable error by failing to follow the previous findings of the CITT. Finally, if the decision is subject to judicial review, did the CBSA breach of procedural fairness by failing to provide notice to all interested parties.

[27] Both the Applicants and the Respondent submit that the decision is reviewable on the standard of reasonableness, relying respectively, upon the decisions in *Uniboard Surfaces Inc. v. Kronotex Fussboden GMBH & Co. FG (F.C.A.)*, [2007] 4 F.C.R. 101 at paragraph 63 and *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

[28] Breaches of procedural fairness are reviewable on the standard of correctness; see the decision in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 at paragraph 43.

[29] I agree that the decision, upon the merits, is reviewable on the standard of reasonableness, as applied by the Federal Court of Appeal in *Uniboard, supra*; see paragraph 63.

[30] However, in my opinion, the dispositive issues in this application are matters of procedure, the first being whether the decision in question is subject to judicial review. The second determinative procedural issue is the statutory appeal process mandated by the SIMA.

[31] This application was made pursuant to section 18.1 of the Act. Paragraph 18.1(3)(b) is relevant and provides as follows:

18.1 (3) On an application for judicial review, the Federal Court 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 Cour fédérale 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 fédéral.

[32] In *Larny Holdings Ltd. v. Canada (Minister of Health)(T.D.)*, [2003] 1 F.C.R. 541 this Court emphasized that a broad range of matters are subject to review pursuant to section 18 of the Act.

[33] However, the Court was equally clear that the scope of matters subject to judicial review under section 18 of the Act does not extend to all decisions, orders, acts or proceedings by federal boards, commissions and tribunals. Rather, it suggested that those decisions and orders that "determine a party's rights" will be subject to judicial review.

[34] At paragraphs 24-25, the Court explains how the decision at issue met that test, as follows:

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.

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 subsection 2(1) of the Act.

[35] In *Pieters v. Canada (Attorney General)* (2007), 313 F.T.R. 231 at paragraph 68, the Court found that a Final Report and Recommendations of the Public Service Integrity Office did "not determine the Applicant's substantive rights or carry legal consequences as required by the

jurisprudence, and are thus not matters subject to judicial review” and dismissed an application for judicial review.

[36] This issue was discussed in *Rothmans, Benson & Hedges Inc. v. Minister of National Revenue* (1998), 148 F.T.R. 3. That case involved a motion to strike an originating notice of motion, which in turn was seeking an order quashing an advance tax ruling issued by the Department of Revenue. The Court expressed the opinion that the advance tax ruling did not have any meaningful effect on the Applicant's rights and said the following at paragraph 28:

The advance ruling does not grant or deny a right, nor does it have any legal consequences... It does not have the legal effect of settling the matter or purport to do so. It is at the most a non-binding opinion. Moreover, there is no evidence that any tax has been levied on a product corresponding to the prototype of the product in the advance ruling.[references omitted]

[37] At paragraph 29, the Court concluded “that the ruling in the letter from Revenue is not a ‘decision’ within the meaning of section 18.1 of the *Federal Court Act*”.

[38] I see no basis to depart from the decision in *Rothmans, supra* and find that the decision in the present case, that is the advanced ruling, is not a “decision” that is subject to judicial review. This conclusion is sufficient to dispose of the within application. However, a brief comment is warranted about the interplay between the statutory appeal process under the SIMA and the availability of judicial review relative to a decision made under that statute.

[39] The Applicants' argument about a breach of procedural fairness is based upon the failure of the CBSA to give them notice of the proceeding giving rise to the advanced ruling. They claim that they are an "interested party" under the SIMA and, as such, they are owed a duty of fairness by an administrative decision-maker unless there is clear statutory language to the contrary, relying on the decision in *Canada (Attorney General) v. Mavi*, [2011] 2 S.C.R. 504 at paragraph 38-39.

[40] The Respondent argues that the Applicants have no standing at this stage of the proceeding and are not entitled to notice. There is no requirement under the SIMA that notice be given to the Applicants until the third stage of the SIMA appeals process which is set out in section 61.

[41] In my view, the Applicants' submissions ignore the statutory scheme. Re-determinations and appeals under the SIMA are governed by sections 56 through 62 of that statute. The statutory appeal process permits the Applicants to be heard on appeal to the CITT, pursuant to section 61 of the SIMA. The Applicants would also have an opportunity to participate in an appeal to the Federal Court of Appeal, pursuant to section 62.

[42] An appeal under the SIMA is not available until a determination is made by a customs officer pursuant to section 56 of the SIMA, which provides as follows:

56. (1) Where, subsequent to the making of an order or finding of the Tribunal or an order of the Governor in Council imposing a countervailing duty under section 7, any goods are

56. (1) Lorsque des marchandises sont importées après la date de l'ordonnance ou des conclusions du Tribunal ou celle du décret imposant des droits compensateurs, prévu à

imported into Canada, a determination by a customs Officer

l'article 7, est définitive une décision rendue par un agent des douanes dans les trente jours après déclaration en détail des marchandises aux termes des paragraphes 32(1), (3) ou (5) de la Loi sur les douanes et qui détermine :

(a) as to whether the imported goods are goods of the same description as goods to which the order or finding of the Tribunal or the order of the Governor in Council applies,

a) la question de savoir si les marchandises sont de même description que des marchandises auxquelles s'applique l'ordonnance ou les conclusions, ou le décret;

(b) of the normal value of or the amount, if any, of the subsidy on any imported goods that are of the same description as goods to which the order or finding of the Tribunal or the order of the Governor in Council applies, and

b) la valeur normale des marchandises de même description que des marchandises qui font l'objet de l'ordonnance ou des conclusions, ou du décret, ou le montant de l'éventuelle subvention qui est octroyée pour elles;

(c) of the export price of or the amount, if any, of the export subsidy on any imported goods that are of the same description as goods to which the order or finding of the Tribunal applies, made within thirty days after they were accounted for under subsection 32(1), (3) or (5) of the Customs Act is final and conclusive.

c) le prix à l'exportation des marchandises de même description que des marchandises qui font l'objet de l'ordonnance ou des conclusions ou le montant de l'éventuelle subvention à l'exportation.

[43] That stage has not yet been reached, since no determination has been made and the appeal process has not been triggered.

[44] According to the decision of the Federal Court of Appeal in *C.B. Powell Limited v. Canada (Border Services Agency)*, [2011] 2 F.C.R. 332 (F.C.A.), a Court should allow a

statutory appeal process to proceed without interruption, unless there are exceptional circumstances.

[45] The Federal Court of Appeal expressed the view that allowing the Court to interfere in the administrative process would be contrary to the intention of Parliament and that few situations would meet that high threshold of "exceptional circumstances".

[46] Further, the Federal Court of Appeal recently affirmed its decision in *C.B. Powell, supra* in *Atomic Energy of Canada Ltd. v. Wilson* (2015), 467 N.R. 201 at paragraph 29-33.

[47] No such determination had been made prior to the commencement of this application.

[48] In effect, the Applicants are seeking judicial review of an interlocutory decision but, as discussed above, that decision is not amenable to judicial review. Further, the statutory appeal process has not yet been exhausted and the Court should not countenance an interruption of that process. Access to this Court upon an application for judicial review would depend upon the nature of the question decided in the statutory appeal process.

[49] Since I have found the decision in issue here is not one that is subject to judicial review, it follows that there was no duty owed to the Applicants that would attract consideration of procedural fairness.

[50] It is not necessary to address the parties' arguments about the reasonableness of the advanced ruling and the application will be dismissed with costs to the Respondent.

[51] The Respondent seeks costs on the basis of Column V of the Tariff B of the *Federal Courts Rules*, SOR/98-106.

[52] The parties can make brief submissions on costs within ten (10) days of this Order unless they otherwise agree on costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, with costs to the Respondent. The parties can make brief submissions on costs within ten (10) days of this Order unless they otherwise agree on costs.

"E. Heneghan"
Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2126-13

STYLE OF CAUSE: PRUDENTIAL STEEL LTD. AND ALGOMA TUBES
INC. v BELL SUPPLY COMPANY AND CANADA
BORDER SERVICES AGENCY

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: APRIL 7, 2015

**PUBLIC JUDGMENT AND
REASONS:** HENEGHAN J.

DATED: DECEMBER 23, 2015

APPEARANCES:

Geoffrey Kubrick Martin Masse	FOR THE APPLICANTS
James McIlroy	FOR THE RESPONDENT
Peter Nostbakken	FOR THE INTERVENER

SOLICITORS OF RECORD:

McMillan LLP Barristers and Solicitors Ottawa, Ontario	FOR THE APPLICANTS
McIlroy & McIlroy Inc Barrister and Solicitor Toronto, Ontario	FOR THE RESPONDENT
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE INTERVENER

TAB 12

Federal Court of Appeal



Cour d'appel fédérale

Date: 20161115

Docket: A-517-15

Citation: 2016 FCA 282

**CORAM: WEBB J.A.
RENNIE J.A.
DE MONTIGNY J.A.**

BETWEEN:

PRUDENTIAL STEEL LTD. and ALGOMA TUBES INC.

Appellants

and

BELL SUPPLY COMPANY

Respondent

and

ATTORNEY GENERAL OF CANADA

Intervener

Heard at Ottawa, Ontario, on June 7, 2016.

Judgment delivered at Ottawa, Ontario, on November 15, 2016.

REASONS FOR JUDGMENT BY:

WEBB J.A.

CONCURRED IN BY:

**RENNIE J.A.
DE MONTIGNY J.A.**

Federal Court of Appeal



Cour d'appel fédérale

Date: 20161115

Docket: A-517-15

Citation: 2016 FCA 282

**CORAM: WEBB J.A.
RENNIE J.A.
DE MONTIGNY J.A.**

BETWEEN:

PRUDENTIAL STEEL LTD. and ALGOMA TUBES INC.

Appellants

and

BELL SUPPLY COMPANY

Respondent

and

ATTORNEY GENERAL OF CANADA

Intervener

REASONS FOR JUDGMENT

WEBB J.A.

[1] This is an appeal from the decision of the Federal Court (2015 FC 1243) dismissing the application for judicial review brought by the Appellants. The Appellants were seeking judicial

review of an advance ruling issued by the Canada Border Services Agency (CBSA) to the Respondent on December 9, 2013 that certain seamless casing and tube products would not be subject to anti-dumping and countervailing duties upon importation into Canada.

[2] For the reasons that follow, I would dismiss this appeal.

I. Background

[3] The Appellants had requested protection under the *Special Import Measures Act*, R.S.C. 1985, c. S-15 (*SIMA*) from dumped and subsidized oil country tubular goods (OCTG) originating in or exported from China.

[4] In a finding issued on March 10, 2008 (NQ-2007-001) the Canadian International Trade Tribunal (CITT) found that “the dumping and subsidizing of seamless carbon or alloy steel oil and gas well casing [as described in this finding] originating in or exported from the People’s Republic of China ... are threatening to cause injury to the domestic industry.” This finding was renewed on March 11, 2013 (RR-2012-002).

[5] In another finding issued on March 23, 2010 (NQ-2009-004), the CITT found that certain OCTG (as described in that finding) originating in or exported from China have caused injury. This finding was renewed on March 2, 2015 (RR-2014-003).

[6] As a result of these findings, anti-dumping and countervailing duties were imposed on the goods identified in these findings.

[7] By a letter dated July 29, 2013, the Respondent requested an advance ruling from the CBSA with respect to whether certain seamless casing and tubing products that would originate in China but would undergo certain work in Indonesia, would be subject to the anti-dumping and countervailing duties referred to above when imported into Canada.

[8] After receiving the original request and subsequent submissions on September 12, 2013 and October 11, 2013, the CBSA in a letter dated December 9, 2013, first stated a brief summary of its understanding of the facts and then stated:

With this understanding, the CBSA has determined that, for purposes of the *Special Import Measures Act*, the specific casing and tubing grades and sizes contained in Bell Supply's advance ruling request of July 29, 2013, and subsequent submissions of September 12, 2013 and October 11, 2013, would be deemed to be seamless casing and tubing products originating in Indonesia and, consequently, would not be subject to anti-dumping duty and countervailing duty upon importation into Canada.

[9] The Appellants sought judicial review of this decision by the CBSA. The Federal Court Judge dismissed the application for judicial review on the basis that the advance ruling is not a decision that is subject to judicial review (Paragraph 38 of her reasons). This conclusion was based on a decision of the Federal Court in *Rothmans, Benson and Hedges Inc. v. Minister of National Revenue* (1998), 148 F.T.R. 3 (*Rothmans*).

[10] The Federal Court Judge noted that her conclusion that the advance ruling is not a decision that is subject to judicial review was sufficient to dispose of the application. However, she also commented on the interplay between the statutory appeal process under *SIMA* and the availability of judicial review of a decision made under that statute.

II. Standard of Review

[11] In this case there has been no decision on the merits of the judicial review application as the Federal Court Judge dismissed the application on a preliminary basis without reviewing the decision that was made by CBSA. As a result, in my view, the standard of review as set out in *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paragraphs 45 to 47 is not applicable in this appeal. Rather, the standards of review that are applicable in this appeal are those standards as set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Findings of fact (including inferences of fact) will stand unless it is established that the Federal Court Judge made a palpable and overriding error. For questions of mixed fact and law, the standard of correctness will apply to any extricable question of law and otherwise the standard of palpable and overriding error will apply. An error is palpable if it is readily apparent and it is overriding if it changes the result.

III. Analysis

[12] The determination by the Federal Court Judge that the advance ruling was not a decision that could be subject to judicial review was based on the decision of the Federal Court in *Rothmans*. In *Rothmans* the company obtained a ruling under the *Excise Act*, R.S.C. 1985, c. E-

14 and the *Excise Tax Act*, R.S.C. 1985, c. F-15 that certain products were “cigarettes” and other products were “tobacco sticks.” When *Rothmans* brought an originating notice of motion to quash this ruling, the Minister of National Revenue brought a motion to strike the notice. The Federal Court allowed the motion and the notice was struck on the basis that the ruling was not a decision. In particular, the Federal Court in *Rothmans* stated that:

27 The moving party recognizes that, as a matter of policy, the Department will respect an advance tax ruling. However, the Department's advance rulings and technical interpretations have no binding legal effect [*Owen Holdings Ltd. v. The Queen* (1997), D.T.C. 5401 at 5404 (F.C.A.)] and the Department would not be estopped by its ruling [*Woon v. Minister of National Revenue* [1950] 50 D.T.C. 871 at 875 (Ex.); *Rothmans Ltd., et al. v. Minister of National Revenue, et al.* [1976] C.T.C. 332 at 338 (F.C.T.D.)]. A taxpayer must prove that it meets the requirements of the legislation on its own terms; the Minister's tax treatment of its competitors cannot assist it [*Ford Motor Co. of Canada Ltd. v. Minister of National Revenue*, [1997] 212 N.R. 275 at 289].

28 The advance ruling does not grant or deny a right, nor does it have any legal consequences [*Demirtas v. Canada*, [1993] 1 F.C. 602 and *Singh v. Canada*, (1994), 82 F.T.R., 68 at 71]. It does not have the legal effect of settling the matter or purport to do so. It is at the most a non-binding opinion. Moreover, there is no evidence that any tax has been levied on a product corresponding to the prototype of the product in the advance ruling.

[Footnote reference numbers have been replaced with the decisions referenced in the footnotes.]

[13] Advance rulings are often provided under the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) and the *Excise Tax Act* and are relied upon by taxpayers. The important role that such rulings play was described by Bowman J. (as he then was) in a footnote in *Goldstein v. The Queen*, [1995] T.C.J. No. 170, [1995] 2 C.T.C. 2036 (and repeated in *Sentinel Hill 1999 Master*

Limited Partnership (Designated member of) v. The Queen, 2007 TCC 742, [2007] T.C.J. No. 556):

10 I leave aside entirely the question of advance rulings which form so important and necessary a part of the administration of the *Income Tax Act*. These rulings are treated by the Department of National Revenue as binding. So far as I am aware no advance ruling that has been given to a taxpayer and acted upon has ever been repudiated by the Minister as against the taxpayer to whom it was given. The system would fall apart if he ever did so.

[14] There is no provision in either the *Income Tax Act* or the *Excise Tax Act* that advance rulings will be binding on the Minister of National Revenue (Minister). However, the Canada Revenue Agency (CRA) has confirmed that it considers such advance rulings to be binding several times in its circulars and memoranda. This confirmation appears in paragraph 14 of the latest version of Information Circular 70-6R7 dated April 22, 2016 for rulings issued in relation to the *Income Tax Act* and paragraph 16 of the latest version of New Memorandum 1.4 dated April 2015 for rulings issued in relation to the *Excise Tax Act*.

[15] Since the CRA considers such rulings to be binding and since, as noted by Bowman J., the system would fall apart if it did not treat them as binding, cases where there is a dispute between a taxpayer and the CRA (or its predecessors) with respect to whether an advance ruling that had been issued by the CRA (or its predecessors) to that taxpayer is binding on the CRA (or its predecessors) are rare.

[16] One such case is *Woon v. Canada (Minister of National Revenue)*, [1951] Ex. C. R. 18, [1950] C.T.C. 263 (*Woon*), where the Exchequer Court held that the Minister was not bound by a

ruling that had been given by the Commissioner of Taxation. In particular, in paragraph 18, the Exchequer Court quoted the following excerpt from *Phipson on Evidence*, 8th Ed.:

Estoppels of all kinds, however, are subject to one general rule: they cannot override the law of the land. Thus, where a particular formality is required by statute, no estoppel will cure the defect.

[17] As a result, even though the taxpayer completed the transactions as described in the ruling, the Minister was not estopped from assessing in a manner contrary to the ruling.

[18] In an updated version of the same text (*Phipson on Evidence*, (18th ed., 2013)), after referring to the decision of the House of Lords in *R. (Reprotech (Pehsham) Ltd.) v. East Sussex County Council*, [2002] UKHL 8, [2003] 1 W.L.R. 348, it is stated at page 118 that:

[on] the one hand, this decision has undoubtedly strengthened the principle that a public body cannot prevent itself from exercising a statutory discretion, or prevent or excuse itself from performing a statutory duty; on the other hand, however, it is obviously unlikely that any further references to the rules of estoppels will be made in this context.

[19] As a result, it appears that the law as stated in *Woon* is still applicable. Whether advance rulings issued under the *Income Tax Act* or the *Excise Tax Act* are binding is not in issue in this appeal. However, it appears that such rulings would not be binding on the Minister who is charged with the duty to assess tax under section 152 of the *Income Tax Act* and the authority to assess tax under section 296 of the *Excise Tax Act*. This statutory duty and statutory discretion that has been granted by Parliament cannot be restricted or modified except by an Act of Parliament.

[20] In this case, the advance ruling provided by the CBSA stated that:

With this understanding, the CBSA has determined that, for purposes of the *Special Import Measures Act*, the specific casing and tubing grades and sizes contained in Bell Supply's advance ruling request of July 29, 2013, and subsequent submissions of September 12, 2013 and October 11, 2013, would be deemed to be seamless casing and tubing products originating in Indonesia and, consequently, would not be subject to anti-dumping duty and countervailing duty upon importation into Canada.

[21] Simon Duval of the CBSA submitted an affidavit in which he stated that:

4. The opinion provided by the CBSA to Bell Supply Company on December 9, 2013 is not binding on it or any importer, and it does not constitute a final decision. The CBSA provides opinions such as that provided to Bell Supply Company on December 9, 2013 only as a courtesy and on a provisional basis. Only when goods have in fact been imported to Canada does the CBSA make a binding determination as to whether they are subject to anti-dumping or countervailing duties. The CBSA will then require further specific information and verification with respect to the goods in coming to its determination.

[22] In the first sentence, when he indicates that the "opinion ... is not binding on it", it is not clear whether the word "it" is intended to refer to Bell Supply Company or the CBSA. Since he refers to "it or any importer" this sentence could be interpreted as a statement that the "opinion provided by the CBSA to Bell Supply Company ... is not binding on [Bell Supply Company] or any importer." Although he also referred to it as an opinion, on cross examination on his affidavit Mr. Duval confirmed that if the CBSA was satisfied that the information that had been provided by the Respondent was correct and that the Respondent satisfied the conditions set out in the letter, that "there would be no duties collected."

[23] However, even though the advance ruling indicates that a final decision has been made by the CBSA and Mr. Duval indicated that he expected the ruling to be followed by CBSA, this does not make the advance ruling binding on the CBSA any more than advance rulings issued in relation to the *Income Tax Act* and the *Excise Tax Act* would be binding on the Minister.

[24] In this case, the Appellants argue that the advance ruling is binding on the CBSA based on the Memorandum D11-11-1 "National Customs Rulings" issued on October 19, 1998. In this memorandum paragraph 9 states that:

9. An NCR is binding on both the Department and the importer as long as all conditions specified in the original request have not changed, subject to any stated qualifications by Revenue Canada, or until the NCR is modified or revoked. It is the responsibility of the importer to advise the Department of any changes to the particulars with respect to an NCR.

[25] In this case there is no live dispute between the Respondent and the CBSA with respect to whether the CBSA is bound by the advance ruling. Assuming, without deciding, that this ruling is a National Customs Rulings, it should be noted that there is no provision of *SIMA* that provides that any advance ruling issued under that statute will be binding. As a result, this statement by the CBSA in its own memorandum is essentially the same as the statements made by the CRA in its published information circular and memorandum that it considers itself to be bound by advance rulings issued in relation to the *Income Tax Act* or the *Excise Tax Act*. Such self-proclaimed declarations by a public agency cannot change the law as reflected in *Phipson on Evidence* and cannot prevent such agency from performing the statutory duty or exercising the statutory discretion that has been bestowed on the agency by Parliament.

[26] Under section 56 of *SIMA*, a determination by a customs officer that certain imported goods would be subject to anti-dumping and countervailing duties is only made after the goods are imported into Canada. Any advance ruling made before such goods are imported would not be binding on such officer as it cannot prevent such officer from exercising the discretion granted by Parliament to make such determination.

[27] The Appellants also argue that they are prejudicially affected by the advance ruling since anti-dumping and countervailing duties are imposed to protect the domestic industry and any decision that such duties would not be imposed on goods that may be imported into Canada would be prejudicial to the domestic industry, if, as a result of a review of that decision, it is found that such duties should be imposed. However, the domestic industry would only be adversely affected if such goods are actually imported. If no such goods are imported, there would be no harm to the domestic industry, even though there is an advance ruling issued by the CBSA that such goods would not be subject to anti-dumping and countervailing duties.

[28] As well, since the advance ruling is not binding on any CBSA officer who may make the determination under section 56 of *SIMA* in relation to any imported goods, the officer could impose anti-dumping and countervailing duties when such goods are imported, notwithstanding the advance ruling. The Appellants would not be prejudiced if the officer did so. Any potential prejudice would only arise if such goods are imported without the imposition of such duties.

[29] As a result, I do not agree with the Appellants that the advance ruling was binding on the CBSA or that the Appellants were prejudicially affected by the issuance of the advance ruling itself.

[30] I would therefore dismiss the appeal, with costs payable by the Appellants to the Respondent.

"Wyman W. Webb"
J.A.

"I agree
Donald J. Rennie J.A."

"I agree
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

**APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED
NOVEMBER 2, 2015, NO. T-2126-13 (2015 FC 1253)**

DOCKET: A-517-15

STYLE OF CAUSE: PRUDENTIAL STEEL LTD. and
ALGOMA TUBES INC. v. BELL
SUPPLY COMPANY and ATTORNEY
GENERAL OF CANADA

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: JUNE 7, 2016

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: RENNIE J.A.
DE MONTIGNY J.A.

DATED: NOVEMBER 15, 2016

APPEARANCES:

Jonathan P. O'Hara FOR THE APPELLANTS

James McIlroy FOR THE RESPONDENT

Kirk Shannon FOR THE INTERVENER

SOLICITORS OF RECORD:

McMillan LLP FOR THE APPELLANTS
Ottawa, Ontario

James McIlroy FOR THE RESPONDENT
Toronto, Ontario

William F. Pentney, Q.C. FOR THE INTERVENER
Deputy Attorney General of Canada
Ottawa, Ontario

TAB 13

Date: 20090121

Docket: A-174-08

Citation: 2009 FCA 15

2009 FCA 15 (CanLII)

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

BETWEEN:

DEMOCRACY WATCH

Applicant

and

CONFLICT OF INTEREST AND ETHICS COMMISSIONER

Respondent

and

ATTORNEY GENERAL OF CANADA

Intervener

REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Ottawa, Ontario, on January 21, 2009)

RICHARD C.J.

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

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

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

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

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

Legislative Scheme

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

39th Parliament as part of Bill C-2, now entitled the *Federal Accountability Act*, S.C. 2006, c. 9.

This legislation was given Royal Assent in December 2006 and came into force on July 9, 2007.

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

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

2009 FCA 15 (CanLII)

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

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

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

Analysis

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

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

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

44. ...

(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. ...

44. [...]

(4) Dans le cadre de l'étude, le commissaire peut tenir compte des renseignements provenant du public qui lui sont communiqués par tout parlementaire et qui portent à croire que l'intéressé a contrevenu à la présente loi. Le parlementaire doit préciser la contravention présumée ainsi que les motifs raisonnables qui le portent à croire qu'une contravention a été commise. [...]

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

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

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

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

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

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

"J. Richard"
Chief Justice

FEDERAL COURT OF APPEAL**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

DOCKET: A-174-08

STYLE OF CAUSE: DEMOCRACY WATCH v.
CONFLICT OF INTEREST AND
ETHICS COMMISSIONER and
ATTORNEY GENERAL OF
CANADA

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: January 21, 2009

REASONS FOR JUDGMENT OF THE COURT BY: (Richard C.J., Décary J.A. and
Noël J.A.)

DELIVERED FROM THE BENCH BY: Richard C.J.

APPEARANCES:

Peter Rosenthal and
Yavar Hameed FOR THE APPLICANT

Ronald D. Lunau and
Nancy Bélanger FOR THE RESPONDENT

Christopher Rupar FOR THE INTERVENER

SOLICITORS OF RECORD:

Hameed Farrokhzad St-Pierre

FOR THE APPLICANT

Gowling Lafleur Henderson LLP

FOR THE RESPONDENT

Office of the Conflict of Interest and Ethics
Commissioner

FOR THE RESPONDENT

John H. Sims, Q.C.
Deputy Attorney General of Canada

FOR THE INTERVENER

TAB 14

T-1278-05

2007 FC 556

Selwyn Pieters (*Applicant*)

v.

Attorney General of Canada (*Respondent*)

and

Public Service Integrity Officer (*Intervener*)

INDEXED AS: PIETERS v. CANADA (ATTORNEY GENERAL) (F.C.)

Federal Court, Heneghan J.—Toronto, October 10, 2006; Ottawa, May 28, 2007.

Public Service Integrity Officer (PSIO) — Judicial review, pursuant to Federal Courts Act, s. 18.1 with respect to report issued by Public Service Integrity Office (PSIO) after investigation into allegations of wrongdoing at Immigration and Refugee Board (IRB) — Public Service Integrity Office created by Treasury Board Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace (policy) — PSIO not excluded from definition of “federal board, commission or other tribunal” in Federal Courts Act, s. 2(1) either because only one person or under exceptions set out — As federal investigative body acting pursuant to Treasury Board disclosure policy made under authority of Financial Administration Act, PSIO is federal board, meeting definition of “federal board, commission or other tribunal” in s. 2(1) — But decision not reviewable pursuant to s. 18.1 — Application dismissed.

Federal Court Jurisdiction — Judicial review, pursuant to Federal Courts Act, s. 18.1 with respect to report issued by Public Service Integrity Office (PSIO) after investigation into allegations of wrongdoing at Immigration and Refugee Board (IRB) — PSIO’s report, recommendations not decision amenable to judicial review as non-binding on deputy head of department involved; not determining applicant’s substantive rights or carrying legal consequences.

This was an application for judicial review, pursuant to section 18.1 of the *Federal Courts Act*, with respect to a report issued by the Public Service Integrity Office upon completion of an investigation into allegations by the applicant of wrongdoing, including allegations of reprisal, at the Immigration and Refugee Board (IRB). At the relevant time, the applicant was employed with the IRB in its Refugee Protection Division (RPD) as a Refugee Protection Officer (RPO). The Public Service Integrity Office was created by the 2001 *Treasury Board Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace* (policy), which was issued on behalf of the Treasury Board pursuant to subsection 11(2) of the *Financial Administration Act*. In his application, the applicant essentially sought to have an order upholding his reprisal complaint or alternatively referring it back to the PSIO and an order directing the PSIO to conduct a further investigation.

In March 2004, the applicant submitted a complaint to the PSIO regarding 10 alleged incidents of wrongdoing at the IRB, in particular, that he had participated in writing reasons for decision at the request of IRB members and that in a case where he was acting as an RPO, the Board member failed to disclose to the claimant’s counsel all of the evidence that he considered. As a result of the applicant’s complaint, two investigations were commenced: the IRB’s own investigation and an independent inquiry by Professor Edward Ratushny into the applicant’s first five allegations. Professor Ratushny’s report found improper conduct by IRB members and the applicant. The report was sent to the PSIO along with responses thereto by the named parties. The PSIO did not make any findings against IRB members on the basis of the jurisdictional restrictions, i.e. as appointees of the Governor in council, IRB members were not subject to the policy and were therefore out of reach of the PSIO investigation. The PSIO issued his final report and recommendations and essentially found that while some of the allegations were substantiated, the IRB had taken appropriate measures in response. The applicant was eventually terminated by the IRB. The issues were whether the PSIO is a “federal board, commission or other tribunal,” as set out in subsection 2(1) of the *Federal*

Courts Act and whether his decision and recommendations made under the policy are subject to judicial review by the Federal Court.

Held, the application should be dismissed.

The PSIO is not excluded from the definition of “federal board, commission or other tribunal” on the basis that he is only one person or under any of the exceptions set out in the definition. The only question that had to be addressed in determining the status of the PSIO is whether, in conducting his investigation and issuing a final report, the PSIO was “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.” As a federal investigative body acting pursuant to a Treasury Board disclosure policy made under the authority of the *Financial Administration Act*, the PSIO is a federal board and meets the definition of a “federal board, commission or other tribunal” in subsection 2(1) of the *Federal Courts Act*.

But the challenged decision and recommendations were not reviewable pursuant to the *Federal Courts Act*, section 18.1. In determining whether the PSIO’s report and recommendations constituted a decision that was amenable to judicial review, it was necessary to determine whether the report and recommendations affected a party’s substantive rights or carried legal consequences. The preamble of the policy explains that public servants are to balance their duty of loyalty to their employer and the public interest in using government information with making disclosures of wrongdoing in accordance with the policy. Under the policy, the PSIO’s mandate is to “act as a neutral entity on matters of internal disclosure.” However, the PSIO is ultimately authorized only to make recommendations regarding findings of wrongdoing. The recommendations are non-binding on the deputy head of the department involved. The PSIO’s final report and recommendations do not determine the applicant’s substantive rights or carry legal consequences as required by case law and therefore are not subject to judicial review.

Nonetheless, the investigation conducted by the PSIO in this case may not have met the standards of procedural fairness. Representatives of the IRB were intimately involved in the PSIO’s investigation. The cumulative effect of various communications and e-mails cast doubt on the degree of impartiality with which the investigation was ultimately conducted.

statutes and regulations judicially considered

Canadian Human Rights Act, R.S.C., 1985, c. H-6.

Federal Courts Act, R.S.C., 1985, c. F-7, ss. 1 (as am. by S.C. 2002 c. 8, s. 14), 2(1) “federal board, commission or other tribunal” (as am. *idem*, s. 15), 18 (as am. by S.C. 1990, c. 8, s. 4; 2002, c. 8, s. 26), 18.1 (as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27).

Federal Courts Rules, SOR/98-106, rr. 1 (as am. by SOR/2004-283, s. 2), 303.

Financial Administration Act, R.S.C., 1985, c. F-11, s. 11(2)(i).

Fisheries Act, R.S.C., 1985, c. F-14, s. 7.

Public Service Staff Relations Act, R.S.C., 1985, c. P-35.

Refugee Protection Division Rules, SOR/2002-228, r. 16.

Special Appointment Regulations, No. 2001-14, SOR/2001-489.

Tabacco Act, S.C. 1997, c. 13, s. 29.

cases judicially considered

applied:

Puccini v. Canada (Director General, Corporate Administrative Services, Agriculture Canada), [1993] 3 F.C. 557; (1993), 65 F.T.R. 127 (T.D.); *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services)*, [1995] 2 F.C. 694; (1995), 125 D.L.R. (4th) 559; 184 N.R. 260 (C.A.).

considered:

Chopra v. Canada (Attorney General) (2005), 275 F.T.R. 200; 2005 FC 595; *Fennelly v. Canada (Attorney General)* (2005), 279 F.T.R. 262; 2005 FC 1291; *Jada Fishing Co. v. Canada (Minister of Fisheries and Oceans)* (2002), 288 N.R. 237; 2002 FCA 103; *Vaughan v. Canada*, [2005] 1 S.C.R. 146; (2005), 250 D.L.R. (4th) 385; 41 C.C.E.I. (3d) 159; 331 N.R. 64; 2005 SCC 11; *Glowinski v. Canada (Treasury Board)* (2006), 286 F.T.R. 217; 2006 FC 78; *Larny Holdings Ltd. v. Canada (Minister of Health)*, [2003] 1 F.C. 541; (2002), 216 D.L.R. (4th) 230; 43 Admin. L.R. (3d) 264; 222 F.T.R. 29; 2002 FCT 750; *Rothmans, Benson & Hedges Inc. v. Canada (Minister of National Revenue — M.N.R.)*, [1998] 2 C.T.C. 176; 148 F.T.R. 3; 98 G.T.C. 6076 (F.C.T.D.).

referred to:

Endicott v. Canada (Treasury Board) (2005), 270 F.T.R. 220; 2005 FC 253; *Carpenter Fishing Corp. v. Canada*, [1998] 2 F.C. 548; (1997), 155 D.L.R. (4th) 572; 221 N.R. 372 (C.A.); leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 349 (QL); *Girard v. Canada* (1994), 79 F.T.R. 219 (F.C.T.D.).

authors cited

Canada. Treasury Board Secretariat. *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace*, November 30, 2001.

Canada. Treasury Board Secretariat. *Policy on the Prevention and Resolution of Harassment in the Workplace*, June 1, 2001.

APPLICATION for judicial review, pursuant to section 18.1 of the *Federal Courts Act*, regarding a report issued by the Public Service Integrity Office upon completion of an investigation into allegations of wrongdoing at the Immigration and Refugee Board. Application dismissed.

appearances:

Peter M. Rosenthal for applicant.

Michael H. Morris and *Joseph Cheng* for respondent.

Martine Nantel for intervener.

solicitors of record:

Roach, Schwartz & Associates, Toronto, for applicant.

Deputy Attorney General of Canada for respondent.

Public Service Integrity Officer for intervener.

The following are the reasons for order and order rendered in English by

HENECHAN J.:

I. Introduction

[1] Mr. Selwyn Andrew Pieters (the applicant) seeks judicial review, pursuant to section 18.1 [as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27] of the *Federal Courts Act*, R.S.C., 1985, c. F-7 [s. 1 (as am. *idem*, s. 14)], with respect to a report issued by the Public Service Integrity Office, dated June 23, 2005. The Public Service Integrity Office issued this report after completing an investigation into certain allegations of wrongdoing advanced by the applicant, including allegations of reprisal, relative to the Immigration and Refugee Board (the IRB).

II. The Parties

[2] At the relevant time, the applicant was employed with the IRB as a refugee protection officer (RPO). He subsequently left his employment with the IRB.

[3] The Public Service Integrity Office was created by the Treasury Board *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace* (the policy). This policy was issued on behalf of the Treasury Board on November 30, 2001 pursuant to subsection 11(2) of the *Financial Administration Act*, R.S.C., 1985, c. F-11. By *Special Appointment Regulations, No. 2001-14* [SOR/2001-489], issued November 6, 2001 and effective November 30, 2001, the Governor General in Council appointed Dr. Edward Keyserlingk as the Public Service Integrity Officer (the PSIO).

[4] The Attorney General of Canada (the Attorney General) is named as the respondent in this matter pursuant to rule 303 of the *Federal Courts Rules*, SOR/98-106 [r. 1 (as am. by SOR/2004-283, s. 2)] (the Rules).

[5] By motion dated March 17, 2006, the PSIO sought leave to intervene in these proceedings. By order dated March 21, 2006 [[2006] F.C.J. No. 887 (F.C.) (Q.L.)], Prothonotary Lafrenière granted the PSIO intervener status, with leave to make written and oral submissions. The order in that regard provides that his application record is to be restricted to issues of its jurisdiction, its role and mandate, and the preparation of his record through its procedural and investigative processes. The order specifically provides that he should not address the merits of the applicant's application for judicial review.

[6] In this application, the applicant seeks the following relief:

1. an order upholding his reprisal complaint or alternatively, an order referring the reprisal complaint back to the PSIO with directions;
2. an order directing the PSIO to conduct a further investigation; and
3. an order granting him the cost of this application on a substantial indemnity basis.

III. Background

[7] At the material time, the applicant was a RPO in the Refugee Protection Division (the RPD) at the Toronto office of the IRB. The main function of the RPD is to adjudicate claims for refugee protection by persons in Canada. The claims are decided by members of the IRB who are appointed by the Governor in Council. Members of the IRB are responsible for determining the facts and applying the law with respect to each claim. These functions are described in the Immigration and Refugee Board of Canada Communications Directorate, "Immigration and Refugee Board of Canada: An Overview."

[8] Refugee protection officers are employees of the IRB who assist the presiding member in the refugee determination process. They conduct research, may interview or question claimants, and make recommendations to the members. Their role is an advisory one and is more specifically described in the *Refugee Protection Division Rules*, SOR/2002-228, rule 16, as follows:

16. The duties of refugee protection officers are, as directed by the Division, to

- (a) review files to identify issues in a claim or other matter;
- (b) conduct research and collect and provide information;
- (c) hold interviews, prepare reports and make recommendations;
- (d) participate in hearings and conferences;
- (e) present evidence and call and question witnesses;

(f) make representations to the Division; and

(g) do any other thing that is necessary to ensure a full and proper examination of a claim or other matter.

[9] On March 10, 2004, the applicant submitted a complaint to the PSIO concerning several alleged incidents of wrongdoing at the IRB. The applicant provided copies of his complaint to the Auditor General of Canada and to the Minister of Citizenship and Immigration. The allegations were also reported in the media. The allegations were as follows:

(i) Allegations 1-3: the applicant alleged that, in three cases where he was acting as the RPO, he was approached by IRB members and took part in writing reasons for decision.

(ii) Allegation 4: the applicant alleged that, in a case where he was acting as the RPO, the Board member failed to disclose to the claimant's counsel all of the evidence that he considered.

(iii) Allegation 5: the applicant alleged that he was improperly treated when he sought to introduce certain evidence during a hearing where he was acting as the RPO.

(iv) Allegations 6-10: the applicant made various complaints regarding his workplace and employer.

The applicant's complaint was lengthy, comprising a 13-page letter and 155 pages of supporting material.

[10] In his affidavit filed in support of his application for judicial review, the applicant states that he went on sick leave without pay following submission of his complaint, beginning on March 15, 2004 and continuing until June 24, 2004. He further states that this became a leave of absence without pay as of June 26, 2004 until June 25, 2005.

[11] The applicant forwarded another letter, dated April 5, 2004, to the PSIO. In this letter, he set out further details about the allegations 1 to 5 detailed in his original letter and he also referred to other alleged incidents of wrongdoing. Two binders of supporting documentation were submitted as attachments to this letter to the PSIO. Those materials are reproduced as part of the tribunal record in the present application.

[12] In consequence of the applicant's March 10, 2004 letter to the PSIO, two investigations were commenced into his allegations of wrongdoing at the IRB. First, the IRB commissioned its own investigation. It informed the PSIO that it intended to conduct an investigation into the applicant's allegations and then, on March 29, 2004, acting general counsel for the IRB contacted Professor Edward Ratushny. The IRB requested that Professor Ratushny conduct an independent inquiry into the first five allegations set forth in the applicant's letter of March 10, 2004. The request for an investigation did not extend to allegations 6 through 10 as these were determined to be subject to dispute resolution mechanisms established by a Treasury Board policy and the applicable collective agreement.

[13] By letter dated April 2, 2004, the IRB informed the applicant that Professor Ratushny would be conducting an investigation into the first five allegations of his complaint and preparing a report on his findings. This letter also explained why the investigation would not explore the applicant's remaining five allegations and invited the applicant to be interviewed by Professor Ratushny for the purposes of the investigation.

[14] Professor Ratushny conducted his investigation in April 2004. He expanded the scope of his investigation to include the additional allegations made by the applicant in his letter of April 5, 2004, which had been sent to the Public Service Integrity Office and copied to Professor Ratushny by e-mail. Professor Ratushny interviewed 13 persons connected to the applicant's allegations. However, the applicant declined to be interviewed by Professor Ratushny.

[15] Upon being advised that Professor Ratushny would be conducting an investigation, the applicant wrote in a letter dated April 2, 2004 that he fully intended to cooperate. At the same time, he set out a number of concerns regarding the proposed investigation, including requests for compensation for costs that he might incur in reproducing materials, travel, and the cost of hiring legal counsel. He also sought an opportunity to view and comment on preliminary findings of fact and "an undertaking that this inquiry will not make an unfavorable report or

a finding of misconduct which relate to me as a result of my disclosures of wrongdoing in the decision-making and reasons writing process at the IRB.”

[16] Professor Ratushny did not grant the applicant the undertaking he sought and the applicant subsequently refused to be interviewed because he objected to the solicitor-client basis upon which Professor Ratushny had been retained by the IRB.

[17] Professor Ratushny released his report on April 30, 2004. He made a finding, with respect to the first allegation, that there was improper conduct on the part of two IRB members and the applicant arising from the fact that the applicant had participated in the preparation of reasons. With respect to the second allegation, he found improper conduct on the part of an IRB member and the applicant. He concluded that the member and the applicant had erred in not disclosing a document that was relied upon in the preparation of reasons. With respect to the third allegation, he found improper conduct on the part of the IRB member and the applicant. He found that the member had improperly consulted the applicant about his observations prior to writing reasons for his decision. He found the fourth allegation to be “inherently improbable.” He found the fifth allegation to be not relevant to the writing of reasons and the decision-making process. Finally, he found no evidence of misconduct with respect to the additional allegations.

[18] Professor Ratushny also expressed concern regarding the good faith of the applicant.

[19] On May 17, 2004, the IRB sent a copy of the Ratushny report to the PSIO. It also asked the parties named in the Ratushny report to respond to the findings. On May 21, 2004, the applicant submitted a detailed response to the IRB and provided a copy of his submissions to the PSIO. He amended his response on May 22 and 24.

[20] On June 17, 2004 the IRB presented to the applicant the results of its review of the Ratushny report and the responses that were generated to it, with a copy to the Public Service Integrity Office. On June 18, the chairperson of the IRB made a public statement regarding the findings of the Ratushny report and how the IRB would respond to the findings of improper conduct.

[21] Following release of the Ratushny report, the Public Service Integrity Office decided that there were “sufficient reasons” to further investigate the applicant’s allegations.

[22] In this regard, the Public Service Integrity Office reviewed the applicant’s written complaint, the Ratushny report and the applicant’s response to the Ratushny report. A Public Service Integrity Office investigator met with the applicant on June 16, 2004. At that time, the applicant spoke to the allegations he had made and the investigator described the scope of the investigation.

[23] During the investigation, there was some disagreement and correspondence about the appropriate scope of the investigation. Essentially, the IRB maintained that IRB members, as appointees of the Governor in Council rather than Treasury Board employees, were not subject to the policy and were therefore “out of reach” of the PSIO investigation. The applicant did not agree with such a limitation on the jurisdiction of the PSIO. Ultimately, the PSIO did not make any findings against IRB members on the basis of the jurisdictional restrictions advanced by the IRB. However, the PSIO states that it nonetheless “met with certain Board Members, with the agreement of the IRB, to clarify facts surrounding the allegations.”

[24] In September 2004, the Public Service Integrity Office interviewed two IRB members connected to the allegations for the purpose of clarifying relevant facts. It also interviewed IRB legal counsel, the applicant’s supervisor and the IRB Regional Director. The Public Service Integrity Office also met with the applicant in June 2004, as mentioned above, September 2004, December 2004 and May 2005. In his final report, the PSIO said that it:

... provided the employee with several opportunities to be heard through his submissions, meetings, correspondence and telephone discussions concerning the allegations of wrongdoing and his complaint of reprisal. Through these various exchanges the employee has had the opportunity to respond on matters affecting him as he was directly implicated in the alleged wrongdoing and the subject of alleged reprisal. This included the opportunity to respond to relevant material drawn from both the IRB and employee submissions which formed the basis of the preliminary

report.

[25] In a letter to the Public Service Integrity Office senior investigator, dated October 26, 2004, the IRB outlined for the PSIO the measures it had taken in response to the Ratushny report. Specifically, the IRB advised that the following actions had been taken:

1. It was determined that one refugee claim should be reopened and reheard;
2. "Appropriate administrative measures" were taken in relation to four IRB members;
3. The IRB Chairperson sent an e-mail to IRB staff and members and issued a public statement, outlining the results of the Ratushny report and the actions that had been taken in response;
4. "Significant efforts" were dedicated to developing a training course on fairness, independence and impartiality for all IRB members and RPOs; and
5. The IRB intended to review its instructions for hearing room participants.

[26] The applicant also submitted a reprisal complaint to the Public Service Integrity Office via e-mail on December 6, 2004. He alleged that, because he had made the allegations of wrongdoing, individuals at the IRB had undertaken retaliatory actions against him. On December 10, 2004, counsel for the applicant submitted a detailed version of the reprisal complaint with attached supporting documentation. The Public Service Integrity Office investigators met with the applicant at this time, reviewed his submissions and discussed the ongoing investigation.

[27] On January 28, 2005, the PSIO issued a preliminary investigation report (the preliminary report) to the applicant and the IRB. Both the applicant and the IRB were given the opportunity to respond to this preliminary report. The IRB submitted its response dated February 28, 2005. In that response, it primarily addressed the issue of the jurisdiction of the PSIO and procedural fairness.

[28] The applicant submitted a response dated March 11, 2005 to the PSIO. In his response, he dealt with each of the PSIO's findings in detail. His counsel made a further submission on March 20, 2005 and the applicant delivered additional comments by e-mail on May 23, 2005.

[29] Upon review of the further submissions from the parties, the Public Service Integrity Office deemed it necessary to conduct additional interviews relative to one of the reprisal allegations. These interviews were conducted in May 2005.

[30] On June 23, 2005, the PSIO released his final report (the final report) to the applicant and the IRB. In an attached cover letter addressed to the applicant, also dated June 23, 2005, the PSIO said that the final report incorporated "some changes and clarifications and response to concerns expressed by you and the IRB in the respective submissions to the PSIO concerning its Preliminary Investigation Report." The letter also went on to say that the final report addressed the applicant's reprisal complaints.

[31] The main conclusions of the final report issued by the PSIO are as follows:

1. Allegation 1: the PSIO substantiated the allegation but concluded that the IRB had already taken appropriate measures in response.
2. Allegations 2 and 3: the PSIO substantiated the allegations and recommended that the IRB review its procedures and consider amending its rules on disclosure.
3. Allegation 4: the PSIO concluded that the evidence did not support the allegation and held that there was in fact evidence to the contrary. This allegation was dismissed.
4. Allegation 5: the PSIO determined that the evidence that the applicant sought to submit was inadmissible and the

allegation was dismissed.

5. Allegations of reprisal: these various allegations were dismissed.

[32] The applicant commenced this application for judicial review with respect to the final report of the PSIO on July 25, 2005. In the material filed in support of this application, he provided details about disciplinary action which had been taken against him. In his affidavit dated September 8, 2005, he deposed that he was scheduled to return to work on June 27, 2005, shortly after publication of the final report. He says that the IRB put him "on leave with pay for a few days." The record indicates that around this time, the IRB anti-harassment coordinator was investigating complaints that had been submitted to her office concerning the applicant.

[33] In a June 10, 2005 letter, the anti-harassment coordinator informed the applicant of her conclusion that the applicant had harassed his colleagues and violated his confidentiality requirements pursuant to the *Policy on the Prevention and Resolution of Harassment in the Workplace* (the harassment policy). A letter from the IRB, dated June 20, 2005 requested that the applicant attend a disciplinary hearing where he would have the opportunity to make whatever additional representations that he felt were appropriate.

[34] The IRB wrote a letter dated June 24, 2005 to the applicant in response to an article that was published on June 22, 2005 by the Canadian Press. In this letter the IRB stated that it felt that the applicant's discussion with the Canadian Press "constituted serious misconduct for a number of reasons," mainly because he breached a confidentiality requirement in the harassment policy, ignored clear confidentiality instructions from the anti-harassment coordinator and breached the duty of loyalty owed to an employer by publicly criticizing the IRB in connection with its handling of his complaint.

[35] A disciplinary hearing took place at IRB facilities on June 27, 2005. The IRB sent its findings and determinations to the applicant by letter dated July 8, 2005. It dealt with a number of preliminary issues including a request by the applicant to record the proceedings, his request to postpone the proceedings, his inquiry regarding who would be deciding the results of the hearing and a subsequent request that the presiding official recuse himself on the grounds of a reasonable apprehension of bias. The letter went on to emphasize that the applicant was not being disciplined for making a disclosure of wrongdoing, filing a complaint with the Canadian Human Rights Commission or for seeking judicial review in the Federal Court in connection with the final report of the PSIO. However, the letter notes that the applicant's right to voice concerns about racism was circumscribed by Treasury Board policy and that he "could not, in the guise of exercising that right, harass your fellow employees."

[36] After addressing the complaint regarding the Canadian Press incident, the IRB concluded that the applicant would be suspended without pay for 10 working days. Because he only worked part-time, this suspension was to be served over the period July 29, 2005 to August 22, 2005. The applicant says in his affidavit that he was suspended without pay from July 29, 2005 until August 31, 2005 and that his employment was terminated on August 25, 2005.

IV. Submissions

[37] In his original submissions, the applicant addressed the issue of standard of review, the jurisdiction of the PSIO, an alleged lack of procedural fairness in the conduct of the PSIO's investigation, and erroneous and capricious findings of fact. In particular, the applicant argued that the PSIO's investigation was flawed as a result of the intimate involvement of counsel for the IRB in that investigation and further, that the PSIO was aware through his counsel that this close involvement could be perceived as a breach of procedural fairness.

[38] The respondent replied to the arguments raised by the applicant. The respondent submitted that the investigation of the PSIO was subject to review against the standards of neutrality and thoroughness, as those standards have been applied by the courts when judicially reviewing investigations conducted pursuant to the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6. Further, the respondent argued that the PSIO's findings were reasonable and made with regard to the evidence before him.

[39] The PSIO addressed the extent of his jurisdiction in the conduct of the investigation, including its right to

determine whether members of the IRB were “employees” for the purposes of that investigation. He also described the broad responsibilities assigned under the policy and provided a general description of the framework within which investigations are conducted. The PSIO took the position that the policy did not grant any rights to be heard in the course of an investigation, but did suggest that the PSIO would invite comments from any person who may be adversely affected.

[40] The PSIO also described the process that would be followed after an investigation had been conducted. He said that a preliminary report is normally prepared for investigations into alleged wrongdoing, and that copies are provided to the department involved and potentially adversely affected individuals. For investigations into alleged reprisals, a copy of the preliminary report is provided to the complainant, the department involved and potentially adversely affected individuals. The PSIO further stated that these parties had the opportunity to make comments before the release of the final report and described this role as investigative, rather than adjudicative.

[41] Neither party directly raised or addressed the issues of the status of the PSIO as a “federal board, commission or other tribunal” as defined in the *Federal Courts Act* [s. 2(1) (as am. by S.C. 2002, c. 8, s. 15)], or of the availability of judicial review in respect of a decision made pursuant to a “policy.” Following the hearing on October 10, 2007, a direction was issued on October 12, 2007, giving the parties the opportunity to address these issues by way of further submissions. Each party filed further submissions addressing these two matters.

[42] The applicant submits that the PSIO does meet the definition of “federal board, commission or other tribunal”, as set out in subsection 2(1) of the *Federal Courts Act*. In this regard, he relies on the decisions in *Puccini v. Canada (Director General, Corporate Administrative Services, Agriculture Canada)*, [1993] 3 F.C. 557 (T.D.), as well as *Chopra v. Canada (Attorney General)* (2005), 273 F.T.R. 200 (F.C.).

[43] The applicant also submits that the decision made pursuant to the policy is subject to judicial review. In this regard, he relies on the decision in *Fennelly v. Canada (Attorney General)* (2005), 279 F.T.R. 262 (F.C.) which in turn cites the Federal Court of Appeal decision in *Jada Fishing Co. v. Canada (Minister of Fisheries and Oceans)* (2002), 288 N.R. 237 (F.C.A.). In *Fennelly*, Justice Kelen noted that in *Jada Fishing*, the Federal Court of Appeal examined the reasonableness of an appeal board recommendation and its respect for the requirements of procedural fairness. In *Jada Fishing*, the Federal Court of Appeal concluded that the Appeal Board report and recommendation could be reviewed.

[44] The applicant submits that the policy at issue in this case is similarly subject to judicial review. The applicant further argues that the policy at issue here is stronger than most “mere policies.” He submits that since the PSIO was appointed by the Governor in Council, the Governor in Council has “at least implicitly required” that the PSIO abide by the terms of the policy. According to the applicant, the policy operates as the governing statute and specifies the jurisdiction of the PSIO.

[45] The intervener similarly argues that the PSIO meets the definition of “federal board, commission or other tribunal” as set out in the *Federal Courts Act*. Further, he describes the policy as providing a unique mechanism within the federal public service that gives public servants an opportunity to report on wrongdoing. While the PSIO acknowledges that the policy is not delegated legislation, delegated regulation, or issued pursuant to a clear statutory requirement, he nonetheless submits that the policy is a directive for the management of the public service.

[46] Relying on this characterization of the policy, the intervener submits that a directive can be defined or enforced through judicial review and in this regard, he cites the decision in *Endicott v. Canada (Treasury Board)* (2005), 270 F.T.R. 220 (F.C.).

[47] The PSIO argues that the policy formalizes a disclosure investigation process where there are no other legal mechanisms available for independent review of allegations of wrongdoing, and that he represents the government’s attempt to balance the need for loyalty with the facilitation of whistleblowing in the federal public service. He describes the general procedure for investigating disclosure under the policy, but maintains that reprisal complaints are dealt with separately under the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35.

[48] The PSIO refers to the decision in *Vaughan v. Canada*, [2005] 1 S.C.R. 146 and submits that this decision stands for the proposition that the courts have no jurisdiction, except in the limited context of judicial review, in the resolution of labour disputes governed by comprehensive codes such as the *Public Service Staff Relations Act*. At the same time, he notes that Justice Binnie, in *Vaughan*, suggested that whistleblowing may represent an exception to this general rule. In addition, the PSIO submits that *Glowinski v. Canada (Treasury Board)* (2006), 286 F.T.R. 217 (F.C.) stands for the proposition that the Court should not attempt to reconcile inconsistent and conflicting Treasury Board policies.

[49] Further, the PSIO relies on the decisions in *Larny Holdings Ltd. v. Canada (Minister of Health)*, [2003] 1 F.C. 541 (T.D.) and *Jada Fishing*, in support of his argument that the decision of the PSIO is amenable to judicial review.

[50] In conclusion, the PSIO submits that although his responsibilities were created by an administrative statute, he is required pursuant to the policy to prepare an annual report to be tabled in Parliament. The PSIO submits that this responsibility is distinct from that assigned to other administrative units created under the policy and that decisions made pursuant to the policy are subject to judicial review.

[51] The respondent, for his part, argues that the PSIO is a “federal board, commission or other tribunal” within the definition set out in subsection 2(1) of the *Federal Courts Act*. However, he further submits that the final report and non-binding recommendations made by the PSIO are not reviewable matters pursuant to section 18 [as am. by S.C. 1990, c. 8, s. 4; 2002, c. 8, s. 26] of the *Federal Courts Act*. In this regard, the respondent relies on the decision in *Jada Fishing* and further refers to the decision in *Rothmans, Benson & Hedges Inc. v. Canada (Minister of National Revenue - M.N.R.)*, [1998] 2 C.T.C. 176 (F.C.T.D.). As in *Rothmans*, the respondent submits that the PSIO’s report and recommendations here are not subject to judicial review because they do not affect the applicant’s substantive rights.

V. Discussion and Disposition

[52] The present proceeding concerns an investigation and report conducted by the PSIO pursuant to the policy. I agree with the submissions of the respondent that the policy was enacted pursuant to subsection 11(2) of the *Financial Administration Act*, in particular paragraph 11(2)(i). At the relevant time, that paragraph read as follows:

11. . . .

(2) Subject to the provisions of any enactment respecting the powers and functions of a separate employer but notwithstanding any other provision contained in any enactment, the Treasury Board may, in the exercise of its responsibilities in relation to personnel management including its responsibilities in relation to employer and employee relations in the public service, and without limiting the generality of sections 7 to 10,

...

(i) provide for such other matters, including terms and conditions of employment not otherwise specifically provided for in this subsection, as the Treasury Board considers necessary for effective personnel management in the public service.

[53] The policy defines “disclosure” as follows:

... information raised within the organization in good faith, based on reasonable belief, by one or more employees concerning a wrongdoing that someone has committed or intends to commit.

[54] “Wrongdoing” is defined in the policy as follows:

... an act or omission concerning:

- (a) a violation of any law or regulation; or
- (b) a breach of the *Values and Ethics for the Public Service*; or
- (c) misuse of public funds or assets; or
- (d) gross mismanagement; or
- (e) a substantial and specific danger to the life, health and safety of Canadians or the environment.

[55] This matter relates to a decision of the PSIO. The office of the PSIO is relatively new and *Chopra* is the only other reported decision to date to consider the role that it plays. However, that decision does not address the status of the PSIO as a “federal board, commission or other tribunal” or the availability of judicial review with respect to a decision by that office. For the reasons that follow, I find that the PSIO is a federal board, commission or other tribunal. However, I am of the view that the challenged decision and recommendations are not reviewable matters pursuant to section 18.1 of the *Federal Courts Act*.

[56] With respect to the status of the PSIO, I refer to the definition of “federal board, commission or other tribunal” set out in subsection 2(1) of the *Federal Courts Act* as follows:

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 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*;

[57] The language of this definition is broad. The PSIO is not excluded from the definition on the basis that he is only one person, or under any of the exceptions set out in the definition. In my opinion, the only question to be addressed in determining the status of the PSIO is whether, in conducting his investigation and issuing a final report, the PSIO was “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.”

[58] All parties rely on the decision in *Puccini* in support of their submissions that the office of the PSIO meets the definition in subsection 2(1). In that case, the Court held that a supervisor acting pursuant to a Treasury Board harassment policy made under the authority of the *Financial Administration Act* was a federal board. In the present case, a similar question arises. Specifically, it is necessary to determine whether the PSIO as a federal investigative body acting pursuant to a Treasury Board disclosure policy made under the authority of the *Financial Administration Act* is a federal board. In my opinion, there is no basis to distinguish the present case from *Puccini*. I conclude that the PSIO fulfils the definition set forth in subsection 2(1) of the *Federal Courts Act* of a “federal board, commission or other tribunal”.

[59] This conclusion is also supported by the decision in *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services)*, [1995] 2 F.C. 694, where the Court of Appeal suggested that the words “powers conferred by or under an Act of Parliament” should be given a broad meaning.

[60] I turn now to the second issue relating to the jurisdiction of this Court, that is whether the report and recommendations of the PSIO constitute a decision that is amenable to judicial review. The central issue in answering this question is whether the report and recommendations affect a party’s substantive rights or carry legal consequences.

[61] In *Jada Fishing*, the Federal Court of Appeal adjudicated an appeal from an order dismissing an application for judicial review of a decision by the Groundfish Panel of the Pacific Region Licence Appeal Board, as adopted by the Minister of Fisheries and Oceans. The initial decision dealt with the appellants' allocated individual vessel "quotas" for a fishing licence.

[62] The Court of Appeal held that the decision of the Panel was not *prima facie* reviewable because the Panel [at paragraph 12] "was without statutory authority and merely made recommendations which the Minister was entitled to accept or reject." Ultimately, the Court did review the Panel's recommendations but only in so far as they were "inexorably connected" to the Minister's final decision that was made pursuant to section 7 of the *Fisheries Act*, R.S.C., 1985, c. F-14.

[63] In my view, in *Jada Fishing* the Federal Court of Appeal determined that the Panel's recommendations and report were not reviewable primarily on the basis that they did not fall within the scope of reviewable matters set out in section 18 of the *Federal Courts Act*. The Court's observation that the Panel "merely made recommendations which the Minister was entitled to accept or reject" is central to its conclusion that those recommendations were not, in and of themselves, subject to judicial review.

[64] In *Larry Holdings*, this Court concluded that the decision of a Health Canada manager was subject to judicial review where the subject of the application for judicial review was a "direction" issued to the operator of a chain of convenience stores. The direction at issue set out Health Canada's position that section 29 of the *Tobacco Act*, S.C. 1997, c. T-13 prohibits vendors from offering cash rebates on the purchase of multiple packs of cigarettes or other tobacco products. In holding that the decision was reviewable, this Court emphasized that a broad range of matters are subject to review pursuant to section 18 of the *Federal Courts Act*.

[65] However, the Court was equally clear that the scope of matters subject to judicial review under section 18 of the Act does not extend to all decisions, orders, acts or proceedings by federal boards, commissions and tribunals. Rather, it suggested that those decisions and orders that [at paragraph 18] "determine a party's rights" will be subject to judicial review. With respect to the matter before it, the Court explained at paragraphs 24-25 how the decision at issue did determine a party's rights:

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.

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 tribuna" within the meaning of subsection 2(1) of the Act. . . .

[66] Similarly, the result in *Rothmans* seemed to turn on the determination of whether the decision at issue meaningfully affected the party's substantive rights. That case involved a motion to strike an originating notice of motion, which in turn was seeking an order quashing an advance tax ruling issued by the Department of Revenue. The Court was of the view that the advance tax ruling did not have any meaningful effect on the applicant's rights and said the following at paragraph 28:

The advance ruling does not grant or deny a right, nor does it have any legal consequences. . . . It does not have the legal effect of settling the matter or purport to do so. It is at the most a non-binding opinion. Moreover, there is no evidence that any tax has been levied on a product corresponding to the prototype of the product in the advance ruling. [References omitted.]

At paragraph 29, the Court went on to conclude "that the ruling in the letter from Revenue is not a 'decision' within the meaning of section 18.1 of the *Federal Court Act*."

[67] In the present case, the policy was adopted pursuant to subsection 11(2) of the *Financial Administration Act*. The focus of the policy is described in its preamble which explains that public servants are to balance their duty of loyalty to their employer and the public interest in using government information with making disclosures of wrongdoing in accordance with the policy. Under the policy, the PSIO's mandate is to "act as a neutral entity on matters of internal disclosure."

[68] However, at the end of the process, the PSIO is authorized only to make recommendations with respect to findings of wrongdoing. These recommendations are non-binding on the deputy head of the department involved, who is the actor that holds the actual decision-making authority. The PSIO's final report and recommendations do not determine the applicant's substantive rights or carry legal consequences as required by the jurisprudence, and are thus not matters subject to judicial review.

[69] The applicant has argued that the policy is without value if the PSIO is unable to give effect to the results of an investigation into wrongdoing in the workplace. The utility or the impotence of a government policy, as the case may be, is a subject beyond review by this Court. In this regard, I refer to *Carpenter Fishing Corp v. Canada*, [1998] 2 F.C. 548 (C.A.), leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 349 (QL), and *Girard v. Canada* (1994), 79 F.T.R. 219 (F.C.T.D.). Accordingly, this application for judicial review cannot succeed.

[70] Nonetheless, I question whether the investigation conducted by the PSIO in this case met the standards of procedural fairness. Representatives of the IRB were intimately involved in the investigation undertaken by the PSIO in 2004. The active involvement of the IRB is demonstrated in certain e-mails and file memoranda. As illustration, an e-mail dated March 26, 2004 from counsel for the PSIO to certain members of the PSIO office reads:

Judith:

As discussed, you will find attached a summary of our (André and I) telephone conversation with Paul Aterman, General Counsel, IRB. The approach would be similar to DIAND where they will contract out the investigation of allegations 1 to 5, allowing PSIO (Judith) to meet with the investigator, review the terms of reference, and obtain progress report. On the other allegations 6 to 10, I indicated to Mr. Aterman that although Mr. Pieters had file [sic] an harassment complaint and an investigation under the Harassment Policy is being conducted, the PSIO still has to make a determination on the allegations of reprisal. They initially thought that PSIO would not deal with those allegations. I mentioned that Judith is reviewing them and will most probably need additional information from IRB and Pieters.

[71] In a later e-mail dated March 26, 2004 to certain members of the Public Service Integrity Office, counsel for the PSIO states:

Judith:

As discussed, IRB has to decide fairly quickly how to act with respect to the first 5 allegations to correct the breach of natural justice, if any. Once that is agreed on both sides (PSIO and IRB), we will have to communicate this to Mr. Pieters. This is, in my opinion, what we may want to discuss at the next Monday meeting.

[72] Counsel for the PSIO expressed some concerns about respect for procedural fairness, as is reflected from the following e-mail to the executive director of the Public Service Integrity Office and a senior investigator of the Public Service Integrity Office dated April 14, 2004, as follows:

Dear Judith and Pierre,

Martine and I discussed the request submitted by Jean Bélanger, DG, HR, IRB to receive a copy of M. Pieters' letter dated April 5 and enclosures. I fully agree with Martine that it would be unwise to agree to this request without first determining the relevance of the documents submitted by M. Pieters in the course of our investigation. Any hasty reply to the IRB request could tarnish the PSIO's reputation. Once the relevance of these documents has been established, a determination will have to be made as to whether or not the PSIO requires M. Pieters' consent to

disclose the documents. In some cases, the rules of natural justice and procedural fairness would not require M. Pieters' consent; however, in other cases, especially those involving his private information, his consent may be required. We will only be able to make that determination as the investigation progresses and following and assessment of each document and of the information contained therein. Our process would therefore not be submitted to the will of the Board, in a similar way to what was decided with the Ratushny inquiry.

[73] In an earlier e-mail to counsel for the Public Service Integrity Office dated March 29, 2004, a senior investigator at the Public Service Integrity Office stated:

Before we make any agreement with the IRB I would like us to have had the chance to speak to Mr. Pieters about this and his other allegations, if only to make contact with him and hear him out a bit. As well, providing him with an indication that we have agreed with the IRB on anything, before we have had the chance to discuss his case, may not appear to him as though we are acting in a neutral fashion. I know that the media circus adds pressure to these types of cases, however, acting prematurely and not allowing us to examine the allegations before acting may place us in a vulnerable position — i.e. having to defend the basis for our actions or acting outside of our established procedures.

[74] As well, the applicant referred to an e-mail, dated May 25, 2005, from the PSIO to Ms. Judith Buchanan, Senior Investigator with the Public Service Integrity Office which reads as follows:

I don't take at all kindly to yet another response from Pieters when he has already submitted his response to the preliminary draft and we considered all those points in the final version about be [sic] completed, with one more issue to be settled by your forthcoming [sic] trip to Toronto.

I am therefore not inclined to respond or consider all these additional points. He had his opportunity and we cannot keep re-opening his case and revising our report.

He has already practically tied up all our limited resources for months and I consider that the final report deals comprehensively [sic] and fairly with all the issues that can reasonably be considered relevant and within my jurisdiction.

Let's see if we can wrap the report up very soon before we receive yet more second, third and fourth thoughts from him.

[75] This expression of frustration by the Public Service Integrity Office may not, by itself, be sufficient to support a finding of breach of procedural fairness. However, in my opinion, the cumulative effect of the various communications noted above, together with this e-mail, casts doubt on the degree of impartiality with which this investigation was ultimately conducted.

[76] Notwithstanding these concerns, the above conclusions on jurisdiction are determinative and this application for judicial review is dismissed.

VI. Costs

[77] If the applicant and the respondent cannot agree on costs, they may make brief submissions on the matter according to the following schedule:

- (i) The applicant shall serve and file his submissions on costs within two weeks of the date of this order;
- (ii) The respondent shall serve and file his submissions within ten days of the receipt of the applicant's submissions; and
- (iii) The applicant may file a brief reply within five days of receipt of the respondent's submissions.

[78] There shall be no costs for or against the intervener.

ORDER

The application for judicial review is dismissed. If the parties cannot agree on costs, submissions may be made in accordance with the schedule outlined in paragraph 77 of the reasons for order.

TAB 15



[Home](#) → [Decisions and determinations](#)

Decision No. 307-C-A-2015

September 21, 2015

APPLICATION by Nan Liu against United Airlines, Inc. carrying on business as United, United Airlines, Continental, Continental Micronesia and Air Micronesia.

Case number: 15-02156

INTRODUCTION

[1] Nan Liu filed an application with the Canadian Transportation Agency (Agency), on behalf of himself, his wife and their children, against United Airlines, Inc. carrying on business as United, United Airlines, Continental, Continental Micronesia and Air Micronesia (United) regarding the cancellation of four business class ticket reservations for travel from London, United Kingdom to Omaha, Nebraska, United States of America (via Montréal, Quebec, Canada and Chicago, Illinois, United States of America) on July 6, 2015, and returning on July 31, 2015 from Omaha to London, via Chicago and New York City, New York, United States of America.

[2] Mr. Liu claims that he purchased the tickets from United on February 11, 2015 and that the reservations were confirmed. Mr. Liu adds that, on the night of February 11, 2015, United cancelled the reservations, citing "an error with a vendor's currency exchange rates". United fully refunded Mr. Liu the purchase price of his tickets.

[3] Mr. Liu is seeking a reinstatement of the tickets at the original price (approximately US\$320 in total for the four tickets), and for the same class of service and routing.

PRELIMINARY MATTER

[4] In his reply, Mr. Liu alleges that United's tariff provisions relating to the cancellation of tickets are "unclear, unreasonable or unduly discriminatory". This allegation represents a new issue.

[5] Subsection 20(2) of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104 provides that:

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

[6] Mr. Liu did not file a request with the Agency seeking permission to raise the issue in question. Accordingly, the Agency will not consider that issue.

ISSUES

1. Was a valid contract of carriage entered into between United and Mr. Liu, and if not, may the doctrine of judicial comity/*stare decisis* apply to this matter?
2. If there was a valid contract of carriage, did United properly apply the terms and conditions set out in its International Tariff, as required by subsection 110(4) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR (Air Transportation Regulations))?
3. If United did not correctly apply its International Tariff, what remedy, if any, is available to Mr. Liu?
4. Should United be awarded costs, pursuant to section 25.1 of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA)?

ISSUE 1: WAS A VALID CONTRACT OF CARRIAGE ENTERED INTO BETWEEN UNITED AND MR. LIU, AND IF NOT, MAY THE DOCTRINE OF JUDICIAL COMITY/STARE DECISIS APPLY TO THIS MATTER?

Position of United

Absence of a contract

[7] United submits that on February 11, 2015, an error occurred on its Denmark-facing Web site such that the exchange rate between the Pound Sterling (GBP) and the Danish Krone (DKK) was incorrect. According to United, the error temporarily caused flights originating in the United Kingdom and denominated in DKK to be presented at only a fraction of their intended prices.

[8] United argues that while it filed fares correctly, a third-party software error caused amounts charged to be significantly lower than prices offered. According to United, a number of Internet travel blogs and forums identified the error and circulated information as to how non-Danish purchasers could take advantage of this error. United states that it promptly voided transactions affected by this exchange rate error, reversed all associated charges, and contacted customers directly through e-mail and other methods.

[9] According to United, this was not a fare intended for American citizens, and in order to take advantage of the error, customers were required to misrepresent their country of origin and set their country of residence and the billing country for credit cards as Denmark. United asserts that Mr. Liu, as a non-Danish customer based in the United States of America, sought to take advantage of the error by misrepresenting

his address as being in Copenhagen, Denmark, and that he listed Denmark as both his country of origin and the billing address for his credit card. United points out that, in his application to the Agency, Mr. Liu submitted that his address was, in fact, in Omaha.

[10] United points out that in Decision No. 202-C-A-2014 (*83 complainants v. Swiss International Air Lines Ltd.*) and Decision No. 177-C-A-2014 (*Alberque v. US Airways Inc.*), the Agency found that as a principle of general contract law, where the party knew or ought to have known that there had been a mistake in the offer made, it is within the courts' jurisdiction to relieve against the mistake.

[11] United submits that Mr. Liu clearly knew that the fare was a mistake based on: blogs and other online publications which highlighted the error; his use of the Danish Web site portal with no nexus to Denmark; his use of a false country of origin and billing country for his credit card; the lack of use of his United membership account which would have revealed his true country of origin; and the fact that Mr. Liu should have seen the correct fare in GBP during the booking process.

[12] United claims that as significant misrepresentations were required to successfully purchase the tickets at the quoted price, Mr. Liu could not reasonably be said to have encountered the error in the normal course of booking tickets. Therefore, United argues that this reasonably suggests that the quoted price was a mistake, could not be part of a unique promotion or sale, and that exploiting this mistake was Mr. Liu's express goal.

[13] In the alternative, United contends that Mr. Liu ought to have known that there had been a mistake in the quoted price. United argues that regardless of whether Mr. Liu knew that the quoted price was a mistake, the contract would still have been void, as the law is clear that a contract will be void where a person ought to have known that there was a mistake in a fundamental term of the contract.

[14] United points out that, as noted by the Agency in Decision No. 202-C-A-2014 and Decision No. 177-C-A-2014, Chief Justice McLachlin stated in *First City Capital Ltd. v. B.C. Building Corp.*, (1989) 43 B.L.R. 29 (*First City Capital*) that:

[28] One circumstance falling clearly within the equitable jurisdiction of the Court to relieve against mistake is that where one party, knowing of the other's mistake as to the terms of an offer, remains silent and concludes a contract on the mistaken terms [...]

[29] It is not necessary to prove actual knowledge on the part of the non-mistaken party in order to ground relief, as in this context one is taken to have known what would have been obvious to a reasonable person in the light of the surrounding circumstances [...]

[30] There is also authority for the proposition that rescission may be granted where a party, having an indication that the other party is entering the contract under some serious mistake or misapprehension regarding a fundamental term, either proceeds on a course of willful ignorance designed to inhibit his own actual knowledge of the other's mistake, or deliberately sets out to ensure that the other party does not become aware of the mistake [...]

[31] In summary therefore, the equitable jurisdiction of the Courts to relieve against mistake in contract comprehends situations where one party, who knows or ought to know of another's mistake in a fundamental term, remains silent and snaps at the offer, seeking to take advantage of the other's mistake. In such cases, it would be unconscionable to enforce the bargain and equity will set aside the contract.

[15] United argues that if Mr. Liu legitimately believed that the fare could have been something other than a mistake, which is expressly denied by United, he could have raised the issue with United. According to United, Mr. Liu chose to remain silent in the hope of securing an advantage, and this is precisely the behaviour described by the court in *First City Capital* as fraudulent and unworthy of legal protection. United contends that as a matter of equity, courts will not enforce a contract when the party seeking enforcement has engaged in equitable or constructive fraud by remaining silent or wilfully ignorant about the mistake in order to take advantage of it.

[16] United cites a number of legal decisions and texts (*McCunn Estate v. Canadian Imperial Bank of Commerce [Ontario Court of Appeal]*, (2001) 53 O.R. (3d) 304 (ON CA), *McMaster University v. Wilchar Construction Ltd.*, 1971 CanLII 594 (ON CA), [1971] 3 O.R. 801, S.M. Waddams in *The Law of Contracts*, 6th ed., and A. Swan and J. Adamski in *Canadian Contract Law*, 3rd ed.) which, according to United, agree with the Agency's position in Decision No. 202-C-A-2014 and Decision No. 177-C-A-2014.

[17] In conclusion, United contends that due to the error in the DKK exchange rate, the parties were never at a meeting of the minds and, as such, a valid contract was never entered into.

United's tariff provisions

[18] United also submits that, based on certain of its tariff provisions, it is not bound to honour the price of the tickets purchased by Mr. Liu as that price represented an unauthorized variation of the published prices by a third party; it is allowed to cancel the tickets because the genuinely applicable fare has not been paid; and Mr. Liu's entry of Denmark as his billing address and country of origin was "abusive, illogical, fictitious and a misrepresentation".

The remedy requested by Mr. Liu

[19] According to United, the legal remedy when a contract is rendered void by a mistake is to restore the status quo, and that remedy has already been achieved given that United has refunded Mr. Liu the purchase price of his tickets. United maintains that Mr. Liu has lost nothing, and that the granting of the remedy he is seeking would unjustly enrich him because of his misrepresentation, to the detriment of United.

Position of Mr. Liu

[20] Mr. Liu submits that United independently confirmed the contract with him by virtue of both the sale of and the ticketing for the fare, and that United missed the opportunity on both occasions to refuse to sell the alleged "mistake fare". He argues that it cannot be too difficult for United to implement, on its Web site, a control scheme to prevent the sale of tickets below a certain amount. Mr. Liu maintains that United has not introduced such control because the carrier opts, occasionally, to sell low fares, which contradicts United's argument that the fare at issue is a mistake. He also maintains that the air transport industry is notorious for intense price competition and, therefore, it is not unusual to witness a "zero" fare being published by air carriers. Mr. Liu states that, as such, it is extremely difficult for air travellers to discern whether a fare is a "mistake" or is simply a "great deal".

Analysis and findings

Previous Agency Decisions: Mistaken Fares Trilogy

[21] In 2014, the Agency issued the following three Decisions relating to mistaken fares that were set by the International Air Transport Association and sent by the Airline Tariff Publishing Company to online ticket agents for sale to passengers in September 2012 for travel from Yangon, Myanmar to various destinations in Canada: [177-C-A-2014](#) Decision No. [177-C-A-2014](#), Decision No. [202-C-A-2014](#) and Decision No. [290-C-A-2014](#) (*Five complainants v. Iberia, Lineas Aereas De Espana, S.A. [Iberia Air Lines of Spain]*), which the Agency referred to as the Mistaken Fares Trilogy.

[22] In the Mistaken Fares Trilogy, the Agency considered the matter as to whether valid contracts had been entered into respecting the carriage at issue. The following is an excerpt from Decision No. [177-C-A-2014](#):

What is a contract?

The Agency is of the opinion that a contract is a legally recognized agreement between two or more parties. The parties to a contract of carriage relating to air travel are usually the carrier and the passenger. Further, the contract of carriage requirements are the same for a contract of carriage as in any other type of contract. [...]

An offer and an acceptance

The Agency finds that for a contract to exist, there must be an offer by one person to another and an acceptance of that offer by the person to whom it is made, i.e., in this case, an offer by the carrier to a passenger and an acceptance of the offer by the passenger.

An offer is defined in Swan, A., *Canadian Contract Law*, (2d), at page 218, LexisNexis, 2009 as "[...] a complete statement of the terms on which one party is prepared to deal, made with the intention that it be open for acceptance by the person (persons) to whom it is addressed. An offer confers on the offeree the power to accept the offer and, on acceptance, a contract will be made." In *642718 Alberta Ltd. v. Alberta Minister of Public Works, Supply & Services* (2004), 368 A.R. 52, the Court of Queen's Bench of Alberta stated that: "Acceptance means the signification by the offeree of his willingness to enter into a contract with the offeror on the terms offered to him by the latter. Without an acceptance there can be no contract."

Once an offer has been accepted, the contract is binding on the parties. However, as described in Friedman, G.H.L., *The Law of Contract in Canada*, at page 12, Thomson Canada Ltd., 2006, an "[a]greement is at the basis of any legally enforceable contract. The absence of assent prevents the creation of a binding contract. There must be a substratum of agreement, or consensus ad idem."

Terms and Conditions

Implied terms/conditions

In the case of a contract of carriage, a carrier under the jurisdiction of the Agency has an obligation to have a tariff which includes its terms and conditions of carriage. Once this tariff is filed with the Agency, it takes effect and is in force on the date stated on the tariff. However, the ATR (Air Transportation Regulations) are clear that acceptance by the Agency of a tariff or an amendment to a tariff does not constitute approval of any of the tariff provisions, unless the tariff has been filed pursuant to an order of the Agency and has been approved by the Agency. Further, the carrier can only offer to transport any person under terms and conditions of carriage as set out in the tariff in force at the time of purchase. These are implied terms.

Express terms/conditions

On the other hand, parties to a contract can state orally or in writing the scope and extent of their respective obligations. For example, as opposed to terms and conditions of carriage included in a tariff, prices that a passenger/buyer has to pay, for which the carriage is to be executed, will vary: these prices are expressly communicated for each carriage. Such prices being a fundamental term of the contract of carriage fall into the category of express terms.

Error/mistake

There can be instances where what appears to be a valid contract of carriage is the result of an error or a mistake by one or both parties. Is such a contract of carriage valid and binding?

To make that determination, courts will look at whether the mistake is fundamental. For example, as expressed in *McCarthy v. Godin Mining & Exploration Ltd.*, (1978), 20 N.B.R. (2d) 676, "if the mistake goes to the root of the contract, it can render the contract void". Further, as stated in *McMaster University v. Wilchar Construction Ltd. et al.*, [1971] 3 OR 801, at para. 44; aff'd 69 D.L.R. (3d) 400n (ON CA), "Normally a man is bound by an agreement to which he has expressed assent. If he exhibits all the outward signs of agreement, at law it will be held that he has agreed. The exception to this is the case where there has been a fundamental mistake or error in the sense above stated. In such case the contract is void *ab initio* [...]" The Agency is of the opinion that if this were the case, the contract would be void *ab initio* as there is no meeting of the minds. [...]

Knew of the mistake or ought to have known

US Airways relies, among other cases, on *First City Capital*. The Agency finds that this case is applicable to this situation. In *First City Capital*, the first issue to be decided was whether the defendant knew or ought to have known that there had been a mistake in the offer made and if the answer to that first issue was positive, the second issue was whether that finding entitled the plaintiff to rescission of the contract. Chief Justice McLachlin stated that:

[28] One circumstance falling clearly within the equitable jurisdiction of the Court to relieve against mistake is that where one party, knowing of the other's mistake as to the terms of an offer, remains silent and concludes a contract on the mistaken terms [...]

[29] It is not necessary to prove actual knowledge on the part of the non-mistaken party in order to ground relief, as in this context one is taken to have known what would have been obvious to a reasonable person in the light of the surrounding circumstances [...]

[30] There is also authority for the proposition that rescission may be granted where a party, having an indication that the other party is entering the contract under some serious mistake or misapprehension regarding a fundamental term, either proceeds on a course of wilful ignorance designed to inhibit his own actual knowledge of the other's mistake, or deliberately sets out to ensure that the other party does not become aware of the mistake [...]

[31] In summary therefore, the equitable jurisdiction of the Courts to relieve against mistake in contract comprehends situations where one party, who knows or ought to know of another's mistake in a fundamental term, remains silent and snaps at the offer, seeking to take advantage of

the other's mistake. In such cases, it would be unconscionable to enforce the bargain and equity will set aside the contract.

[23] In Decision No. 177-C-A-2014, the Agency concluded, at paragraph 48, that no valid contract of carriage had been entered into between US Airways and Mr. Alberque (see also paragraphs 50 and 43 of Decision No. 202-C-A-2014 and Decision No. 290-C-A-2014, respectively). On that basis, the Agency dismissed each complaint.

Judicial comity/Stare decisis

[24] In Decision No. 345-C-A-2014 (*Bailey v. Japan Airlines*), Decision No. 398-C-A-2014 (*Response by China Southern to Decision No. 290-C-A-2014*) and Decision No. 411-C-A-2014 (*Chandnani et al v. Malaysia Airlines*), the Agency considered the matters of judicial comity and stare decisis as they apply to previous Agency Decisions relating to mistaken fares. In those Decisions, the Agency stated the following:

Judicial comity

In *Ahani v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 8284 (FC), the Federal Court of Canada wrote:

[4] In *Glaxo Group Ltd. v. Canada (Minister of National Health and Welfare)*, supra, Richard J. (as he then was) considered whether he was bound, by reasons of judicial comity, to apply a decision of Noël J. (as he then was) on one of the identical issues raised before him. In reviewing the principle of judicial comity and its application, Richard J. stated as follows:

The principle of judicial comity has been expressed as follows:

The generally accepted view is that this court is bound to follow a previous decision of the court unless it can be shown that the previous decision was manifestly wrong, or should no longer be followed: for example, (1) the decision failed to consider legislation or binding authorities which would have produced a different result, or (2) the decision, if followed, would result in a severe injustice. The reason generally assigned for this approach is a judicial comity. While doubtless this is a fundamental reason for the approach, I think that an equally fundamental, if not more compelling, reason is the need for certainty in the law, so far as that can be established. Lawyers would be in an intolerable position in advising clients if a division of the court was free to decide an appeal without regard to a previous decision or the principle involved in it. [...]

A similar position was taken by Mr. Justice Jockett, President of the Exchequer Court, in *Canada Steamship Lines Ltd. v. M.N.R.*, [1966] Ex. C.R. 972 at p. 976, [1966] C.T.C. 255, 66 D.T.C. 5205:

I think I am bound to approach the matter in the same way as the similar problem was approached in each of these cases until such time, if any, as a different course is indicated by a higher Court. When I say I am bound, I do not mean that I am bound by any strict rule of stare decisis but by my own view as to the desirability of having the decisions of this Court follow a consistent course as far as possible.

Stare decisis

Although it is true that the Agency has already noted, for example in [250-C-A-2012](#) Decision No. [250-C-A-2012](#) (*Lukács v. Air Canada*) and [251-C-A-2012](#) Decision No. [251-C-A-2012](#) (*Lukács v. Air Canada*), that members of administrative tribunals, like the Agency, are not bound by the principle of stare decisis, and that a tribunal is not bound to follow its own previous decisions on similar issues, there are some situations where the application of that principle is appropriate, if only to have the decisions of the Agency follow a consistent course as far as possible, as stated by Mr. Justice Jockett. In a recent judgment of the Supreme Court of Canada, *Canada (Attorney General) v. Confédération des syndicats nationaux*, 2014 SCC 49 (CanLII), the Supreme Court of Canada had to decide whether an action had to be dismissed on the basis of stare decisis. The Supreme Court of Canada stated:

[25] Although relatively uncommon in Quebec civil procedure, the mechanism for dismissing actions at a preliminary stage on the basis of *stare decisis* is similar to the *res judicata* exception (art. 165(1) C.C.P.). Under both of them, the legal issues raised by the applicant must already have been clearly resolved by the courts. However, unlike *res judicata*, *stare decisis* does not necessarily require that the dispute be between the same parties. What must be established is that the issue is the same and that the questions it raises have already been answered by a higher court whose judgment has the authority of *res judicata*.

[26] In *Canada v. Imperial Tobacco*, Gascon J.A., as he then was, explained this as follows:

[translation] In this context, the manufacturers' argument that this case is not *res judicata*, because *Imperial* was not decided by a court of competent civil law jurisdiction or because strict identity of parties, cause and object is not established, does not appear to me to be determinative. I see no need for further discussion of the distinctions the manufacturers raise with respect to these identities of parties, cause and object, which in their view refute the AGC's *res judicata* argument. In my opinion, the appropriate principle to apply to resolve the issue is instead *stare decisis*.

The Superior Court should have held on the basis of *stare decisis* that it was bound by *Imperial*. The Supreme Court, by ruling as it did on the issue of the AGC's immunity in relation to the course or principle of action challenged by the manufacturers, had in a sense barred the manufacturers' actions in warranty by rendering them unfounded in law, even if the alleged facts were assumed to be true.

Stare decisis is a less stringent basis for an argument than *res judicata*, since it requires only a similar or analogous factual framework. *Stare decisis* is a principle "under which a court must follow earlier judicial decisions when the same points arise again in litigation" [...] It applies, of course, to decisions of the Supreme Court, particularly in the area of public law as here, where the parties were involved in earlier litigation on the specific question at issue. [...]

[25] In this case, the circumstances suggest that Mr. Liu did not raise the mistake with United and that he intended to benefit from United's mistake. The Agency is of the opinion that this is analogous to the First City Capital case where Chief Justice McLachlin referred to situations where a party "knows or ought to know of another's mistake in a fundamental term, remains silent and snaps at the offer, seeking to take advantage of the other's mistake". As there exists a "similar or analogous factual framework" between this case and the Mistaken Fares Trilogy, the Agency is of the opinion that it should apply the doctrine of judicial comity/*stare decisis*.

Conclusion

[26] In light of the above, the Agency finds that no valid contract has been entered into between United and Mr. Liu as there was no meeting of the minds. Consequently, the Agency dismisses Mr. Liu's application.

[27] Therefore, there is no need for the Agency to address Issues 2 and 3.

ISSUE 4: SHOULD UNITED BE AWARDED COSTS, PURSUANT TO SECTION 25.1 OF THE CTA?

Position of United

[28] United requests that the Agency award it reasonable costs in responding to Mr. Liu's application.

Position of Mr. Liu

[29] Mr. Liu did not make any submissions respecting this matter.

Analysis and findings

[30] Section 25.1 of the CTA provides that:

1. Subject to subsections (2) to (4), the Agency has all the powers that the Federal Court has to award costs in any proceeding before it.
2. Costs may be fixed in any case at a sum certain or may be taxed.
3. The Agency may direct by whom and to whom costs are to be paid and by whom they are to be taxed and allowed.
4. The Agency may make rules specifying a scale under which costs are to be taxed.

[31] The Agency has full discretion to award costs and, in the past, it has relied on a set of general principles in determining whether to award costs, including whether the applicant for an award of costs has a substantial interest in the proceeding, has participated in the proceeding in a responsible manner, has made a significant contribution that is relevant to the proceeding, and has contributed to a better understanding of the issues by all the parties before the Agency. In addition, the Agency may consider other factors, such as the importance and complexity of the issues, the amount of work, and the result of the proceeding in justifying an award of costs. In this case, there are other factors which favour awarding costs to United.

[32] The Agency has not typically awarded costs against individual applicants who in good faith bring forward applications regarding their experiences travelling by air. Even if unsuccessful, the Agency has declined to award costs against an applicant because, in part, there would be concern that future applicants might hesitate filing an application with the Agency out of fear that if not successful, they would be called upon to compensate a carrier for substantial legal costs. Proceedings should be accessible and, for this reason, the Agency has often determined that parties should bear their own costs.

[33] The facts of this case are different. The evidence indicates that Mr. Liu knew that the ticket price he obtained was the result of a mistake. United provided evidence that Mr. Liu used a false address to obtain the erroneous fare. This suggests that Mr. Liu had been made aware of a glitch in the calculation of an exchange rate resulting in fares being set at a fraction of their intended prices and that he purposefully set about to exploit this. Mr. Liu offered no explanation in response to the evidence submitted by United.

[34] Mr. Liu brought this application to the Agency and sought to enforce the contract even though he knew that it was based on a mistake, and he misrepresented himself. This is conduct that the Agency finds should be addressed through an award of costs. This application should not have been brought to the

Agency. It was not only devoid of merit but was based on a deception and was not filed in good faith. United was required to retain Counsel and expend significant resources to investigate the application and provide detailed submissions in response. The Agency finds that an award of costs against Mr. Liu is appropriate, and that those costs be fixed.

ORDER

[35] In light of the above, the Agency orders Mr. Liu, by no later than October 21, 2015, to pay CAD\$1,000.00 to United.

Member(s)

Stephen Campbell

[Back to rulings](#)

[Share this page](#)

Date modified:

2015-09-21

TAB 16



[Home](#) → [Decisions and determinations](#)

Decision No. 398-C-A-2014

October 29, 2014

RESPONSE by China Southern Airlines Company Limited carrying on business as China Southern Airlines and China Southern to the direction to show cause set out in 290-C-A-2014">Decision No. 290-C-A-2014.

File No.: M4120-3/14-03897

BACKGROUND

[1] In 290-C-A-2014">Decision No. 290-C-A-2014 (*Five Complainants v. Iberia Air Lines of Spain and China Southern*) [Decision], the Canadian Transportation Agency (Agency) provided China Southern Airlines Company Limited carrying on business as China Southern Airlines and China Southern (China Southern) with the opportunity to show cause why, with respect to the complaint filed by Steen Jorgensen, the Agency should not find that, in downgrading service or providing a refund based on erroneously quoted fares, China Southern did not properly apply the terms and conditions set out in its international tariff, as required by subsection 110(4) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR (Air Transportation Regulations)).

[2] In that same Decision, the Agency provided Mr. Jorgensen with the opportunity to comment on China Southern's submission.

[3] On August 11, 2014, China Southern filed its answer, and on August 13, 2014, Mr. Jorgensen filed his reply.

ISSUE: DID CHINA SOUTHERN PROPERLY APPLY THE TERMS AND CONDITIONS SET OUT IN ITS INTERNATIONAL TARIFF, AS REQUIRED BY SUBSECTION 110(4) OF THE ATR (Air Transportation Regulations)?

POSITIONS OF PARTIES

China Southern

[4] China Southern requests that the Agency, under section 32 of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA) reconsider the factors in the direction to show cause. China Southern argues that several precedent-setting decisions relating to virtually identical tickets purchased for travel between Myanmar and North America were issued by the Agency after the close of pleadings, and that those decisions have a significant material impact with respect to China Southern. China Southern further argues that the contract on which the Agency made a ruling in 290-C-A-2014 Decision No. 290-C-A-2014 is the same contract that Mr. Jorgensen had with China Southern, as it was part of the same ticket. China Southern maintains, therefore, that the decision made by the Agency with respect to Iberia, Lineas Aereas De Espana, S.A. (Iberia Air Lines of Spain) [Iberia] must apply equally to China Southern.

[5] China Southern also requests that the Agency accept its more detailed explanation regarding the ticket being issued in error. China Southern advises that in its pleadings it described the price of the ticket as an "error". However, according to China Southern, this factor was not considered by the Agency.

[6] China Southern also contends that pursuant to section 17.3 of its General Conditions of International Carriage for Passenger & Baggage, China Southern is only liable for damage occurring on its own operated flights. Therefore, China Southern contends that it is only responsible for the portion of Mr. Jorgensen's itinerary from Yangon, Myanmar to Guangzhou, People's Republic of China, as this portion was the only segment operated by China Southern.

Mr. Jorgensen

[7] In response to China Southern's request for a review of Decision No. 290-C-A-2014 under section 32 of the CTA, Mr. Jorgensen states that the carrier is trying to circumvent the purpose and specifics of the direction to show cause, and re-argue its case using statements and arguments previously made by Mr. Jorgensen and Iberia.

[8] With respect to China Southern's claim of being responsible solely for transportation from Yangon to Guangzhou pursuant to section 17.3 of China Southern's General Conditions of International Carriage for Passenger & Baggage, Mr. Jorgensen contends that the application of this tariff provision applies to lost and damaged luggage and personal injury, and is clearly inapplicable to this situation.

ANALYSIS AND FINDINGS

Previous Agency Decisions: Mistaken Fares Trilogy

[9] In 177-C-A-2014 Decision No. 177-C-A-2014 (*Alberque v. US Airways*), 202-C-A-2014 Decision No. 202-C-A-2014 (*83 complainants v. Swiss International Air Lines*) and 290-C-A-2014 Decision No. 290-C-A-2014, which the Agency refers to as the Mistaken Fares Trilogy, the Agency considered the matter of mistaken fares that were set by the International Air Transport Association, and sent by the Airline Tariff Publishing Company to online ticket agents for sale to passengers in September 2012 for travel from Yangon to various destinations in Canada. In those Decisions, the Agency determined that the complainants knew or should have known that the fares at issue were erroneous, that as such there was no meeting of the minds between the parties respecting those fares, and that accordingly the parties had

not entered in a contract. The Agency therefore dismissed the complaints. As submitted by China Southern, 290-C-A-2014*>Decision No. 290-C-A-2014 not only relates to the same factual background as in the other decisions in the Mistaken Fares Trilogy but it is also part of the same contract that the complainant had with China Southern.

[10] In light of the Mistaken Fares Trilogy, China Southern is asking the Agency to reconsider the factors in the direction to show cause because the Mistaken Fares Trilogy relates to virtually identical tickets purchased for travel between Myanmar and North America. The Agency is of the opinion that although China Southern refers to its submissions as an application under section 32 of the CTA, China Southern is in fact asking the Agency to follow its own decisions on the same issue and factual background as it is arguing that the decision made by the Agency with respect to Iberia must apply equally to China Southern.

Judicial Comity/Stare Decisis

Judicial Comity

[11] In *Ahani v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 8284 (FC), the Federal Court of Canada wrote:

[4] In *Glaxo Group Ltd. v. Canada (Minister of National Health and Welfare)*, supra, Richard J. (as he then was) considered whether he was bound, by reasons of judicial comity, to apply a decision of Noël J. (as he then was) on one of the identical issues raised before him. In reviewing the principle of judicial comity and its application, Richard J. stated as follows:

The principle of judicial comity has been expressed as follows:

The generally accepted view is that this court is bound to follow a previous decision of the court unless it can be shown that the previous decision was manifestly wrong, or should no longer be followed: for example, (1) the decision failed to consider legislation or binding authorities which would have produced a different result, or (2) the decision, if followed, would result in a severe injustice. The reason generally assigned for this approach is a judicial comity. While doubtless this is a fundamental reason for the approach, I think that an equally fundamental, if not more compelling, reason is the need for certainty in the law, so far as that can be established. Lawyers would be in an intolerable position in advising clients if a division of the court was free to decide an appeal without regard to a previous decision or the principle involved in it.

[...]

A similar position was taken by Mr. Justice Jockett, President of the Exchequer Court, in *Canada Steamship Lines Ltd. v. M.N.R.*, [1966] Ex. C.R. 972 at p. 976, [1966] C.T.C. 255, 66 D.T.C. 5205:

I think I am bound to approach the matter in the same way as the similar problem was approached in each of these cases until such time, if any, as a different course is indicated by a higher Court. When I say I am bound, I do not mean that I am bound by any strict rule of stare decisis but by my own view as to the desirability of having the decisions of this Court follow a consistent course as far as possible.

Stare decisis

[12] Although it is true that the Agency has already noted, for example in 250-C-A-2012 Decision No. 250-C-A-2012 (*Lukács v. Air Canada*) and 251-C-A-2012 Decision No. 251-C-A-2012 (*Lukács v. Air Canada*), that members of administrative tribunals, like the Agency, are not bound by the principle of stare decisis, and that a tribunal is not bound to follow its own previous decisions on similar issues, there are some situations where its application is appropriate, if only to have the decisions of the Agency follow a consistent course as far as possible, as noted by Mr. Justice Jaccottet. In a recent decision of the Supreme Court of Canada, *Canada (Attorney General) v. Confédération des syndicats nationaux*, 2014 SCC 49 (CanLII), the Supreme Court of Canada had to decide whether an action had to be dismissed on the basis of stare decisis. The Supreme Court of Canada noted:

[25] Although relatively uncommon in Quebec civil procedure, the mechanism for dismissing actions at a preliminary stage on the basis of *stare decisis* is similar to the *res judicata* exception (art. 165(1) C.C.P.). Under both of them, the legal issues raised by the applicant must already have been clearly resolved by the courts. However, unlike *res judicata*, *stare decisis* does not necessarily require that the dispute be between the same parties. What must be established is that the issue is the same and that the questions it raises have already been answered by a higher court whose judgment has the authority of *res judicata*.

[26] In *Canada v. Imperial Tobacco*, Gascon J.A., as he then was, explained this as follows:

[translation] In this context, the manufacturers' argument that this case is not *res judicata*, because *Imperial* was not decided by a court of competent civil law jurisdiction or because strict identity of parties, cause and object is not established, does not appear to me to be determinative. I see no need for further discussion of the distinctions the manufacturers raise with respect to these identities of parties, cause and object, which in their view refute the AGC's *res judicata* argument. In my opinion, the appropriate principle to apply to resolve the issue is instead *stare decisis*.

The Superior Court should have held on the basis of *stare decisis* that it was bound by *Imperial*. The Supreme Court, by ruling as it did on the issue of the AGC's immunity in relation to the course or principle of action challenged by the manufacturers, had in a sense barred the manufacturers' actions in warranty by rendering them unfounded in law, even if the alleged facts were assumed to be true.

Stare decisis is a less stringent basis for an argument than *res judicata*, since it requires only a similar or analogous factual framework. *Stare decisis* is a principle "under which a court must follow earlier judicial decisions when the same points arise again in litigation"[...] It applies, of course, to decisions of the Supreme Court, particularly in the area of public law as here, where the parties were involved in earlier litigation on the specific question at issue. [...]

[13] As submitted by China Southern, the contract on which the Agency made a ruling in 290-C-A-2014 Decision No. 290-C-A-2014 (which is one of the three Decisions in the Mistaken Fares Trilogy) is the same contract that Mr. Jorgensen had with China Southern, as it was part of the same ticket.

Moreover, as there exists in the present matter a "similar or analogous factual framework" to that in 290-C-A-2014">Decision No. 290-C-A-2014 as well as the other two Decisions referred to as the Mistaken Fares Trilogy, the Agency is of the opinion that it should apply the doctrine of judicial *comity/stare decisis*.

CONCLUSION

[14] Based on the doctrine of judicial *comity/stare decisis*, as explained above, the Agency finds, as it did in the Mistaken Fares Trilogy, that a valid contract was not entered into between China Southern and Mr. Jorgensen as there was no meeting of the minds. As a result of this, there is no need for the Agency to address the direction to show cause issued in 290-C-A-2014">Decision No. 290-C-A-2014 as to whether China Southern properly applied its international tariff.

[15] Consequently, the Agency dismisses Mr. Jorgensen's complaint.


Refund of cancelled ticket

[16] The Agency notes that Mr. Jorgensen did not travel on his ticket. Therefore, he is entitled to a full refund of the cost of his ticket as provided for under Rule 90 – Refunds, of China Southern's International Rules and Fares tariff, NTA (National Transportation Agency)(A) No. 532 on file with the Agency.

Member(s)

Sam Barone
Geoffrey C. Hare

Back to rulings

 Share this page

Date modified:
2014-10-29

TAB 17

RJR — MacDonald Inc. *Applicant*

RJR — MacDonald Inc. *Requérante*

v.

c.

**The Attorney General of
Canada** *Respondent*

^a **Le procureur général du Canada** *Intimé*

and

^b et

The Attorney General of Quebec
Mis-en-cause

Le procureur général du Québec
Mis en cause

and

^c et

**The Heart and Stroke Foundation of
Canada, the Canadian Cancer Society, the
Canadian Council on Smoking and Health,
and Physicians for a Smoke-Free
Canada** *Interveners on the application for
interlocutory relief*

^d **La Fondation des maladies du cœur du
Canada, la Société canadienne du cancer, le
Conseil canadien sur le tabagisme et la
santé, et Médecins pour un Canada sans
fumée** *Intervenants dans la demande de
redressement interlocutoire*

and between

^e et entre

Imperial Tobacco Ltd. *Applicant*

Imperial Tobacco Ltd. *Requérante*

v.

^f c.

**The Attorney General of
Canada** *Respondent*

^g **Le procureur général du Canada** *Intimé*

and

et

The Attorney General of Quebec
Mis-en-cause

^h **Le procureur général du Québec**
Mis en cause

and

et

**The Heart and Stroke Foundation of
Canada, the Canadian Cancer Society, the
Canadian Council on Smoking and Health,
and Physicians for a Smoke-Free
Canada** *Interveners on the application for
interlocutory relief*

ⁱ **La Fondation des maladies du cœur du
Canada, la Société canadienne du cancer, le
Conseil canadien sur le tabagisme et la
santé, et Médecins pour un Canada sans
fumée** *Intervenants dans la demande de
redressement interlocutoire*

1994 CanLII 117 (SCC)

INDEXED AS: RJR — MACDONALD INC. v. CANADA
(ATTORNEY GENERAL)

File Nos.: 23460, 23490.

1993: October 4; 1994: March 3.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

APPLICATIONS FOR INTERLOCUTORY RELIEF

Practice — Interlocutory motions to stay implementation of regulations pending final decision on appeals and to delay implementation if appeals dismissed — Leave to appeal granted shortly after applications to stay heard — Whether the applications for relief from compliance with regulations should be granted — Tobacco Products Control Act, S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(f), 18 — Tobacco Products Control Regulations, amendment, SOR/93-389 — Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 24(1) — Rules of the Supreme Court of Canada, SOR/83-74, s. 27 — Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1.

The *Tobacco Products Control Act* regulates the advertisement of tobacco products and the health warnings which must be placed upon those products. Both applicants successfully challenged the Act's constitutional validity in the Quebec Superior Court on the grounds that it was *ultra vires* Parliament and that it violates the right to freedom of expression in s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The Court of Appeal ordered the suspension of enforcement until judgment was rendered on the Act's validity but declined to order a stay of the coming into effect of the Act until 60 days following a judgment validating the Act. The majority ultimately found the legislation constitutional.

The *Tobacco Products Control Regulations, amendment*, would cause the applicants to incur major expense in altering their packaging and these expenses would be irrecoverable should the legislation be found unconstitutional. Before a decision on applicants' leave applications to this Court in the main actions had been made, the applicants brought these motions for stay pursuant to s. 65.1 of the *Supreme Court Act*, or, in the event that leave was granted, pursuant to r. 27 of the *Rules of the Supreme Court of Canada*. In effect, the applicants sought to be released from any obligation to comply with the new packaging requirements until the disposi-

RÉPERTORIÉ: RJR — MACDONALD INC. c. CANADA
(PROCUREUR GÉNÉRAL)

N^{os} du greffe: 23460, 23490.

^a 1993: 4 octobre; 1994: 3 mars.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

DEMANDES DE REDRESSEMENT INTERLOCUTOIRE

Pratique — Demandes interlocutoires visant à surseoir à l'application d'un règlement en attendant la décision finale sur des appels et à en retarder la mise en œuvre si les appels sont rejetés — Autorisations d'appel accordées peu après l'audition des demandes de sursis — Les demandes de dispense de l'application du règlement devraient-elles être accordées? — Loi réglementant les produits du tabac, L.C. 1988, ch. 20, art. 3, 4 à 8, 9, 11 à 16, 17f), 18 — Règlement sur les produits du tabac — Modification, DORS/93-389 — Charte canadienne des droits et libertés, art. 1, 2b), 24(1) — Règles de la Cour suprême du Canada, DORS/83-74, art. 27 — Loi sur la Cour suprême, L.R.C. (1985), ch. S-26, art. 65.1.

La *Loi réglementant les produits du tabac* vise à réglementer la publicité des produits du tabac et les mises en garde qui doivent être apposées sur ces produits. Les deux requérantes ont eu gain de cause devant la Cour supérieure du Québec lorsqu'elles ont contesté la constitutionnalité de la Loi au motif qu'elle était *ultra vires* du Parlement et contrevenait à l'al. 2b) de la *Charte canadienne des droits et libertés*. La Cour d'appel a ordonné la suspension du contrôle d'application jusqu'à ce que jugement soit rendu sur la validité de la Loi, mais elle a refusé de suspendre l'application de la Loi pendant une période de 60 jours suivant un jugement déclarant la Loi valide. La Cour d'appel à la majorité a ultérieurement déclaré la loi constitutionnelle.

Le *Règlement sur les produits du tabac — Modification* obligerait les requérantes à engager des dépenses considérables pour modifier leurs emballages, et ces dépenses ne seraient pas recouvrables si la législation était déclarée inconstitutionnelle. Avant la décision relative aux autorisations de pourvoi dans les actions principales, les requérantes ont demandé un sursis d'exécution en vertu de l'art. 65.1 de la *Loi sur la Cour suprême* ou, dans l'éventualité où les autorisations d'appel seraient accordées, en vertu de l'art. 27 des *Règles de la Cour suprême du Canada*. En réalité, les requérantes demandent d'être libérées de toute obligation de se conformer

tion of the main actions. They also requested that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of *Tobacco Products Control Act*.

This Court heard applicants' motions on October 4 and granted leave to appeal the main action on October 14. At issue here was whether the applications for relief from compliance with the *Tobacco Products Control Regulations, amendment* should be granted. A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants.

Held: The applications should be dismissed.

The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the *Supreme Court of Canada Act* and r. 27 of the *Rules of the Supreme Court of Canada*.

The words "other relief" in r. 27 of the *Supreme Court Rules* are broad enough to permit the Court to defer enforcement of regulations that were not in existence when the appeal judgment was rendered. It can apply even though leave to appeal may not yet be granted. In interpreting the language of the rule, regard should be had to its purpose: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal.

Section 65.1 of the *Supreme Court Act* was adopted not to limit the Court's powers under r. 27 but to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. It should be interpreted as conferring the same broad powers as are included in r. 27. The Court, pursuant to both s. 65.1 and r. 27, can not only grant a stay of execution and of proceedings in the traditional sense but also make any order that preserves matters between the parties in a state that will, as far as possible, prevent prejudice pending resolution by the Court of the controversy, so as to enable the Court to

aux nouvelles exigences en matière d'emballage jusqu'aux décisions sur les actions principales. Elles ont aussi demandé que le sursis soit accordé pour une période de 12 mois à compter d'un refus des autorisations d'appel ou d'un arrêt de notre Cour confirmant la validité de la *Loi réglementant les produits du tabac*.

Notre Cour a entendu les demandes des requérantes le 4 octobre et a accordé, le 14 octobre, les autorisations d'appel relativement aux actions principales. La question est de savoir si les demandes visant à obtenir une dispense de l'application du *Règlement sur les produits du tabac — Modification* devraient être accordées. Une question préliminaire a été soulevée relativement à la compétence de notre Cour d'accorder le redressement demandé par les requérantes.

Arrêt: Les demandes sont rejetées.

Les pouvoirs de la Cour suprême du Canada d'accorder un redressement dans des procédures de ce genre sont prévus à l'art. 65.1 de la *Loi sur la Cour suprême du Canada* et à l'art. 27 des *Règles de la Cour suprême du Canada*.

L'expression «autre redressement» à l'art. 27 des *Règles de la Cour suprême du Canada* est suffisamment générale pour permettre à notre Cour de retarder l'application d'un règlement qui n'existait pas au moment où la cour d'appel a rendu son jugement. La règle peut s'appliquer même si l'autorisation d'appel n'a pas encore été accordée. Dans l'interprétation du libellé de la règle, il faut en examiner l'objet: faciliter les «recours» devant la Cour et «prendre les mesures nécessaires à l'application de la présente loi». Pour réaliser son objet, la règle ne peut être limitée aux cas où l'autorisation d'appel a déjà été accordée ni recevoir une interprétation restrictive de façon à s'appliquer seulement à une ordonnance qui suspend ou arrête l'exécution des procédures de la Cour par une tierce partie ou encore qui bloque l'exécution du jugement objet de l'appel.

L'adoption de l'art. 65.1 de la *Loi sur la Cour suprême* ne visait pas à restreindre les pouvoirs de notre Cour en vertu de l'art. 27, mais à permettre à un seul juge d'exercer la compétence d'accorder un sursis dans les cas où, avant la modification, c'était la Cour qui pouvait accorder un sursis. Il faut l'interpréter comme conférant les mêmes pouvoirs généraux que ceux de l'art. 27. La Cour est habilitée, tant en vertu de l'art. 65.1 que de l'art. 27, non seulement à accorder un sursis d'exécution et une suspension d'instance dans le sens traditionnel, mais aussi à rendre toute ordonnance visant à maintenir les parties dans une situation qui, dans la mesure

1994 CanLII 117 (SCC)

render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. The Court therefore must have jurisdiction to enjoin conduct on the part of a party acting in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court.

Jurisdiction to grant the relief requested by the applicants exists even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, which established that the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established. If jurisdiction under s. 65.1 of the Act and r. 27 were wanting, jurisdiction would be found in s. 24(1) of the *Canadian Charter of Rights and Freedoms*. A *Charter* remedy should not be defeated because of a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

The three-part *American Cyanamid* test (adopted in Canada in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*) should be applied to applications for interlocutory injunctions and as well for stays in both private law and *Charter* cases.

At the first stage, an applicant for interlocutory relief in a *Charter* case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation into the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the

du possible, ne sera pas cause de préjudice en attendant le règlement du différend par la Cour, de façon que cette dernière puisse rendre une décision qui ne sera pas dénuée de sens et d'efficacité. Notre Cour doit être en mesure d'intervenir non seulement à l'égard des termes mêmes du jugement, mais aussi à l'égard de ses effets. Notre Cour doit donc posséder la compétence d'interdire à une partie d'accomplir tout acte fondé sur le jugement, qui, s'il était accompli, tendrait à annuler ou à diminuer l'effet de la décision de notre Cour.

Notre Cour possède la compétence d'accorder le redressement demandé par les requérantes, même si les requérantes demandent une «suspension» du règlement plutôt qu'une «exemption» de son application. Une conclusion différente sur ce point irait à l'encontre de l'arrêt *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*, selon lequel la distinction entre les cas de «suspension» et d'«exemption» ne se fait qu'après que la compétence a été par ailleurs établie. Si la compétence de notre Cour ne pouvait reposer sur l'art. 65.1 de la Loi et l'art. 27 des Règles, le fondement de cette compétence pourrait être le par. 24(1) de la *Charte canadienne des droits et des libertés*. Une lacune dans les pouvoirs accessoires de notre Cour en matière de procédure permettant de préserver les droits des parties en attendant le règlement final d'un différend touchant des droits constitutionnels ne devrait pas faire obstacle à une réparation fondée sur la *Charte*.

Le critère en trois étapes de l'arrêt *American Cyanamid* (adopté au Canada dans *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*) devrait s'appliquer aux demandes d'injonction interlocutoire et de suspension d'instance, tant en droit privé que dans des cas relevant de la *Charte*.

À la première étape, le requérant d'un redressement interlocutoire dans un cas relevant de la *Charte* doit établir l'existence d'une question sérieuse à juger. Le juge de la requête doit déterminer s'il est satisfait au critère, en se fondant sur le bon sens et un examen extrêmement restreint du fond de l'affaire. Le fait qu'une cour d'appel a accordé une autorisation d'appel relativement à l'action principale constitue une considération pertinente et importante, de même que tout jugement rendu sur le fond, mais ni l'un ni l'autre n'est concluant sur ce point. Le tribunal saisi de la requête ne devrait aller au-delà d'un examen préliminaire du fond de l'affaire que lorsque le résultat de la requête interlocutoire équivaudra en fait à un règlement final de l'action, ou que la question de constitutionnalité d'une loi se présente comme une pure question de droit. Les cas de ce genre sont extrêmement rares. Sauf lorsque la demande est futile ou

1994 CanLII 117 (SCC)

statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.

vexatoire ou que la question de la constitutionnalité d'une loi se présente comme une pure question de droit, le juge de la requête doit en général procéder à l'examen des deuxième et troisième étapes du critère de l'arrêt *Metropolitan Stores*.

At the second stage the applicant is required to demonstrate that irreparable harm will result if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

À la deuxième étape, le requérant doit établir qu'il subira un préjudice irréparable en cas de refus du redressement. Le terme «irréparable» a trait à la nature du préjudice et non à son étendue. Dans les cas relevant de la *Charte*, même une perte financière quantifiable, invoquée à l'appui d'une demande, peut être considérée comme un préjudice irréparable s'il n'est pas évident qu'il pourrait y avoir recouvrement au moment de la décision sur le fond.

The third branch of the test, requiring an assessment of the balance of inconvenience to the parties, will normally determine the result in applications involving *Charter* rights. A consideration of the public interest must be taken into account in assessing the inconvenience which it is alleged will be suffered by both parties. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation has in fact this effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

La troisième étape du critère, l'appréciation de la pondération des inconvénients, permettra habituellement de trancher les demandes concernant des droits garantis par la *Charte*. Il faut tenir compte de l'intérêt public dans l'appréciation des inconvénients susceptibles d'être subis par les deux parties. Les considérations d'intérêt public auront moins de poids dans les cas d'exemption que dans les cas de suspension. Si la nature et l'objet affirmé de la loi sont de promouvoir l'intérêt public, le tribunal des requêtes ne devrait pas se demander si la loi a réellement cet effet. Il faut supposer que tel est le cas. Pour arriver à contrer le supposé avantage de l'application continue de la loi que commande l'intérêt public, le requérant qui invoque l'intérêt public doit établir que la suspension de l'application de la loi serait elle-même à l'avantage du public.

As a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

En règle générale, les mêmes principes s'appliquent lorsqu'un organisme gouvernemental présente une demande de redressement interlocutoire. Cependant, c'est à la deuxième étape que sera examinée la question de l'intérêt public, en tant qu'aspect du préjudice irréparable causé aux intérêts du gouvernement. Cette question sera de nouveau examinée à la troisième étape lorsque le préjudice du requérant est examiné par rapport à celui de l'intimé, y compris le préjudice que ce dernier aura établi du point de vue de l'intérêt public.

Here, the application of these principles to the facts required that the applications for stay be dismissed.

En l'espèce, l'application de ces principes aux faits aboutit au rejet des demandes de sursis.

The observation of the Quebec Court of Appeal that the case raised serious constitutional issues and this Court's decision to grant leave to appeal clearly indicated that these cases raise serious questions of law.

L'observation de la Cour d'appel du Québec que l'affaire soulève des questions constitutionnelles sérieuses, ainsi que les autorisations d'appel accordées par notre Cour, indiquent clairement que l'affaire soulève des questions de droit sérieuses.

1994 CanLII 117 (SCC)

Although compliance with the regulations would require a significant expenditure and, in the event of their being found unconstitutional, reversion to the original packaging would require another significant outlay, monetary loss of this nature will not usually amount to irreparable harm in private law cases. However, where the government is the unsuccessful party in a constitutional claim, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies. Although the required expenditure would impose economic hardship on the companies, the economic loss or inconvenience can be avoided by passing it on to purchasers of tobacco products. Further, the applications, since they were brought by two of the three companies controlling the Canadian tobacco industry, were in actual fact for a suspension of the legislation, rather than for an exemption from its operation. The public interest normally carries greater weight in favour of compliance with existing legislation. The weight given is in part a function of the nature of the legislation and in part a function of the purposes of the legislation under attack. The government passed these regulations with the intention of protecting public health and furthering the public good. When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. The applicants, rather, must offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation. The only possible public interest in the continued application of the current packaging requirements, however, was that the price of cigarettes for smokers would not increase. Any such increase would not be excessive and cannot carry much weight when balanced against the undeniable importance of the public interest in health

Bien que l'application du règlement obligerait les requérantes à faire des dépenses importantes et si ce règlement était déclaré inconstitutionnel, à engager d'autres dépenses considérables pour revenir à leurs méthodes actuelles d'emballage, une perte monétaire de cette nature n'équivaudra habituellement pas à un préjudice irréparable dans des affaires de droit privé. Toutefois, lorsque le gouvernement est la partie qui échoue dans une affaire de nature constitutionnelle, un demandeur aura beaucoup plus de difficulté à établir la responsabilité constitutionnelle et à obtenir une réparation monétaire. Les dépenses nécessitées par le nouveau règlement causeront donc un préjudice irréparable aux requérantes si les demandes sont rejetées, mais les actions principales accueillies en appel.

Pour déterminer lequel de l'octroi ou du refus du redressement interlocutoire occasionnerait le plus d'inconvénients, il faut notamment procéder à l'examen de la nature du redressement demandé et du préjudice invoqué par les parties, de la nature de la loi contestée et de l'intérêt public. Les dépenses nécessaires imposeraient un fardeau économique aux sociétés, mais la perte ou les inconvénients économiques peuvent être reportés sur les acheteurs des produits du tabac. Par ailleurs, puisqu'elles sont présentées par deux des trois sociétés qui contrôlent l'industrie canadienne du tabac, les demandes constituent en réalité un cas de suspension plutôt qu'un cas d'exemption de l'application de la législation. L'intérêt public pèse habituellement plus en faveur du respect de la législation existante. Le poids accordé aux préoccupations d'intérêt public dépend en partie de la nature de la loi et en partie de l'objet de la loi contestée. Le gouvernement a adopté le règlement dans l'intention de protéger la santé publique et donc de promouvoir le bien public. Si le gouvernement déclare qu'il adopte une loi pour protéger et favoriser la santé publique et s'il est établi que les limites qu'il veut imposer à l'industrie sont de même nature que celles qui, dans le passé, ont eu des avantages concrets pour le public, il n'appartient pas à un tribunal saisi d'une requête interlocutoire d'évaluer les véritables avantages qui découleront des exigences particulières de la loi. Les requérantes doivent plutôt faire contrepois à ces considérations d'intérêt public en établissant que la suspension de l'application de la loi serait davantage dans l'intérêt public. Pour ce qui est du maintien de l'application des exigences actuelles en matière d'emballage, seule la non-majoration du prix des cigarettes pour les fumeurs pourrait être dans l'intérêt du public. Une telle majoration ne serait vraisemblablement pas excessive et ne peut avoir beaucoup de poids face à l'importance incontestable de l'intérêt public dans la protection de la santé

1994 CanLII 117 (SCC)

and in the prevention of the widespread and serious medical problems directly attributable to smoking.

et la prévention de problèmes médicaux répandus et graves directement attribuables à la cigarette.

Cases Cited

Applied: Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., [1987] 1 S.C.R. 110; considered: Labatt Breweries of Canada Ltd. v. Attorney General of Canada, [1980] 1 S.C.R. 594; American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396; referred to: R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401; Keable v. Attorney General (Can.), [1978] 2 S.C.R. 135; Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co. (1924), 55 O.L.R. 127; Laboratoire Pentagone Ltée v. Parke, Davis & Co., [1968] S.C.R. 269; Adrian Messenger Services v. The Jockey Club Ltd. (No. 2) (1972), 2 O.R. 619; Bear Island Foundation v. Ontario (1989), 70 O.R. (2d) 574; N.W.L. Ltd. v. Woods, [1979] 1 W.L.R. 1294; Trieger v. Canadian Broadcasting Corp. (1988), 54 D.L.R. (4th) 143; Tremblay v. Daigle, [1989] 2 S.C.R. 530; Dialadex Communications Inc. v. Crammond (1987), 34 D.L.R. (4th) 392; R.L. Crain Inc. v. Hendry (1988), 48 D.L.R. (4th) 228; MacMillan Bloedel Ltd. v. Mullin, [1985] 3 W.W.R. 577; Hubbard v. Pitt, [1976] Q.B. 142; Mills v. The Queen, [1986] 1 S.C.R. 863; Nelles v. Ontario, [1989] 2 S.C.R. 170; Ainsley Financial Corp. v. Ontario Securities Commission (1993), 14 O.R. (3d) 280; Morgentaler v. Ackroyd (1983), 150 D.L.R. (3d) 59; Attorney General of Canada v. Fishing Vessel Owners' Association of B.C., [1985] 1 F.C. 791; Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans) (1988), 21 F.T.R. 304; Island Telephone Co., Re (1987), 67 Nfld. & P.E.I.R. 158; Black v. Law Society of Alberta (1983), 144 D.L.R. (3d) 439; Vancouver General Hospital v. Stoffman (1985), 23 D.L.R. (4th) 146; Rio Hotel Ltd. v. Commission des licences et permis d'alcool, [1986] 2 S.C.R. ix; Ontario Jockey Club v. Smith (1922), 22 O.W.N. 373; R. v. Oakes, [1986] 1 S.C.R. 103.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(h), 24(1).
Code of Civil Procedure of Québec, art. 523.
Constitution Act, 1867, s. 91.
Fisheries Act, R.S.C. 1970 c. F-14.
Rules of the Supreme Court of Canada, 1888, General Order No. 85(17).
Rules of the Supreme Court of Canada, SOR/83-74, s. 27.

Jurisprudence

Arrêt appliqué: Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd., [1987] 1 R.C.S. 110; arrêts examinés: Brasseries Labatt du Canada Ltée c. Procureur général du Canada, [1980] 1 R.C.S. 594; American Cyanamid Co. c. Ethicon Ltd., [1975] A.C. 396; arrêts mentionnés: R. c. Crown Zellerbach Canada Ltd., [1988] 1 R.C.S. 401; Keable c. Procureur général (Can.), [1978] 2 R.C.S. 135; Battle Creek Toasted Corn Flake Co. c. Kellogg Toasted Corn Flake Co. (1924), 55 O.L.R. 127; Laboratoire Pentagone Ltée c. Parke, Davis & Co., [1968] R.C.S. 269; Adrian Messenger Services c. The Jockey Club Ltd. (No. 2) (1972), 2 O.R. 619; Bear Island Foundation c. Ontario (1989), 70 O.R. (2d) 574; N.W.L. Ltd. c. Woods, [1979] 1 W.L.R. 1294; Trieger c. Canadian Broadcasting Corp. (1988), 54 D.L.R. (4th) 143; Tremblay c. Daigle, [1989] 2 R.C.S. 530; Dialadex Communications Inc. c. Crammond (1987), 34 D.L.R. (4th) 392; R.L. Crain Inc. c. Hendry (1988), 48 D.L.R. (4th) 228; MacMillan Bloedel Ltd. c. Mullin, [1985] 3 W.W.R. 577; Hubbard c. Pitt, [1976] Q.B. 142; Mills c. La Reine, [1986] 1 R.C.S. 863; Nelles c. Ontario, [1989] 2 R.C.S. 170; Ainsley Financial Corp. c. Ontario Securities Commission (1993), 14 O.R. (3d) 280; Morgentaler c. Ackroyd (1983), 150 D.L.R. (3d) 59; Procureur général du Canada c. Fishing Vessel Owners' Association of B.C., [1985] 1 C.F. 791; Esquimalt Anglers' Association c. Canada (Ministre des pêches et océans) (1988), 21 F.T.R. 304; Island Telephone Co., Re (1987), 67 Nfld. & P.E.I.R. 158; Black c. Law Society of Alberta (1983), 144 D.L.R. (3d) 439; Vancouver General Hospital c. Stoffman (1985), 23 D.L.R. (4th) 146; Rio Hotel Ltd. c. Commission des licences et permis d'alcool, [1986] 2 R.C.S. ix; Ontario Jockey Club c. Smith (1922), 22 O.W.N. 373; R. c. Oakes, [1986] 1 R.C.S. 103.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 2b), 24(1).
Code de procédure civile du Québec, art. 523.
Loi constitutionnelle de 1867, art. 91.
Loi réglementant les produits du tabac, L.R.C. (1985), ch. 14 (4e suppl.), L.C. 1988, ch. 20, art. 3, 4 à 8, 9, 11 à 16, 17f), 18.
Loi sur la Cour suprême, L.R.C. (1985), ch. S-26, art. 65.1 [aj. L.C. 1990, ch. 8, art. 40], 97(1)a).

1994 CanLII 117 (SCC)

Supreme Court Act, R.S.C., 1985, c. S-26, ss. 65.1 [ad. S.C. 1990, c. 8, s. 40], 97(1)(a).
Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(f), 18.
Tobacco Products Control Regulations, amendment, SOR/93-389.

Authors Cited

Canada. Minister of National Health and Welfare. Regulatory Impact Analysis Statement. (Statement following *Tobacco Products Control Regulations, amendment*, SOR/93-389.) In *Canada Gazette*, Part II, Vol. 127, No. 16, p. 3284.
 Cassels, Jamie. "An Inconvenient Balance: The Injunction as a Charter Remedy". In Jeffrey Berryman, ed. *Remedies: Issues and Perspectives*. Scarborough, Ont.: Carswell, 1991, 271.
 Sharpe, Robert J. *Injunctions and Specific Performance*, 2nd ed. Aurora, Ont.: Canada Law Book, 1992 (loose-leaf).

APPLICATIONS for interlocutory relief ancillary to constitutional challenge of enabling legislation following judgment of the Quebec Court of Appeal, [1993] R.J.Q. 375, 53 Q.A.C. 79, 102 D.L.R. (4th) 289, 48 C.P.R. (3d) 417, allowing an appeal from a judgment of Chabot J., [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, 37 C.P.R. (3d) 193, granting the application. Applications dismissed.

Colin K. Irving, for the applicant RJR — MacDonald Inc.

Simon V. Potter, for the applicant Imperial Tobacco Inc.

Claude Joyal and Yves Lebœuf, for the respondent.

W. Ian C. Binnie, Q.C., and *Colin Baxter*, for the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada.

The judgment of the Court on the applications for interlocutory relief was delivered by

Loi sur les pêcheries, S.R.C. 1970, ch. F-14.
Règlement sur les produits du tabac — Modification, DORS/93-389.
Règles de la Cour suprême du Canada, 1888, Ordonnance générale n° 85(17).
Règles de la Cour suprême du Canada, DORS/83-74, art. 27.

Doctrine citée

Canada. Ministre de la Santé nationale et du Bien-être social. Résumé de l'étude d'impact de la réglementation. (Résumé accompagnant le *Règlement sur les produits du tabac*, DORS/93-389.) Dans *Gazette du Canada*, partie II, vol. 127, n° 16, p. 3284.
 Cassels, Jamie. «An Inconvenient Balance: The Injunction as a Charter Remedy». In Jeffrey Berryman, ed. *Remedies: Issues and Perspectives*. Scarborough, Ont.: Carswell, 1991, 271.
 Sharpe, Robert J. *Injunctions and Specific Performance*, 2nd ed. Aurora, Ont.: Canada Law Book, 1992 (feuilles mobiles).

DEMANDES de redressement interlocutoire faisant partie d'une contestation de la constitutionnalité d'une loi habilitante à la suite d'un arrêt de la Cour d'appel du Québec, [1993] R.J.Q. 375, 53 Q.A.C. 79, 102 D.L.R. (4th) 289, 48 C.P.R. (3d) 417, qui a accueilli un appel de la décision du juge Chabot, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, 37 C.P.R. (3d) 193, qui avait fait droit à la demande. Demandes rejetées.

Colin K. Irving, pour la requérante RJR — MacDonald Inc.

Simon V. Potter, pour la requérante Imperial Tobacco Inc.

Claude Joyal et Yves Lebœuf, pour l'intimé.

W. Ian C. Binnie, c.r., et *Colin Baxter*, pour la Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé et Médecins pour un Canada sans fumée.

Version française du jugement de la Cour sur des demandes de redressement interlocutoire rendu par

1994 CanLII 117 (SCC)

SOPINKA AND CORY JJ. —

LES JUGES SOPINKA ET CORY —

I. Factual Background

I. Le contexte factuel

These applications for relief from compliance with certain *Tobacco Products Control Regulations, amendment*, SOR/93-389 as interlocutory relief are ancillary to a larger challenge to regulatory legislation which will soon be heard by this Court.

Les présentes demandes interlocutoires visant à obtenir une dispense de l'application de certaines dispositions du *Règlement sur les produits du tabac — Modification*, DORS/93-389 font partie d'une contestation plus large de la loi réglementaire que notre Cour entendra sous peu.

The *Tobacco Products Control Act*, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, came into force on January 1, 1989. The purpose of the Act is to regulate the advertisement of tobacco products and the health warnings which must be placed upon tobacco products.

La *Loi réglementant les produits du tabac*, L.R.C. (1985), ch. 14 (4^e suppl.), L.C. 1988, ch. 20, est entrée en vigueur le 1^{er} janvier 1989. Cette loi vise à réglementer la publicité des produits du tabac et les mises en garde qui doivent être apposées sur les produits du tabac.

The first part of the *Tobacco Products Control Act*, particularly ss. 4 to 8, prohibits the advertisement of tobacco products and any other form of activity designed to encourage their sale. Section 9 regulates the labelling of tobacco products, and provides that health messages must be carried on all tobacco packages in accordance with the regulations passed pursuant to the Act.

La première partie de la *Loi réglementant les produits du tabac*, plus particulièrement ses art. 4 à 8, interdisent la publicité en faveur des produits du tabac et toute autre activité destinée à en encourager la vente. L'article 9 réglemente l'étiquetage des produits du tabac et prévoit que tout emballage d'un produit du tabac doit comporter des messages relatifs à la santé, conformément au règlement d'application de la Loi.

Sections 11 to 16 of the Act deal with enforcement and provide for the designation of tobacco product inspectors who are granted search and seizure powers. Section 17 authorizes the Governor in Council to make regulations under the Act. Section 17(f) authorizes the Governor in Council to adopt regulations prescribing "the content, position, configuration, size and prominence" of the mandatory health messages. Section 18(1)(b) of the Act indicates that infringements may be prosecuted by indictment, and upon conviction provides for a penalty by way of a fine not to exceed \$100,000, imprisonment for up to one year, or both.

Les articles 11 à 16 de la Loi portent sur le contrôle d'application et prévoient la désignation d'inspecteurs des produits du tabac auxquels sont conférés des pouvoirs de perquisition et de saisie. L'article 17 autorise le gouverneur en conseil à prendre des règlements en vertu de la Loi. L'alinéa 17f) autorise le gouverneur en conseil à adopter des règlements fixant «la teneur, la présentation, l'emplacement, les dimensions et la mise en évidence» des messages obligatoires relatifs à la santé. L'alinéa 18(1)b) de la Loi indique que des contraventions peuvent donner lieu à des poursuites pour acte criminel, et que leur auteur encourt sur déclaration de culpabilité une amende maximale de 100 000 \$ et un emprisonnement maximal d'un an, ou l'une de ces peines.

Each of the applicants challenged the constitutional validity of the *Tobacco Products Control Act* on the grounds that it is *ultra vires* the Parliament of Canada and invalid as it violates s. 2(b) of the

Chacune des requérantes a contesté la constitutionnalité de la *Loi réglementant les produits du tabac* au motif qu'elle est *ultra vires* du Parlement du Canada et non valide en ce qu'elle contrevient à

1994 CanLII 117 (SCC)

Canadian Charter of Rights and Freedoms. The two cases were heard together and decided on common evidence.

On July 26, 1991, Chabot J. of the Quebec Superior Court granted the applicants' motions, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, finding that the Act was *ultra vires* the Parliament of Canada and that it contravened the *Charter*. The respondent appealed to the Quebec Court of Appeal. Before the Court of Appeal rendered judgment, the applicants applied to this court for interlocutory relief in the form of an order that they would not have to comply with certain provisions of the Act for a period of 60 days following judgment in the Court of Appeal.

Up to that point, the applicants had complied with all provisions in the *Tobacco Products Control Act*. However, under the Act, the complete prohibition on all point of sale advertising was not due to come into force until December 31, 1992. The applicants estimated that it would take them approximately 60 days to dismantle all of their advertising displays in stores. They argued that, with the benefit of a Superior Court judgment declaring the Act unconstitutional, they should not be required to take any steps to dismantle their displays until such time as the Court of Appeal might eventually hold the legislation to be valid. On the motion the Court of Appeal held that the penalties for non-compliance with the ban on point of sale advertising could not be enforced against the applicants until such time as the Court of Appeal had released its decision on the merits. The court refused, however, to stay the enforcement of the provisions for a period of 60 days following a judgment validating the Act.

On January 15, 1993, the Court of Appeal for Quebec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289, allowed the respondent's appeal, Brossard J.A. dissenting in part. The Court unanimously held that the Act was not *ultra vires* the government of Canada. The Court of Appeal accepted that the Act infringed s. 2(b) of the *Charter* but found, Brossard J.A. dissenting on this aspect, that it was justified under s. 1 of the *Charter*. Brossard J.A. agreed

l'al. 2b) de la *Charte canadienne des droits et libertés*. Les deux affaires ont été entendues ensemble et tranchées sur preuve commune.

Le 26 juillet 1991, le juge Chabot de la Cour supérieure du Québec a fait droit aux requêtes des requérantes, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, et conclu que la Loi était *ultra vires* du Parlement du Canada et qu'elle contrevenait à la *Charte*. L'intimé a interjeté appel devant la Cour d'appel du Québec. Avant que la Cour d'appel ne rende son jugement, les requérantes ont demandé à cette cour un redressement interlocutoire de la nature d'une ordonnance déclarant qu'elles n'auraient pas à se conformer à certaines dispositions de la Loi pendant une période de 60 jours suivant le jugement de la Cour d'appel.

Jusqu'à ce moment, les requérantes avaient respecté toutes les dispositions de la *Loi réglementant les produits du tabac*. Cependant, en vertu de la Loi, l'interdiction absolue de publicité à tous les points de vente ne devait entrer en vigueur que le 31 décembre 1992. Les requérantes estimaient qu'elles auraient besoin de 60 jours environ pour démonter tous les supports publicitaires dans les magasins. Fortes du jugement de la Cour supérieure qui avait déclaré la Loi inconstitutionnelle, les requérantes soutenaient qu'elles ne devraient pas être tenues de démonter leurs étalages tant que la Cour d'appel n'aurait pas déclaré la loi valide. En réponse à la requête, la Cour d'appel a statué que les peines pour contravention à l'interdiction de publicité aux points de vente ne pouvaient être appliquées contre les requérantes avant qu'elle se soit prononcée sur le fond. Toutefois, la cour a refusé de suspendre l'application des dispositions pendant une période de 60 jours suivant un jugement déclarant la Loi valide.

Le 15 janvier 1993, la Cour d'appel du Québec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289, a accueilli l'appel de l'intimé; le juge Brossard était dissident en partie. La cour a statué, à l'unanimité, que la Loi n'était pas *ultra vires* du gouvernement du Canada. La Cour d'appel a reconnu que la Loi contrevenait à l'al. 2b) de la *Charte*, mais a statué que cette contravention se justifiait en vertu de l'article premier de la *Charte*, le juge Brossard

with the majority with respect to the requirement of unattributed package warnings (that is to say the warning was not to be attributed to the Federal Government) but found that the ban on advertising was not justified under s. 1 of the *Charter*. The applicants filed an application for leave to appeal the judgment of the Quebec Court of Appeal to this Court.

On August 11, 1993, the Governor in Council published amendments to the regulations dated July 21, 1993, under the Act: *Tobacco Products Control Regulations, amendment*, SOR/93-389. The amendments stipulate that larger, more prominent health warnings must be placed on all tobacco products packets, and that these warnings can no longer be attributed to Health and Welfare Canada. The packaging changes must be in effect within one year.

According to affidavits filed in support of the applicant's motion, compliance with the new regulations would require the tobacco industry to redesign all of its packaging and to purchase thousands of rotogravure cylinders and embossing dies. These changes would take close to a year to effect, at a cost to the industry of about \$30,000,000.

Before a decision on their leave applications in the main actions had been made, the applicants brought these motions for a stay pursuant to s. 65.1 of the *Supreme Court Act*, R.S.C., 1985, c. S-26 (ad. by S.C. 1990, c. 8, s. 40) or, in the event that leave was granted, pursuant to r. 27 of the *Rules of the Supreme Court of Canada*, SOR/83-74. The applicants seek to stay "the judgment of the Quebec Court of Appeal delivered on January 15, 1993", but "only insofar as that judgment validates sections 3, 4, 5, 6, 7 and 10 of [the new regulations]". In effect, the applicants ask to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. The applicants further request that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a

étant dissident sur ce dernier point. Le juge Brosard a souscrit à l'opinion de la majorité relativement à la nécessité de mises en garde non attribuées sur les emballages (c'est-à-dire que les mises en garde ne devaient pas être attribuées au gouvernement fédéral), mais a conclu que l'interdiction de publicité ne pouvait se justifier en vertu de l'article premier de la *Charte*. Les requérantes ont déposé des demandes d'autorisation d'appel relativement à la décision de la Cour d'appel du Québec.

Le 11 août 1993, le gouverneur en conseil a publié des modifications du règlement datées du 21 juillet 1993 et prises en application de la Loi: *Règlement sur les produits du tabac—Modification*, DORS/93-389. Ces modifications imposent l'obligation d'apposer des mises en garde plus visibles et plus grandes sur tous les emballages des produits du tabac et de ne plus les attribuer à Santé et Bien-être Canada. Une période d'un an est allouée pour modifier les emballages.

Selon les affidavits déposés à l'appui de la requête, le respect du nouveau règlement exigerait de l'industrie du tabac de reconcevoir totalement les emballages et d'acheter des milliers de cylindres de rotogravure et de matrices de gaufrage. L'industrie aurait besoin de près d'un an pour procéder à ces changements, moyennant un coût d'environ 30 000 000 \$.

Avant la décision relative aux autorisations de pourvoi dans les actions principales, les requérantes ont demandé un sursis d'exécution en vertu de l'art. 65.1 de la *Loi sur la Cour suprême*, L.R.C. (1985), ch. S-26 (aj. L.C. 1990, ch. 8, art. 40) ou, dans l'éventualité où les autorisations d'appel seraient accordées, en vertu de l'art. 27 des *Règles de la Cour suprême du Canada*, DORS/83-74. Les requérantes demandent un sursis à l'exécution du [TRADUCTION] «jugement de la Cour d'appel du Québec rendu le 15 janvier 1993», mais «seulement dans la mesure où ce jugement valide les art. 3, 4, 5, 6, 7 et 10 du [nouveau règlement]». En réalité, les requérantes demandent d'être libérées de toute obligation de se conformer aux nouvelles exigences en matière d'emballage jusqu'aux décisions sur les actions principales. Elles demandent

decision of this Court confirming the validity of *Tobacco Products Control Act*.

The applicants contend that the stays requested are necessary to prevent their being required to incur considerable irrecoverable expenses as a result of the new regulations even though this Court may eventually find the enabling legislation to be constitutionally invalid.

The applicants' motions were heard by this Court on October 4. Leave to appeal the main actions was granted on October 14.

II. Relevant Statutory Provisions

Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, s. 3:

3. 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 the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;

(b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and

(c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1 (ad. S.C. 1990, c. 8, s. 40):

65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

également que le sursis soit accordé pour une période de 12 mois à compter du refus des autorisations d'appel ou d'un arrêt de notre Cour confirmant la validité de la *Loi réglementant les produits du tabac*.

Les requérantes soutiennent qu'elles doivent obtenir le sursis demandé pour ne pas avoir à engager des dépenses considérables et non recouvrables par suite de l'application du nouveau règlement, et ce, même si notre Cour pouvait en fin de compte déclarer inconstitutionnelle la loi habilitante.

Notre Cour a entendu les demandes des requérantes le 4 octobre. Le 14 octobre, elle accordait les autorisations d'appel relativement aux actions principales.

II. Les textes législatifs pertinents

Loi réglementant les produits du tabac, L.R.C. (1985), ch. 14 (4^e suppl.), L.C. 1988, ch. 20, art. 3:

3. 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, urgent et d'envergure nationale et, plus particulièrement:

a) de protéger la santé des Canadiennes et des 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, autant que faire se peut dans une société libre et démocratique, des incitations à la consommation du tabac et du tabagisme qui peut en résulter;

c) de mieux sensibiliser les Canadiennes et les Canadiens aux méfaits du tabac par la diffusion efficace de l'information utile aux consommateurs de celui-ci.

Loi sur la Cour suprême, L.R.C. (1985), ch. S-26, art. 65.1 (aj. L.C. 1990, ch. 8, art. 40):

65.1 La Cour ou un juge peut, à la demande d'une partie qui a déposé l'avis de la demande d'autorisation d'appel, ordonner, aux conditions que l'une ou l'autre estime indiquées, le sursis d'exécution du jugement objet de la demande.

Rules of the Supreme Court of Canada, SOR/83-74, s. 27:

27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

III. Courts Below

In order to place the applications for the stay in context it is necessary to review briefly the decisions of the courts below.

Superior Court, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449

Chabot J. concluded that the dominant characteristic of the *Tobacco Products Control Act* was the control of tobacco advertising and that the protection of public health was only an incidental objective of the Act. Chabot J. characterized the *Tobacco Products Control Act* as a law regulating advertising of a particular product, a matter within provincial legislative competence.

Chabot J. found that, with respect to s. 2(b) of the *Charter*, the activity prohibited by the Act was a protected activity, and that the notices required by the Regulations violated that *Charter* guarantee. He further held that the evidence demonstrated that the objective of reducing the level of consumption of tobacco products was of sufficient importance to warrant legislation restricting freedom of expression, and that the legislative objectives identified by Parliament to reduce tobacco use were a pressing and substantial concern in a free and democratic society.

However, in his view, the Act did not minimally impair freedom of expression, as it did not restrict itself to protecting young people from inducements to smoke, or limit itself to lifestyle advertising. Chabot J. found that the evidence submitted by the respondent in support of its contention that adver-

Règles de la Cour suprême du Canada, DORS/83-74, art. 27:

27. La partie contre laquelle la Cour ou un autre tribunal a rendu un jugement ou une ordonnance peut demander à la Cour un sursis à l'exécution de ce jugement ou de cette ordonnance ou un autre redressement, et la Cour peut accorder à cette demande aux conditions qu'elle juge appropriées.

b III. Les tribunaux d'instance inférieure

Pour situer les demandes de sursis d'exécution dans leur contexte, il faut examiner brièvement les décisions des tribunaux d'instance inférieure.

La Cour supérieure, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449

Le juge Chabot a conclu que la caractéristique dominante de la *Loi réglementant les produits du tabac* était le contrôle de la publicité du tabac et que la protection de la santé publique n'était qu'un objectif indirect de la Loi. Le juge Chabot a qualifié la *Loi réglementant les produits du tabac* comme étant une loi visant à réglementer la publicité d'un produit particulier, ce qui est une question relevant de la compétence législative provinciale.

En ce qui concerne l'al. 2b) de la *Charte*, le juge Chabot a conclu que l'activité interdite par la Loi est une activité protégée et que les avis exigés par le règlement vont à l'encontre de l'al. 2b) de la *Charte*. Il a conclu aussi que la preuve établissait, d'une part, que l'objectif de réduction de la consommation des produits du tabac était suffisamment important pour justifier l'adoption d'une loi restreignant la liberté d'expression et, d'autre part, que les objectifs législatifs identifiés par le Parlement aux fins de la réduction de l'utilisation du tabac, répondaient à un problème urgent et réel dans une société libre et démocratique.

Cependant, selon le juge Chabot, la Loi ne constituait pas une atteinte minimale à la liberté d'expression, en ce qu'elle ne visait pas seulement à protéger les jeunes contre les incitations à la consommation du tabac, ou ne se limitait pas à la publicité dite de style de vie. Le juge Chabot a

1994 CanLII 117 (SCC)

tising bans decrease consumption was unreliable and without probative value because it failed to demonstrate that any ban of tobacco advertising would be likely to bring about a reduction of tobacco consumption. Therefore, the respondent had not demonstrated that an advertising ban restricted freedom of expression as little as possible. Chabot J. further concluded that the evidence of a rational connection between the ban of Canadian advertising and the objective of reducing overall consumption of tobacco was deficient, if not non-existent. He held that the Act was a form of censorship and social engineering which was incompatible with a free and democratic society and could not be justified.

conclu que la preuve présentée par l'intimé selon laquelle l'interdiction totale de la publicité diminuait la consommation n'était pas fiable et n'avait aucune valeur probante parce qu'elle n'établissait pas que l'interdiction de la publicité entraînerait une diminution du tabagisme. En conséquence, l'intimé n'avait pas démontré que l'interdiction de la publicité portait le moins possible atteinte à la liberté d'expression. Le juge Chabot a conclu aussi que la preuve d'un lien rationnel entre la prohibition de la publicité au Canada et l'objectif de réduction du tabagisme était insuffisante, voire inexistante. Il a conclu que la Loi constituait en fait une forme de censure et d'ingérence sociale incompatible avec l'essence même d'une société libre et démocratique, qui ne pouvait être justifiée.

Court of Appeal (on the application for a stay)

La Cour d'appel (relativement au sursis d'exécution du jugement)

In deciding whether or not to exercise its broad power under art. 523 of the *Code of Civil Procedure of Québec* to "make any order necessary to safeguard the rights of the parties", the Court of Appeal made the following observation on the nature of the relief requested:

En décidant si elle devait exercer son vaste pouvoir en vertu de l'art. 523 du *Code de procédure civile du Québec* de «rendre toutes ordonnances propres à sauvegarder les droits des parties», la Cour d'appel a fait l'observation suivante relativement à la nature du redressement demandé:

But what is at issue here (if the Act is found to be constitutionally valid) is the suspension of the legal effect of part of the Act and the legal duty to comply with it for 60 days, and the suspension, as well, of the power of the appropriate public authorities to enforce the Act. To suspend or delay the effect or the enforcement of a valid act of the legislature, particularly one purporting to relate to the protection of public health or safety is a serious matter. The courts should not lightly limit or delay the implementation or enforcement of valid legislation where the legislature has brought that legislation into effect. To do so would be to intrude into the legislative and the executive spheres. [Emphasis in original.]

[TRADUCTION] Toutefois, ce qui est en cause en l'espèce (si la Loi est déclarée valide du point de vue constitutionnel) est, d'une part, la suspension de l'effet juridique d'une partie de la Loi et de l'obligation de s'y conformer pendant une période de 60 jours et, d'autre part, la suspension du pouvoir des autorités publiques responsables d'en assurer l'application. C'est une question sérieuse que de suspendre ou de retarder l'effet ou l'exécution d'une loi valide adoptée par la législature, notamment une loi portant sur la protection de la santé ou de la sécurité du public. Les tribunaux ne devraient pas limiter ou retarder à la légère l'application ou l'exécution d'une loi valide si la législature a procédé à sa mise en vigueur. Le faire aurait pour effet d'empiéter dans les sphères législative et exécutive. [Souligné dans l'original.]

The Court made a partial grant of the relief sought as follows:

La cour a fait droit en partie au redressement demandé:

Since the letters of the Department of Health and Welfare and appellants' contestation both suggest the possibility that the applicants may be prosecuted under Sec. 5 after December 31, 1992 whether or not judgment has been rendered on these appeals by that date, it

[TRADUCTION] Puisque les lettres du ministère de la Santé et du Bien-être et la contestation des appelantes laissent entendre qu'il existe une possibilité que les requérantes soient poursuivies en vertu de l'art. 5 de la Loi après le 31 décembre 1992, peu importe que le juge-

1994 CanLII 117 (SCC)

seems reasonable to order the suspension of enforcement under Sec. 5 of the Act until judgment has been rendered by this Court on the present appeals. There is, after all, a serious issue as to the validity of the Act, and it would be unfairly onerous to require the applicants to incur substantial expense in dismantling these point of sale displays until we have resolved that issue.

We see no basis, however, for ordering a stay of the coming into effect of the Act for 60 days following our judgment on the appeals.

Indeed, given the public interest aspect of the Act, which purports to be concerned with the protection of public health, if the Act were found to be valid, there is excellent reason why its effect and enforcement should not be suspended (*A.G. of Manitoba v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110, 127, 135). [Emphasis in original.]

Court of Appeal (on the validity of the legislation), [1993] R.J.Q. 375, 102 D.L.R. (4th) 289

1. LeBel J.A. (for the majority)

LeBel J.A. characterized the *Tobacco Products Control Act* as legislation relating to public health. He also found that it was valid as legislation enacted for the peace, order and good government of Canada.

LeBel J.A. applied the criteria set out in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, and concluded that the Act satisfied the "national concern" test and could properly rest on a purely theoretical, unproven link between tobacco advertising and the overall consumption of tobacco.

LeBel J.A. agreed with Brossard J.A. that the Act infringed freedom of expression pursuant to s. 2(b) of the *Charter* but found that it was justified under s. 1 of the *Charter*. LeBel J.A. concluded that Chabot J. erred in his findings of fact in failing to recognize that the rational connection and minimal impairment branches of the *Oakes* test have been attenuated by later decisions of the

ment sur le fond ait alors été rendu ou non, il est approprié d'ordonner la suspension de l'application de l'art. 5 jusqu'à ce que le jugement sur le fond soit rendu. Il existe après tout une question sérieuse à juger relativement à la validité de la Loi, et il serait injustement onéreux d'exiger des requérantes qu'elles engagent des dépenses considérables pour démonter les supports publicitaires aux points de vente jusqu'à ce que nous ayons tranché la question.

Cependant, il n'est aucunement justifié, à notre avis, d'ordonner une suspension de l'entrée en vigueur de la Loi pendant une période de 60 jours suivant notre jugement dans ces appels.

En fait, compte tenu de l'intérêt public de cette Loi, qui vise à protéger la santé publique, dans l'éventualité où la Loi serait déclarée valide, il y a d'excellentes raisons de ne pas suspendre son effet et sa mise en application (*Manitoba (Procureur Général) c. Metropolitan Stores (MTS) Ltd.*, [1987] 1 R.C.S. 110, aux pp. 127 et 135). [Souligné dans l'original.]

La Cour d'appel (relativement à la validité de la loi), [1993] R.J.Q. 375, 102 D.L.R. (4th) 289

1. Le juge LeBel (au nom de la majorité)

Le juge LeBel a qualifié la *Loi réglementant les produits du tabac* de loi relative à la santé publique. Il a affirmé que la loi était valide en tant que loi adoptée pour la paix, l'ordre et le bon gouvernement.

Le juge LeBel a appliqué le critère formulé dans l'arrêt *R. c. Crown Zellerbach Canada Ltd.*, [1988] 1 R.C.S. 401, et il a conclu que la Loi satisfaisait au critère de la «théorie de l'intérêt national» et qu'elle pouvait reposer sur un lien purement théorique non prouvé entre la publicité du tabac et sa consommation globale.

Souscrivant à l'opinion du juge Brossard, le juge LeBel a affirmé que la Loi contrevenait à la liberté d'expression garantie par l'al. 2b) de la *Charte*, mais il a conclu que cette contravention pouvait se justifier en vertu de l'article premier. Le juge LeBel a conclu que le juge Chabot avait commis une erreur dans ses conclusions de fait en omettant de reconnaître que les volets du lien

Supreme Court of Canada. He found that the s. 1 test was satisfied since there was a possibility that prohibiting tobacco advertising might lead to a reduction in tobacco consumption, based on the mere existence of a [TRANSLATION] "body of opinion" favourable to the adoption of a ban. Further he found that the Act appeared to be consistent with minimal impairment as it did not prohibit consumption, did not prohibit foreign advertising and did not preclude the possibility of obtaining information about tobacco products.

2. Brossard J.A. (dissenting in part)

Brossard J.A. agreed with LeBel J.A. that the *Tobacco Products Control Act* should be characterized as public health legislation and that the Act satisfied the "national concern" branch of the peace, order and good government power.

However, he did not think that the violation of s. 2(b) of the *Charter* could be justified. He reviewed the evidence and found that it did not demonstrate the existence of a connection or even the possibility of a connection between an advertising ban and the use of tobacco. It was his opinion that it must be shown on a balance of probabilities that it was at least possible that the goals sought would be achieved. He also disagreed that the Act met the minimal impairment requirement since in his view the Act's objectives could be met by restricting advertising without the need for a total prohibition.

IV. Jurisdiction

A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants. Both the Attorney General of Canada and the interveners on the stay (several health organizations, i.e., the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada) argued

rationnel et de l'atteinte minimale, du critère formulé dans l'arrêt *Oakes*, avaient été assouplis dans des arrêts ultérieurs de la Cour suprême du Canada. Il a conclu que le critère exigé par l'article premier était satisfait puisqu'il se peut que l'interdiction de la publicité sur le tabac entraîne une réduction de la consommation du tabac, d'après l'existence même d'un «corps d'opinions» favorables à l'adoption d'une telle interdiction. Par ailleurs, il a conclu que la Loi paraît conforme au critère de l'atteinte minimale en ce qu'elle n'interdit pas la consommation, n'interdit pas la publicité étrangère et n'écarte pas la possibilité d'obtenir de l'information sur les produits du tabac.

2. Le juge Brossard (dissident en partie)

Le juge Brossard a souscrit à l'opinion du juge LeBel que la *Loi réglementant les produits du tabac* devrait être qualifiée de loi visant le domaine de la santé publique et qu'elle satisfait au volet de «la dimension nationale» du pouvoir de légiférer pour la paix, l'ordre et le bon gouvernement.

Cependant, le juge Brossard n'était pas d'avis que la violation de l'al. 2b) de la *Charte* pouvait se justifier. Il a examiné la preuve et affirmé qu'elle n'établissait pas l'existence d'un lien, ou même l'existence d'une probabilité de lien, entre l'interdiction de publicité et la consommation des produits du tabac. À son avis, il faut établir, selon une prépondérance des probabilités, qu'il est tout au moins possible que les buts visés soient atteints. Il n'a pas souscrit à l'opinion que la Loi satisfaisait au critère de l'atteinte minimale puisque, selon lui, les objectifs de la Loi pourraient être atteints par une restriction de la publicité sans qu'il soit nécessaire d'imposer une prohibition totale.

IV. Compétence

Une question préliminaire a été soulevée relativement à la compétence de notre Cour d'accorder le redressement demandé par les requérantes. Le procureur général du Canada et les intervenants dans les demandes de sursis, (plusieurs organisations de santé dont la Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé et

1994 CanLII 117 (SCC)

that this Court lacks jurisdiction to order a stay of execution or of the proceedings which would relieve the applicants of the obligation of complying with the new regulations. Several arguments were advanced in support of this position.

First, the Attorney General argued that neither the old nor the new regulations dealing with the health messages were in issue before the lower courts and, as such, the applicants' requests for a stay truly cloaks requests to have this Court exercise an original jurisdiction over the matter. Second, he contended that the judgment of the Quebec Court of Appeal is not subject to execution given that it only declared that the Act was *intra vires* s. 91 of the *Constitution Act, 1867* and justified under s. 1 of the *Charter*. Because the lower court decision amounts to a declaration, there is, therefore, no "proceeding" that can be stayed. Finally, the Attorney General characterized the applicants' requests as being requests for a suspension by anticipation of the 12-month delay in which the new regulations will become effective so that the applicants can continue to sell tobacco products for an extended period in packages containing the health warnings required by the present regulations. He claimed that this Court has no jurisdiction to suspend the operation of the new regulations.

The interveners supported and elaborated on these submissions. They also submitted that r. 27 could not apply because leave to appeal had not been granted. In any event, they argued that the words "or other relief" are not broad enough to permit this Court to defer enforcement of regulations that were not even in existence at the time the appeal judgment was rendered.

The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the *Supreme Court Act* and r. 27 of the *Rules of the Supreme Court of Canada*.

Médecins pour un Canada sans fumée) ont soutenu que notre Cour n'avait pas compétence pour ordonner un sursis d'exécution ou une suspension d'instance qui libérerait les requérantes de l'obligation de se conformer au nouveau règlement. Plusieurs moyens ont été invoqués à l'appui de cette position.

Premièrement, le procureur général soutient que les dispositions concernant les messages relatifs à la santé prévus dans l'ancien ou le nouveau règlement n'ont pas été contestées devant les tribunaux d'instance inférieure et, partant, que les requérantes se trouvent en fait à demander à notre Cour d'exercer une compétence de première instance sur la question. Deuxièmement, ils soutiennent que le jugement de la Cour d'appel du Québec ne peut être exécuté puisqu'il ne fait que déclarer que la Loi est *intra vires* de l'art. 91 de la *Loi constitutionnelle de 1867*, et qu'elle est justifiable en vertu de l'article premier de la *Charte*. Parce que la décision de l'instance inférieure équivaut à un jugement déclaratoire, il n'existe en conséquence aucune «procédure» qui pourrait faire l'objet d'un sursis. Enfin, selon le procureur général, les demandes des requérantes reviennent à demander une suspension par anticipation du délai de 12 mois avant la mise en application du règlement, pour leur permettre de continuer de vendre des produits du tabac dans les emballages comportant les mises en garde exigées par le règlement actuel. Il soutient que notre Cour n'a pas compétence pour suspendre l'application du nouveau règlement.

Les intervenants ont appuyé et étayé ces arguments. Ils ont aussi soutenu que l'art. 27 ne pouvait s'appliquer parce que l'autorisation d'appel n'avait pas été accordée. Quoi qu'il en soit, ils ont soutenu que l'expression «ou un autre redressement» n'est pas suffisamment générale pour permettre à notre Cour de retarder l'application d'un règlement qui n'existait même pas au moment du jugement rendu par la Cour d'appel.

Les pouvoirs de la Cour suprême du Canada en cette matière sont prévus à l'art. 65.1 de la *Loi sur la Cour suprême*, et à l'art. 27 des *Règles de la Cour suprême du Canada*.

Supreme Court Act

65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada

27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

Rule 27 and its predecessor have existed in substantially the same form since at least 1888 (see *Rules of the Supreme Court of Canada*, 1888, General Order No. 85(17)). Its broad language reflects the language of s. 97 of the Act whence the Court derives its rule-making power. Subsection (1)(a) of that section provides that the rules may be enacted:

97....

(a) for regulating the procedure of and in the Court and the bringing of cases before it from courts appealed from or otherwise, and for the effectual execution and working of this Act and the attainment of the intention and objects thereof;

Although the point is now academic, leave to appeal having been granted, we would not read into the rule the limitations suggested by the interveners. Neither the words of the rule nor s. 97 contain such limitations. In our opinion, in interpreting the language of the rule, regard should be had to its purpose, which is best expressed in the terms of the empowering section: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal. Examples of the former, traditionally described as stays of execution, are

Loi sur la Cour suprême

65.1 La Cour ou un juge peut, à la demande d'une partie qui a déposé l'avis de la demande d'autorisation d'appel, ordonner, aux conditions que l'une ou l'autre estime indiquées, le sursis d'exécution du jugement objet de la demande.

Règles de la Cour suprême du Canada

27. La partie contre laquelle la Cour ou un autre tribunal a rendu un jugement ou une ordonnance peut demander à la Cour un sursis à l'exécution de ce jugement ou de cette ordonnance ou un autre redressement, et la Cour peut accéder à cette demande aux conditions qu'elle juge appropriées.

Le libellé de l'art. 27 et de celui qui le précédait n'a pratiquement pas été modifié depuis au moins 1888 (voir les *Règles de la Cour suprême du Canada*, 1888, Ordonnance générale n° 85(17)). Son libellé général correspond au libellé de l'art. 97 de la Loi duquel notre Cour tire son pouvoir de réglementation. L'alinéa (1)a) de cette disposition prévoit que des règles peuvent être adoptées pour:

97....

a) réglementer la procédure à la Cour et les modalités de recours devant elle contre les décisions de juridictions inférieures ou autres et prendre les mesures nécessaires à l'application de la présente loi;

Bien qu'il s'agisse maintenant d'une question théorique, les autorisations de pourvoi ayant été accordées, nous ne sommes pas disposés à admettre que cette règle inclut les restrictions proposées par les intervenants. À notre avis, ni le libellé de la règle ni celui de l'art. 97 ne renferment de telles restrictions. À notre avis, dans l'interprétation du libellé de la règle, il faut en examiner l'objet, lequel est clairement exprimé dans la disposition habilitante: faciliter les «recours» devant la Cour et «prendre les mesures nécessaires à l'application de la présente loi». Pour réaliser son objet, la règle ne peut être limitée aux cas où l'autorisation d'appel a déjà été accordée ni recevoir une interprétation restrictive de façon à s'appliquer seulement à une ordonnance qui suspend ou arrête l'exécution des procédures de la Cour par une tierce partie ou encore qui bloque l'exécution du jugement objet

1994 CanLII 117 (SCC)

contained in the subsections of s. 65 of the Act which have been held to be limited to preventing the intervention of a third party such as a sheriff but not the enforcement of an order directed to a party. See *Keable v. Attorney General (Can.)*, [1978] 2 S.C.R. 135. The stopping or freezing of all proceedings is traditionally referred to as a stay of proceedings. See *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127 (C.A.). Such relief can be granted pursuant to this Court's powers in r. 27 or s. 65.1 of the Act.

Moreover, we cannot agree that the adoption of s. 65.1 in 1992 (S.C. 1990, c. 8, s. 40) was intended to limit the Court's powers under r. 27. The purpose of that amendment was to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. Section 65.1 should, therefore, be interpreted to confer the same broad powers that are included in r. 27.

In light of the foregoing and bearing in mind in particular the language of s. 97 of the Act we cannot agree with the first two points raised by the Attorney General that this Court is unable to grant a stay as requested by the applicants. We are of the view that the Court is empowered, pursuant to both s. 65.1 and r. 27, not only to grant a stay of execution and of proceedings in the traditional sense, but also to make any order that preserves matters between the parties in a state that will prevent prejudice as far as possible pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. This means that the Court must have jurisdiction to enjoin conduct on the part of a party in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court. In this case, the new

de l'appel. Des exemples des premiers cas, traditionnellement qualifiés de sursis d'exécution, sont prévus à l'art. 65 de la Loi que l'on a interprété comme visant à empêcher l'intervention d'une tierce partie comme un shérif, mais non l'exécution d'une ordonnance visant une partie. Voir l'arrêt *Keable c. Procureur général (Can.)*, [1978] 2 R.C.S. 135. L'arrêt ou le blocage de toutes les procédures est généralement appelé une suspension d'instance. Voir l'arrêt *Battle Creek Toasted Corn Flake Co. c. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127 (C.A.). Un tel redressement peut être accordé conformément aux pouvoirs que l'art. 27 ou l'art. 65.1 de la Loi confèrent à notre Cour.

Par ailleurs, nous ne pouvons souscrire à l'opinion que l'adoption de l'art. 65.1 en 1992 (L.C. 1990, ch. 8, art. 40) visait à restreindre les pouvoirs de notre Cour en vertu de l'art. 27. La modification visait à permettre à un seul juge d'exercer la compétence d'accorder un sursis dans les cas où, avant la modification, c'était la Cour qui pouvait accorder un sursis. En conséquence, l'art. 65.1 doit être interprété de façon à conférer les mêmes pouvoirs généraux que ceux inclus dans l'art. 27.

Compte tenu de ce qui précède et du libellé même de l'art. 97 de la Loi, nous sommes d'avis que, contrairement aux deux premiers points soulevés par le procureur général, notre Cour peut faire droit aux demandes de sursis des requérantes. Nous sommes d'avis que la Cour est habilitée, tant en vertu de l'art. 65.1 que de l'art. 27, non seulement à accorder un sursis d'exécution et une suspension d'instance dans le sens traditionnel, mais aussi à rendre toute ordonnance visant à maintenir les parties dans une situation qui, dans la mesure du possible, ne sera pas cause de préjudice en attendant le règlement du différend par la Cour, de façon que cette dernière puisse rendre une décision qui ne sera pas dénuée de sens et d'efficacité. Notre Cour doit être en mesure d'intervenir non seulement à l'égard des termes mêmes du jugement, mais aussi à l'égard de ses effets. Cela signifie que notre Cour doit posséder la compétence d'interdire à une partie d'accomplir tout acte fondé

1994 CanLII 117 (SCC)

regulations constitute conduct under a law that has been declared constitutional by the lower courts.

This, in our opinion, is the view taken by this Court in *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 594. The appellant Labatt, in circumstances similar to those in this case, sought to suspend enforcement of regulations which were attacked by it in an action for a declaration that the regulations were inapplicable to Labatt's product. The Federal Court of Appeal reversed a lower court finding in favour of Labatt. Labatt applied for a stay pending an appeal to this Court. Although the parties had apparently agreed to the terms of an order suspending further proceedings, Laskin C.J. dealt with the issue of jurisdiction, an issue that apparently was contested notwithstanding the agreement. The Chief Justice, speaking for the Court, determined that the Court was empowered to make an order suspending the enforcement of the impugned regulation by the Department of Consumer and Corporate Affairs. At page 600, Laskin C.J. responded as follows to arguments advanced on the traditional approach to the power to grant a stay:

It was contended that the Rule relates to judgments or orders of this Court and not to judgments or orders of the Court appealed from. Its formulation appears to me to be inconsistent with such a limitation. Nor do I think that the position of the respondent that there is no judgment against the appellant to be stayed is a tenable one. Even if it be so, there is certainly an order against the appellant. Moreover, I do not think that the words of Rule 126, authorizing this Court to grant relief against an adverse order, should be read so narrowly as to invite only intervention directly against the order and not against its effect while an appeal against it is pending in this Court. I am of the opinion, therefore, that the appellant is entitled to apply for interlocutory relief against the operation of the order dismissing its declaratory

sur le jugement, qui, s'il était accompli, tendrait à annuler ou à diminuer l'effet de la décision de notre Cour. En l'espèce, le nouveau règlement est un acte pris en application d'une loi qui a été déclarée constitutionnelle par les tribunaux d'instance inférieure.

À notre avis, c'est l'opinion même que notre Cour avait exprimée dans l'arrêt *Brasseries Labatt du Canada Ltée c. Procureur général du Canada*, [1980] 1 R.C.S. 594. Dans cette affaire, l'appelante Labatt, dans des circonstances semblables à celles de l'espèce, demandait à notre Cour d'ordonner un sursis à l'application du règlement qu'elle attaquait dans une action visant à obtenir un jugement déclarant que le règlement était inapplicable au produit de Labatt. La Cour d'appel fédérale a infirmé la décision que le tribunal de première instance avait rendue en faveur de Labatt. Labatt a demandé le sursis des procédures jusqu'à ce que notre Cour rende jugement. Bien que les parties eussent apparemment accepté les conditions d'une ordonnance visant la suspension de toute autre procédure, le juge en chef Laskin a examiné la question de compétence, que l'on aurait apparemment contestée malgré l'entente entre les parties. Le Juge en chef, s'exprimant au nom de la Cour, a déterminé que notre Cour était habilitée à rendre une ordonnance visant à suspendre l'application du règlement attaqué par le ministère de la Consommation et des Corporations. Voici comment le juge en chef Laskin a répondu aux arguments soulevés relativement à la conception traditionnelle du pouvoir d'accorder un sursis (p. 600):

On prétend que cette règle s'applique aux jugements ou ordonnances de cette Cour et non aux jugements ou ordonnances de la cour dont on interjette appel. Le texte de la règle me paraît inconciliable avec une pareille interprétation. En outre, la thèse de l'intimé selon laquelle il n'existe aucun jugement dont l'exécution puisse être suspendue me semble intenable et, même si c'était le cas, il est clair qu'une ordonnance a été rendue contre l'appelante. De plus, la règle 126, qui autorise cette Cour à accorder un redressement contre une ordonnance, ne doit pas être interprétée de façon à permettre à la Cour d'intervenir uniquement contre l'ordonnance et non contre son effet s'il y a pourvoi contre cette ordonnance devant cette Cour. En conséquence, l'appelante a le droit de demander un redressement interlocutoire

action, and that this Court may grant relief on such terms as may be just. [Emphasis added.]

visant le sursis d'exécution de l'ordonnance qui rejette son action déclaratoire et cette Cour a le pouvoir d'accorder un redressement aux conditions qu'elle estime équitables. [Nous soulignons.]

While the above passage appears to answer the submission of the respondents on this motion that *Labatt* was distinguishable because the Court acted on a consent order, the matter was put beyond doubt by the following additional statement of Laskin C.J. at p. 601:

Bien que ce passage paraisse répondre à l'argument des intimés en l'espèce qu'il faut faire une distinction avec l'arrêt *Labatt* parce que notre Cour devait se prononcer sur une ordonnance convenue par les parties, les commentaires ajoutés par le juge en chef Laskin dissipent tout doute sur cette question, à la p. 601.

Although I am of the opinion that Rule 126 applies to support the making of an order of the kind here agreed to by counsel for the parties, I would not wish it to be taken that this Court is otherwise without power to prevent proceedings pending before it from being aborted by unilateral action by one of the parties pending final determination of an appeal.

Même si j'estime que la règle 126 s'applique et permet le prononcé d'une ordonnance de la nature de celle convenue par les avocats des parties, cela ne signifie pas que cette Cour n'a pas, en d'autres circonstances, le pouvoir d'éviter que des procédures en instance devant elle avortent par suite de l'action unilatérale d'une des parties avant la décision finale.

Indeed, an examination of the factums filed by the parties to the motion in *Labatt* reveals that while it was agreed that the dispute would be resolved by an application for a declaration, it was not agreed that pending resolution of the dispute the enforcement of the regulations would be stayed.

En fait, il ressort des mémoires déposés par les parties à la requête dans l'arrêt *Labatt* que les parties avaient convenu de faire trancher leur différend par un jugement déclaratoire, mais non de faire surseoir à l'exécution du règlement en attendant la résolution du différend.

In our view, this Court has jurisdiction to grant the relief requested by the applicants. This is the case even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with this Court's finding in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110. In that case, the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established and the public interest is being weighed against the interests of the applicant seeking the stay of proceedings. While "suspension" is a power that, as is stressed below, must be exercised sparingly, this is achieved by applying the criteria in *Metropolitan Stores* strictly and not by a restrictive interpretation of this Court's jurisdiction. Therefore, the final argument of the Attorney General on the issue of jurisdiction also fails.

À notre avis, notre Cour possède la compétence d'accorder le redressement demandé par les requérantes, même si les requérantes demandent une «suspension» du règlement plutôt qu'une exemption de son application. Prétendre le contraire irait à l'encontre de la conclusion de notre Cour dans l'arrêt *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*, [1987] 1 R.C.S. 110. Selon cet arrêt, la distinction entre les cas de «suspension» et les cas d'«exemption» se fait seulement après que la compétence est par ailleurs établie et quand la question de l'intérêt public est soupesée par rapport aux intérêts de la personne qui demande la suspension d'instance. Si le pouvoir de «suspension d'instance» doit être exercé, comme nous l'avons déjà mentionné, avec modération, on y parvient par l'application de critères formulés dans l'arrêt *Metropolitan Stores* et non par une interprétation restrictive de la compétence de notre Cour. En conséquence, le dernier argument soulevé par le procureur général relativement à la question de compétence échoue également.

1994 CarLI 117 (SCC)

Finally, if jurisdiction under s. 65.1 of the Act and r. 27 were wanting, we would be prepared to find jurisdiction in s. 24(1) of the Charter. A Charter remedy should not be defeated due to a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

Enfin, si la compétence de notre Cour ne pouvait reposer sur l'art. 65.1 de la Loi et l'art. 27 des Règles, nous sommes d'avis que le fondement de cette compétence pourrait être le par. 24(1) de la Charte. Une lacune dans les pouvoirs accessoires de notre Cour en matière de procédure permettant de préserver les droits des parties en attendant le règlement final d'un différend touchant des droits constitutionnels ne devrait pas faire obstacle à une réparation fondée sur la Charte.

V. Grounds for Stay of Proceedings

V. Motifs de suspension d'instance

The applicants rely upon the following grounds:

Les requérantes se fondent sur les moyens suivants:

1. The challenged Tobacco Products Control Regulations, amendment were promulgated pursuant to ss. 9 and 17 of the Tobacco Products Control Act, S.C. 1988, c. 20.

1. Le Règlement sur les produits du tabac—Modification, qui est contesté, a été pris conformément aux art. 9 et 17 de la Loi réglementant les produits du tabac, L.C. 1988, ch. 20.

2. The applicants have applied to this Court for leave to appeal a judgment of the Quebec Court of Appeal dated January 15, 1993. The Court of Appeal overturned a decision of the Quebec Superior Court declaring certain sections of the Act to be beyond the powers of the Parliament of Canada and an unjustifiable violation of the Canadian Charter of Rights and Freedoms.

2. Les requérantes ont présenté à notre Cour une demande d'autorisation d'appel contre un jugement de la Cour d'appel du Québec, rendu le 15 janvier 1993. La Cour d'appel a infirmé une décision de la Cour supérieure du Québec déclarant que certaines dispositions de la Loi outrepassaient les pouvoirs du Parlement du Canada et constituaient une violation injustifiable de la Charte canadienne des droits et libertés.

3. The effect of the new regulations is such that the applicants will be obliged to incur substantial unrecoverable expenses in carrying out a complete redesign of all its packaging before this Court will have ruled on the constitutional validity of the enabling legislation and, if this Court restores the judgment of the Superior Court, will incur the same expenses a second time should they wish to restore their packages to the present design.

3. L'effet du nouveau règlement est tel que les requérantes devront engager des dépenses non recouvrables considérables pour procéder à une nouvelle conception de leurs emballages avant que notre Cour ne se soit prononcée sur la validité constitutionnelle de la loi habilitante et, advenant le cas où notre Cour rétablirait la décision de la Cour supérieure, d'engager les mêmes dépenses une deuxième fois si elles désirent revenir à l'emballage actuel.

4. The tests for granting of a stay are met in this case:

4. Les critères applicables à une suspension d'instance sont satisfaits:

- (i) There is a serious constitutional issue to be determined.
- (ii) Compliance with the new regulations will cause irreparable harm.

- (i) Il existe une question constitutionnelle sérieuse à juger.
- (ii) Le respect du nouveau règlement causera un préjudice irréparable.

1994 CanLII 117 (SCC)

(iii) The balance of convenience, taking into account the public interest, favours retaining the status quo until this court has disposed of the legal issues.

(iii) La prépondérance des inconvénients, compte tenu de l'intérêt public, favorise le maintien du statu quo jusqu'à ce que notre Cour ait réglé les questions juridiques.

VI. Analysis

The primary issue to be decided on these motions is whether the applicants should be granted the interlocutory relief they seek. The applicants are only entitled to this relief if they can satisfy the test laid down in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, *supra*. If not, the applicants will have to comply with the new regulations, at least until such time as a decision is rendered in the main actions.

A. *Interlocutory Injunctions, Stays of Proceedings and the Charter*

The applicants ask this Court to delay the legal effect of regulations which have already been enacted and to prevent public authorities from enforcing them. They further seek to be protected from enforcement of the regulations for a 12-month period even if the enabling legislation is eventually found to be constitutionally valid. The relief sought is significant and its effects far reaching. A careful balancing process must be undertaken.

On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.

On the other hand, the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of *Charter* rights. Such a practice would undermine the spirit and purpose of the

VI. Analyse

La principale question soulevée dans les présentes demandes est de savoir s'il faut accorder aux requérantes le redressement interlocutoire sollicité. Elles y ont droit seulement si elles satisfont aux critères formulés dans *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*, précité. Dans la négative, les requérantes devront se conformer au nouveau règlement, au moins jusqu'à ce qu'une décision soit rendue relativement aux actions principales.

A. *Les injonctions interlocutoires, la suspension d'instance et la Charte*

Les requérantes demandent à notre Cour de retarder l'effet juridique d'un règlement qui a déjà été adopté et d'empêcher les autorités publiques d'en assurer l'application. Elles demandent également d'être protégées contre le contrôle d'application du règlement pendant une période de 12 mois même si, ultérieurement, la loi habilitante devait être déclarée valide du point de vue constitutionnel. Le redressement demandé est important et ses effets sont d'une portée considérable. Il faut procéder à un processus de pondération soigneux.

D'une part, les tribunaux doivent être prudents et attentifs quand on leur demande de prendre des décisions qui privent de son effet une loi adoptée par des représentants élus.

D'autre part, la *Charte* impose aux tribunaux la responsabilité de sauvegarder les droits fondamentaux. Si les tribunaux exigeaient strictement que toutes les lois soient observées à la lettre jusqu'à ce qu'elles soient déclarées inopérantes pour motif d'inconstitutionnalité, ils se trouveraient dans certains cas à fermer les yeux sur les violations les plus flagrantes des droits garantis par la *Charte*. Une telle pratique contredirait l'esprit et l'objet de la *Charte* et pourrait encourager un gouvernement

Charter and might encourage a government to prolong unduly final resolution of the dispute.

à prolonger indûment le règlement final des différends.

Are there, then, special considerations or tests which must be applied by the courts when *Charter* violations are alleged and the interim relief which is sought involves the execution and enforceability of legislation?

Existe-t-il alors des considérations ou des critères spéciaux que les tribunaux doivent appliquer quand on allègue la violation de la *Charte* et que le redressement provisoire demandé touche l'exécution et l'applicabilité de la loi?

Generally, the same principles should be applied by a court whether the remedy sought is an injunction or a stay. In *Metropolitan Stores*, at p. 127, Beetz J. expressed the position in these words:

Généralement, un tribunal devrait appliquer les mêmes principes, que le redressement demandé soit une injonction ou une suspension d'instance. Dans l'arrêt *Metropolitan Stores*, le juge Beetz exprime ainsi cette position (p. 127):

A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

La suspension d'instance et l'injonction interlocutoire sont des redressements de même nature. À moins qu'un texte législatif ne prescrive un critère différent, elles ont suffisamment de traits en commun pour qu'elles soient assujetties aux mêmes règles et c'est avec raison que les tribunaux ont eu tendance à appliquer à la suspension interlocutoire d'instance les principes qu'ils suivent dans le cas d'injonctions interlocutoires.

We would add only that here the applicants are requesting both interlocutory (pending disposition of the appeal) and interim (for a period of one year following such disposition) relief. We will use the broader term "interlocutory relief" to describe the hybrid nature of the relief sought. The same principles apply to both forms of relief.

Nous ajouterons seulement que les requérantes en l'espèce demandent à la fois un redressement interlocutoire (en attendant le règlement du pourvoi) et provisoire (pendant une période d'une année suivant le jugement). Nous utiliserons l'expression générale «redressement interlocutoire» pour décrire le caractère mixte du redressement demandé. Les mêmes principes régissent les deux types de redressements.

Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. 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. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

L'arrêt *Metropolitan Stores* établit une analyse en trois étapes que les tribunaux doivent appliquer quand ils examinent une demande de suspension d'instance ou d'injonction interlocutoire. Premièrement, une étude préliminaire du fond du litige doit établir qu'il y a une question sérieuse à juger. Deuxièmement, il faut déterminer si le requérant subirait un préjudice irréparable si sa demande était rejetée. Enfin, il faut déterminer laquelle des deux parties subira le plus grand préjudice selon que l'on accorde ou refuse le redressement en attendant une décision sur le fond. Il peut être utile d'examiner chaque aspect du critère et de l'appliquer ensuite aux faits en l'espèce.

1994 CanLII 117 (SCC)

B. *The Strength of the Plaintiff's Case*

Prior to the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, an applicant for interlocutory relief was required to demonstrate a "strong *prima facie* case" on the merits in order to satisfy the first test. In *American Cyanamid*, however, Lord Diplock stated that an applicant need no longer demonstrate a strong *prima facie* case. Rather it would suffice if he or she could satisfy the court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". The *American Cyanamid* standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), at pp. 2-13 to 2-20.

In *Metropolitan Stores*, Beetz J. advanced several reasons why the *American Cyanamid* test rather than any more stringent review of the merits is appropriate in *Charter* cases. These included the difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding, the impracticality of undertaking a s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General.

The respondent here raised the possibility that the current status of the main action required the applicants to demonstrate something more than "a serious question to be tried." The respondent relied upon the following *dicta* of this Court in *Laboratoire Pentagone Ltée v. Parke, Davis & Co.*, [1968] S.C.R. 269, at p. 272:

The burden upon the appellant is much greater than it would be if the injunction were interlocutory. In such a case the Court must consider the balance of convenience as between the parties, because the matter has not yet come to trial. In the present case we are being asked to suspend the operation of a judgment of the Court of Appeal, delivered after full consideration of the merits.

B. *La force de l'argumentation du requérant*

Avant la décision de la Chambre des lords *American Cyanamid Co. c. Ethicon Ltd.*, [1975] A.C. 396, la personne qui demandait une injonction interlocutoire devait établir une [TRADUCTION] «forte apparence de droit» quant au fond de l'affaire pour satisfaire au premier critère. Toutefois, dans *American Cyanamid*, lord Diplock avait précisé que le requérant n'avait plus à établir une forte apparence de droit et qu'il lui suffisait de convaincre le tribunal que [TRADUCTION] «la demande n'est ni futile ni vexatoire, ou, en d'autres termes, que la question à trancher est sérieuse». Le critère formulé dans *American Cyanamid* est maintenant généralement accepté par les tribunaux canadiens qui, toutefois, reviennent à l'occasion à un critère plus strict: voir Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), aux pp. 2-13 à 2-20.

Dans *Metropolitan Stores*, le juge Beetz a énoncé plusieurs raisons pour lesquelles, dans un cas relevant de la *Charte*, le critère formulé dans *American Cyanamid* convient mieux qu'un examen plus rigoureux du fond. Il a notamment parlé des difficultés à trancher des questions factuelles et juridiques complexes à partir d'éléments de preuve limités dans une procédure interlocutoire, des difficultés pratiques à procéder à une analyse fondée sur l'article premier à ce stade, et de la possibilité qu'une décision provisoire sur le fond soit rendue en l'absence de plaidoiries complètes ou avant qu'un avis soit donné aux procureurs généraux.

L'intimé a soulevé la possibilité que, compte tenu de l'état actuel de l'action principale, les requérantes soient tenues de démontrer davantage que l'existence «d'une question sérieuse à juger». L'intimé se fonde sur l'opinion incidente de notre Cour dans *Laboratoire Pentagone Ltée c. Parke, Davis & Co.*, [1968] R.C.S. 269, à la p. 272:

[TRADUCTION] La charge imposée à l'appelante est beaucoup plus lourde que s'il s'agissait d'une injonction interlocutoire. Dans un tel cas, le tribunal doit examiner la prépondérance des inconvénients entre les parties parce que le procès n'a pas encore eu lieu. En l'espèce, on nous demande de suspendre l'exécution d'un jugement de la Cour d'appel, rendu après examen complet

It is not sufficient to justify such an order being made to urge that the impact of the injunction upon the appellant would be greater than the impact of its suspension upon the respondent.

To the same effect were the comments of Kelly J.A. in *Adrian Messenger Services v. The Jockey Club Ltd. (No. 2)* (1972), 2 O.R. 619 (C.A.), at p. 620:

Unlike the situation prevailing before trial, where the competing allegations of the parties are unresolved, on an application for an interim injunction pending an appeal from the dismissal of the action the defendant has a judgment of the Court in its favour. Even conceding the ever-present possibility of the reversal of that judgment on appeal, it will in my view be in a comparatively rare case that the Court will interfere to confer upon a plaintiff, even on an interim basis, the very right to which the trial Court has held he is not entitled.

And, most recently, of Philp J. in *Bear Island Foundation v. Ontario* (1989), 70 O.R. (2d) 574 (H.C.), at p. 576:

While I accept that the issue of title to these lands is a serious issue, it has been resolved by trial and by appeal. The reason for the Supreme Court of Canada granting leave is unknown and will not be known until they hear the appeal and render judgment. There is not before me at this time, therefore, a serious or substantial issue to be tried. It has already been tried and appealed. No attempt to stop harvesting was made by the present plaintiffs before trial, nor before the appeal before the Court of Appeal of Ontario. The issue is no longer an issue at trial.

According to the respondent, such statements suggest that once a decision has been rendered on the merits at trial, either the burden upon an applicant for interlocutory relief increases, or the applicant can no longer obtain such relief. While it might be possible to distinguish the above authorities on the basis that in the present case the trial judge agreed with the applicant's position, it is not necessary to do so. Whether or not these statements reflect the state of the law in private applications for interlocutory relief, which may well be open to question, they have no application in *Charter* cases.

sur le fond. Pour justifier une telle ordonnance, il ne suffit pas d'affirmer que l'incidence de l'injonction sur l'appelante sera plus importante que celle d'une suspension d'instance sur l'intimée.

Le juge Kelly a fait des commentaires au même effet dans *Adrian Messenger Services c. The Jockey Club Ltd. (No. 2)* (1972), 2 O.R. 619 (C.A.), à la p. 620:

[TRADUCTION] Contrairement à la situation antérieure au procès, lorsque les prétentions opposées des parties ne sont pas encore réglées, dans le cas d'une demande d'injonction interlocutoire en attendant un appel contre le rejet de l'action, le défendeur est fort du jugement que la cour a rendu en sa faveur. Même en reconnaissant la possibilité omniprésente que ce jugement soit infirmé en appel, il est, à mon avis, relativement rare que la cour d'appel intervienne pour conférer à un demandeur, même de façon provisoire, le droit même qui lui a été refusé par le tribunal de première instance.

Plus récemment, le juge Philp affirmait dans *Bear Island Foundation c. Ontario* (1989), 70 O.R. (2d) 574 (H.C.), à la p. 576:

[TRADUCTION] Bien que je reconnaisse que la question du titre de ces terres soit une question sérieuse, elle a été réglée en première instance et en appel. La raison pour laquelle la Cour suprême du Canada a accordé une autorisation de pourvoi est inconnue et continuera de l'être tant que la Cour n'aura pas procédé à l'audition et rendu jugement. Je ne suis pas en l'espèce saisi d'une question sérieuse à juger. Il y a déjà eu un procès et un appel sur cette question. Les demandresses en l'espèce n'ont jamais tenté d'arrêter la récolte avant le procès, ni avant l'appel à la Cour d'appel de l'Ontario. La question ne constitue plus une question en litige.

D'après l'intimé, de telles affirmations laissent entendre que, dès qu'une décision est rendue sur le fond au procès, le requérant d'un redressement interlocutoire a un fardeau plus lourd ou ne peut plus obtenir le redressement. Bien qu'il soit possible d'établir en l'espèce une distinction par rapport aux décisions citées, puisque le juge de première instance a accepté la position de la requérante, il n'est pas nécessaire de le faire. Que ces affirmations traduisent ou non l'état du droit applicable aux demandes de redressement interlocutoire à caractère privé, question qui demeure sujette à débat, elles ne sont pas applicables aux cas relevant de la *Charte*.

1994 CanLII 117 (SCC)

The *Charter* protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged *Charter* violation to review the matter carefully. This is so even when other courts have concluded that no *Charter* breach has occurred. Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted. It follows that we are in complete agreement with the conclusion of Beetz J. in *Metropolitan Stores*, at p. 128, that "the *American Cyanamid* 'serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience."

La *Charte* protège les libertés et droits fondamentaux. Compte tenu de l'importance des intérêts auxquels, selon la requête, il a été porté atteinte, tout tribunal appelé à se prononcer sur une violation de la *Charte* doit procéder à un examen soigneux de la question. Tel est le cas même lorsque d'autres tribunaux ont conclu qu'il n'y avait pas eu violation de la *Charte*. Par ailleurs, compte tenu du caractère complexe de la plupart des droits garantis par la Constitution, le tribunal saisi d'une requête aura rarement le temps de faire l'analyse approfondie requise du fond de la demande du requérant. Ceci est vrai pour toute demande de redressement interlocutoire, que le procès ait eu lieu ou non. Nous sommes donc pleinement d'accord avec la conclusion du juge Beetz dans l'arrêt *Metropolitan Stores*, à la p. 128: «la formulation dans l'arrêt *American Cyanamid*, savoir celle de l'existence d'une «question sérieuse» suffit dans une affaire constitutionnelle où, comme je l'indique plus loin dans les présents motifs, l'intérêt public est pris en considération dans la détermination de la prépondérance des inconvénients.»

What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the *Charter* claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see *Metropolitan Stores*, *supra*, at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

Quels sont les indicateurs d'une «question sérieuse à juger»? Il n'existe pas d'exigences particulières à remplir pour satisfaire à ce critère. Les exigences minimales ne sont pas élevées. Le juge saisi de la requête doit faire un examen préliminaire du fond de l'affaire. La décision sur le fond que rend le juge de première instance relativement à la *Charte* est une indication pertinente, mais pas nécessairement concluante que les questions soulevées en appel constituent des questions sérieuses: voir *Metropolitan Stores*, précité, à la p. 150. De même, l'autorisation d'appel sur le fond qu'une cour d'appel accorde constitue une indication que des questions sérieuses sont soulevées, mais un refus d'autorisation dans un cas qui soulève les mêmes questions n'indique pas automatiquement que les questions de fond ne sont pas sérieuses.

Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely

Une fois convaincu qu'une réclamation n'est ni futile ni vexatoire, le juge de la requête devrait examiner les deuxième et troisième critères, même s'il est d'avis que le demandeur sera probablement

1994 CanLII 117 (SCC)

to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the *American Cyanamid* principle in such a situation in *N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294, at p. 1307:

Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

Cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception. Several cases indicate that this exception is already applied to some extent in Canada.

In *Trieger v. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (Ont. H.C.), the leader of the Green Party applied for an interlocutory mandatory injunction allowing him to participate in a party leaders' debate to be televised within a few days of the hearing. The applicant's only real interest was in being permitted to participate in the debate, not in any subsequent declaration of his rights. Campbell J. refused the application, stating at p. 152:

débouté au procès. Il n'est en général ni nécessaire ni souhaitable de faire un examen prolongé du fond de l'affaire.

Il existe deux exceptions à la règle générale selon laquelle un juge ne devrait pas procéder à un examen approfondi sur le fond. La première est le cas où le résultat de la demande interlocutoire équivaudra en fait au règlement final de l'action. Ce sera le cas, d'une part, si le droit que le requérant cherche à protéger est un droit qui ne peut être exercé qu'immédiatement ou pas du tout, ou, d'autre part, si le résultat de la demande aura pour effet d'imposer à une partie un tel préjudice qu'il n'existe plus d'avantage possible à tirer d'un procès. En fait, dans l'arrêt *N.W.L. Ltd. c. Woods*, [1979] 1 W.L.R. 1294, à la p. 1307, lord Diplock a modifié le principe formulé dans l'arrêt *American Cyanamid*:

[TRADUCTION] Toutefois, lorsque l'octroi ou le refus d'une injonction interlocutoire aura comme répercussion pratique de mettre fin à l'action parce que le préjudice déjà subi par la partie perdante est complet et du type qui ne peut donner lieu à un dédommagement, la probabilité que le demandeur réussirait à établir son droit à une injonction, si l'affaire s'était rendue à procès, constitue un facteur dont le juge doit tenir compte lorsqu'il fait l'appréciation des risques d'injustice possibles selon qu'il tranche d'une façon plutôt que de l'autre.

Cette exception pourrait bien englober les cas où un requérant cherche à faire interdire le piquetage. Plusieurs décisions indiquent que cette exception est déjà appliquée dans une certaine mesure au Canada.

Dans l'arrêt *Trieger c. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (H.C. Ont.), le chef du Parti Vert avait demandé une ordonnance interlocutoire visant à lui permettre de participer à un débat télévisé des chefs de partis devant avoir lieu peu de jours après l'audition. Le requérant était seulement intéressé à participer au débat et non à obtenir une déclaration ultérieure de ses droits. Le juge Campbell a refusé la demande en ces termes à la p. 152:

This is not the sort of relief that should be granted on an interlocutory application of this kind. The legal issues involved are complex and I am not satisfied that the applicant has demonstrated there is a serious issue to be tried in the sense of a case with enough legal merit to justify the extraordinary intervention of this court in making the order sought without any trial at all. [Emphasis added.]

In *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, the appellant Daigle was appealing an interlocutory injunction granted by the Quebec Superior Court enjoining her from having an abortion. In view of the advanced state of the appellant's pregnancy, this Court went beyond the issue of whether or not the interlocutory injunction should be discharged and immediately rendered a decision on the merits of the case.

The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.

The second exception to the *American Cyanamid* prohibition on an extensive review of the merits arises when the question of constitutionality presents itself as a simple question of law alone. This was recognized by Beetz J. in *Metropolitan Stores*, at p. 133:

There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(a) of the *Canadian Charter of Rights and Freedoms*, could not possibly be saved under s. 1 of the *Charter* and might perhaps be struck down right away; see *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional.

[TRANSLATION] Il ne s'agit pas du type de redressement qui devrait être accordé dans le cadre d'une demande interlocutoire de cette nature. Les questions juridiques en cause sont complexes et je ne suis pas convaincu que le requérant a démontré l'existence d'une question sérieuse à juger au sens d'une affaire dont le fond juridique est suffisant pour justifier l'intervention extraordinaire de la cour sans aucun procès. [Nous soulignons.]

Dans l'arrêt *Tremblay c. Daigle*, [1989] 2 R.C.S. 530, l'appelante Daigle interjetait appel contre une injonction interlocutoire rendue par la Cour supérieure du Québec lui interdisant de se faire avorter. Compte tenu de l'état avancé de la grossesse de l'appelante, notre Cour est allée au-delà de la question de l'injonction interlocutoire et a rendu immédiatement une décision sur le fond de l'affaire.

Les circonstances justifiant l'application de cette exception sont rares. Lorsqu'elle s'applique, le tribunal doit procéder à un examen plus approfondi du fond de l'affaire. Puis, au moment de l'application des deuxième et troisième étapes de l'analyse, il doit tenir compte des résultats prévus quant au fond.

La deuxième exception à l'interdiction, formulée dans l'arrêt *American Cyanamid*, de procéder à un examen approfondi du fond d'une affaire, vise le cas où la question de constitutionnalité se présente uniquement sous la forme d'une pure question de droit. Le juge Beetz l'a reconnu dans l'arrêt *Metropolitan Stores*, à la p. 133:

Il peut exister des cas rares où la question de la constitutionnalité se présente sous la forme d'une question de droit purement et simplement, laquelle peut être définitivement tranchée par un juge saisi d'une requête. Un exemple théorique qui vient à l'esprit est la situation où le Parlement ou une législature prétendrait adopter une loi imposant les croyances d'une religion d'État. Pareille loi enfreindrait l'al. 2a) de la *Charte canadienne des droits et libertés*, ne pourrait possiblement pas être justifiée par l'article premier de celle-ci et pourrait peut-être le risque d'être frappée d'illégalité sur-le-champ: voir *Procureur général du Québec c. Québec Association of Protestant School Boards*, [1984] 2 R.C.S. 66, à la p. 88. Or, il va sans dire qu'il s'agit là de cas exceptionnels.

A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

Un juge appelé à trancher une demande s'inscrivant dans les limites très étroites de la deuxième exception n'a pas à examiner les deuxième ou troisième critères puisque l'existence du préjudice irréparable ou la prépondérance des inconvénients ne sont pas pertinentes dans la mesure où la question constitutionnelle est tranchée de façon définitive et rend inutile le sursis.

The suggestion has been made in the private law context that a third exception to the *American Cyanamid* "serious question to be tried" standard should be recognized in cases where the factual record is largely settled prior to the application being made. Thus in *Dialadex Communications Inc. v. Crammond* (1987), 34 D.L.R. (4th) 392 (Ont. H.C.), at p. 396, it was held that:

Dans le contexte du droit privé, on a soutenu qu'il faudrait reconnaître une troisième exception au critère de «la question sérieuse à juger», formulé dans l'affaire *American Cyanamid*, lorsque le dossier factuel est en grande partie réglé avant le dépôt de la demande. Ainsi, dans l'affaire *Dialadex Communications Inc. c. Crammond* (1987), 34 D.L.R. (4th) 392 (H.C. Ont.), à la p. 396, on a conclu:

1994 CanLII 117 (SCC)

Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong *prima facie* case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted.

[TRADUCTION] Lorsque les faits ne sont pas vraiment contestés, les demandeurs doivent être en mesure d'établir qu'il existe une forte apparence de droit et qu'ils subiront un préjudice irréparable si l'injonction est refusée. Si les faits sont contestés, le critère à satisfaire est moins exigeant. Dans ce cas, les demandeurs doivent établir que leur action n'est pas futile et qu'il existe une question sérieuse à juger, et que, selon la prépondérance des inconvénients, une injonction devrait être accordée.

To the extent that this exception exists at all, it should not be applied in *Charter* cases. Even if the facts upon which the *Charter* breach is alleged are not in dispute, all of the evidence upon which the s. 1 issue must be decided may not be before the motions court. Furthermore, at this stage an appellate court will not normally have the time to consider even a complete factual record properly. It follows that a motions court should not attempt to undertake the careful analysis required for a consideration of s. 1 in an interlocutory proceeding.

Si cette exception existe, elle ne devrait pas s'appliquer aux cas relevant de la *Charte*. Même si les faits qui fondent l'allégation de violation de la *Charte* ne sont pas contestés, le tribunal des requêtes pourrait bien ne pas avoir devant lui tous les éléments de preuve requis pour un examen fondé sur l'article premier. Par ailleurs, à cette étape, une cour d'appel n'aura habituellement pas le temps d'examiner suffisamment même un dossier factuel complet. Il s'ensuit qu'un tribunal des requêtes ne devrait pas tenter de procéder à l'analyse approfondie que nécessite un examen de l'article premier dans le cadre d'une procédure interlocutoire.

C. Irreparable Harm

C. Le préjudice irréparable

Beetz J. determined in *Metropolitan Stores*, at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted,

Le juge Beetz a affirmé dans l'arrêt *Metropolitan Stores* (à la p. 128) que «[l]e deuxième critère consiste à décider si la partie qui cherche à obtenir l'injonction interlocutoire subirait, si elle n'était

suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

"Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid, supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

The assessment of irreparable harm in interlocutory applications involving *Charter* rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in *Charter* cases.

pas accordée, un préjudice irréparable». Certains tribunaux ont examiné, à cette étape, le préjudice que l'intimé risque de subir si le redressement demandé est accordé. Nous sommes d'avis qu'il est plus approprié de le faire à la troisième étape de l'analyse. Le préjudice allégué à l'intérêt public devrait également être examiné à cette étape.

À la présente étape, la seule question est de savoir si le refus du redressement pourrait être si défavorable à l'intérêt du requérant que le préjudice ne pourrait pas faire l'objet d'une réparation, en cas de divergence entre la décision sur le fond et l'issue de la demande interlocutoire.

Le terme «irréparable» a trait à la nature du préjudice subi plutôt qu'à son étendue. C'est un préjudice qui ne peut être quantifié du point de vue monétaire ou un préjudice auquel il ne peut être remédié, en général parce qu'une partie ne peut être dédommée par l'autre. Des exemples du premier type sont le cas où la décision du tribunal aura pour effet de faire perdre à une partie son entreprise (*R.L. Crain Inc. c. Hendry* (1988), 48 D.L.R. (4th) 228 (B.R. Sask.)); le cas où une partie peut subir une perte commerciale permanente ou un préjudice irrémédiable à sa réputation commerciale (*American Cyanamid, précité*); ou encore le cas où une partie peut subir une perte permanente de ressources naturelles lorsqu'une activité contestée n'est pas interdite (*MacMillan Bloedel Ltd. c. Mullin*, [1985] 3 W.W.R. 577 (C.A.C.-B.)). Le fait qu'une partie soit impecunieuse n'entraîne pas automatiquement l'acceptation de la requête de l'autre partie qui ne sera pas en mesure de percevoir ultérieurement des dommages-intérêts, mais ce peut être une considération pertinente (*Hubbard c. Pitt*, [1976] Q.B. 142 (C.A.)).

L'appréciation du préjudice irréparable dans le cas de demandes interlocutoires concernant des droits garantis par la *Charte* est une tâche qui sera habituellement plus difficile qu'une appréciation comparable dans le cas d'une demande en matière de droit privé. Une des raisons en est que la notion de préjudice irréparable est étroitement liée à la réparation que sont les dommages-intérêts, lesquels ne constituent pas la principale réparation dans les cas relevant de la *Charte*.

1994 CanLII 117 (SCC)

This Court has on several occasions accepted the principle that damages may be awarded for a breach of *Charter* rights: (see, for example, *Mills v. The Queen*, [1986] 1 S.C.R. 863, at pp. 883, 886, 943 and 971; *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at p. 196). However, no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the *Charter*. In light of the uncertain state of the law regarding the award of damages for a *Charter* breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

D. The Balance of Inconvenience and Public Interest Considerations

The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined at this stage.

The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In *American Cyanamid*, Lord Diplock cautioned, at p. 408, that:

[i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

À plusieurs reprises, notre Cour a accepté le principe que des dommages-intérêts peuvent être accordés relativement à une violation des droits garantis par la *Charte*: (voir par exemple *Mills c. La Reine*, [1986] 1 R.C.S. 863, aux pp. 883, 886, 943 et 971; *Nelles c. Ontario*, [1989] 2 R.C.S. 170, à la p. 196). Toutefois, il n'existe pas encore de théorie juridique relative aux principes susceptibles de régir l'octroi de dommages-intérêts en vertu du par. 24(1) de la *Charte*. Compte tenu de l'incertitude du droit quant à la condamnation des dommages-intérêts en cas de violation de la *Charte*, il sera dans la plupart des cas impossible pour un juge saisi d'une demande interlocutoire de déterminer si un dédommagement adéquat pourra être obtenu au procès. En conséquence, jusqu'à ce que le droit soit clarifié en cette matière, on peut supposer que le préjudice financier, même quantifiable, qu'un refus de redressement causera au requérant constitue un préjudice irréparable.

D. La prépondérance des inconvénients et l'intérêt public

Dans l'arrêt *Metropolitan Stores*, le juge Beetz décrit, à la p. 129, le troisième critère applicable à une demande de redressement interlocutoire comme un critère qui consiste «à déterminer laquelle des deux parties subira le plus grand préjudice selon que l'on accorde ou refuse une injonction interlocutoire en attendant une décision sur le fond». Compte tenu des exigences minimales relativement peu élevées du premier critère et des difficultés d'application du critère du préjudice irréparable dans des cas relevant de la *Charte*, c'est à ce stade que seront décidées de nombreuses procédures interlocutoires.

Il y a de nombreux facteurs à examiner dans l'appréciation de la «prépondérance des inconvénients» et ils varient d'un cas à l'autre. Dans l'arrêt *American Cyanamid*, lord Diplock fait la mise en garde suivante (à la p. 408):

[TRADUCTION] [i]l serait peu sage de tenter de demander à être pris en considération au moment du choix de la décision la plus convenable, encore moins de proposer le poids relatif à accorder à chacun de ces éléments. En la matière, chaque cas est un cas d'espèce.

He added, at p. 409, that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

The decision in *Metropolitan Stores*, at p. 149, made clear that in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry." This was the approach properly followed by Blair J. of the General Division of the Ontario Court in *Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280, at pp. 303-4:

Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

1. The Public Interest

Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in *Metropolitan Stores*. A few additional points may be made. It is the "polycentric" nature of the *Charter* which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., *Remedies: Issues and Perspectives*, 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:

While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in *Charter* litigation is not unequivocal or asymmetrical in the way suggested in *Metropolitan Stores*. The Attorney General is not the exclusive representative of a monolithic "public" in *Charter* disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to

Il ajoute, à la p. 409: [TRADUCTION] «Il peut y avoir beaucoup d'autres éléments particuliers dont il faut tenir compte dans les circonstances particulières d'un cas déterminé.»

L'arrêt *Metropolitan Stores*, établit clairement que, dans tous les litiges de nature constitutionnelle, l'intérêt public est un «élément particulier» à considérer dans l'appréciation de la prépondérance des inconvénients, et qui doit recevoir «l'importance qu'il mérite» (à la p. 149). C'est la démarche qui a été correctement suivie par le juge Blair de la Division générale de la Cour de l'Ontario dans l'affaire *Ainsley Financial Corp. c. Ontario Securities Commission* (1993), 14 O.R. (3d) 280, aux pp. 303 et 304:

[TRADUCTION] Une injonction interlocutoire comportant une contestation de la validité constitutionnelle d'une loi ou de l'autorité d'un organisme chargé de l'application de la loi diffère des litiges ordinaires dans lesquels les demandes de redressement opposent des plaideurs privés. Il faut tenir compte des intérêts du public, que l'organisme a comme mandat de protéger, et en faire l'appréciation par rapport à l'intérêt des plaideurs privés.

1. L'intérêt public

Dans *Metropolitan Stores*, le juge Beetz a formulé des directives générales quant aux méthodes à utiliser dans l'appréciation de la prépondérance des inconvénients. On peut y apporter quelques précisions. C'est le caractère «polycentrique» de la *Charte* qui exige un examen de l'intérêt public dans l'appréciation de la prépondérance des inconvénients: voir Jamie Cassels, «An Inconvenient Balance: The Injunction as a Charter Remedy» dans J. Berryman, dir., *Remedies: Issues and Perspectives*, 1991, 271, aux pp. 301 à 305. Toutefois, le gouvernement n'a pas le monopole de l'intérêt public. Comme le fait ressortir Cassels, à la p. 303:

[TRADUCTION] Bien qu'il soit fort important de tenir compte de l'intérêt public dans l'appréciation de la prépondérance des inconvénients, l'intérêt public dans les cas relevant de la *Charte* n'est pas sans équivoque ou asymétrique comme le laisse entendre l'arrêt *Metropolitan Stores*. Le procureur général n'est pas le représentant exclusif d'un public «monolithique» dans les litiges sur la *Charte*, et le requérant ne présente pas toujours une

represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

revendication individualisée. La plupart du temps, le requérant peut également affirmer qu'il représente une vision de «l'intérêt public». De même, il se peut que l'intérêt public ne milite pas toujours en faveur de l'application d'une loi existante.

It is, we think, appropriate that it be open to both parties in an interlocutory *Charter* proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

À notre avis, il convient d'autoriser les deux parties à une procédure interlocutoire relevant de la *Charte* à invoquer des considérations d'intérêt public. Chaque partie a droit de faire connaître au tribunal le préjudice qu'elle pourrait subir avant la décision sur le fond. En outre, le requérant ou l'intimé peut faire pencher la balance des inconvénients en sa faveur en démontrant au tribunal que l'intérêt public commande l'octroi ou le refus du redressement demandé. «L'intérêt public» comprend à la fois les intérêts de l'ensemble de la société et les intérêts particuliers de groupes identifiables.

We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application. Such was the position taken by the trial judge in *Morgentaler v. Ackroyd* (1983), 150 D.L.R. (3d) 59 (Ont. H.C.), per Linden J., at p. 66.

En conséquence, nous sommes d'avis qu'il faut rejeter une méthode d'analyse qui exclut l'examen d'un préjudice non directement subi par une partie à la requête. Telle était la position adoptée par le juge de première instance dans l'affaire *Morgentaler c. Ackroyd* (1983), 150 D.L.R. (3d) 59 (H.C. Ont.). Le juge Linden conclut à la p. 66:

The applicants rested their argument mainly on the irreparable loss to their potential women patients, who would be unable to secure abortions if the clinic is not allowed to perform them. Even if it were established that *these women* would suffer irreparable harm, such evidence would not indicate any irreparable harm to *these applicants*, which would warrant this court issuing an injunction at their behest. [Emphasis in original.]

[TRANSLATION] Les requérants fondent principalement leur argumentation sur le préjudice irréparable que risquent de subir leurs patientes éventuelles qui ne pourront obtenir un avortement si la clinique n'est pas autorisée à les faire. Même s'il était établi que *ces femmes* subiraient un préjudice irréparable, une telle preuve n'indiquerait pas que les requérants en l'espèce subiraient un préjudice irréparable, justifiant la cour de délivrer une injonction à leur demande. [En italique dans l'original.]

When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the

Lorsqu'un particulier soutient qu'un préjudice est causé à l'intérêt public, ce préjudice doit être prouvé puisqu'on présume ordinairement qu'un particulier poursuit son propre intérêt et non celui de l'ensemble du public. Dans l'examen de la prépondérance des inconvénients et de l'intérêt public, il n'est pas utile à un requérant de soutenir qu'une autorité gouvernementale donnée ne représente pas l'intérêt public. Il faut plutôt que le

court of the public interest benefits which will flow from the granting of the relief sought.

requérant convaincre le tribunal des avantages, pour l'intérêt public, qui découleront de l'octroi du redressement demandé.

Courts have addressed the issue of the harm to the public interest which can be relied upon by a public authority in different ways. On the one hand is the view expressed by the Federal Court of Appeal in *Attorney General of Canada v. Fishing Vessel Owners' Association of B.C.*, [1985] 1 F.C. 791, which overturned the trial judge's issuance of an injunction restraining Fisheries Officers from implementing a fishing plan adopted under the *Fisheries Act*, R.S.C. 1970, c. F-14, for several reasons, including, at p. 795:

Cette question de l'atteinte à l'intérêt public invoquée par une autorité publique a été abordée de diverses façons par les tribunaux. D'un côté, on trouve le point de vue exprimé par la Cour d'appel fédérale dans l'arrêt *Procureur général du Canada c. Fishing Vessel Owners' Association of B.C.*, [1985] 1 C.F. 791, qui a infirmé la décision de la Division de première instance d'accorder une injonction empêchant des fonctionnaires des pêcheries de mettre en œuvre un plan de pêche adopté en vertu de la *Loi sur les pêcheries*, S.R.C. 1970, ch. F-14. Parmi d'autres motifs, la cour a souligné celui-ci (à la p. 795):

1994 CanLII 117 (SCC)

(b) the Judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm.

b) le juge a eu tort de tenir pour acquis que le fait d'accorder l'injonction ne causerait aucun tort aux appelants. Lorsqu'on empêche un organisme public d'exercer les pouvoirs que la loi lui confère, on peut alors affirmer, en présence d'un cas comme celui qui nous occupe, que l'intérêt public, dont cet organisme est le gardien, subit un tort irréparable.

This dictum received the guarded approval of Beetz J. in *Metropolitan Stores* at p. 139. It was applied by the Trial Division of the Federal Court in *Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans)* (1988), 21 F.T.R. 304.

Le juge Beetz a approuvé avec réserve ces remarques dans l'arrêt *Metropolitan Stores* (à la p. 139). Elles ont été appliquées par la Division de première instance de la Cour fédérale dans *Esquimalt Anglers' Association c. Canada (Ministre des pêches et océans)* (1988), 21 F.T.R. 304.

A contrary view was expressed by McQuaid J.A. of the P.E.I. Court of Appeal in *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158, who, in granting a stay of an order of the Public Utilities Commission pending appeal, stated at p. 164:

Un point de vue contraire a été exprimé par le juge McQuaid de la Cour d'appel de l'Île-du-Prince-Édouard dans *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158, qui, en autorisant un sursis d'exécution d'une ordonnance de la Public Utilities Commission porté en appel, a affirmé, à la p. 164:

I can see no circumstances whatsoever under which the Commission itself could be inconvenienced by a stay pending appeal. As a regulatory body, it has no vested interest, as such, in the outcome of the appeal. In fact, it is not inconceivable that it should welcome any appeal which goes especially to its jurisdiction, for thereby it is provided with clear guidelines for the future, in situations where doubt may have therefore existed. The pub-

[TRANSLATION] Je ne vois aucune circonstance susceptible de causer un inconvénient à la Commission s'il y a un sursis d'exécution en attendant l'appel. En tant qu'organisme de réglementation, la Commission ne possède aucun intérêt acquis quant à l'issue de l'appel. En fait, on peut concevoir qu'elle soit favorable à un appel qui porte tout particulièrement sur sa compétence, car elle se trouve à recevoir des directives claires pour l'avenir

lic interest is equally well served, in the same sense, by any appeal

relativement à des situations où il aurait pu exister des doutes. De la même manière, un appel sert également bien l'intérêt public

In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

À notre avis, le concept d'inconvénient doit recevoir une interprétation large dans les cas relevant de la *Charte*. Dans le cas d'un organisme public, le fardeau d'établir le préjudice irréparable à l'intérêt public est moins exigeant que pour un particulier en raison, en partie, de la nature même de l'organisme public et, en partie, de l'action qu'on veut faire interdire. On pourra presque toujours satisfaire au critère en établissant simplement que l'organisme a le devoir de favoriser ou de protéger l'intérêt public et en indiquant que c'est dans cette sphère de responsabilité que se situe le texte législatif, le règlement ou l'activité contestés. Si l'on a satisfait à ces exigences minimales, le tribunal devrait, dans la plupart des cas, supposer que l'interdiction de l'action causera un préjudice irréparable à l'intérêt public.

A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

En règle générale, un tribunal ne devrait pas tenter de déterminer si l'interdiction demandée entraînerait un préjudice réel. Le faire amènerait en réalité le tribunal à examiner si le gouvernement gouverne bien, puisque l'on se trouverait implicitement à laisser entendre que l'action gouvernementale n'a pas pour effet de favoriser l'intérêt public et que l'interdiction ne causerait donc aucun préjudice à l'intérêt public. La *Charte* autorise les tribunaux non pas à évaluer l'efficacité des mesures prises par le gouvernement, mais seulement à empêcher celui-ci d'empiéter sur les garanties fondamentales.

Consideration of the public interest may also be influenced by other factors. In *Metropolitan Stores*, it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of certain provisions of a law is suspended entirely. See *Black v. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439; *Vancouver General*

L'examen de l'intérêt public peut également être touché par d'autres facteurs. Dans *Metropolitan Stores*, on a fait remarquer que les considérations d'intérêt public ont davantage de poids dans les cas de «suspension» que dans les cas d'«exemption». La raison en est que l'atteinte à l'intérêt public est beaucoup moins probable dans le cas où un groupe restreint et distinct de requérants est exempté de l'application de certaines dispositions d'une loi que dans le cas où l'application de la loi est suspendue dans sa totalité. Voir les affaires *Black c. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439; *Vancouver General Hospital c. Stoffman*

Hospital v. Staffman (1985), 23 D.L.R. (4th) 146; *Rio Hotel Ltd. v. Commission des licences et permis d'alcool*, [1986] 2 S.C.R. ix.

(1985), 23 D.L.R. (4th) 146; *Rio Hotel Ltd. c. Commission des licences et permis d'alcool*, [1986] 2 R.C.S. ix.

Similarly, even in suspension cases, a court may be able to provide some relief if it can sufficiently limit the scope of the applicant's request for relief so that the general public interest in the continued application of the law is not affected. Thus in *Ontario Jockey Club v. Smith* (1922), 22 O.W.N. 373 (H.C.), the court restrained the enforcement of an impugned taxation statute against the applicant but ordered him to pay an amount equivalent to the tax into court pending the disposition of the main action.

Par ailleurs, même dans les cas de suspension, un tribunal peut être en mesure d'offrir quelque redressement s'il arrive à suffisamment circonscrire la demande de redressement du requérant de façon à ne pas modifier l'application continue de la loi que commande l'intérêt public général. Ainsi, dans la décision *Ontario Jockey Club c. Smith* (1922), 22 O.W.N. 373 (H.C.), le tribunal a restreint à l'égard du requérant l'application d'une loi fiscale contestée, mais lui a ordonné de consigner à la cour la somme correspondant aux taxes exigées, en attendant le règlement de l'action principale.

2. The Status Quo

2. Le statu quo

In the course of discussing the balance of convenience in *American Cyanamid*, Lord Diplock stated at p. 408 that when everything else is equal, "it is a counsel of prudence to . . . preserve the status quo." This approach would seem to be of limited value in private law cases, and, although there may be exceptions, as a general rule it has no merit as such in the face of the alleged violation of fundamental rights. One of the functions of the *Charter* is to provide individuals with a tool to challenge the existing order of things or status quo. The issues have to be balanced in the manner described in these reasons.

Dans le cadre de l'examen de la prépondérance des inconvénients dans l'affaire *American Cyanamid*, lord Diplock a affirmé que, toutes choses demeurant égales, [TRADUCTION] «il sera plus prudent d'adopter les mesures propres à maintenir le statu quo» (p. 408). Cette méthode semble être d'une utilité restreinte dans les litiges de droit privé; quoiqu'il puisse y avoir des exceptions, en règle générale, l'application de cette méthode n'est pas fondée comme telle lorsqu'on invoque la violation de droits fondamentaux. L'une des fonctions de la *Charte* est de fournir aux particuliers un moyen de contester l'ordre actuel des choses ou le statu quo. Les diverses questions doivent être pondérées de la façon décrite dans les présents motifs.

E. Summary

E. Sommaire

It may be helpful at this stage to review the factors to be considered on an application for interlocutory relief in a *Charter* case.

Il est utile à ce stade de résumer les facteurs à examiner dans le cas d'une demande de redressement interlocutoire dans un cas relevant de la *Charte*.

As indicated in *Metropolitan Stores*, the three-part *American Cyanamid* test should be applied to applications for interlocutory injunctions and as well for stays in both private law and *Charter* cases.

Comme l'indique *Metropolitan Stores* l'analyse en trois étapes d'*American Cyanamid* devrait s'appliquer aux demandes d'injonctions interlocutoires et de suspensions d'instance, tant en droit privé que dans les affaires relevant de la *Charte*.

1994 CanLII 117 (SCC)

At the first stage, an applicant for interlocutory relief in a *Charter* case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.

At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving *Charter* rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to

À la première étape, le requérant d'un redressement interlocutoire dans un cas relevant de la *Charte* doit établir l'existence d'une question sérieuse à juger. Le juge de la requête doit déterminer si le requérant a satisfait au critère, en se fondant sur le bon sens et un examen extrêmement restreint du fond de l'affaire. Le fait qu'une cour d'appel a accordé une autorisation d'appel relativement à l'action principale constitue certes une considération pertinente et importante, de même que tout jugement rendu sur le fond; toutefois, ni l'une ni l'autre de ces considérations n'est concluante. Le tribunal saisi de la requête ne devrait aller au-delà d'un examen préliminaire du fond de l'affaire que lorsque le résultat de la requête interlocutoire équivaudra en fait à un règlement final de l'action, ou que la question de constitutionnalité d'une loi se présente comme une pure question de droit. Les cas de ce genre sont extrêmement rares. Sauf lorsque la réclamation est futile ou vexatoire ou que la question de la constitutionnalité d'une loi se présente comme une pure question de droit, le juge de la requête devrait procéder à l'examen des deuxième et troisième étapes de l'analyse décrite dans l'arrêt *Metropolitan Stores*.

À la deuxième étape, le requérant doit convaincre la cour qu'il subira un préjudice irréparable en cas de refus du redressement. Le terme «irréparable» a trait à la nature du préjudice et non à son étendue. Dans les cas relevant de la *Charte*, même une perte financière quantifiable, invoquée à l'appui d'une demande, peut être considérée comme un préjudice irréparable s'il n'est pas évident qu'il pourrait y avoir recouvrement au moment de la décision sur le fond.

C'est la troisième étape du critère, celle de l'appréciation de la prépondérance des inconvénients, qui permettra habituellement de trancher les demandes concernant des droits garantis par la *Charte*. En plus du préjudice que chaque partie prétend qu'elle subira, il faut tenir compte de l'intérêt public. L'effet qu'une décision sur la demande aura sur l'intérêt public peut être invoqué par l'une ou l'autre partie. Les considérations d'intérêt public auront moins de poids dans les cas d'exemption que dans les cas de suspension. Si la

promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

VII. Application of the Principles to these Cases

A. *A Serious Question to be Tried*

The applicants contend that these cases raise several serious issues to be tried. Among these is the question of the application of the rational connection and the minimal impairment tests in order to justify the infringement upon freedom of expression occasioned by a blanket ban on tobacco advertising. On this issue, Chabot J. of the Quebec Superior Court and Brossard J.A. in dissent in the Court of Appeal held that the government had not satisfied these tests and that the ban could not be justified under s. 1 of the *Charter*. The majority of the Court of Appeal held that the ban was justified. The conflict in the reasons arises from different interpretations of the extent to which recent jurisprudence has relaxed the onus fixed upon the state in *R. v. Oakes*, [1986] 1 S.C.R. 103, to justify its action in public welfare initiatives. This Court has granted leave to hear the appeals on the merits. When faced with separate motions for interlocutory relief pertaining to these cases, the Quebec Court of Appeal stated that "[w]hatever the outcome of these appeals, they clearly raise serious

nature et l'objet affirmé de la loi sont de promouvoir l'intérêt public, le tribunal des requêtes ne devrait pas se demander si la loi a réellement cet effet. Il faut supposer que tel est le cas. Pour arriver à contrer le supposé avantage de l'application continue de la loi que commande l'intérêt public, le requérant qui invoque l'intérêt public doit établir que la suspension de l'application de la loi serait elle-même à l'avantage du public.

Enfin, en règle générale, les mêmes principes s'appliqueraient lorsqu'un organisme gouvernemental présente une demande de redressement interlocutoire. Cependant, c'est à la deuxième étape que sera examinée la question de l'intérêt public, en tant qu'aspect du préjudice irréparable causé aux intérêts du gouvernement. Cette question sera de nouveau examinée à la troisième étape lorsque le préjudice du requérant est examiné par rapport à celui de l'intimé, y compris le préjudice que ce dernier aura établi du point de vue de l'intérêt public.

VII. Application des principes en l'espèce

A. *Une question sérieuse à juger*

Les requérantes soutiennent que les présentes affaires soulèvent plusieurs questions sérieuses à juger, dont celle de l'application des critères du lien rationnel et de l'atteinte minimale, qui servent à justifier l'atteinte à la liberté d'expression entraînée par l'interdiction générale de la publicité sur les produits du tabac. Sur ce point, le juge Chabot de la Cour supérieure du Québec et le juge Brossard, dissident, de la Cour d'appel ont conclu que le gouvernement n'avait pas satisfait à ces critères et que l'interdiction ne pouvait se justifier en vertu de l'article premier de la *Charte*. La Cour d'appel à la majorité a statué que l'interdiction pouvait se justifier. Ces divergences d'opinions résultent d'interprétations différentes de la portée de l'assouplissement à la théorie du fardeau imposé au ministère public dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103, lorsqu'il veut justifier son intervention dans le domaine du bien-être public. Notre Cour a accordé les autorisations de pourvoi sur le fond. Relativement à des requêtes distinctes de redressement interlocutoire en l'espèce, la Cour d'appel du

1994 CanLII 117 (SCC)

constitutional issues." This observation of the Quebec Court of Appeal and the decision to grant leaves to appeal clearly indicate that these cases raise serious questions of law.

Québec a affirmé que: [TRADUCTION] «[q]uelle que soit l'issue de ces appels, ils soulèvent clairement des questions constitutionnelles sérieuses.» Cette observation de la Cour d'appel du Québec et les autorisations d'appel données par notre Cour indiquent clairement que les présentes affaires soulèvent des questions de droit sérieuses.

B. Irreparable Harm

B. Le préjudice irréparable

The applicants allege that if they are not granted interlocutory relief they will be forced to spend very large sums of money immediately in order to comply with the regulations. In the event that their appeals are allowed by this Court, the applicants contend that they will not be able either to recover their costs from the government or to revert to their current packaging practices without again incurring the same expense.

Les requérantes soutiennent que si elles n'obtiennent pas le redressement interlocutoire, elles seront immédiatement forcées de faire des dépenses très importantes pour se conformer au règlement et que, advenant le cas où notre Cour accueillerait les pourvois des requérantes, elles ne seront pas en mesure de recouvrer du gouvernement les coûts subis ou de revenir à leurs méthodes actuelles d'emballage sans engager de nouveau les mêmes dépenses.

Monetary loss of this nature will not usually amount to irreparable harm in private law cases. Where the government is the unsuccessful party in a constitutional claim, however, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

Une perte monétaire de cette nature n'équivaudra habituellement pas à un préjudice irréparable dans des affaires de droit privé. Toutefois, lorsque le gouvernement est la partie qui échoue dans une affaire de nature constitutionnelle, un demandeur aura beaucoup plus de difficulté à établir la responsabilité constitutionnelle et à obtenir une réparation monétaire. Les dépenses requises par le nouveau règlement causeront donc un préjudice irréparable aux requérantes si les présentes demandes sont refusées, mais les actions principales accueillies en appel.

C. Balance of Inconvenience

C. La prépondérance des inconvénients

Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies.

Pour déterminer lequel de l'octroi ou du refus du redressement interlocutoire occasionnerait le plus d'inconvénients, il faut notamment procéder à l'examen des facteurs suivants: la nature du redressement demandé et du préjudice invoqué par les parties, la nature de la loi contestée et l'intérêt public.

The losses which the applicants would suffer should relief be denied are strictly financial in nature. The required expenditure is significant and would undoubtedly impose considerable economic hardship on the two companies. Nonetheless, as

Les pertes que subiraient les requérantes, en cas de refus du redressement, sont de nature strictement financière. Les dépenses nécessaires sont importantes et imposeraient certainement un fardeau économique considérable aux deux sociétés.

1994 CanLII 117 (SCC)

pointed out by the respondent, the applicants are large and very successful corporations, each with annual earnings well in excess of \$50,000,000. They have a greater capacity to absorb any loss than would many smaller enterprises. Secondly, assuming that the demand for cigarettes is not solely a function of price, the companies may also be able to pass on some of their losses to their customers in the form of price increases. Therefore, although the harm suffered may be irreparable, it will not affect the long-term viability of the applicants.

Second, the applicants are two companies who seek to be exempted from compliance with the latest regulations published under the *Tobacco Products Control Act*. On the face of the matter, this case appears to be an "exemption case" as that phrase was used by Beetz J. in *Metropolitan Stores*. However, since there are only three tobacco producing companies operating in Canada, the application really is in the nature of a "suspension case". The applicants admitted in argument that they were in effect seeking to suspend the application of the new regulations to all tobacco producing companies in Canada for a period of one year following the judgment of this Court on the merits. The result of these motions will therefore affect the whole of the Canadian tobacco producing industry. Further, the impugned provisions are broad in nature. Thus it is appropriate to classify these applications as suspension cases and therefore ones in which "the public interest normally carries greater weight in favour of compliance with existing legislation" (p. 147).

The weight accorded to public interest concerns is partly a function of the nature of legislation generally, and partly a function of the purposes of the specific piece of legislation under attack. As Beetz J. explained, at p. 135, in *Metropolitan Stores*:

Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by demo-

Néanmoins, comme l'a fait ressortir l'intimé, les requérantes sont des sociétés importantes et prospères, dont les revenus annuels dépassent les 50 millions de dollars. Elles peuvent absorber des pertes plus facilement que des entreprises plus petites. De plus, si l'on présume que, pour les cigarettes, la demande ne dépend pas uniquement du prix, ces sociétés peuvent reporter tout accroissement des dépenses sur leurs clients par le biais de majorations de prix. En conséquence, bien que le préjudice subi puisse être irréparable, il n'aura pas d'incidence à long terme sur la viabilité des entreprises requérantes.

Deuxièmement, les requérantes sont deux sociétés qui veulent être exemptées de l'application des dernières modifications du règlement pris en vertu de la *Loi réglementant les produits du tabac*. Au vu du dossier, le litige paraît être un «cas d'exemption» au sens où cette expression a été employée par le juge Beetz dans *Metropolitan Stores*. Toutefois, puisqu'il n'existe que trois sociétés de production de tabac au Canada, les demandes constituent en réalité une sorte de «cas de suspension». Les requérantes ont admis au cours des débats qu'elles cherchaient en fait à faire suspendre l'application du nouveau règlement à l'égard de toutes les sociétés de production de tabac au Canada pendant une période d'un an suivant le jugement de notre Cour sur le fond. La décision rendue relativement aux demandes aura donc des répercussions sur l'ensemble de l'industrie canadienne du tabac. Par ailleurs, les dispositions attaquées sont de nature générale. Il convient donc de considérer ces demandes comme un cas où «l'intérêt public commande normalement davantage le respect de la législation existante» (p. 147).

L'importance accordée aux préoccupations d'intérêt public dépend en partie de la nature de la loi en général et en partie de l'objet de la loi contestée. Comme le juge Beetz l'explique, à la p. 135 de l'arrêt *Metropolitan Stores*:

Qu'elles soient ou non finalement jugées constitutionnelles, les lois dont les plaideurs cherchent à obtenir la suspension, ou de l'application desquelles ils demandent d'être exemptés par voie d'injonction interlocutoire, ont

1994 CanLII 117 (SCC)

cratically-elected legislatures and are generally passed for the common good, for instance: . . . the protection of public health . . . It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will be seen later, in quite a few exemption cases, is susceptible temporarily to frustrate the pursuit of the common good. [Emphasis added.]

été adoptées par des législatures démocratiquement élues et visent généralement le bien commun, par exemple: [. . .] protéger la santé [. . .] Il semble bien évident qu'une injonction interlocutoire dans la plupart des cas de suspension et, jusqu'à un certain point, comme nous allons le voir plus loin, dans un bon nombre de cas d'exemption, risque de contrecarrer temporairement la poursuite du bien commun. [Nous soulignons.]

The regulations under attack were adopted pursuant to s. 3 of the *Tobacco Products Control Act* which states:

Le règlement attaqué a été adopté conformément à l'art. 3 de la *Loi réglementant les produits du tabac* qui prévoit:

3. 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,

3. 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, urgent et d'envergure nationale et, plus particulièrement:

(a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;

a) de protéger la santé des Canadiennes et des Canadiens compte tenu des preuves établissant de façon indiscutable un lien entre l'usage du tabac et de nombreuses maladies débilitantes ou mortelles;

(b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and

b) de préserver notamment les jeunes, autant que faire se peut dans une société libre et démocratique, des incitations à la consommation du tabac et du tabagisme qui peut en résulter;

(c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

c) de mieux sensibiliser les Canadiennes et les Canadiens aux méfaits du tabac par la diffusion efficace de l'information utile aux consommateurs de celui-ci.

The Regulatory Impact Analysis Statement, in the *Canada Gazette*, Part II, Vol. 127, No. 16, p. 3284, at p. 3285, which accompanied the regulations stated:

Le Résumé de l'étude d'impact de la réglementation (*Gazette du Canada*, partie II, vol. 127, n° 16, p. 3284, à la p. 3285, qui accompagne le règlement précise:

The increased number and revised format of the health messages reflect the strong consensus of the public health community that the serious health hazards of using these products be more fully and effectively communicated to consumers. Support for these changes has been manifested by hundreds of letters and a number of submissions by public health groups highly critical of the initial regulatory requirements under this legislation as well as a number of Departmental studies indicating their need.

L'augmentation du nombre des messages relatifs à la santé et la modification de la présentation de ces messages témoignent du consensus profond auquel sont parvenus les responsables de la santé publique, à savoir qu'il faut faire connaître de façon plus complète et plus efficace aux consommateurs les graves dangers de l'usage du tabac sur la santé. Des appuis pour les modifications réglementaires ont été exprimés dans des centaines de lettres et dans un certain nombre de mémoires présentés par des groupes du secteur de la santé publique, qui ont critiqué les premiers règlements adoptés en application de la loi, ainsi que dans un certain nombre d'études ministérielles soulignant la nécessité de ces modifications.

1994 CanLII 117 (SCC)

These are clear indications that the government passed the regulations with the intention of protecting public health and thereby furthering the public good. Further, both parties agree that past studies have shown that health warnings on tobacco product packages do have some effects in terms of increasing public awareness of the dangers of smoking and in reducing the overall incidence of smoking in our society. The applicants, however, argued strenuously that the government has not shown and cannot show that the specific requirements imposed by the impugned regulations have any positive public benefits. We do not think that such an argument assists the applicants at this interlocutory stage.

When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. That is particularly so in this case, where this very matter is one of the main issues to be resolved in the appeal. Rather, it is for the applicants to offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation.

The applicants in these cases made no attempt to argue any public interest in the continued application of current packaging requirements rather than the new requirements. The only possible public interest is that of smokers' not having the price of a package of cigarettes increase. Such an increase is not likely to be excessive and is purely economic in nature. Therefore, any public interest in maintaining the current price of tobacco products cannot carry much weight. This is particularly so when it is balanced against the undeniable importance of the public interest in health and in the pre-

Ce qui a été cité indique clairement que le gouvernement a adopté le règlement en cause dans l'intention de protéger la santé publique et donc pour promouvoir le bien public. Par ailleurs, les deux parties ont reconnu que des études réalisées dans le passé ont démontré que les mises en garde apposées sur les emballages de produits du tabac produisent des résultats en ce qu'elles sensibilisent davantage le public aux dangers du tabagisme et contribuent à réduire l'usage général du tabac dans notre société. Toutefois, les requérantes ont soutenu avec vigueur que le gouvernement n'a pas établi et qu'il ne peut établir que les exigences spécifiques imposées par le règlement attaqué présentent des avantages pour le public. À notre avis, cet argument ne vient pas en aide aux requérantes à ce stade interlocutoire.

Si le gouvernement déclare qu'il adopte une loi pour protéger et promouvoir la santé publique et s'il est établi que les limites qu'il veut imposer à l'industrie sont de même nature que celles qui, dans le passé, ont eu des avantages concrets pour le public, il n'appartient pas à un tribunal saisi d'une requête interlocutoire d'évaluer les véritables avantages qui découleront des exigences particulières de la loi. Cela est d'autant plus vrai en l'espèce qu'il s'agit de l'une des questions principales à trancher en appel. Les requérantes doivent plutôt faire contrepois à ces considérations d'intérêt public en établissant que la suspension de l'application de la loi serait davantage dans l'intérêt public.

En l'espèce, les requérantes n'ont pas tenté de faire valoir que l'intérêt public commande l'application continue des exigences actuelles en matière d'emballage plutôt que des nouvelles exigences. Il n'y a que la non-majoration du prix d'un paquet de cigarettes pour les fumeurs qui pourrait être dans l'intérêt public. Une telle majoration des prix ne sera vraisemblablement pas excessive et sera de nature purement économique. En conséquence, l'argument qu'il existe un intérêt pour le public à maintenir le prix actuel des produits du tabac ne peut avoir beaucoup de poids. Cela est tout particulièrement vrai lorsque ce facteur est examiné par rapport à l'importance incontestable de l'intérêt du

vention of the widespread and serious medical problems directly attributable to smoking.

public dans la protection de la santé et la prévention de problèmes médicaux répandus et graves, directement attribuables à la cigarette.

The balance of inconvenience weighs strongly in favour of the respondent and is not offset by the irreparable harm that the applicants may suffer if relief is denied. The public interest in health is of such compelling importance that the applications for a stay must be dismissed with costs to the successful party on the appeal.

La prépondérance des incon vénients est fortement en faveur de l'intimé et n'est pas contrebalancée par le préjudice irréparable que pourraient subir les requérantes si le redressement est refusé. L'intérêt public dans le domaine de la santé revêt une importance si impérieuse que les demandes de sursis doivent être rejetées avec dépens adjugés à la partie qui aura gain de cause en appel.

Applications dismissed.

Demandes rejetées.

Solicitors for the applicant RJR — MacDonald Inc.: Mackenzie, Gervais, Montreal.

Procureurs de la requérante RJR — MacDonald Inc.: Mackenzie, Gervais, Montréal.

Solicitors for the applicant Imperial Tobacco Inc.: Ogilvy, Renault, Montreal.

Procureurs de la requérante Imperial Tobacco Inc.: Ogilvy, Renault, Montréal.

Solicitors for the respondent: Côté & Ouellet, Montreal.

Procureurs de l'intimé: Côté & Ouellet, Montréal.

Solicitors for the interveners on the application for interlocutory relief the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada: McCarthy, Tétrault, Toronto.

Procureurs des intervenants dans la demande de redressement interlocutoire la Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé et Médecins pour un Canada sans fumée: McCarthy, Tétrault, Toronto.

1994 CanLII 117 (SCC)

Federal Court



Cour fédérale

Date: 20170120**Docket: T-2105-16****Citation: 2017 FC 76****Ottawa, Ontario, January 20, 2017****PRESENT: The Honourable Mr. Justice Gascon****BETWEEN:****UNILIN BEHEER B.V. AND
FLOORING INDUSTRIES LIMITED, SARL****Plaintiffs****and****TRIFOREST INC., JUNWU ZHANG
ZAIRONG FENG, CONGYU ZHANG
AND MOLSON INTERNATIONAL TRADING
INC.****Defendants****PUBLIC ORDER AND REASONS****I. Overview**

[1] By an amended notice of motion dated December 28, 2016, the Plaintiffs Unilin Beheer B.V. [Unilin] and Flooring Industries Limited, Sarl [FIL] request three remedies from this Court. First, they apply for a review of the execution of the *ex parte* Mareva injunction order [the

Mareva Injunction Order] issued by Mr. Justice LeBlanc on December 19, 2016 against the Defendants Triforest Inc. [Triforest], Mr. Junwu Zhang, Ms. Zairong Feng and Ms. Congyu Zhang [collectively, the Triforest Defendants], and a declaration that this Mareva Injunction Order was lawfully executed. Second, they seek to convert this Mareva Injunction Order into an interlocutory Mareva injunction pursuant to Rule 373 of the *Federal Courts Rules*, SOR/98-106. Third, they want to obtain an interlocutory injunction order against the Triforest Defendants as well as the Defendant Molson International Trading Inc. [Molson] pursuant to Rule 373 or, in the alternative and as the Defendants may elect, an order to deposit into Court. The three aspects of the Plaintiffs' motion are collectively referred to as the Review Motion in this judgment.

[2] The Plaintiffs claim that the Defendants are infringing certain patents they hold with respect to laminate flooring products. Laminate flooring is a multi-layer wood-based flooring product and generally consists of multiple panels that are coupled together to cover a floor surface.

[3] The Plaintiffs contend that an interlocutory Mareva injunction order should be issued by this Court against the Triforest Defendants as there is genuine risk that the Triforest Defendants would remove their liquid assets from Canada or dissipate them to render ineffective any judgment of this Court. The Plaintiffs further submit that the Court should also issue an interlocutory injunction order against all Defendants to prevent them from continuing to manufacture, use, sell or import into Canada their laminate flooring products until the questions of patent infringement and validity are finally determined by this Court on the main action.

[4] The Defendants respond that the Court should dismiss the Plaintiffs' request on the execution of the Mareva Injunction Order as the Order was improperly obtained and is impossible to properly enforce. The Defendants further submit that the Plaintiffs have failed to establish the existence of a real risk that the Triforest Defendants have or will expatriate or dissipate financial resources, let alone outside the normal course of business and for the purpose of avoiding the possibility of a judgment. Finally, the Defendants argue that the Court should not issue an interlocutory injunction to restrain them from manufacturing, using, selling or importing into Canada laminate flooring products that purportedly infringe the Plaintiffs' patents as the Plaintiffs have failed to establish irreparable harm that cannot be compensated financially.

[5] There are three issues to be decided on this Review Motion:

- A. Was the Mareva Injunction Order lawfully executed?
- B. Should the Mareva Injunction Order be converted into an interlocutory Mareva injunction order?
- C. Should the interlocutory injunction order sought by the Plaintiffs be granted?

[6] For the reasons that follow, the Plaintiffs' Review Motion is granted in part. I conclude that the Mareva Injunction Order was lawfully executed in accordance with its terms and followed the applicable procedural rules. However, I am not persuaded that the elements required to issue an interlocutory Mareva injunction order are satisfied. This is because the evidence obtained and provided by the Plaintiffs is not sufficient to demonstrate, on a balance of probabilities, that there is a real risk of removal or dissipation of assets in order to frustrate judgment. I am also not satisfied that the tripartite test set forth in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*] for the issuance of interlocutory

injunctions is met, as the Plaintiffs have notably failed to provide the required clear and non-speculative evidence to demonstrate, on a balance of probabilities, that they will suffer irreparable harm if the injunction is not granted.

II. Background

A. *The parties*

[7] The Plaintiffs Unilin and FIL are sister companies that are part of the Unilin Group. Unilin is a Netherlands-based company and FIL is a Luxembourg company. The Unilin Group regroups companies that are leading manufacturers of a variety of products in the building materials industry, including laminate flooring products.

[8] Traditionally, laminate flooring was installed by coupling panels with each other using a simple tongue and groove joint secured by an adhesive such as glue. The Unilin Group then developed a revolutionary technology for joining panels of laminate floor products without the use of an adhesive [the Glueless Locking Technology], and launched it in the market in 1997. The Glueless Locking Technology involves shaping the profiles of the tongue and groove of the flooring panels such that they are “locked” when coupled together. The tongue and groove of the flooring panels can be coupled together by rotation or lateral displacement. The Glueless Locking Technology is protected throughout the world by a vast portfolio of patents held by the Unilin Group.

[9] Unilin owns the patent rights relating to the Glueless Locking Technology and FIL is responsible for the licensing and enforcement of the Unilin Group's patent rights. The Plaintiffs do not manufacture or sell directly laminate flooring products in Canada but they are present in the Canadian market through importers of their licensed products.

[10] The Defendant Triforest is a Canadian importer, distributor and retailer of laminate flooring products. Triforest operates three stores in Canada, one in Markham, Ontario and two in the Vancouver area in British Columbia. It has a total of 20 employees. Triforest sells its laminate flooring products to retailers in association with at least the trademarks TOUCAN and TOUCAN FOREST PRODUCTS, and the retailers in turn resell them to Canadian customers. The laminate flooring products currently sold by Triforest are not licensed by the Plaintiffs [the Unlicensed Products].

[11] The three individual Defendants are all directors of Triforest. They are members of the same family, Mr. Zhang and Ms. Feng being husband and wife and Ms. Zhang being their daughter.

[12] The Unlicensed Products imported by Triforest are manufactured by at least two companies located in China, namely Chuzhou Runlin Wood Industry Co Ltd [Runlin] and Shenglang Wood Co, Ltd [Shenglang]. Triforest, Runlin, Shenglang and the three individual Defendants are also associated with a third Chinese company, Chuzhou Jiude Wood Co, Ltd [Jiude]. Shenglang was a licensee of the Unilin Group from January 2014 until March 2016, when its license was terminated due to Shenglang's inaccurate reporting of products

manufactured and sold under license, and thus of the royalties due to Unilin. Runlin and Jiude are not and have never been licensees of Unilin. Mr. Zhang, Ms. Feng and Ms. Zhang, are also the shareholders and legal representatives of the three Chinese manufacturers Runlin, Shenglang and Jiude.

[13] In other words, the three individual Defendants are involved in both Triforest's business activities in Canada and in the Chinese companies that manufacture and export the Unlicensed Products imported and distributed in Canada by Triforest.

[14] The Defendant Molson sells laminate flooring products imported into Canada by Triforest from two retail locations located in Markham, Ontario and Mississauga, Ontario. According to the Plaintiffs' investigation of publicly available information data, Molson is estimated to be the largest Canadian importer of unlicensed laminate flooring products manufactured by Runlin, after Triforest.

B. *The Plaintiffs' patents*

[15] Unilin owns a vast portfolio of patents and patent applications around the world pertaining to the Glueless Locking Technology, including Canadian Patent Nos. 2,475,076 [the 076 Patent] and 2,522,321 [the 321 Patent], directed at certain aspects of the Glueless Locking Technology [collectively, the Canadian Patents]. FII is a licensee of the Canadian Patents, and has the right to grant sublicenses.

[16] Over the years, the Unilin Group has developed an extensive licensing program for the Glueless Locking Technology, whereby Unilin grants licenses to manufacturers around the world to manufacture and sell flooring products incorporating this technology. At present, the Unilin Group has approximately 150 active licensees for the Glueless Locking Technology and, on the basis of data available to the Plaintiffs, some 49 Canadian importers of laminate flooring products have exclusively imported Unilin's licensed products in 2016.

[17] In 2012, the Plaintiffs developed a program pursuant to which licensed manufacturers in certain countries (including China) must affix a holographic authentication label [the L2C Label] to each box of flooring products they manufacture under license from the Plaintiffs [the L2C Program]. The purpose of the L2C Program was to more easily identify Unilin's licensed products in the marketplace and more accurately trace the complete volume of products incorporating the Glueless Locking Technology manufactured by its licensees.

[18] The Unilin Group has distributed over 143 million L2C Labels to its licensees since the start of the L2C Program in April 2012. Since that time, these licensees have reported the manufacture and sale of approximately 280 million square meters of laminate flooring products. In addition, the Plaintiffs have spent time and resources enforcing their patents related to the Glueless Locking Technology throughout the world, including in Canada.

C. *History of the proceedings*

[19] Around August 2014, the Plaintiffs became aware of Triforest's alleged infringing activities. An investigation by the Plaintiffs uncovered that Triforest imported, distributed and

sold in Canada laminate flooring products manufactured by Runlin that were not licensed by the Plaintiffs, that allegedly infringe several claims of the Canadian Patents and that did not bear the L2C Label.

[20] Between September 2014 and September 2015, the Plaintiffs and their counsel wrote several letters to Triforest requesting that it cease importing and selling unlicensed laminate flooring. In October 2015, representatives of Triforest (including Ms. Feng) met with counsel for the Plaintiffs. The evidence submitted by the Plaintiffs shows that, during that meeting, it was confirmed that Triforest imported Unlicensed Products manufactured by Runlin. Ms. Feng also represented that Triforest would not be in a position to compensate the Plaintiffs for the unpaid royalties associated with the past importation and sale of the Unlicensed Products and that if Triforest were forced to do so, it would go bankrupt. Triforest also confirmed at the meeting that it would cease selling unlicensed laminate flooring products in Canada.

[21] In early 2016, the Plaintiffs learned that, despite the October 2015 meeting, Triforest had continued to import into Canada significant amounts of unlicensed laminate flooring products from Runlin. According to the Plaintiffs' investigation, as of August 2016, Triforest had imported close to one million square meters of unlicensed laminate flooring products from Runlin to Canada.

[22] Between October 2013 and April 2015, the Plaintiffs also sent letters to Molson. At first, it was to inform Molson about the L2C Program, the L2C Label and the patents held by the Unilin Group on laminate flooring products incorporating the Glueless Locking Technology.

When they learned that Molson was selling laminate flooring products manufactured by Runlin and supplied by Triforest, the Plaintiffs requested that Molson cease its importation and sale of unlicensed laminate flooring products.

[23] In May and June 2016, investigators were retained by the Plaintiffs to purchase sample flooring products sold by Triforest and Molson in Toronto and Vancouver. The vast majority of the boxes of Unlicensed Products obtained by the investigators did not bear L2C Labels. In June and July 2016, the Plaintiffs' technical expert, Dr. Joseph Loferski, proceeded to test and analyse some of the sample flooring products purchased by the investigators, in order to assess whether they infringe any of certain specific claims of the Canadian Patents. Dr. Loferski issued his opinion in October 2016 and concluded that each and every element of claims 13 to 17, 19, 20 and 21 of the 076 Patent and of claims 10, 11 and 12 of the 321 Patent were found in each of the samples of the products he had analysed.

[24] In October 2016, Mr. Olivier Soucisse, an analyst investigator, was engaged by the Plaintiffs to investigate the financial situation of the Triforest Defendants. Mr. Soucisse conducted background checks, ascertained ownership of real estate and other assets, and gathered wealth and financial information on these Defendants. Mr. Soucisse issued his report in November 2016, indicating that the Canadian assets of the Triforest Defendants included heavily leveraged real estate, as well as bank accounts for which the details and contents were unknown.

[25] On December 6, 2016, the Plaintiffs commenced an action for infringement against the Defendants and brought an *ex parte* motion for a Mareva injunction against the Triforest

Defendants. On the basis of the evidence then provided by the Plaintiffs, including affidavits from the investigators, from Dr. Loferski, from Mr. Soucisse and from a representative of FIL, Ms. Christine Walmsley-Scott, the *ex parte* motion was heard and granted by this Court on December 19, 2016. The Mareva Injunction Order was directed at Triforest, at the three individual Defendants and at various banks and financial institutions.

D. *Settlement privilege issue*

[26] The Triforest Defendants claim that the Plaintiffs improperly rely on certain documents which are the subject of settlement privilege. These documents relate to the October 2015 meeting between representatives of Triforest and counsel for the Plaintiffs, where the importation of Unlicensed Products and the alleged infringement of the Plaintiffs' Canadian Patents were discussed.

[27] I do not agree with the Triforest Defendants. It is well established that the settlement privilege requires the presence of three conditions: a litigious dispute in existence or within contemplation; a communication made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and a communication made with the purpose to attempt to effect a settlement (*Kirkbi AG v Ritvik Holdings Inc.*, [2002] FCJ No 793 at para 175). However, there is an exception to the rule of settlement privilege where the communication subject to privilege is not used as evidence of liability for the conduct which is the subject of negotiations or of weak cause of action, but is used for other purposes. In those circumstances, the privilege does not bar production in Court (Sopinka, Lederman & Bryant, *The*

Law of Evidence in Canada, 4th ed, Markham: LexisNexis Canada Inc, at para 14.343; *Sabre Inc v International Air Transport Assn*, [2009] OJ No 903 at paras 20-21).

[28] This is the case here, as the Plaintiffs do not rely on the impugned documents to establish the liability of the Triforest Defendants for the alleged infringement of its Canadian Patents, but instead as evidence that Triforest were aware of the Plaintiffs' licenses and that its representatives had then indicated that they would not have the financial resources to pay the license fees on all the Unlicensed Products if they had to.

[29] These documents and the arguments relying on their content can therefore be properly considered by this Court in the context of the Plaintiffs' Review Motion.

III. Analysis

A. *Execution of the Mareva Injunction Order*

[30] The first question to be determined is whether the Mareva Injunction Order issued on December 19, 2016 was lawfully executed.

[31] The issue on this first portion of the motion brought by the Plaintiffs is to review the execution of the Mareva Injunction Order to determine if the execution was lawful and proper. This is not an appeal on the merits of the Mareva Injunction Order granted or a motion for a stay of the Order. Nor is it a motion to vary or set aside the Mareva Injunction Order pursuant to Rule 399.

[32] On the record before me, I am satisfied that, in the circumstances of this case, the Mareva Injunction Order was lawfully executed by the Plaintiffs.

(1) Mareva injunctions

[33] A Mareva injunction is a type of interlocutory injunction whereby the assets of a party are frozen so that they cannot be removed from the jurisdiction or dissipated in order to frustrate judgment. This is an exceptional form of injunction, granted on the basis that there is a genuine risk that the defendants will dissipate their assets or remove them outside of the jurisdiction prior to judgment, which would render judgment against that party useless, as there would be nothing against which to enforce it.

[34] A Mareva injunction is a most extraordinary remedy. The general rule established in *Lister & Co v Stubbs*, [1886-90] All ER 797 (CA) is that execution cannot be obtained prior to judgment and judgment cannot be obtained prior to trial (*Aetna Financial Services v Feigelman*, [1985] 1 SCR 2 [*Aetna*] at 10; *Eli Lilly Canada Inc v Novopharm Limited*, 2010 FC 241 [*Eli Lilly*] at para 15). The fundamental principle is that a litigant is not entitled to a remedy or execution against a defendant's assets before having established liability on the part of that defendant. Moreover, the Mareva injunction is typically an *ex parte* order, which puts an even higher threshold on the moving party. The granting of a Mareva injunction is therefore only available where the strict conditions for its issuance are met, and the courts should be prudent and cautious before issuing one.

[35] The test for the granting of a Mareva injunction is well-established and was first developed by Lord Denning in *Third Chandris Shipping Corporation v Unimarine SA*, [1979] 1 QB 645 (CA) [*Third Chandris*]. The requirements outlined by Lord Denning in *Third Chandris* have been cited with approval in Canada, and the Canadian courts have developed and re-articulated them in various cases (*Chitel et al v Rothbart et al* (1982), 141 DLR (3d) 268 (Ont CA) [*Chitel*] at paras 43-57; *Aetna* at 19-21; *Marine Atlantic Inc v Blyth et al* (1993), 113 DLR (4th) 501 (FCA) [*Marine Atlantic*] at paras 5-10; *Eli Lilly* at paras 17-20; *Cho v Twin Cities Power-Canada*, 2012 ABCA 47 at para 5).

[36] Further to those precedents, the moving party must therefore satisfy the following test to obtain a Mareva injunction:

- A. establish a *strong prima facie* case;
- B. meet the five following guidelines developed in *Third Chandris* as modified and rephrased in *Chitel*:
 - i. make full and frank disclosure of all matters in its knowledge which are material for the judge to know;
 - ii. give particulars of its claim against the defendant, stating the ground of its claim and the amount thereof, and fairly stating the points made against it by the defendant;
 - iii. give some grounds for believing that the defendant has assets in the jurisdiction;
 - iv. give some grounds for believing that there is a risk of the assets being removed from jurisdiction or dissipated in order to frustrate judgment; and

v. give an undertaking in damages in case it fails in its claim or the injunction turns out to be unjustified; and

C. satisfy the regular tripartite test for an interlocutory injunction described in *RJR-MacDonald*, namely the presence of a serious issue to be tried, irreparable harm if the injunction is not granted and the balance of convenience favouring the moving party.

[37] If the moving party fails on any of these conditions, the courts should refuse the Mareva injunction.

(2) Execution of the Mareva Injunction Order

[38] The terms regarding the execution of the Mareva Injunction Order were set out in the Order.

[39] The Mareva Injunction Order required that the Plaintiffs deposit with the Court the amount of \$50,000 as security for damages prior to service upon the Defendants, banks or financial institutions. The Plaintiffs did file the \$50,000 deposit with the Court on December 20, 2016.

[40] The Mareva Injunction Order was then sent by facsimile and formally served on December 21 and 22, 2016 on eight banks and financial institutions (namely Bank of Montreal, CIBC, HSBC, Royal Bank of Canada, Scotiabank, TD Canada Trust [TD], Bank of China and Industrial and Commercial Bank of China [ICBC]). The Mareva Injunction Order was accompanied by a letter from counsel for the Plaintiffs, indicating what the Mareva Injunction

Order required these banks and financial institutions to accomplish. The letter notably mentioned to the banks and financial institutions that the Order was to prevent the Triforest Defendants from transferring assets (including by the payment of monies) outside of Canada.

[41] The Mareva Injunction Order was then properly served upon Triforest, Ms. Feng and Ms. Zhang on December 21, 2016, and the following day upon Mr. Zhang and Molson. The affidavits filed by the Plaintiffs in support of the Review Motion attest to that.

[42] As required, the Plaintiffs brought their motion to review the execution of the Mareva Injunction Order before the Court within 14 days of service upon all Defendants, namely on January 4, 2016, one day before the scheduled expiry of the Order. Plaintiffs' counsel also filed with the Court the written reports received from the banks and financial institutions further to the execution of the Order. There is no indication that the Plaintiffs did not compensate the banks and financial institutions for reasonable expenses they incurred in carrying the searches and freezing of assets ordered.

[43] Based on my review of the evidence, I find that the procedure followed was in accordance with the terms of the Mareva Injunction Order, that no improper execution of the Order arose and that the behaviour of the Plaintiffs and their counsel involved with the execution of the Order was irreproachable. I also do not find that the Order was obtained for an improper purpose and I observe that, at the time the Order was issued, the conditions for the issuance of the *ex parte* Mareva injunction were met to the satisfaction of the presiding judge.

[44] The Triforest Defendants claim that the Mareva Injunction Order cannot be considered as having been lawfully executed on two grounds: they contend that the Plaintiffs have failed to make a full and frank disclosure, and they complain about the fact that the banks and the financial institutions ended up freezing all banking accounts of the Triforest Defendants, thereby widely exceeding the scope of the Order.

[45] I am not convinced that these arguments raised by the Triforest Defendants reflect an unlawful execution of the Mareva Injunction Order.

[46] I agree that a party seeking an *ex parte* Mareva injunction is required to make full and frank disclosure of all material facts as the Court is asked to grant such order solely on the basis of the evidence presented by the moving party. It is indeed a well-established principle of our law that a party seeking the extraordinary relief of an *ex parte* injunction must provide a balanced and complete presentation of the facts. A fact may be material even if it is not determinative. However, I do not find that there was a lack of full and frank disclosure in the Plaintiffs' application for the Mareva Injunction Order or that they omitted or misrepresented material facts. On the contrary, I conclude that the Plaintiffs lived up to their obligations and duties imposed by the law.

[47] The Triforest Defendants essentially take exception with the Plaintiffs' reliance on the fact that they had been recently unable to pursue a similar claim for infringement against a third party, MGA Commodities Inc. [MGA], who became insolvent before the Plaintiffs could execute a judgment against it. In their submissions, the Plaintiffs expressed strong concerns that the

Triforest Defendants would imitate MGA and seek bankruptcy protection to avoid paying any amount for which they would be liable to the Plaintiffs for patent infringement. The Triforest Defendants claim that the Plaintiffs failed to disclose to the Court that there was no relationship between MGA and Triforest; that by November 2016, the financial investigations into the Triforest Defendants showed significant assets in Canada and no risk of insolvency; and that the MGA case dealt with counterfeiting of the Plaintiffs' laminate flooring products as well as allegations of copyright and trademark infringement, unlike the present proceeding limited to an alleged patent infringement.

[48] I am satisfied that the Plaintiffs made a full and frank disclosure of the MGA situation in their attempt to draw a parallel between that case and the current case. At no point did the Plaintiffs claim or suggest that there was a relationship between MGA and the Triforest Defendants. In addition, the results of the Plaintiffs' financial investigations, the existence of the real estate assets owned by the three individual Defendants and the financial situation of all Triforest Defendants were fully disclosed through the affidavit of Mr. Soucisse. Finally, the failure to specifically mention the counterfeiting aspect of the MGA case was not, in my opinion, a material element. In fact, Ms. Walmsley-Scott testified that, in her view, infringement and counterfeiting were serious problems of a similar nature for the Unilin Group. Moreover, the parallel drawn with the MGA situation was made with respect to the inability to collect payment following an infringer's insolvency rather than in relation to the features and extent of the infringement by MGA.

[49] The Triforest Defendants also complain about the fact that the Plaintiffs have been unable to properly enforce the Mareva Injunction Order, which only permitted the prohibition of money transfers by the Triforest Defendants to recipients outside of Canada. Instead, the banks and financial institutions have completely frozen the bank accounts and credit cards of the Triforest Defendants, preventing them from depositing or withdrawing any funds in the normal course of their livelihoods or business.

[50] The Plaintiffs acknowledge that the financial assets of the Triforest Defendants have been completely frozen, that this was not the remedy contemplated by the Mareva Injunction Order, and that this went beyond the scope of the terms of the Mareva Injunction Order. The banks and financial institutions that were served with the Mareva Injunction Order indicated to Plaintiffs' counsel that it was not possible for them to limit their application of the Mareva Injunction Order to its scope as issued. The evidence before me and the representations made by counsel at the hearing, however, indicate that, as soon as this became known to the Plaintiffs, their counsel had discussions with the banks and the financial institutions to find a solution, which proved difficult to do during the Christmas holiday period.

[51] While this might have raised an issue with respect to the enforceability of the Mareva Injunction Order and might have provided grounds to the Triforest Defendants to vary the Order or to set it aside, I am not ready to find that this constitutes an unlawful or improper execution of the Order by the Plaintiffs or its representatives. I note that, in the interim order issued with the consent of the Triforest Defendants on January 5, 2017, to remain valid until the issuance of this judgment, the terms that the banks and financial institutions had found impossible to implement

have been modified and that the banking accounts of the Triforest Defendants are no longer frozen.

(3) Conclusion on the review of the Order

[52] For the above reasons, I am thus of the view that the execution of the Mareva Injunction Order was carried out lawfully by the Plaintiffs. The Plaintiffs are therefore authorized to withdraw the deposit of \$50,000 they had filed with the Court on December 20, 2016.

B. *Interlocutory Mareva injunction*

[53] The second issue to be determined is whether the Mareva Injunction Order should be converted into an interlocutory Mareva injunction order. To succeed, the Plaintiffs have to demonstrate that all the components of the test for the issuance of Mareva injunctions remain satisfied further to the evidence obtained from the execution of the Mareva Injunction Order and the receipt of the response materials filed by the Triforest Defendants.

[54] I have reviewed the voluminous evidence obtained by the Plaintiffs from the four banks and financial institutions that provided banking accounts information on the Triforest Defendants, as well as the evidence tendered by the Triforest Defendants through the affidavits of Mr. Steve Wang, accountant for Triforest, and Ms. Zhang. The Plaintiffs' evidence is contained in the various affidavits of Ms. Julie Morin and of Ms. Van Khai Luong containing the letters and reports from the banks and financial institutions, and in the extracts of the Triforest Defendants' bank statements and passports prepared by Plaintiffs' counsel for the hearing before

this Court. On the evidentiary record before me, I am not satisfied that there is clear and convincing evidence allowing me to conclude that a remedy as exceptional and extraordinary as an interlocutory Mareva injunction should be issued in this case. More specifically, I do not find that there is evidence supporting, on a balance of probabilities, a real risk that the Triforest Defendants would remove their assets from Canada or dissipate them outside of normal and lawful course of business, for the purpose of avoiding or rendering ineffective a judgment that the Plaintiffs may obtain on their claim of infringement. The evidence uncovered through the execution of the Mareva Injunction Order simply does not confirm the risk anticipated and feared by the Plaintiffs when the *ex parte* Order was issued.

[55] This “genuine risk” factor contained in the five *Third Chandris / Chitel* guidelines is the “overriding consideration” for the issuance of a Mareva injunction (*Aetna* at 24), and I conclude that the Plaintiffs do not satisfy it. As this is sufficient to refuse the interlocutory Mareva injunction, there is no need to consider the other factors and conditions prescribed by the jurisprudence on Mareva injunctions.

(1) Strong *prima facie* case

[56] That said, since the parties and their respective counsel spent a fair portion of their written and oral submissions on the issue of the “strong *prima facie* case” of infringement, and in anticipation of the discussion below on the *RJR-MacDonald* test, I will make the following remarks on this point.

[57] The Triforest Defendants dispute the assertion that the Plaintiffs have a strong *prima facie* case against them. They raise four arguments in support of their position. The Triforest Defendants first assert that the infringement analysis of Dr. Loferski is flawed because he did not measure the density of the core in the Unlicensed Products, whereas claims in each of the 076 Patent and the 321 Patent require that the product be made with HDF or MDF. The Triforest Defendants also contend that claim 10 of the 321 Patent requires “elastic deformation of the groove” and that Dr. Loferski admitted that the lower lip of the Triforest products deformed, not the groove. They further submit that the 076 Patent and the 321 Patent are invalid on the basis of various grounds including overbreadth, claim ambiguity, indefiniteness, anticipation by other patents and lack of utility. Finally, the Triforest Defendants have provided decisions issued in other countries where Unilin Group’s patents apparently corresponding to the Canadian Patents have been found invalid, and where the corresponding European patents had their claims narrowed.

[58] For the following reasons, I am not satisfied that the Triforest Defendants have provided clear and convincing evidence disputing the validity of the 076 Patent and the 321 Patent, to the point where the statutory presumption of validity has been displaced and where the Plaintiffs’ case no longer falls within the range of a strong *prima facie* case of infringement. The Triforest Defendants may have laid the ground for some arguable points on the merits of the Plaintiffs’ case of patent infringement, a matter to be decided at trial. However, at this stage, I find that the evidence adduced by the Plaintiffs provides answers to the various arguments raised by the Triforest Defendants against the validity of the Canadian Patents, sufficient to satisfy me that the Plaintiffs have demonstrated a strong *prima facie* case.

[59] I pause to note that counsel for the Triforest Defendants opposes the production of the second supplemental affidavit of Ms. Luong filed on behalf of the Plaintiffs, which contains responding evidence on the issue of prior art documents submitted to the Canadian Patent Office in 2006, during the prosecution of the Canadian Patents. I do not agree. I am instead satisfied that this affidavit can be admitted as it is relevant and is assisting the Court on an issue raised by the Triforest Defendants in their response and discussed at length in the cross-examination of Ms. Walmsley-Scott. I am also of the view that it causes no undue prejudice to the Triforest Defendants and that it serves the interests of justice to have it on the record (*Atlantic Engraving Ltd v Lapointe Rosenstein* (2002), 23 CPR (4th) 5 (FCA) at paras 8-9).

[60] Turning to the Triforest Defendants' arguments, I am not persuaded that the cross-examination of Dr. Loferski allows to conclude that, since the density of the core in Triforest's Unlicensed Products was not measured, it was not possible for Dr. Loferski to conclude that these products infringed the identified claims of the Canadian Patents. Dr. Loferski stated in his evidence that he was able to confirm that the Triforest Unlicensed Products were made of HDF and MDF, and there is evidence showing that Triforest explicitly advertises that its products are made of HDF. Similarly, on the elastic deformation of the groove, I agree with the Plaintiffs that there is evidence showing that Dr. Loferski equates the groove with the lower lip.

[61] As to the decisions arising from the other jurisdictions, I am not persuaded that they erode the strong *prima facie* case of the Plaintiffs. Despite certain challenges in Europe, the Plaintiffs' patents have remained valid and have been slightly modified further to those decisions, prior to the Canadian Patents being issued. These decisions, in my view, are not

sufficient to question the validity of the Canadian Patents. Patent law varies between jurisdictions and the scope of the claims and of the monopolies granted to the Plaintiffs' various patents related to the Glueless Locking Technology will therefore differ from one country to the other. Absent any expert evidence challenging the validity of the Canadian Patents, I do not find that the decisions issued in the UK, France and the Netherlands pertaining to patents owned by the Unilin Group in these jurisdictions, as well as the two pieces of prior art cited by the Triforest Defendants, are sufficient to dispute, cast doubt or challenge the deemed validity of the Plaintiffs' Canadian Patents.

[62] More specifically, the evidence shows that the relevant UK patent was declared valid following an amendment, and a corresponding European patent was also found valid following opposition proceedings. Similarly, in France, there was consent to the reversal of the French decision invalidating certain claims of a European patent, following a parallel opposition to the same patent decided in the Plaintiffs' favour after the issuance of the French decision. As to the decision in the Netherlands, I agree with the Plaintiffs that it is of no relevance, as it pertains to a patent directed at an invention different from the inventions covered by the Canadian Patents. Finally, the Plaintiffs point out that the pieces of prior art raised by the Triforest Defendants were submitted and considered by the Canadian patent authorities prior to the issuance of the Canadian Patents.

[63] I am therefore of the view that the Plaintiffs have demonstrated a strong *prima facie* case of infringement against the Triforest Defendants. A strong *prima facie* case requires more than an arguable case; it implies that the moving party has a high chance of success on the merits. In

this case, the Plaintiffs own the rights in the 076 and 321 Patents, including the exclusive right, privilege and liberty of making, constructing, using and selling to others to be used, the inventions as claimed therein. This was confirmed in the affidavits of Ms. Walmsley-Scott and Dr. Loferski. There is an initial presumption of validity. The Canadian Patents are in force since 1997, and their validity has never been challenged in Canada. Furthermore, the expert evidence of Dr. Loferski demonstrates that the Unlicensed Products imported and sold by the Triforest Defendants incorporate all of the elements of many claims of the 076 Patent and 321 Patent and infringe upon the Plaintiffs' exclusive patent rights. The evidentiary record also satisfies me that the Triforest Defendants sell and distribute Unlicensed Products that may infringe upon the 076 and 321 Patents and do not bear any L2C Label. The Plaintiffs' investigations further show that the Defendants hold a significant inventory of Unlicensed Products. All of this evidence points to a high chance of success for the Plaintiffs in their action for infringement.

[64] The Triforest Defendants claim that statutory presumption alone is not sufficient to establish a *prima facie* case required to support an interlocutory injunction when affidavit evidence is offered disputing the validity of the patent, relying on *Teledyne Industries Inc et al v Lido Industrial Products Ltd* (1977), 33 CPR (2d) 270 at 276 [*Teledyne*]. However, *Teledyne* was a case where expert affidavit evidence from a patent agent had been offered to dispute the validity and infringement of the patent. In addition, this was a case where the patent was of recent origin and its validity had never been established. This is not the situation here. On the contrary, the Triforest Defendants did not submit any expert affidavit evidence challenging the validity of the Plaintiffs' Canadian Patents.

[65] Accordingly, I am satisfied that the Plaintiffs have made out a strong *prima facie* case of patent infringement against all Defendants.

(2) Real risks of removal or dissipation of assets

[66] The problem with the Plaintiffs' motion for an interlocutory Mareva injunction is the requirement of a real risk of removal or dissipation of assets by the Triforest Defendants.

[67] The Plaintiffs claim that the banking information received further to the execution of the Mareva Injunction Order confirms that the Triforest Defendants have liquid assets in Canada, and that they frequently and easily transfer large sums of money in and out of their Canadian bank accounts, to and from unknown destinations. On the basis of these banking patterns and of the Triforest Defendants' commercial activities in China, the Plaintiffs submit that there is no question that the conversion of the Mareva Injunction Order into an interlocutory Mareva injunction order is necessary to ensure that any final judgment of this Court will be effective and enforceable.

[68] I disagree. Despite the able representations made by counsel for the Plaintiffs, I am not persuaded that, with the evidence uncovered by the Plaintiffs and the evidence filed by the Triforest Defendants on this Review Motion, the demanding test for the issuance of an interlocutory Mareva injunction is now met.

(a) *The Chitel test*

[69] True, the real risk of assets being removed from the jurisdiction or dissipated by the defendant to avoid the possibility of judgment is only one of the five *Third Chandris / Chitel* factors and it may be that the Plaintiffs satisfy many of the other conditions. However, this “genuine risk” factor is the overriding consideration for granting a Mareva injunction (*Aetna* at 24). Evidence of a threat to arrange assets to as to defeat judgment and “for the purpose of avoiding judgment” is key (*Marine Atlantic* at para 9).

[70] On this point, it is worth citing the exact test I must apply, as set out in *Chitel* at para 57.

It reads as follows:

The applicant must persuade the Court by his material that the defendant is removing or there is a real risk that he is about to remove his assets from the jurisdiction to avoid the possibility of a judgment, or that the defendant is otherwise dissipating or disposing of his assets, in a manner clearly distinct from his usual or ordinary course of business or living, so as to render the possibility of future tracing of assets remote, if not impossible in fact or in law.

[71] The Plaintiffs therefore had to provide clear and convincing evidence that, on a balance of probabilities, 1) the Triforest Defendants are removing or there is a real risk that they are about to remove their assets from Canada or are otherwise dissipating or disposing of their assets, 2) they do this in a manner clearly distinct from their usual or ordinary course of business or living, 3) so as to render the possibility of future tracing of the assets remote, if not impossible, or for the purpose of avoiding the possibility of judgment.

[72] The burden is on the moving party to prove each of those three elements. Only where all those criteria are met can a Mareva injunction prevent the impugned behaviour. It would

therefore not be enough to provide evidence that the defendant is having financial difficulties or that the defendant will probably remove its assets from the jurisdiction, if there is no evidence to suggest that the defendant also has a purpose to defeat or frustrate a potential judgment. If the assets are not dissipated for the purpose to avoid judgment, or if transfers are carried out in the normal course of a defendant's affairs, then the moving party, like all others with claims against the defendant, must run the risk that the defendant may dissipate its assets or consume them in discharging other liabilities and so leave nothing with which to satisfy a judgment.

[73] I pause to underline that, as the Supreme Court stated in *FH v McDougall*, 2008 SCC 53 [*McDougall*], there is only one standard of proof in civil cases in Canada, and that is proof on a balance of probabilities (*McDougall* at para 46). In that decision, Mr. Justice Rothstein, for a unanimous court, said that "it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case" and that the only legal rule in all cases is that "evidence must be scrutinized with care by the trial judge" to determine whether it is more likely than not that an alleged event occurred or is likely to occur (*McDougall* at para 45). Evidence "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*McDougall* at para 46). This, evidently, applies to the type of evidence needed for a *Mareva* injunction.

[74] I agree with the Plaintiffs that, in determining whether there is a genuine risk that a defendant removes its assets from Canada or dissipates them, the courts must consider all of the relevant circumstances, including the nature of the conduct alleged and the type of assets involved (*Caisse populaire Laurier d'Ottawa Itee v Guertin*, [1983] OJ No 2221 (Ont HC)

[*Laurier*] at para 17; *Insurance Corp. of British Columbia v Patko*, 2008 BCCA 65 at para 29).

But in the end, what needs to be assessed is “whether in all of those circumstances the assets will be dealt with in a manner that will serve to hamper or defeat the plaintiff’s attempts to realize on any judgment they might obtain” (*Laurier* at para 17).

[75] A motion like this one ultimately turns on its facts. And, when all of the circumstances are considered, the evidence adduced in this case fails to convince me that, on a balance of probabilities, the three components of the test set out in *Chitel* are met. What the Plaintiffs more specifically overlooked here are two fundamental elements of the test: acting out of the ordinary course of business, and a purpose or intent to evade legitimate execution and enforcement of a potential adverse decision.

(b) *The evidence*

[76] I find that the evidence on the record before me shows that:

- A. Neither Triforest nor the three individual Defendants are currently insolvent or face financial difficulties;
- B. The Triforest Defendants own [REDACTED] real estate assets in Canada, [REDACTED];
- C. Before the expiration of the Marcva Injunction Order on January 5, 2016, four financial institutions confirmed that they did not locate any account in the name of the Triforest Defendants. Counsel for the Plaintiffs however received information and transaction history pertaining to certain banking accounts that the Triforest Defendants hold [REDACTED];

- D. The deposit and withdrawal patterns in the various banking accounts of the Triforest Defendants date back to 2013 and 2014 (and sometimes to 2011 and 2012) for the majority of their banking accounts;
- E. The majority of the evidence singled out by the Plaintiffs in their extracts provided to the Court relate to 2012, 2013, 2014 and 2015. More limited evidence has been provided for 2016;
- F. The travel evidence regarding the three individual Defendants, adduced to reflect the correlation between banking withdrawals and travel abroad to China, essentially date back to 2012 and 2014, with only one single instance in 2016;
- G. The banking accounts of the Triforest Defendants generally contain vague and general entries [REDACTED], not allowing to know the source or the destination of the money transfers;
- H. The [REDACTED] banking accounts report regular transfers to [REDACTED] institutions offering various cross-border financial services including global payments solutions, foreign exchange and international transfers;
- I. The evidence does not allow to confirm or corroborate whether the transfers of money [REDACTED], are transfers out of the jurisdiction;
- J. The payments made to the supplier Runlin were well identified in one [REDACTED] banking account, but these explicit entries were only for one supplier and were limited to a few payments made in the first quarter of 2016;
- K. Several banking accounts of Triforest and of the three individual Defendants [REDACTED] showed substantial balances in December 2016, at the time the accounts were frozen further to the Mareva Injunction Order. [REDACTED];
- L. Ms. Feng has a banking account [REDACTED] showing no movement since January 2015;
- M. The various [REDACTED] banking accounts of Triforest show lots of deposits and withdrawal activities, with significant balances regularly remaining in the accounts throughout the period for which the accounts have been provided.

[77] As was the case in *Eli Lilly*, I am of the view that, when considered in its totality, this evidence does not establish, on a balance of probabilities, that the Triforest Defendants are about to remove assets from Canada or that in making their various money transfers, they are acting in anything other than the ordinary and usual course of their business and livelihood. Further, there is insufficient evidence on the record to prove, on a balance of probabilities, that the Triforest Defendants are transferring these amounts for the purpose of avoiding judgment or that they would wind up their Canadian operations rather than pay a judgment awarded to the Plaintiffs.

(c) *No expatriation or dissipation of assets*

[78] On the removal of assets out of the jurisdiction or the dissipation of assets, I find no clear and convincing evidence able to support the affirmations made by the Plaintiffs. At best, the evidence is inconclusive and speculative. To use the words of Ms. Walmsley-Scott in her cross-examination, there is a belief “that because of the defendants’ close ties to China that there’s a significant risk that they could transfer all their assets out of Canada” (my emphasis). This is too speculative and insufficient to constitute evidence of expatriation of assets on which to base the grant of a Mareva injunction, as the removal of assets must be more than a mere possibility.

[79] I am also not persuaded, based on the record before me, that I can reasonably infer from the evidence on the transfers [REDACTED], that this is to be read as necessarily meaning transfers outside of Canada, in the absence of other corroborating evidence. I am also not ready to infer that regular [REDACTED] from a banking account, without any more detail and without any other evidence, is sufficient to demonstrate, on a balance of probabilities, the existence of a transfer outside the jurisdiction or a dissipation of assets. Stated otherwise, I cannot conclude that

it is more likely than not that the required expatriation or dissipation of assets occurred or is likely to occur.

[80] True, the transaction history of the Triforest Defendants' [REDACTED] banking accounts shows that the accounts are sometimes kept at a relatively low ongoing balance, that the Triforest Defendants frequently deposit large sums of money in their accounts, and subsequently transfer equally large sums of money out of the accounts a few days or weeks after the deposits, normally by way of withdrawal or Internet transfer. But the evidence also shows that substantial balances regularly remain in the Triforest accounts. Further, as acknowledged by the Plaintiffs in two paragraphs in their written submissions, the large deposits, withdrawals and transfers are more often than not "to and from unknown destinations".

[81] I accept that the evidence on the banking accounts of the Triforest Defendants reflects the transfer of significant withdrawals and deposits representing a large amount of money in the past few years. I understand that this may be a source of concern for the Plaintiffs. However, I do not agree that this amounts to evidence of a genuine risk of removal of assets out of Canada or of dissipation of assets.

(d) *Transfers in the usual course of business or living*

[82] Turning to the second element of the *Chitel* test, which is the disposition of assets in a manner clearly distinct from the defendant's usual or ordinary course of business or living, the reports of the Triforest Defendants' banking accounts provided [REDACTED] show large deposits, withdrawals and transfers that have been going on for years, that clearly started prior to

the events leading to the Plaintiffs' motion, and that do not exhibit a change in behavior as a result of the Plaintiffs' correspondences, meeting with the Plaintiffs' counsel in October 2015, or the commencement of their action for infringement. The [REDACTED] bank records, in particular, show a pattern of large transfers in and out of the Triforest Defendants' banking accounts that pre-date the events in question. This evidence does not support a conclusion that these are or were transfers occurring outside of the normal course of the livelihoods and business of the Triforest Defendants, and actually supports the opposite conclusion. There is also no evidence suggesting that this course of action is fraudulent or illegal.

[83] Of course, given the vertical integration of the Triforest Defendants' operations, it is reasonable to infer that some of those transfers and withdrawals made in the normal course of business must have included money transfers to China, to the related manufacturers and suppliers of laminate flooring products, or to the three individual Defendants. Since only a few transactions with suppliers were clearly identified as such in the [REDACTED] account, it is also reasonable to infer that [REDACTED] included payments to suppliers. However, there is no evidence allowing me to conclude that these money transfers are clearly distinct from the normal course of business or living of the Triforest Defendants.

[84] The banking accounts evidence obtained by the Plaintiffs is voluminous. The problem for the Plaintiffs is that this evidence goes back to 2012, 2013 and 2014 (and sometimes to 2011), and shows a recurring pattern of deposits, withdrawals and transfers that have been occurring for years in the banking accounts of the Triforest Defendants. There is no evidence reflecting a change in the circumstances of the Triforest Defendants' livelihood, business or operations, or

any risk of the Triforest Defendants removing assets out of the usual or ordinary course of their livelihood or business in order to defeat or frustrate an eventual judgment.

[85] In her affidavit, Ms. Zhang also indicated that, for the three individual Defendants, the source of the large deposits were from accounts in China, line of credit accounts with the [REDACTED], Internet transfers from other banks accounts held by them, or loan repayments by Triforest. She stated that the large withdrawals were used for the purchase of real estate, home renovations and transfers to other bank accounts held by the individual Defendants, loans to Triforest, mortgage payments, tuition and living expenses. Turning to Mr. Wang, he has affirmed in his affidavit that Triforest regularly transfers funds from its [REDACTED] banking accounts to entities or persons located in or outside of Canada for the purpose of fulfilling its payment obligations for the normal operation of the business, including several reoccurring monthly expenses such as payroll, payments to suppliers, rental expenses and GST remittances. He testified that transfers made by Triforest from its [REDACTED] banking accounts to entities or persons located in China have been only for business-related purposes. This evidence of Ms. Zhang and of Mr. Wang was not challenged nor contradicted.

[86] On the evidentiary record before me, I therefore find that the Triforest Defendants have not changed, and do not intend to change, their usual methods of transferring their monetary assets and of running their business. I note that their laminate flooring business is active and continuing, both as manufacturers in China and importers in Canada, and that Triforest has become one of the five largest importers of laminate flooring products in Canada.

(e) *No purpose of avoiding judgment*

[87] Finally, turning to the third and last part of the *Chitel* test, I can only consider granting a Mareva injunction if I can conclude that the purpose and intention of the Triforest Defendants is to defeat any judgment that the Plaintiffs may obtain against them. Again, there is no clear and convincing evidence demonstrating, on a balance of probabilities, that the purpose of the Triforest Defendants withdrawing the funds from their accounts is not a legitimate one. The fact that these transfers might affect the Plaintiffs' ability to recover on any judgment it may obtain does not, in and of itself, justify the granting of a Mareva injunction.

[88] As was the case in *Aetna*, there is no evidence allowing me to find an improper motive behind the transfers of money by the Triforest Defendants. The evidence instead shows that the transfers reflect the history of conduct of the business and personal affairs carried out by the Triforest Defendants, and there is no sufficient basis to find a purpose on the part of the Triforest Defendants to default on their obligations, either generally or to the Plaintiffs, if such an obligation is found to exist on the merits (*Aetna* at 36).

[89] In light of the evidence before me, I do not find that, on a balance of probabilities, there is an improper purpose on the part of the Triforest Defendants in the various transfers of funds observed in their banking accounts. Nor am I persuaded that, on a balance of probabilities, the evidence unearthed with the benefit of the Mareva Injunction Order support a conclusion that there is a real risk that the Triforest Defendants will deal with their banking accounts in a manner that will interfere with or defeat the Plaintiffs' attempt to realize on any judgment they might obtain on the merits. I further observe that the Plaintiffs' investigation into the current status of the Triforest Defendants' finances showed no evidence of an intention by the Triforest

Defendants to defeat or frustrate an eventual judgment. It instead showed that the bank accounts, loans, mortgages, credit cards and leases of the Triforest Defendants were in good standing, and there was no evidence of dissipation of assets, bankruptcy, collections or judgment against them. Their respective financial situation is sound.

[90] In any event, I note that evidence that a defendant is insolvent or having financial difficulties, or the possibility that potential judgment debtors may be declared bankrupt, is not sufficient to justify a Mareva injunction (*Marine Atlantic* at para 9). There must be evidence that the disposal of assets is “for the purpose of avoiding judgment”: “[t]he removal of assets from the jurisdiction by a resident defendant in the normal course of its business, without there being any suggestion of an intent to defeat or frustrate any eventual judgment recovery by the plaintiff, is not enough to support a Mareva injunction” (*Marine Atlantic* at para 9).

[91] I accept that representatives of Triforest have at least been evasive if not untruthful with Plaintiffs’ counsel in October 2015, that they have tried to hide the fact that they knew the source of Triforest’s Unlicensed Products, and that they then indicated they would go bankrupt if they had to pay royalties to the Plaintiffs for all their past importations of Unlicensed Products. For the Plaintiffs, the October 2015 report from their counsel on the meeting with Triforest is a key document. I acknowledge that, on the basis of this document, there may have been some dishonesty on the part of the Triforest Defendants at the time. However, considering all the circumstances and all the evidence before me, I do not find that this October 2015 statement is enough to tip the balance in favour of the Plaintiffs on the interlocutory Mareva injunction, and

to conclude that the transfers of money the Triforest Defendants have been doing for years are for the purpose of avoiding judgment.

[92] Looking at the matter with the added benefit of the results from the execution of the Mareva Injunction Order, it is my view that the significance of the October 2015 statement has atrophied with the passage of time and with the dissonance observed between its contents and the more recent evidence on the sound financial situation of the Triforest Defendants.

[93] One other point is worth mentioning. The evidence shows that the Triforest Defendants have ties to Canada. The three individual Defendants became permanent Canadian residents in March 2012, have lived in Canada since then, and own real estate assets in the country.

[REDACTED]. Triforest operates three stores in Canada with 20 employees. Triforest has an on-going business as one the five largest imports of laminate flooring products in Canada, perhaps, I acknowledge, due to the benefit of Unlicensed Products that could be infringing on the Canadian Patents of the Plaintiffs. This is not reflective of a situation where defendants are about to flee the jurisdiction or dissipate assets in order to avoid a judgment against them.

[94] In other words, when all the evidence on the record is considered, I am not persuaded that it is now sufficient to meet the third dimension of the *Chitel* test and to support the issuance of the interlocutory Mareva injunction now sought by the Plaintiffs. The evidence uncovered through the execution of the Mareva Injunction Order does not confirm the significance of the risk identified to obtain the initial Order.

(3) Conclusion on the interlocutory Mareva injunction

[95] For the above reasons, I am unable to conclude, based on all the circumstances of this case and on a balance of probabilities, that there is real risk of removal of assets from the jurisdiction before a judgment could be obtained by the Plaintiffs, or that assets would be dissipated by the Triforest Defendants so as to frustrate a judgment, outside of their normal course of business and operations. The evidence does not show that, and it does not allow me to draw such inference. Evidence that the Triforest Defendants regularly transfer large sums of money in and out of their Canadian bank accounts, to and from unknown destinations, is not enough to satisfy the stringent test established for Mareva injunctions, and to convince me that the conversion of the Mareva Injunction Order into an interlocutory Mareva injunction order is necessary to ensure that any final judgment of this Court will be effective and enforceable.

[96] I observe that, in its submissions to the Court, Triforest is prepared to undertake to produce to the Plaintiffs an accounting of past sales of its laminate flooring products in Canada for the period starting on June 1, 2014, ending on the day before the date of signing such undertaking, and to keep an accounting of current and future sales of its laminate flooring products in Canada until the disposition of this matter or until the term of the Canadian Patents, whichever comes first. I am of the view that it would be in the interests of justice to keep that undertaking in place and that an order to that effect seems just and appropriate in the circumstances.

C. *Interlocutory injunction*

[97] The third issue to be determined on this Review Motion is whether an interlocutory injunction order should be issued against all Defendants to prevent them from continuing to

manufacture, use, sell or import into Canada their unlicensed laminate flooring products until the matters raised by the action for patent infringement are finally determined by the Court. To succeed, the Plaintiffs have to demonstrate that each element of the *RJR-MacDonald* test for the issuance of interlocutory injunctions is met.

[98] For the reasons that follow, I am not persuaded that, on the record before me, the Plaintiffs have provided the required clear and non-speculative evidence to demonstrate, on a balance of probabilities, that they will suffer irreparable harm if the interlocutory injunction sought is not granted.

(1) The *RJR-MacDonald* test

[99] It is trite law that for an interlocutory injunction to be granted, the moving party must satisfy the three conditions set out in *RJR-MacDonald*. In that decision, the Supreme Court held that, to issue an order for injunctive relief, a court must first be satisfied that there is a serious issue to be tried. Second, it must determine that the applicant would suffer irreparable harm if the injunction were refused. Third, it must find that the “balance of convenience”, which contemplates an assessment of which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits, favours the moving party (*RJR-MacDonald* at 334). The tripartite test is conjunctive, so all three elements have to be met in order for an injunction to be granted.

[100] In recent decisions issued in the context of stays, as opposed to interlocutory injunctions, the Federal Court of Appeal has indeed frequently reminded that all three elements of the

tripartite test have to be satisfied. Finding the existence of a serious issue does not automatically bring with it that the other two prongs of the tripartite test are satisfied. As the Federal Court of Appeal stated in *Janssen Inc v Abbvie Corporation*, 2014 FCA 112 [*Janssen*], each branch of the test adds something important and “none of the branches can be seen as an optional extra” (*Janssen* at para 19).

[101] I add that the Federal Court of Appeal has repeatedly considered that the applicable test for interlocutory injunctions is the same as the test governing the granting of stays of proceedings or of appeals (*Toronto Real Estate Board v Commissioner of Competition*, 2016 FCA 204 at para 11; *Janssen* at paras 12-17; *Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 [*Glooscap*] at para 4; *International Charity Association Network v Canada (National Revenue)*, 2008 FCA 114 at para 5). As the Federal Court of Appeal makes no distinction between the principles developed for interlocutory stays or for interlocutory injunctions, its observations on the cumulative requirement of the three elements of the *RJR-MacDonald* test are equally applicable in the context of injunctions, even though these were made in the context of stays.

[102] That said, I agree that three prongs of the interlocutory injunction test are interrelated and that the three factors should not be assessed in total isolation from one another (*University of California v I-Med Pharma Inc*, 2016 FC 350 [*I-Med Pharma I*] at para 31; *University of California v I-Med Pharma Inc*, 2016 FC 606 [*I-Med Pharma II*] at para 27, aff'd 2017 FCA 8; *Geophysical Service Incorporated v Canada-Nova-Scotia Offshore Petroleum Board*, 2014 FC

450 [*Geophysical Service*] at para 35; *Merck & Co Inc v Nu-Pharm Inc*, (2000) 4 CPR (4th) 464 [*Nu-Pharm*] at para 13).

[103] In their written and oral submissions, the Plaintiffs relied on case law developing the “blatant infringement” approach to suggest that this may result in a lower irreparable harm threshold or even in an exemption from the requirement to establish irreparable harm, depending on the facts at stake. They argue that, in the circumstances of this case, the behaviour of the Triforest Defendants amounts to a blatant patent infringement, and they invite the Court to consider a more lenient approach on the issue of irreparable harm.

[104] This line of jurisprudence on “blatant infringement” must, however, be put in its proper context.

[105] First, I note that the “blatant infringement” argument has arisen in copyright cases, as opposed to patent cases. While it is well accepted that copyright infringement does not take place inadvertently, this is not necessarily the case for patent infringement given the highly technical nature of most patent claims. In fact, in one of the early cases where the notion of “blatant infringement” was introduced, Madam Justice Reed made an explicit distinction with patent cases before accepting that there was a lesser need to prove irreparable harm in “blatant” cases of copyright infringement (*International Business Corporation v Ordinateurs Spirales Inc/Spirales Computers Inc* (1984), 80 CPR (2d) 187 (FCTD) [*Spirales Computers*] at 201). She explicitly indicated that for patent cases, the threshold must be higher, and would require the usual proof of irreparable harm for interlocutory injunctions:

In any event, I am not convinced that the degree of harm required to be proved in a case such as this, where there had been blatant copying, is as high as that required in other cases of interlocutory injunction. Counsel for the plaintiff argued that the irreparable harm test was appropriate to patents because it was easy to inadvertently infringe a patent right. Thus, the courts are slow to grant interlocutory injunctions in patent cases. He argued, however, that copying could not take place inadvertently and therefore the courts were more willing to grant interlocutory injunctions in copyright infringement actions when the copying was very clear, without requiring irreparable harm or a finding that damages would not be adequate. I accept this reasoning. It accords with my interpretation of the jurisprudence.

[106] I am not aware of cases, and counsel for the Plaintiffs did not cite any, where this notion of “blatant infringement” was used in the context of an injunctive relief sought for patent infringement. It is a concept which remains foreign to patent cases.

[107] Second, the “blatant infringement” cases can be traced back to the reasoning of Mr. Justice Nadon in *Diamant Toys Ltd v Jouets Bo-Jeux Toys Inc*, 2002 FCT 384 [*Diamant Toys*], where he adopted the Court’s view in *Spirales Computers* and found that when copyright infringement is blatant, there must be a less stringent test of damages (*Diamant Toys* at para 56). However, as recently stated by Madam Justice Tremblay-Lamer in *Bell Canada v 1326030 Ontario Inc (iTVBox.net)*, 2016 FC 612 [*Bell Canada*], Mr. Justice Nadon’s reasoning has subsequently been read by this Court as being restricted to those situations where there is a finding of blatant copyright infringement (*Bell Canada* at para 29; *Geophysical Service* at para 36; *Western Steel and Tube Ltd v Erickson Manufacturing Ltd*, 2009 FC 791 [*Western Steel*] at paras 11-12).

[108] Third, these “blatant infringement” cases did not go as far as suggesting or implying that no proof of irreparable harm is required in order to obtain an interlocutory injunction when there is evidence of blatant copyright infringement. In my view, they rather only hold for the proposition that a strong finding on the first prong of the tripartite injunction test in copyright cases may lower the threshold on the other two prongs, and that it may then be appropriate to consider a less severe test of potential damage than would otherwise be the case (*Western Steel* at para 12). I am not aware of injunction cases where an applicant’s case was sufficiently strong, even in the copyright context, that the threshold for meeting the other two factors was set so low that no proof of irreparable harm was required. A robust case on the serious issue dimension of the *RJR-MacDonald* test does not relieve the moving party from the burden of establishing that it would suffer some irreparable harm that could not be compensated with damages (*Bell Canada* at para 29). In short, “there is no automatic conclusion that irreparable harm exists merely because the foundation of an action is an infringement of copyright or trademark or the alleged tort of passing off” (*Western Steel* at para 11).

[109] I further observe that, in cases where this issue of blatant copyright infringement was raised, the Court was nonetheless persuaded that there was some form of irreparable harm (*Bell Canada* at para 31). I mention one last point: the early cases such as *Diamant Toys* where the “blatant infringement” approach emerged were not interlocutory injunction cases but rather cases involving preservation orders, where the legal requirements are different (*Western Steel* at paras 11-12).

[110] For all those reasons, I am not convinced that the “blatant infringement” case law should guide my approach to the assessment of irreparable harm in this patent case, or that I should depart from the well-accepted principles governing the evidentiary requirements for this second element of the *RJR-MacDonald* test.

[111] In any event, even if I were to assume that there is precedent to support the proposition that irreparable harm can be satisfied by a demonstration that a defendant’s allegedly infringing patented product is substantially the same as that of the plaintiff, and that the “blatant infringement” approach developed in the copyright space could be imported into the patent space, I consider that the evidence before me is inadequate and insufficient to make a determination that there is a “blatant” patent infringement in this case. A strong *prima facie* case of patent infringement does not necessarily equate to a blatant infringement. To be qualified as blatant, the infringement needs to be undeniable and unmistakable. I accept that such obviousness can arise in copyright and trademark cases, but it is much more difficult to establish in patent cases. Especially in a situation where, as is the case here, the Triforest Defendants have raised some arguments questioning the validity of the Plaintiffs’ Canadian Patents, where the patents cover dozens of pages and each identify numerous claims, and where there is no explicit admission of infringement. The issue will be debated in detail at trial. While I agree that the Plaintiffs have a strong *prima facie* case of patent infringement, I am not persuaded that the evidence before me suffices, at this early stage, to qualify this case as one of “blatant infringement” by the Triforest Defendants.

(2) Serious issue

[112] The first part of the tripartite test is whether the evidence before the Court is sufficient to satisfy it that there is a serious issue to be tried. The threshold is a low one. While a preliminary assessment of the merits of the case is required, “a prolonged examination of the merits is generally neither necessary nor desirable” (*RJR-MacDonald* at 337-338). As a general rule, the question of whether a serious issue exists should be answered on the basis of no more than an “extremely limited review of the case” (*RJR-MacDonald* at 348). Once the Court determines that the underlying proceeding is “neither vexatious nor frivolous”, it should proceed to the second part of the test (*RJR-MacDonald* at 337). In an interlocutory injunction, “the underlying dispute remains to be decided, and judges sitting on such matters should generally avoid wading any further into that underlying dispute than is strictly necessary to deal with the matter before them” (*Jamieson Laboratories Ltd v Reckitt Benckiser LLC*, 2015 FCA 104 at para 25).

[113] In light of my earlier finding that the Plaintiffs have demonstrated a strong *prima facie* case of patent infringement on the motion for an interlocutory Mareva injunction, I am satisfied that there is a serious issue to be tried. There is an initial presumption that the Canadian Patents of the Plaintiffs are valid and based on the facts before me, there is definitely at least an arguable case and a serious issue that the Defendants’ Unlicensed Products would fall within the scope of one or more claims of the Canadian Patents. The fact that the Defendants may have an arguable case of their own to question the validity of the Canadian Patents does not mean that there is no serious issue to be tried.

[114] The first element of the *RJR-MacDonald* test is accordingly met.

(3) Irreparable harm

[115] I now turn to the second part of the tripartite test, irreparable harm.

(a) *Legal requirements*

[116] “Irreparable” refers to the nature of the harm suffered rather than its magnitude; it is harm which “either cannot be quantified in monetary terms or which cannot be cured” (*RJR-MacDonald* at 341). The threshold for establishing irreparable harm is very high. Harm does not become irreparable solely because precisely calculating damages would be difficult, as is regularly the case in patent cases (*I-Med Pharma II* at para 32; *Merck Frosst Canada Inc v Canada (Minister of Health)* (1997), 74 CPR (3d) 460 (FCTD) [*Merck Frosst Canada*] at 464; *Merck & Co v Apotex Inc*, [1993] FCJ No 1095 at para 42). Difficulty in precisely calculating damages does not constitute irreparable harm, provided there is some reasonably accurate way of quantifying and measuring those damages (*Nu-Pharm* at para 32).

[117] It is also well established that irreparable harm in the context of injunctive relief must flow from clear and non-speculative evidence which demonstrates how such harm will occur if the relief is not granted (*AstraZeneca Canada Inc v Apotex Inc*, 2011 FC 505 at para 56, aff’d 2011 FCA 211; *Aventis Pharma SA v Novopharm Ltd*, 2005 FC 815 [*Aventis Pharma*] at paras 59-61, aff’d 2005 FCA 390; *Syntex Inc v Novopharm Ltd* (1991), 36 CPR (3d) 129 (FCA) at 135). Simply finding that irreparable harm is likely is not enough; there must be evidence that the moving party will or would suffer irreparable harm if the injunction is not granted (*Centre Ice Ltd v National Hockey League et al* (1994), 53 CPR (3d) 34 (FCA) [*Centre Ice*] at 52).

[118] In *Janssen*, the Federal Court of Appeal stated that a party seeking a suspension relief must demonstrate in a detailed and concrete way that it will suffer “real, definite, unavoidable harm – not hypothetical and speculative harm – that cannot be repaired later” (*Janssen* at para 24). In that decision, Mr. Justice Stratas added that “it would be strange if vague assumptions and bald assertions, rather than detailed and specific evidence, could support the granting of such serious relief” (*Janssen* at para 24). The Federal Court of Appeal has indeed frequently insisted on the quality of evidence needed to establish irreparable harm. General assertions cannot establish irreparable harm as “[t]hey essentially prove nothing” (*Gateway City Church v Canada (National Revenue)*, 2013 FCA 126 [*Gateway Church*] at para 15). Similarly, “[a]ssumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight” (*Glooscap* at para 31).

[119] I cannot do better than repeat the often-cited passage from Mr. Justice Stratas in *Stoney First Nation v Shotclose*, 2011 FCA 232 [*Stoney First Nation*] at para 48:

It is all too easy for those seeking a stay in a case like this to enumerate problems, call them serious, and then, when describing the harm that might result, to use broad, expressive terms that essentially just assert – not demonstrate to the Court’s satisfaction – that the harm is irreparable.

[120] In injunctive matters, the burden is on the moving party to satisfy the court that there is “evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result” unless the injunction is granted (*Gateway Church* at para 16; *Glooscap*, at para 31; *Stoney First Nation* at para 48). Again, the requirement of having evidence “sufficiently clear, convincing and cogent to satisfy the balance of probabilities test”.

set out in *McDougall*, of course also applies to the clear and non-speculative evidence needed for irreparable harm.

(b) *Plaintiffs' claims of irreparable harm*

[121] The Plaintiffs argue that, if an interlocutory injunctive relief preventing the Defendants from continuing to import and sell the Unlicensed Products is not granted, they will suffer serious and irreparable harm under a number of headings. These allegations of harm are premised on the fact that Triforest is now amongst the top five importers of laminate flooring products in Canada and that, to the Plaintiffs' knowledge, it is the largest importer of infringing laminate flooring products.

[122] The Plaintiffs' claims of irreparable harm are all contained in the affidavit of Ms. Walmsley-Scott. No other evidence has been provided by the Plaintiffs. In essence, Ms. Walmsley-Scott states that the Plaintiffs will suffer harm through 1) the loss of goodwill and reputation; 2) the loss of market share and of existing and potential customers; 3) the risk of the Defendants "springboarding" into the post-patent market; and 4) the financial inability of the Defendants to pay an eventual judgment against them.

[123] I observe that Ms. Walmsley-Scott does not cite nor provide a single document in support of her allegations of harm.

[124] Having reviewed the totality of the evidence provided by the Plaintiffs, I am not satisfied that, on a balance of probabilities, there is the required clear and non-speculative evidence to

support any of the allegations of irreparable harm. In fact, even if I were to assume that the current case could amount to a “blatant infringement” and that the lower threshold approach discussed above could be imported in the patent space, I do not find that the Plaintiffs’ assertions of irreparable harm would meet these more flexible requirements.

[125] First, the various allegations of harm are not supported by detailed and specific evidence, and they thus remain in the universe of speculations. Second, the harm alleged by the Plaintiffs is all quantifiable, and no expert evidence has been provided to demonstrate that such harm is not measurable in monetary terms or that no methodology is available to calculate the Plaintiffs’ alleged damages.

(c) *Speculative nature of irreparable harm*

[126] The alleged harm singled out in the affidavit of Ms. Walmsley-Scott can be regrouped under four different headings.

(i) *Loss of goodwill and reputation*

[127] The Plaintiffs first claim that if the infringement of their intellectual property rights is allowed to continue, their goodwill and reputation will be hurt. This will result from the impossibility of monitoring the Defendants’ infringement, the destruction of the goodwill built between the Unilin Group and its licensees and importers of licensed products, and the incitement of other importers to trade in unlicensed products.

[128] The Plaintiffs contend that the Unilin Group will be perceived in the flooring industry as being unwilling and unable to enforce its Canadian intellectual property rights and the L2C Program, despite the significant time and resources it has spent on developing its program. Ms. Walmsley-Scott says it will become impossible to monitor and prevent the infringing activities if Triforest is not prevented from selling the Unlicensed Products, and that it is already impossible for Unilin to properly monitor the situation. The Plaintiffs also submit that the failure by the Triforest Defendants to pay royalties has impaired the ability of other licensees to fairly compete in the Canadian marketplace, thus undermining Unilin's licensing program. The Plaintiffs further allege that, if not restrained by this Court, the Defendants' ongoing infringement will incite other importers of laminate flooring products to purchase their products from unlicensed manufacturers, and new manufacturers not to seek a license from Unilin, the whole in order to avoid paying the royalties owed to Unilin for the licensing of the products incorporating the Glueless Locking Technology.

[129] Ms. Walmsley-Scott affirms that this harm cannot be measured in monetary terms.

[130] The problem is that, apart from Ms. Walmsley-Scott own self-serving assertions, there is no evidence on the various components of this chain of events. The risk of such harm is entirely speculative as these assertions are unsupported by any evidence and any degree of particularity. The record indicates that Triforest and Molson have been present in the Canadian market for over two years and that Triforest has managed to become one of the five leading importers of laminate flooring products in Canada. Yet, no particular evidence has been provided by Ms.

Walmsley-Scott or the Plaintiffs with respect to the impact of the Defendants' presence on the business of their licensees in Canada, or of the Canadian importers of their licensed products.

[131] There is no evidence on the potential negative perceptions or impossibility of monitoring. Also, no evidence from importers or from licensees has been adduced to the effect that they might have a negative view on the Plaintiffs' monitoring and enforcement of its Canadian Patents. There is no evidence of licensees having discontinued or threatening to discontinue paying royalties to Unilin if the Triforest Defendants continue to operate their business without having to pay theirs. There is also no evidence of potential or prospective licensees refraining from doing business with Unilin while awaiting the outcome of the Plaintiffs' recourses against the Triforest Defendants.

[132] This situation is quite different from the cases cited by the Plaintiffs, such as *Universal City Studios Inc v Zellers Inc* (1983), 73 CPR (2d) 1 (FCTD) at 11 or *Anne of Green Gables Licensing Authority Inc v Avonlea Traditions Inc* (2000), 6 CPR (4th) 57 (Ont CA) at para 16, where some supporting evidence from license users had been provided on the issue of loss of goodwill and reputation.

[133] Similarly, there is no evidence to substantiate the so-called floodgates argument advanced by the Plaintiffs, as no particulars or examples (except for the statements made by Ms. Walmsley-Scott) have been provided showing that other manufacturers or importers have been or could be encouraged to engage in the infringing activities, resulting in a "death by 1000 cuts" to the Unilin Group's licensing and L2C Program (*Spirales Computers* at 199-200).

[134] The Plaintiffs bear the onus of providing the clear and convincing evidence of irreparable harm to their goodwill and reputation, but their evidence on this issue boils down to hypotheticals and speculations. No witness and no document lend any support for the assertions made on this claim of reputational damage. I must therefore conclude that the Plaintiffs have not established a basis for this heading of irreparable harm.

[135] In addition, I am also not persuaded that the evidence supports the allegation that it has been or will become impossible for the Plaintiffs to monitor and prevent infringing activities if the injunction is not granted. I instead note that the Plaintiffs' own evidence shows that they have been somewhat actively protecting and enforcing their patents relating to the Glucless Locking Technology, including the Canadian Patents. The Plaintiffs have sent over 200 letters to potential importers operating in Canada to notify them regarding the LC2 Program and to flag the issue of potential infringement of their intellectual property rights on laminate flooring products. The evidence also indicates that the Plaintiffs keep track of sales of unlicensed products in Canada. Finally, they have taken action and initiated a few lawsuits against various alleged infringers, including recently against MGA. This behaviour is not reflective of a patent owner unable to monitor and enforce its intellectual property rights, or shackled in its efforts to do so.

(ii) Loss of market share and of existing and potential customers

[136] The Plaintiffs also claim that the infringing activities of the Defendants will allow them to gain market share at the expense of Unilin's licensees, because unlicensed flooring products are sold by manufacturers at lower prices than licensed products since no royalties are paid. This will also result in manufacturers and importers being encouraged to sell unlicensed products at a

lower cost, and in a loss of actual or potential customers for the Plaintiffs. The Plaintiffs further contend that, if the Defendants are permitted to maintain their infringing activities, they will be able to continue to unfairly compete with competitors selling licensed laminate flooring products in Canada, including Unilin and customers of Unilin's licensees, by either charging lower prices for their products and/or using the larger profits to invest in other activities to increase sales.

[137] This, repeats Ms. Walmsley-Scott, cannot be estimated or measured in monetary terms either.

[138] Again, the evidence provided only shows general and speculative assertions about loss of market share, without any particularity. This, as the Federal Court of Appeal frequently reminded, is insufficient to meet the high threshold of irreparable harm.

[139] There is no evidence of new manufacturers refraining from seeking a license from Unilin in order to avoid paying royalties, or threatening to do so. Let alone evidence of such behaviour being triggered by the infringing activities of the Defendants. There is no evidence of Unilin licensees having terminated or threatening to terminate their licensing arrangements, of licensees or importers having lowered or threatening to lower prices for their licensed products. There is no evidence of lost sales or threat by importers to purchase cheaper, unlicensed imported products. There is no evidence of other manufacturers being tempted or encouraged to sell unlicensed products at a lower cost, or of Unilin's licensees losing actual or potential customers to unlicensed manufacturers. There is not even evidence of Triforest' Unlicensed Products being sold at prices lower or with larger profits than the Unilin licensed products because of the alleged

monetary benefit gained from the failure to pay royalties. Not a single sales report, example of lost business, testimony of licensee or of importer has been offered to support the allegations made by Ms. Walmsley-Scott.

[140] In that context, to suggest that there could be irreparable harm in the form of lost sales or lost customers in the period leading to the hearing on the merits is entirely speculative. The unsubstantiated affirmations of Ms. Walmsley-Scott cannot base a finding of irreparable harm. In fact, at one point, Ms. Walmsley-Scott even says that, since it is difficult to get back a customer's business once it is lost, this may result in some of Unilin's licensees going out of business due to an inability to compete. This falls short of the requirements established by the case law on irreparable harm.

[141] Again, despite the fact that the Plaintiffs have known about the allegedly infringing activities of the Defendants since at least August 2014 and monitored Triforest's importation activity using publicly accessible data from Datamyne, they offer no concrete evidence to support any loss of business during this period, or that other importers of laminate flooring products have purchased their products from unlicensed manufacturers.

[142] This is a case where the party seeking to enforce its patents was in the market at the same time as the alleged infringer and, as the Federal Court of Appeal reminded in *Centre Ice*, a notable absence of supporting evidence of lost business in those circumstances is fatal to a claim of irreparable harm (*Centre Ice* at 54). I would add that this Court has frequently held that this type of harm alleged to be suffered by the Plaintiffs in terms of lost market share, lost

opportunities to expand and price reductions is typically not irreparable in patent cases (*I-Med Pharma II* at paras 43-46; *Aventis Pharma* at paras 33-45; *Merck Frosst Canada* at 462).

[143] In any event, if that was to translate into an ability for the Defendants to obtain a greater market share than they would otherwise have been able to have, to the detriment of competitors who respect intellectual property rights and acquire products from licensed manufacturers, this damage would be quantifiable as it would take the form of increased sales of unlicensed products for which royalties need to be paid to Unilin.

(iii) Springboarding

[144] The Plaintiffs further raise the prospect of irreparable harm resulting from “springboarding”. The “springboard” argument refers to situations where the alleged infringer has not yet entered the market but plans to do so near the end of the patent life, or where the alleged infringer actually enters the market, in order to gain an early start or position to better compete in the after-patent market. The party holding the patent thus loses a part of the market share due to a breach of its patent in anticipation of the patent’s expiry (*China Ceramic Proppant Ltd v Carbo Ceramics Inc*, 2004 FCA 283 at paras 3 and 10). Springboarding thus typically refers to losses intervening after the expiry of the patent, caused by a behaviour that, however, occurred prior to the expiry (*Bayer Healthcare AG v Sandoz Canada Incorporated*, 2007 FC 352 [Bayer] at para 52).

[145] Given that the 076 Patent and the 321 Patent will expire in June 2017, the Plaintiffs claim that the Defendants’ ongoing infringement of Unilin’s patent rights until their term will provide

them with the ability to obtain a greater market share than they would otherwise have been able to secure through selling licensed products, and provide the Defendants with a “springboard” into the post-patent market (*Baker Hughes Inc v Galvanic Analytical Systems Ltd* (1991), 37 CPR (3d) 512 (FCTD) at 515; *Spirales Computers* at 199-200). That is, the advantage gained by the Triforest Defendants as a result of their premature entry into the market will continue to result in losses for Unilin in the months immediately following the expiry of the Canadian Patents, which damages, the Plaintiffs say, are not recoverable.

[146] I do not find that, in light of the evidence before me, this “springboarding” amounts to demonstrated irreparable harm to the Plaintiffs. First, it is true that Unilin’s Canadian Patents are approaching the end of their term of protection but, since the Defendants are already on the market and are not new players planning a “springboard” entry, I am not convinced that there is clear and non-speculative evidence of harm in that respect in the existing market context. As indicated above, the Plaintiffs have failed to provide the required convincing and non-speculative evidence of loss of market share despite the Plaintiffs’ awareness of the Triforest Defendants’ activities since more than two years.

[147] Second, since the Plaintiffs are not directly present in the Canadian market except through the sales of their licensed products made by importers and the receipt of royalties, how can there be harm to the Plaintiffs in terms of lost market opportunities following the expiry of the Canadian Patents? That would be harm to the business of Unilin’s licensed manufacturers or of importers of its licensed products, which would allegedly lose ground to the Triforest Defendants in the after-patent market. Only harm suffered by the moving party qualifies under

this branch of the *RJR-MacDonald* test, not that of third parties (*Glooscap* at para 33). The Plaintiffs thus cannot claim these potential losses of their importers or licensees in the post-patent market as irreparable harm of their own. In addition, this claim of potential loss remains hypothetical and suffers from the same shortcomings identified above on the lack of particularity.

[148] Third, I am also not persuaded that this type of harm cannot be measured in monetary terms for the Plaintiffs, as it will essentially translate into loss of royalty revenues until the expiry of the patent protection (*Aventis Pharma* at para 61; *Bristol Myers Squibb Co v Apotex Inc*, 2001 FCT 1086 at paras 20-21). Damages in patent cases are intended to put a successful plaintiff in the position that it would have been in, but for the infringement. It is entirely speculative to say that a party will not be able to recover damages for any losses that it may suffer in the post-patent period, as such damages can indeed be recoverable and calculable (*Bayer* at paras 56-57).

(iv) Inability to pay

[149] The Plaintiffs finally claim that, based on Unilin's prior experience in being denied proper compensation by MGA following MGA's infringement of its patent rights in Canada, there is a genuine risk that Unilin would not be able to recover the complete damages owed by the Defendants as a result of their similar infringing activities. Ms. Walmsley-Scott states that she believes "that Triforest will attempt to thwart any order of this Court through a similar scheme" (as MGA). In relation to that concern over the Defendants' inability to pay, the Plaintiffs also rely on the October 2015 events detailed above. They argue that the Triforest

Defendants have explicitly stated and shown that they had no intention to pay Unilin the royalties owed for the unlicensed laminate flooring products they had imported at the time and continue to import, and that, if Triforest were to be forced to do so, their only option would be to go bankrupt. In light of the fact that Triforest explicitly stated that it would be financially unable to pay the license fees for the unlicensed products they have imported, the Plaintiffs submit that it is absolutely reasonable to conclude that Triforest will not pay the damages they would be ordered to pay by the Court.

[150] I do not agree that this amounts to clear and non-speculative evidence of irreparable harm in the circumstances of this case.

[151] I first note that this inability to pay has not been recognized as irreparable harm in *Eli Lilly*, since a failure to be able to collect a judgment is speculative. It is speculative with respect to the monetary amount at stake as the moving party does not know what will not be available from the defendant in the event it is successful in its action for infringement. This is precisely the case here. The Plaintiffs have only established that they are concerned to be unable to collect on a future judgment against the Triforest Defendants. This does not satisfy the irreparable harm requirements (*Eli Lilly* at para 32). The Plaintiffs must establish the harm with clear and convincing evidence and demonstrate on a balance of probabilities that the alleged harm is likely to occur. The Plaintiffs' potential failure to be able to collect a judgment meets none of these requirements as the Plaintiffs can only speculate as to the amount of damages they say that they may fail to recover (*Eli Lilly* at para 32; *RBC Dexia Investor Services Trust v Goran Capital Inc.*, 2016 ONSC 1138 at para 11).

[152] That said, I acknowledge that some cases suggest that a real, non-speculative risk of a defendant's financial inability to satisfy a judgment or an award could, in certain circumstances, be a relevant consideration in the assessment of the question of irreparable harm (*RJR-MacDonald* at 341; *Turbo-Resources Ltd v Petro-Canada Inc* (1989), 24 CPR (3d) 1 (FCA) at 18-19). Even if I was to follow this line of cases, for a defendant's inability to pay to constitute irreparable harm, there would still need to be, as always, clear and non-speculative evidence demonstrating such inability on a balance of probabilities. I am not persuaded that the evidentiary record before me supports such a conclusion in this case.

[153] The Plaintiffs have the evidentiary burden of establishing that the Defendants' current financial situation is such that the Plaintiffs would not be able to collect on damages which may be awarded to them if successful. I can appreciate that Ms. Walmsley-Scott and the Plaintiffs feel some frustration following the recent experience they went through in the aborted enforcement of their rights against another infringer, MGA, due to MGA's filing for bankruptcy. However, to draw from this separate and unrelated event a claim of irreparable harm based on a suspected parallel behaviour by the Defendants is entirely speculative.

[154] I further note that the statement attributed to Triforest to the effect that they would be financially unable to pay the Unilin license fees was made in October 2015, and that the information available on the financial situation of the Triforest Defendants since then does not reflect that they are in financial difficulty. On the contrary, there is no evidence of dissipation of assets, bankruptcy, collections or judgment against the Defendants in the results of the financial investigations conducted by the Plaintiffs and filed in support of their Review Motion. As

previously discussed, the Plaintiffs' investigation shows that the bank accounts, loans, mortgages, credit cards and leases of the Triforest Defendants are in good standing, and that the three individual Defendants recently acquired Canadian real estate assets. Furthermore, the banking accounts evidence obtained further to the execution of the Mareva Injunction Order shows that the Triforest Defendants hold many banking accounts containing substantial balances in December 2016.

[155] I therefore do not find, after weighing the various elements of the evidentiary record before me and on a balance of probabilities, that the Plaintiffs' sour collection experience with MGA or the October 2015 statement of Triforest's representatives suffice to conclude that there is clear and non-speculative evidence of an inability to pay on the part of the Defendants, cogent enough to qualify as irreparable harm. The suggestion that the Defendants would not be in a financial position to pay whatever amount of damages might be awarded to the Plaintiffs at trial does not find support in the evidence in the circumstances. In other words, doubts or concerns that a plaintiff may have about a defendant's eventual incapacity to pay are not enough to grant an interlocutory injunction pending trial.

[156] To demonstrate that harm will actually be suffered and that it will not be able to be repaired later, the moving party must provide evidence concrete and particular enough to allow the Court to be persuaded on the matter (*Stoney First Nation* at para 49). Injunctive relief is not granted on the basis of assertions, it is granted on the basis of evidence. And this is what is lacking here.

(v) Conclusion on speculative nature of harm

[157] In light of the foregoing, I am not convinced that the Plaintiffs have adduced the required real, clear and non-speculative evidence showing that they will suffer irreparable harm. There is no persuasive, detailed and concrete evidence demonstrating the existence of the various headings of potential harm asserted by Ms. Walmsley-Scott. I thus find that the various allegations cannot support a finding of irreparable harm meeting the requirements established by *RJR-MacDonald* and its progeny. As was the case in *Janssen*, the harm that the Plaintiffs say they might potentially suffer is too speculative and hypothetical to form a basis for a finding of irreparable harm.

[158] It is entirely understandable that, given the context of this dispute, the Plaintiffs are concerned and fear that, absent an injunctive restraint on the Defendants, they will continue to suffer lost revenues from unpaid royalties by the Defendants, what they feel is a loss of goodwill and other adverse impacts. However, these fears need an objective basis in order to qualify as irreparable harm and to open the door to an exceptional interlocutory injunctive relief. The central problem with the Plaintiffs' claims of irreparable harm is that they are unsupported by evidence beyond the assertions of Unilin's main corporate witness. "Irreparable harm must be demonstrated, not just asserted. Demonstration is achieved by supplying particular information that empowers the Court to find the existence of harm that cannot be repaired later" (*Gateway Church* at para 18). On the record before me, there is only assertion, not demonstration.

(d) Quantifiable nature of harm

[159] There is also a second major problem with the Plaintiffs' allegations of irreparable harm, and it is the fact that the evidence on the record does not allow to conclude that the alleged harm is not quantifiable, and thus irreparable.

[160] Ms. Walmsley-Scott states on a few occasions that the damages apprehended by the Plaintiffs cannot be measured in monetary terms. These bald statements fall short of the exigencies of irreparable harm in two main respects. First, no credible and convincing evidence has been provided to support the assertions that the Plaintiffs' harm would be impossible to quantify in monetary terms. Second, there is every indication on the record that damages in respect of any royalty revenues lost or likely to be lost by Unilin are indeed capable of calculation.

[161] As rightly pointed out by counsel for Molson at the hearing, an affirmation from Ms. Walmsley-Scott to the effect that the Plaintiffs' alleged harm is not quantifiable in monetary terms is not good enough. Ms. Walmsley-Scott is a corporate witness who does not have the experience nor the expertise to render an "opinion on what is quantifiable in damages and what is not" (*I-Med Pharma I* at para 39). Furthermore, Ms. Walmsley-Scott offers no factual basis for her assertions on the incapacity to measure the alleged damages. I agree with the Defendants that such evidence is not sufficient and falls well short of having the attributes able to convince me that, on a balance of probabilities, the claimed harm is not quantifiable in monetary terms (*I-Med Pharma I* at paras 36-44).

[162] No proper expert evidence on the record speaks to quantification issues, neither on why the alleged damages of the Plaintiffs cannot be quantified and measured in monetary terms, nor on why no methodology exists to calculate them. This is quite different from the situation in *Reckitt Benckiser LLC v Jamieson Laboratories Ltd*, 2015 FC 215 [*Jamieson*] at paras 53-54, aff'd 2015 FCA 104 at para 31, where losses were considered irreparable because there was extensive expert evidence demonstrating that no possibility of quantifying the losses and of calculating the damages existed.

[163] Contrary to the situation in *Jamieson*, no attempt was even made by the Plaintiffs to try to quantify the alleged harm. And no expert evidence was provided to support the assertion that the Plaintiffs' damages are not capable of quantification or to demonstrate that no methodology for quantifying the losses exists. I just cannot infer that damages cannot be quantified in monetary terms from the unsupported allegations of a corporate witness who is not in a position to address the quantification issue.

[164] I add that damages are not unquantifiable simply because there could be some difficulty in calculating them (*Nu-Pharm* at para 32). "Patent rights are economic in nature and there is usually no reason why damages ensuing from infringement are unable to be measured or calculated in a reasonably accurate way" (*J-Med Pharma II* at para 79; *Pfizer Ireland Pharmaceuticals v Lilly Icos LLC*, 2003 FC 1278 at para 27 citing *Cutter Ltd v Baxter Travenol Laboratories of Canada Ltd* (1980), 47 CPR (2d) 53 (FCA) at 55-56). It is the burden of the moving party to demonstrate that damages cannot be quantified when it alleges that this is the case. The Plaintiffs have failed to do so here.

[165] Superimposed on this is the fact that there is every indication that the damages claimed by the Plaintiffs to be irreparable are in fact quantifiable. The harm to be suffered by the Plaintiffs further to the alleged patent infringement by the Defendants results from lost licensing revenues and lost royalties. The Plaintiffs do not themselves sell the laminate flooring products at issue in the Canadian market; only importers selling Unilin's licensed products do. The Plaintiffs rather collect royalties under non-exclusive licensing agreements with approximately 49 importers operating in the Canadian market. The Plaintiffs' royalties and license fees are based on a simple formula using the volume of laminated flooring products sold.

[166] Based on the evidence, this looks to be easily capable of quantification. Indeed, the Plaintiffs have been able to estimate lost licensing revenues in their written submissions. For example, using publicly accessible data of Triforest's import activity, the Plaintiffs have quantified a reasonable royalty of \$228,000 on inventory currently in Triforest's possession, using the square meterage (m²) of these products multiplied by the royalty rate of \$US 0.92 per m² adjusted by the exchange rate of \$1.33/\$US. For past sales, a reasonable royalty can thus easily be calculated. Using the same simple arithmetic, the Plaintiffs were also able to quickly make a damage assessment and to estimate the lost royalties for past importation by the Defendants in the conclusions contained in the revised proposed order they submitted to the Court at the hearing of their Review Motion. Again, this figure was computed based on square meterage of sales multiplied by the royalty rate.

[167] I should mention that there is nothing extraordinary about the type of harm alleged – loss of goodwill, loss of market share, incitement of others to infringe – that would differentiate this

case from most patent infringement proceedings. The loss of licensing fees which may be owed are quantifiable damages which can reasonably be determined after a decision on the merits of the case.

[168] For all those reasons, I am therefore not satisfied that the Plaintiffs have offered sufficient evidence demonstrating, on a balance of probabilities, that they would suffer harm that is irreparable, if the interlocutory injunction is not granted. The allegations and evidence before me do not amount to clear and non-speculative evidence establishing harm and allowing the Court to make inferences that the claimed harm is not quantifiable and thus irreparable. The second element of the *RJR-MacDonald* test is accordingly not met.

(4) Balance of convenience

[169] I now turn to the last part of the *RJR-MacDonald* test, the balance of convenience (or inconvenience, as some prefer to state it). Under this third part of the test, the Court must determine which of the parties will suffer the greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits (*RJR-MacDonald* at 342). Given that the Plaintiffs have not led the evidence needed to allow me to make a finding of irreparable harm and having concluded that they have failed to satisfy that branch of the *RJR-MacDonald* test, it is not necessary for me to consider where the balance of convenience lies. The Plaintiffs' motion succeeds only if all three requirements are proved, and one of the elements has clearly not been established.

[170] Since the three components of the test are interrelated, I would however add that, in my view, the balance of convenience favours the Defendants as refusing the issuance of an interlocutory injunction implies that the *status quo* will be maintained until a decision on the merits of the Plaintiffs' action for patent infringement, and that the Defendants will continue to carry on their business in the interim period. Moreover, if an interlocutory injunction is refused, the Plaintiffs have not established that they will suffer irreparable harm, and damages will remain a remedy available and adequate for the unpaid royalties that could be owed by the Defendants.

(5) Conclusion on the interlocutory injunction

[171] The Plaintiffs have the obligation to satisfy me that they meet all elements of the tripartite conjunctive test set forth in *RJR-MacDonald* in order to be successful on their motion for interlocutory injunction. On the basis of the evidence before me, I find that they have not provided clear and non-speculative evidence of irreparable harm, and that the balance of convenience does not favour them. I must therefore deny their motion.

D. Other remedies

[172] Both the Plaintiffs and the Defendants seek a confidentiality order with respect to certain affidavits containing banking information and financial information on the Triforest Defendants. The evidence uncovered through the execution of the Mareva Injunction Order and filed with the Court as exhibits to the affidavits of Ms. Morin and Ms. Luong, as well as the affidavits of Ms.

Zhang and Mr. Wang, contain financial information pertaining to the Triforest Defendants, including account numbers, transaction history and current balances.

[173] In the circumstances, I am satisfied that this evidence should be filed under seal and be subject to a confidentiality order in accordance with Rule 151. I consider this to be appropriate on the basis of the principles in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at paras 53-55 and the submissions of the parties.

IV. Conclusion

[174] For the reasons detailed above, I conclude that the Mareva Injunction Order was lawfully executed in accordance with its terms and followed the applicable procedural rules. However, I am not persuaded that the grounds required for the issuance of an interlocutory Mareva injunction order are met, as the evidence obtained and provided by the Plaintiffs is not sufficient to demonstrate, on a balance of probabilities, that there is a real risk of removal or dissipation of assets by the Triforest Defendants in order to frustrate judgment, outside the normal scope of their business. I am also not satisfied that the tripartite test set forth in *RJR-MacDonald* for the issuance of interlocutory injunctions is met, as the Plaintiffs have failed to provide the required clear and non-speculative evidence to demonstrate, on a balance of probabilities, that they will suffer irreparable harm if the injunction is not granted.

[175] Costs are awarded to the Plaintiffs on their motion for the *ex parte* Mareva Injunction Order and on the first dimension of their Review Motion dealing with the review of the execution of the Order. Costs are awarded to the Defendants on the two other aspects of the

Plaintiffs' Review Motion, namely the motion for an interlocutory Mareva injunction and the motion for an interlocutory injunction.

ORDER**THIS COURT'S ORDERS that:**

1. The execution of the Mareva Injunction Order issued on December 19, 2016 was lawfully conducted;
2. The Plaintiffs are authorized to withdraw from the Court the deposit they have filed on December 20, 2016, as security for damages in connection with the execution of the Mareva Injunction Order, and the Administrator is ordered to pay out the said deposit together with all interest accrued thereon, by cheque payable to Smart & Biggar In Trust;
3. The motion to convert the Mareva Injunction Order into an interlocutory Mareva injunction order is dismissed;
4. The motion for the issuance of an interlocutory injunction order is dismissed;
5. The affidavits of Julie Morin dated December 28 and 30, 2016 and the second supplementary affidavit of Van Khai Luong dated January 3, 2017 filed by the Plaintiffs and the affidavits of Steve Wang dated December 28, 2016 and Congyu Zhang dated December 30, 2016 filed by the Defendants shall be treated as confidential;
6. The Defendant Triforest shall maintain its undertaking dated January 3, 2017 with respect to its accounting of sales;

7. Costs are awarded to the Plaintiffs on their *ex parte* motion for a Mareva injunction and on their review motion dealing with the review of the execution of the Order. Costs are awarded to the Defendants on the Plaintiffs' review motion relating to the motion for an interlocutory Mareva injunction and the motion for an interlocutory injunction. If the parties are unable to agree on costs, they should file written submissions within 14 days of this Order, not to exceed five pages in length.

"Denis Gascon"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2105-16

STYLE OF CAUSE: UNILIN BEHEER B.V. AND, FLOORING INDUSTRIES LIMITED, SARL v TRIFOREST INC., JUNWU ZHANG, ZAIRONG FENG, CONGYU ZHANG, AND MOLSON INTERNATIONAL TRADING INC.

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: JANUARY 4, 2017

ORDER AND REASONS: GASCON J.

DATED: JANUARY 20, 2017

APPEARANCES:

François Guay Guillaume Lavoie-Ste-Marie Renaud Garon-Gendron	FOR THE PLAINTIFFS
Gervas Wall Junyi Chen	FOR THE DEFENDANTS TRIFOREST INC., JUNWU ZHANG, ZAIRON FENG, CONYU ZHANG
Christopher Tan	FOR THE DEFENDANT MOLSON INTERNATIONAL TRADING INC.

SOLICITORS OF RECORD:

Smart & Biggar/Fetherstonhaugh Barristers & Solicitors Montreal, Quebec	FOR THE PLAINTIFFS
Dceth Williams Wall LLP Barrister and Solicitors Toronto, Ontario	FOR THE DEFENDANTS TRIFOREST INC., JUNWU ZHANG, ZAIRON FENG, CONYU ZHANG
Sprigings IP Barrister and Solicitors Toronto, Ontario	FOR THE DEFENDANT MOLSON INTERNATIONAL TRADING INC.

Federal Court



Cour fédérale

Date: 20180323

Docket: T-430-18

Citation: 2018 FC 334

Vancouver, British Columbia, March 23, 2018

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

'NAMGIS FIRST NATION

Applicant

and

**MINISTER OF FISHERIES, OCEANS AND
THE CANADIAN COAST GUARD and
MARINE HARVEST CANADA INC**

Respondents

ORDER AND REASONS

Table of Contents

I. Introduction..... 2

I. The Parties 4

 A. 'Namgis First Nation..... 4

 B. Marine Harvest..... 6

 C. The Minister..... 7

II. *Morton v Canada (Fisheries and Oceans)*..... 8

III. The PRV Policy 10

IV. Consultation..... 15

 A. The DFO..... 15

B. Marine Harvest 16

V. Expert Evidence 18

 A. Applicant 18

 (1) Dr. Richard Routledge 18

 (2) Dr. Fred Kibenge 20

 (3) Dr. Martin Krkosek 23

 B. Marine Harvest 26

 (1) Diane Morrison 26

 (2) Vincent Erenst 27

VI. Preliminary Issues 28

VII. Issues 29

VIII. Analysis 29

 A. Serious question to be tried 30

 B. Irreparable harm 30

 C. Balance of convenience 34

 D. Undertaking as to damages 38

IX. Conclusion 38

i. Introduction

[1] This is a motion pursuant to Rules 373 and 374 of the *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*], in which the ‘Nanmgis First Nation (“Nanmgis”) seeks an interlocutory injunction against the Minister of Fisheries, Oceans and the Canadian Coast Guard (the “Minister”) and Marine Harvest Canada Inc. (“Marine Harvest”), as follows:

- As against the Minister:
 - a) an interlocutory injunction enjoining the Minister from issuing to Marine Harvest a licence under section 56 of the *Fishery (General) Regulations*, SOR/93-53 [*FGR*] authorizing the introduction, release or transfer into the marine environment of any fish (“Transfer Licence”) into open-water pens at Marine Harvest’s aquaculture facility located at Swanson Island, BC (the “Swanson Island Facility”) without first testing such fish for the Piscine orthoreovirus (“PRV”) or heart and skeletal muscle inflammation (“HSMI”); or
 - b) if any such Transfer Licence has previously been granted, an interlocutory injunction suspending the validity of the Transfer Licence; until the hearing and determination of the underlying application for judicial review;
- As against Marine Harvest:
 - a) an interlocutory injunction enjoining Marine Harvest:
 - i. from seeking, obtaining or acting upon any Transfer Licence in connection with the Swanson Island Facility; and/or

- ii. irrespective of whether a Transfer Licence has been sought or obtained, from introducing, releasing or transferring fish into the marine environment into open-water pens at the Swanson Island Facility;
- until the hearing and determination of the underlying application for judicial review; and
- An order dispensing with the need for the Applicant to provide any undertaking as to damages.

{2} The injunction motion is part of the Applicant's broader application for judicial review pursuant to sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 and Rule 301 of the *Federal Courts Rules*, which relates to a Fisheries and Oceans Canada ("DFO") policy of not testing for PRV or HSMI in fish prior to issuing Transfer Licenses (the "PRV Policy"). In its application for judicial review, the Applicant seeks:

- Declarations that:
 - the PRV Policy and any Transfer Licence issued pursuant to the PRV Policy for the Swanson Island Facility are unreasonable and/or unlawful;
 - Canada was required, but failed, to consult and accommodate the Applicant prior to adopting and implementing the PRV Policy, and prior to issuing any Transfer Licence for the Swanson Island Facility, and is required to do so in connection with any future such Transfer Licence;
 - in adopting the PRV Policy, and in issuing any Transfer Licenses for the Swanson Island Facility pursuant to the PRV Policy, Canada failed to consider the role the decision could play for the Applicant in the ongoing process of reconciliation between the Applicant and Canada;
 - farmed Atlantic salmon must be tested for PRV prior to the issuance of a Transfer Licence by the Minister;
 - farmed Atlantic salmon that test positive for PRV must not be authorized for transfer;
- An order:
 - quashing the PRV Policy and any subsequent decision to issue a Transfer Licence for the Swanson Island Facility made pursuant to the PRV Policy;
 - requiring Canada to consult the Applicant in relation to the PRV Policy, and any Transfer Licence for the Swanson Island Facility;
 - directing that this Court shall retain jurisdiction to resolve issues that may arise in the course of Canada's consultation with the Applicant in connection with the PRV Policy and any Transfer Licence for the Swanson Island Facility; and
 - prohibiting the Minister from issuing any Transfer Licences for the Swanson Island Facility until such time as Canada has discharged its duty to consult and accommodate the Applicant in relation to the PRV Policy and any such Transfer Licences.

I. The Parties

A. *'Namgis First Nation*

[3] The Applicant is a “band” under the *Indian Act*, RSC 1985, c I-5 and its members are “aboriginal peoples of Canada” within the meaning of section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, c 11. Don Svanvik, the elected Chief Councillor of ‘Namgis, provided an affidavit that describes ‘Namgis history, culture and assertions of Aboriginal rights and title.

[4] The Applicant claims that its traditional territory includes the Nimpkish and Kokish River watersheds on northern Vancouver Island in their entirety, as well as adjacent marine areas in and around Malcolm Island, Cormorant Island, Swanson Island, Hanson Island, Foster Island and the Plumper and Pearse Island Groups (the “Asserted Territory”). It considers the Nimpkish River at the north-east end of Vancouver Island to be situated within the core of its territory and of tremendous importance to the community.

[5] The Applicant asserts Aboriginal rights and title throughout the Asserted Territory, including title to the lands, water, air, marine foreshore and seabed, as well as rights to fishing, hunting, gathering and stewardship. In particular, it asserts that Pacific salmon, including sockeye, chum, pink, chinook and coho, are an integral aspect of their oral history and traditions, way of life, economy, culture, ceremonies, food and trade.

[6] In 1998, the Applicant began negotiations with Canada and the Province of BC in the BC Treaty Commission Process. As part of that process, it submitted maps outlining the Asserted Territory as well as broader resource harvesting areas. The process is at Stage 4 and the draft Agreement in Principle identifies issues the parties have agreed to negotiate, including: fisheries and marine resources; water and water resources; title, jurisdiction, selection and access; governance; financial and fiscal arrangements; and environment.

[7] As well, in August 2004, the Applicant and Canada entered into a Comprehensive Fisheries Agreement under which Canada is providing the Applicant with funding to participate in the management of the fisheries in the Asserted Territory. In August 2015, the Applicant entered into the Aboriginal Fund for Species at Risk Contribution Agreement, in which Canada committed to include the Applicant in the protection and recovery of aquatic species at risk.

[8] As part of its stewardship efforts to protect and preserve the wild salmon populations in its Asserted Territory, and in response to significant declines in those populations, the Applicant has taken steps towards conservation and restoration, including:

- a voluntary moratorium on all fishing for all species of salmon in the Nimpkish River until such time as the populations recover to sustainable harvesting levels;
- establishment of a hatchery on the Nimpkish River for chum, sockeye, coho and chinook; and
- establishment of a land-based, closed-containment aquaculture facility as a pilot project to demonstrate that land-based fish farming using recirculating aquaculture system technology is economically viable and ecologically sustainable.

[9] Chief Svanvik stated that wild salmon populations in the Asserted Territory have declined significantly. In particular, since the 1950s the Applicant has compiled its own data about the populations of salmon returning to the Nimpkish River. That river was once among the

top salmon producing rivers in BC, but in recent times salmon populations have become severely depleted. The Applicant now believes that all species of Nimpkish River salmon are at critically low levels that cannot sustain additional stressors.

B. *Marine Harvest*

[10] Marine Harvest is a large, multinational corporation engaged in the business of fish farming. It is one of four main salmon farming companies operating in BC. As of November 2017, it held 56 of the 119 licences issued in BC that authorize the operation of an aquaculture facility ("Aquaculture Licence"). All of its facilities are licenced for Atlantic salmon.

[11] Marine Harvest owns and operates the Swanson Island Facility pursuant to an Aquaculture Licence. That licence was issued on July 10, 2016, and expires on June 30, 2022.

[12] The Swanson Island Facility comprises open-net pens located within the marine environment, approximately 19 km from the mouth of the Nimpkish River and 16 km from the Applicant's main community. It has been stocked with farmed salmon since the early 1990s. Marine Harvest (and its predecessor company) has operated the facility ever since, keeping it stocked with fish with the exception of fallow periods of about two to six months between harvesting and restocking.

[13] The Swanson Island Facility is currently empty of fish, the last stock having been harvested in late 2017. On February 27, 2018, Marine Harvest applied for a Transfer Licence for

up to 1,000,000 Atlantic salmon smolts from its hatchery at Ocean Falls, BC, to the Swanson Island Facility.

C. *The Minister*

[14] The Minister has discretion to issue Aquaculture Licences pursuant to subsection 7(1) of the *Fisheries Act*, RSC 1985, c F-14 [*Fisheries Act*]:

7 (1) Subject to subsection (2), the Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued leases and licences for fisheries or fishing, wherever situated or carried on.

[15] An Aquaculture Licence may cover a period of several years, during which the aquaculture facility's stock will have to be replaced. A Transfer License must be obtained before this can occur, pursuant to subsection 55(1) of the *FGR*:

55 (1) Subject to subsection (2), no person shall, unless authorized to do so under a licence,

- (a) release live fish into any fish habitat; or
- (b) transfer any live fish to any fish rearing facility.

[16] Section 56 of the *FGR* establishes constraints on the Minister's discretion in respect of Transfer Licenses and requires certain pre-conditions to be met:

56 The Minister may issue a licence if

- (a) the release or transfer of the fish would be in keeping with the proper management and control of fisheries;
- (b) the fish do not have any disease or disease agent that may be harmful to the protection and conservation of fish; and

(c) the release or transfer of the fish will not have an adverse effect on the stock size of fish or the genetic characteristics of fish or fish stocks.

II. *Morton v Canada (Fisheries and Oceans)*

[17] In *Morton v Canada (Fisheries and Oceans)*, 2015 FC 575 [*Morton*], this Court reviewed the Minister's issuance of an Aquaculture Licence to Marine Harvest for the Swanson Island Facility. Section 3.1 of that licence permitted the transfer of fish to the facility in certain circumstances, including where:

3.1 [...]

(b) the license holder has obtained written and signed confirmation, executed by the source facility's veterinarian or fish health staff, that, in their professional judgement:

(i) mortalities, excluding eggs, in any stock reared at the source facility have not exceeded 1% per day due to any infectious diseases, for any four consecutive day period during the rearing period;

(ii) the stock to be moved from the source facility shows no signs of clinical disease requiring treatment; and

(iii) no stock at the source facility is known to have had any [of eight specified diseases of concern]; or

(iv) where conditions 3.1(b)(i) and/or 3.1(b)(iii) cannot be met transfer may still occur if the facility veterinarian has conducted a risk assessment of facility fish health records, review of diagnostic reports, evaluation of stock compartmentalization, and related biosecurity measures and deemed the transfer to be low risk.

[18] This Court made several preliminary observations. It noted that there was a body of credible scientific evidence establishing a causal relationship between PRV and HSMI and,

although there was a healthy debate between scientists on the issue, the Minister was not erring on the side of caution (*Morton* at paras 45 and 46). As well, subsection 56(b) of the *FGR* embodies the precautionary principle; it is designed to anticipate and prevent harm even in the absence of scientific certainty that such harm will occur (*Morton* at paras 97 and 99). Finally, the Minister's duty under subsection 56(b) of the *FGR* supports the conservation of the resource, which is the Minister's primary obligation under the *Fisheries Act* (*Morton* at para 56).

[19] This Court then found that conditions 3.1(b)(i) and (iii) were reasonably consistent with subsection 56(b) of the *FGR*. Condition 3.1(b)(i) established clear, objective criteria governing transfers that are demonstrably linked to subsection 56(b) of the *FGR* (*Morton* at para 61). Condition 3.1(b)(iii) precluded transfers where stock was known to have had a disease that could severely impact fisheries (*Morton* at para 69).

[20] However, conditions 3.1(b)(ii) and (iv) were inconsistent with subsection 56(b) of the *FGR*. Condition 3.1(b)(ii) maintained a lower standard by requiring fish to show no signs of clinical disease requiring treatment, rather than not having any disease or disease agent (*Morton* at para 63). Condition 3.1(b)(iv) allowed for a transfer of a diseased fish if the facility veterinarian considered the transfer to be "low risk", which circumvented subsection 56(b) of the *FGR* and provided for transfers through less rigorous conditions than required by law (*Morton* at para 71).

[21] Furthermore, the Minister improperly sub-delegated to the licensee the ultimate determination as to whether a transfer was permissible. Although a delegate may grant some part

of its authority to another, unlimited discretion cannot be conferred on a sub-delegate and supervisory control over the sub-delegate should be retained (*Morton* at para 83). Condition 3.1(b)(iv) did not provide any objective standards or criteria with respect to deeming a transfer as “low risk” and it allowed for a transfer of diseased fish without the knowledge, approval or supervision of the Minister (*Morton* at para 88).

[22] Finally, conditions 3.1(b)(ii) and (iv) were inconsistent with subsection 56(b) of the *FGK* in light of the precautionary principle. The phrase “may be harmful” does not require scientific certainty or that harm is a likely consequence of a transfer, and the phrase “any disease or disease agent” should not be interpreted as requiring scientific consensus that a disease agent (e.g., PRV) is the cause of the disease (e.g., HSMI). (*Morton* at para 97).

[23] Accordingly, this Court held that conditions 3.1(b)(ii) and (iv) were of no force and effect and were severed from the Aquaculture License issued to Marine Harvest (*Morton* at para 101).

[24] In June 2016, the Respondents filed a Notice of Appeal of this Court’s decision in *Morton*, but the appeal was discontinued in January 2017.

III. The PRV Policy

[25] Andrew Thomson, Regional Director of the DFO Fisheries Management Branch, provided an affidavit outlining the DFO’s aquaculture management policies, and in particular, its current policy of not requiring testing for PRV or HSMI prior to issuing a Transfer Licence.

[26] Following this Court's decision in *Morton*, the Minister issued amended Aquaculture Licences stipulating that if the licence holder wants to transfer fish into their facility, they must now apply to DFO's Introductions and Transfers Committee ("ITC") for a Transfer Licence. The ITC includes representatives from the DFO's Science Branch and Aquaculture Management Division. It assesses the potential genetic, ecologic and fish health impacts of proposed transfers to fish and fish habitat.

[27] As part of this process, Aquaculture Licence holders are required to submit an Introduction and Transfer application as well as a Fish Health Attestation Form. The attestation form is executed by the source facility's veterinarian, fish health staff, or facility manager, attesting that, in their professional judgement:

- mortalities, excluding eggs, in any stock reared at the source facility have not exceeded 1% per day due to any infectious agents, for any four consecutive day period during the rearing period;
- the stock to be moved from the source facility shows no signs of clinical disease, with the exception of saprolegniasis; and
- no stock at the source facility is known to have any one of eight specified diseases of concern.

[28] As well, the DFO conducts hatchery inspections every three months to coincide with hatchery-to-marine Transfer Licence applications. If the DFO suspects that a Canadian Food Inspection Agency ("CFIA") reportable disease is present, the CFIA will be notified and further testing will be conducted. The DFO will not authorize the transfer until CFIA requirements have been implemented, and additional conditions may be added to the Transfer Licence. If the DFO has concerns related to a non-CFIA reportable disease, DFO veterinarians will assess whether mitigation is in place to address the disease of concern, and will recommend movement restrictions, the addition of conditions to the Transfer Licence or a denial of the transfer

application. DFO veterinarians will also consider the overall state of fish health within the Fish Health Surveillance Zone of the proposed transfer.

[29] After its assessment, ITC committee members provide its response to the application. If it recommends that the application should be allowed, or should be allowed with additional conditions, the DFO Regional Manager, Aquaculture Programs, considers the recommendation and decides whether to issue a Transfer Licence.

[30] The DFO does not require Aquaculture Licence holders to test for PRV or HSMI prior to being issued a Transfer Licence (the "PRV Policy").

[31] In January 2017, the DFO's Regional Director General – Pacific signed a memorandum recommending that DFO maintain its policy of not testing for PRV and HSMI prior to transfers of fish because PRV and HSMI are not of serious concern in BC (the "2017 Memorandum"). Materials attached to that memorandum included, among other things, a summary of the Minister's interpretation of section 56 of the *FGR* (the "Minister's Interpretation"), as well as a Canadian Science Advisory Secretariat Science Response (the "CSAS Science Response").

[32] The Minister's Interpretation noted that the phrase "protection and conservation of fish" in subsection 56(b) of the *FGR* was an important qualifier, because all disease agents may be harmful to some degree but not all disease agents may be so harmful as to threaten the protection and conservation of fish. In other words, subsection 56(b) of the *FGR* is aimed at a potential harm that is macro in nature: where the genetic diversity, species or ecosystem of a stock or

conservation unit may be harmed such that they cannot sustain biodiversity and the continuance of evolutionary and natural production processes.

[33] The CSAS Science Response, dated December 2015, assessed the potential impacts of PRV on the west coast of North America. It included the input of 16 contributors and three external reviewers, and cited 38 scientific references. It concluded that there was a low likelihood that the presence of PRV in any life stage of farmed Atlantic and Pacific salmon would have a significant impact on wild Pacific salmon populations.

[34] As well, the CSAS Science Response provided background information on HSMI. It was among the top four most common salmonid aquaculture diseases in Norway, and the number of outbreaks had more than doubled between 2004 and 2012. Clinical signs usually occurred 5-9 months after sea-transfer and included abnormal swimming behaviour, anorexia and up to 20% mortality. Diagnosis was confirmed by microscopic observation of lesions in cardiac and skeletal muscle. It is one of several diseases that affect the heart, and in moderate to severe cases the skeletal muscle, of Atlantic salmon.

[35] On March 9, 2018, the PRV Policy was reaffirmed by the DFO Director of Aquaculture Management (the "March 2018 Decision"). Materials relied upon to make that decision included, among other things, the 2017 Memorandum and a Rapid Science Response prepared by DFO Science (the "Rapid Science Response").

[36] The Rapid Science Response was completed on March 5, 2018. These reports are prepared when there is not enough time to complete a CSAS Science Response. The purpose of this Rapid Science Response was to ensure that the DFO's testing and fish management approach were informed by the latest scientific evidence.

[37] The Rapid Science Response found that recently published literature altered the scientific perspective on the role of PRV in the development disease, in four ways:

- evidence had been provided that PRV infection can directly cause HSMI in Atlantic salmon, but it remained unclear why in many instances infections do not lead to disease;
- the occurrence of HSMI-like lesions in BC-farmed Atlantic had now been formally linked to HSMI. Furthermore, the infection of farmed fish with PRV in this instance was via a marine reservoir since the fish were free of PRV upon entry into previously fallow pens. However, no elevation in mortalities was noted despite the occurrence of HSMI;
- PRV had been found in a broad host range and over enormous geographical expanses. It predominantly appears to infect salmonid hosts, but different species of salmon had different susceptibility. It had been detected in 20% of stocks tested and the prevalence within each stock ranged from 2-73%. Further research was required to demonstrate an association between salmon farming and the prevalence of infection in wild salmon; and
- recent findings supported the hypothesis that HSMI results from the recognition of virus by infected cells and the destruction of those cells by T-cells.

[38] The Rapid Science Response concluded that the sole detection of PRV remains insufficient as a disease determinant - high loads of PRV are commonly detected in apparently healthy fish without clinical disease. Furthermore, the recent studies corroborated and strengthened previous findings:

- in both Norway and BC, Atlantic salmon have acquired PRV infections through exposure to a marine source of virus;
- PRV is endemic in several species of Pacific salmon over the geographic range of Washington to Alaska;
- in BC, there have not been elevated mortality or production concerns associated with the sporadic occurrence of lesions diagnostic of HSMI in farmed Atlantic salmon;
- HSMI has only been described in farmed fish, globally; and
- PRV may contribute to the rare disease occurrence of Jaundice Syndrome in BC-farmed chinook but in most circumstances has low to no virulence with Pacific salmon species.

[39] As noted above, on March 9, 2018, the DFO Director of Aquaculture Management reviewed all of this information and confirmed that the DFO would continue its policy of not testing for PRV and HSMI prior to issuing Transfer Licences.

IV. Consultation

A. *The DFO*

[40] The DFO's current policy is to not consult with Aboriginal peoples with respect to Transfer Licences. In his affidavit, Mr. Thomson stated:

The Department does not currently consult or provide public notification on introduction and transfer licences as consultation with First Nations takes place around aquaculture licensing decisions. Aquaculture licences are issued under the assumption that fish will be transferred to and from the site as part of routine operations.

[41] This policy exists despite representatives from the Province of BC having acknowledged that the Applicant has a strong claim in respect of Aboriginal fishing rights. A letter from the BC Ministry of Natural Resources to the Applicant, dated February 4, 2011, regarding replacement of land tenures for the purpose of finfish aquaculture, stated:

The Ministry is proceeding on the basis of a preliminary assessment of the 'Namgis First Nation having a strong claim in respect to aboriginal fishing rights within its asserted traditional territory and a lower prima facie claim in respect to aboriginal title to the subject area of the tenures, these being submerged lands that are subject to overlapping First Nations' claims. In arriving at this preliminary assessment we have taken into consideration information the 'Namgis First Nation has provided as well as information reasonably available to us.

[42] Canada has received several letters from the Applicant between September 2017 and March 2018 regarding their opposition to net pen salmon aquaculture in the Asserted Territory, concerns related to the lack of consultation on ITC applications, and on concerns related to the PRV Policy. According to Mr. Thomson, the DFO has not formally responded to these letters and has told the Applicant that the DFO does not consult on ITC applications.

[43] On February 28, 2018, the DFO informed the Applicant that it had received an application to restock the Swanson Island Facility. Additional information related to the application process was provided on March 1, 2018, and March 9, 2018. The ITC coordinator also discussed the matter by phone with Chief Svanvik on March 12, 2018, explaining that the application was under review and although the DFO was reviewing its consultation policy, there were currently no planned changes. No information was provided with respect to PRV.

B. *Marine Harvest*

[44] Since May 2016, Marine Harvest has communicated with the Applicant in respect to the Swanson Island Facility, requesting meetings to share data and discuss production plans, stewardship, facility observations and collaborative research. The Applicant has previously told Marine Harvest that it is not interested in meeting unless it is to discuss the removal of open net fish farms. As well, the Applicant has noted that it is severely understaffed and unable to participate in collaborative studies or facility observations.

[45] On December 21, 2017, representatives from Marine Harvest informed the Applicant that Marine Harvest planned to restock the Swanson Island Facility in March or April of 2018. On

February 7, 2018, the Applicant received a letter from Marine Harvest advising that it was about to begin preparing the facility for the transfer of smolts. This letter did not provide materials the Applicant had requested, including:

- the Transfer Licence;
- the application for the Transfer Licence;
- any materials used in support of such an application;
- the results of any tests performed on the fish to be transferred regarding diseases or disease agents; and
- any risk evaluations used to determine if the fish transferred would have an adverse effect on the stock size of fish or the genetic characteristics of fish or fish stocks.

[46] On February 13, 2018, the Applicant wrote to Marine Harvest re-iterating its objection to a transfer of smolts into the Swanson Island Facility and its concerns about the irreparable harm such a transfer would cause. The Applicant requested the following information:

- the date Marine Harvest intended to (or did) apply for a Transfer Licence;
- the application package that would be (or had been) submitted to the DFO; and
- the date Marine Harvest intended to begin transferring fish.

[47] On February 19, 2018, Marine Harvest replied and stated that the fish would be ready for transfer to the Swanson Island Facility during the second half of March. It also advised the Applicant that the “most recent fish health screenings of the smolts destined for the site have been confirmed healthy, and free of tested pathogens, including PRV.” No further information was provided regarding this testing.

[48] On February 20, 2018, the Applicant replied, objecting to the proposed transfer. The Applicant also requested details of the “recent fish health screening”. No reply was received. Marine Harvest now claims that it did not provide this information because it did not have a data sharing agreement with the Applicant such that the information would be kept confidential.

V. Expert Evidence

[49] Due to the urgent nature of this motion, cross-examinations were not conducted on any of the affidavits filed, including those summarized below.

A. *Applicant*

(1) Dr. Richard Routledge

[50] Dr. Routledge is a Professor Emeritus of the Department of Statistics and Actuarial Science, and Associate Member of the Department of Biological Sciences, at Simon Fraser University. He Holds a PhD in statistical ecology from Dalhousie University, a MSc in statistics from the University of Alberta and a BSc in mathematics from Queen's University. For the last 26 years, his work and research has focused on ecological statistics and Pacific salmon biology, including assessing the risks pathogens pose to biodiversity, fisheries and aquaculture operations in BC.

[51] Dr. Routledge provided an affidavit in which he concluded that PRV would likely be transferred from farmed Atlantic salmon in the Swanson Island Facility, if it is restocked, to both wild Pacific salmon as well as Pacific salmon that are released from the Applicant's hatchery.

[52] He noted that Marine Harvest has admitted that all but one of its hatcheries is infected with PRV. As well, a fish pathologist with the BC Ministry of Agriculture's Animal Health Centre has admitted that approximately 80% of farmed Atlantic salmon in BC are infected with

PRV. Moreover, he accepted the conclusions of Dr. Kibenge, described below, and that conditions leading to the rapid spread of PRV and more virulent strains of PRV would be present in the Swanson Island Facility when it is stocked.

[53] Dr. Routledge stated that the scientific literature establishes that proximity to open-net pen aquaculture facilities increases rates of PRV infection in wild Pacific salmon. One peer-reviewed article, of which he was a co-author, found that 95% of the farmed Atlantic salmon tested had PRV, and that detection rates of PRV in wild Pacific salmon in regions in close proximity to aquaculture facilities (in the passages between Vancouver Island and the BC mainland) were much higher (37-45%) than in wild Pacific salmon from regions that are further away from aquaculture facilities (5%).

[54] He noted that the following sites that are within 21 km of the Swanson Island Facility:

- the mouth of the Nimpkish River, which is the largest natural salmon spawning watershed in the Asserted Territory from which wild and hatchery juvenile Pacific salmon migrate out to sea;
- Alder Bay, which is the proposed release site for Pacific salmon raised in the Applicant's hatchery;
- the Applicant's salmon fishing sites; and
- sites known to be used by wild Pacific salmon from the Nimpkish, Fraser and Sakinaw watersheds.

[55] Dr. Routledge concluded that the conditions at the Swanson Island Facility, if it is stocked with salmon without first testing for PRV, would likely result in:

- the introduction of PRV-infected smolts into the open-net pens at the Swanson Island Facility;
- PRV spreading rapidly within the farmed salmon population in the Swanson Island Facility;
- the Swanson Island Facility shedding upwards of 6.6×10^{16} particles of PRV per hour;

- the PRV shed by the Swanson Island Facility travelling up to 30 km in the marine environment; and
- PRV being transferred from the farmed Atlantic salmon in the Swanson Island Facility to wild Pacific salmon as well as Pacific salmon the Applicant releases from its hatchery.

(2) Dr. Fred Kibenge

[56] Dr. Kibenge is a Professor of Virology, and the Chairman of the Department of Pathology and Microbiology, at the University of PEI. He holds a PhD in Animal Virology from Murdoch University in Australia, and a Bachelor of Veterinary Medicine from Makerere University in Uganda. He specializes in veterinary virology, has completed three post-doctoral fellowships in that field, has published extensively on the detection of fish viruses as well as the role those viruses play in aquaculture, and appeared as an expert witness before the Commission of Inquiry into the Decline of Salmon in the Fraser River (the "Cohen Commission").

[57] Dr. Kibenge was asked to assess the impacts of PRV to wild and hatchery-grown Pacific salmon caused by the restocking of the Swanson Island Facility without first testing those fish for PRV. He summarized his conclusions as follows:

- PRV occurs in farmed Atlantic salmon and wild Pacific salmon in BC. HSMI occurs in farmed Atlantic salmon, and it is reasonable to expect that PRV will cause HSMI or HSMI-like symptoms in wild Pacific salmon in BC;
- PRV can be transferred from farmed Atlantic salmon to wild and hatchery-raised Pacific salmon, and farmed salmon in open-net pens are the most significant source of PRV in the marine environment;
- the Swanson Island Facility will be a significant source of PRV that is near to key habitats for wild Pacific salmon and salmon released from the Applicant's hatchery;
- PRV causes adverse health effects in farmed Atlantic salmon, wild Pacific salmon and Pacific salmon released from hatcheries. For example, PRV is associated with adverse health effects in chinook salmon, such as jaundice, and is expected to cause similar adverse health effects in other species of wild Pacific salmon, but it is difficult to confirm this expectation because it is difficult to diagnose disease and adverse health effects in wild Pacific salmon – dead fish simply disappear and diseased fish are removed from the population by predators;

- stocking the Swanson Island Facility with farmed Atlantic salmon smolts will result in PRV being transferred from the smolts to wild Pacific salmon in the Asserted Territory and cause irreversible harm to individual fish; and
- the auditing and monitoring program of aquaculture facilities in BC conducted by the Fish Health Audit and Surveillance Program is likely inadequate to detect PRV and HSMI.

[58] Dr. Kibenge stated that there is no doubt that HSMI occurs in farmed Atlantic salmon in BC aquaculture facilities. As well, DFO's Fish Audit and Surveillance Program ("FASP") had previously failed to diagnose HSMI at a facility because it used different diagnostic criteria than is described in the scientific literature. In fact, the FASP routinely misdiagnoses symptoms of HSMI.

[59] He explained that PRV causes HSMI in Atlantic salmon, but the degree to which HSMI occurs (its severity and prevalence), or whether it occurs in wild Pacific salmon, is not clearly known. The latter is difficult to determine due to difficulties associated with diagnosing disease in wild fish populations. However, it is reasonable to expect that PRV infection in wild Pacific salmon can result in the same or similar diseases as seen in Atlantic salmon.

[60] Dr. Kibenge opined that stocking the Swanson Island Facility without first testing the fish for PRV would likely result in PRV being transferred from the farmed Atlantic salmon to wild Pacific salmon. PRV-infected fish shed virus into the marine environment at high rates. PRV is expected to remain infectious for a long time in the water column, accumulate in open-net pens and be transported by currents. In this way, aquaculture facilities amplify and spread disease and are likely amplifying the spread of PRV to wild Pacific salmon. He expects farmed salmon in open-net pens to be the most significant source of PRV in the marine environment in BC. As

well, he expects that PRV can travel up to 30 km in the water column, meaning that a large portion of the Asserted Territory and associated salmon populations are at risk of PRV spreading from the Swanson Island Facility.

[61] He explained that PRV causes adverse health effects in farmed Atlantic salmon and is likely to cause similar conditions in wild Pacific salmon:

- PRV targets the red blood cells of Atlantic salmon. The scientific community expects that it targets the same cells in Pacific salmon and this has been confirmed for coho;
- HSMI has been found to cause up to 20% mortality and 100% morbidity in farmed Atlantic salmon;
- Marine Harvest has consistently listed HSMI as one of top four causes of infectious mortality;
- PRV has been proven to cause or has been associated with anorexia, lethargy and abnormal swimming behaviour in salmon;
- the net effect of PRV/HSMI is that it damages the heart and reduces the delivery of oxygen to cells. As a result, PRV/HSMI infected fish have less athletic ability;
- PRV is also associated with jaundice, lethargy, poor growth, block spots, HSMI-like disease and other clinical conditions;
- stressful events induce adverse health effects associated with PRV. The DFO has concluded that sea lice make salmonids more susceptible to infection, and sea lice are a major problem in the Asserted Territory; and
- adverse health effects associated with PRV reduce ability to escape predation and spawn.

[62] Finally, Dr. Kibenge opined that FASP is inadequate to detect and prevent the spread of PRV and HSMI to populations of wild Pacific salmon. It has previously failed to detect HSMI, and a report by 11 experts, five of whom were DFO scientists at the time, expressly said that FASP was inadequate because it employs limited sampling and uses different diagnostic criteria than is established in the scientific literature. It has likely underreported the occurrence of HSMI in BC aquaculture facilities. Indeed, the DFO's criteria for "disease outbreaks" of HSMI contradict that of the World Organization of Animal Health. Undetected outbreaks increase the risk of the spread of HSMI and PRV.

[63] He concluded by stating that not testing for PRV before transferring fish into the marine environment will substantially increase the risk that wild fish will be infected with PRV and that wild Pacific salmon will incur the negative health consequences associated with PRV.

[64] In his reply affidavit of March 19, 2018, Dr. Kibenge challenged the Marine Harvest test results for PRV. While I allowed this evidence to be considered, I gave it limited weight in reaching my decision.

(3) Dr. Martin Krkosek

[65] Dr. Krkosek is an Assistant Professor and Canada Research Chair of Ecology and Evolutionary Biology in Population Ecology at the Department of Ecology and Evolutionary Biology at the University of Toronto. He is also an advisor to the Commissioner of the Environment and Sustainable Development in the Office of the Auditor General of Canada for its assessment of salmon aquaculture. Dr. Krkosek has a PhD in Biological Sciences from the University of Alberta and a BSc in Biology and Mathematics from the University of Victoria. He has been working in the field of population ecology of infectious diseases and marine fishes since 2003, including conducting fieldwork on wild Pacific salmon in the Asserted Territory as well as publishing articles on wild Pacific salmon populations and how they may be affected by marine aquaculture operations.

[66] Dr. Krkosek assessed the potential impact of not testing for PRV before restocking the Swanson Island Facility on 69 populations of pink, chum, sockeye, chinook and coho that spawn

in or migrate through the Asserted Territory (the "Assessed Populations"). He concluded that:

- the health and long-term viability of conservation units and populations of wild Pacific salmon that may use the Asserted Territory has been significantly depleted:
 - 41 distinct salmon populations or conservation units of species of the Assessed Populations are in a poor or imperilled condition as determined by the Committee for the Status of Endangered Wildlife in Canada ("COSEWIC") (17 populations), DFO (21 populations), or by him (4 populations) (the "Vulnerable Populations");
 - many of the Assessed Populations historically supported fisheries of high significance for commercial fishers and First Nations, but those fisheries are now closed or restricted;
- as a result of the low abundance and productivity of the Vulnerable Populations, there is little capacity for those populations to persist under currently unfavourable environmental and biological conditions, let alone to absorb new stressors;
- the restocking of the Swanson Island aquaculture facility with PRV-infected Atlantic salmon will result in the most important mechanism, or risk factor, by which an infectious disease can cause the extirpation of endangered populations - a reservoir host population (farmed salmon) that maintains a virus population from which the virus can spread into an imperilled wild host population (depleted wild Pacific salmon);
- the resulting spread of PRV to the Vulnerable Populations is very likely to cause the following serious impacts:
 - depleted health, survival, and reproductive success of individuals in the Vulnerable Populations, adding to existing sources of mortality or reproductive failure affecting these populations;
 - increased likelihood that Vulnerable Populations suffer extirpation owing to the additional mortality and/or reproductive failures caused by PRV infections;
 - declines in population size of genetically, behaviourally, and physiologically unique conservation units;
 - genetic diversity lost due to population decline or extirpation that is irreversible on the time scale of hundreds of years and may not be recoverable at all;
 - Vulnerable Populations already at risk of extirpation and slow, or no recovery, will have elevated risk of becoming locally extirpated; and
 - loss of genetic diversity owing to the loss or decline of a conservation unit will reduce standing biodiversity and therefore reduce the capacity for adaptation to other significant stressors, such as climate change, making populations more vulnerable to extirpation; and
 - the loss of crucial food resources for Northern Resident Killer Whales, which are listed as threatened, and Southern Resident Killer Whales, which are listed as endangered, under the *Species at Risk Act*, SC 2002, c 29.

[67] Dr. Krkosek explained that populations and conservation units of all five of the major species of Pacific salmon that occur in the Asserted Territory are at risk or in poor condition.

This includes juvenile sockeye originating from the Nipkish, Fraser and Sakinaw watersheds that

are categorized as “endangered” or of “special concern” by COSEWIC or as “stocks of concern” by the DFO. Other populations of salmon that use the Asserted Territory include chinook from the Fraser River that are listed as “threatened” by COSEWIC and amber or amber/green by DFO, as well as chum and pink salmon that once had historically productive populations but are now subject to fishery closures and restrictions.

[68] Eight of the Vulnerable Populations are local to the Asserted Territory, meaning that the watershed they originate from is within or in close proximity to the Asserted Territory. In particular, the DFO has identified as “stocks of concern” two sockeye populations local to the Asserted Territory and has frequently applied restrictions or closures of those commercial fisheries, or the Aboriginal food, social and ceremonial fisheries, due to low abundance. As well, the Nimpkish River chum salmon population has collapsed relative to historical levels, and the DFO has imposed restrictions to protect and rebuild that population.

[69] Dr. Krkosek concluded that it is very likely that stocking the Swanson Island Facility with PRV-infected salmon will cause the following irreversible impacts to the health of individuals and the Vulnerable Populations:

- individuals lost due to PRV infection cannot be replaced;
- genetic diversity lost due to population decline or extirpation will be slow to recover if it recovers at all; and
- populations already at risk of extirpation and slow, or no recovery, will have elevated risk of becoming locally extirpated.

B. *Marine Harvest*

(1) Diane Morrison

[70] Diane Morrison is the Director of Fish Health and Food Safety for Marine Harvest. She has a BSc from the University of Guelph and a Doctor of Veterinary Medicine from the Ontario Veterinary College at the University of Guelph. She is licensed to practice veterinary medicine in BC.

[71] Ms. Morrison provided an affidavit outlining Marine Harvest's screening of fish for health concerns. The company has Standard Operating Procedures ("SOPs") for different types of sampling and testing, including for PRV. The SOP for testing for PRV was developed in collaboration with the BC Animal Health Centre and has been in place since 2013 when the litigation in Morton began. Since then, Marine Harvest has voluntarily monitored for PRV at its production facilities to increase knowledge of its occurrence, prevalence and significance.

[72] She explained that for PRV testing, fish are sampled one at a time. All tools are sterilized before collecting heart samples, which are placed into individually labelled whirlpaks, frozen and then sent to the BC Centre for Aquatic Health Sciences ("CAHS") for analysis. CAHS follows International Organization for Standardization ("ISO") and Good Laboratory Practice ("GLP") guidelines, and has CFIA Level II accreditation and US Fish and Wildlife Service ("USFWS") Title 50 accreditation. They use a Polymerase Chain Reaction ("PCR") based method to test for PRV.

[73] On December 19, 2017, Marine Harvest staff sampled 20 randomly collected fish from the Ocean Falls Hatchery pursuant to the PRV sampling protocol. On January 24, Marine Harvest staff sampled 19 randomly collected fish from the Ocean Falls Hatchery pursuant to the PRV sampling protocol. On March 7, 2018, Marine Harvest employees sampled 36 fish from the Ocean Falls Hatchery -- 30 of these fish were randomly collected and 6 were fresh mortalities. All of these samples were delivered to CAHS shortly after collection, and all samples tested negative for PRV.

(2) Vincent Erenst

[74] Mr. Erenst is the Managing Director for Marine Harvest and Chair of the BC Salmon Farmers Association. He has a BSc in biology from the University of Groningen and a MSc in biology from Wageningen University and Research Centre in the Netherlands. He has worked in the field of aquaculture for 35 years.

[75] Mr. Erenst explained that there are about 1,120,000 smolts at the Ocean Falls hatchery that will be ready for transfer shortly. Marine Harvest started the smoltification process for most of these fish on February 12, 2018. When ready, the smolts must be removed from their freshwater tanks and taken to a saltwater farm site within a short window of time, or most of them will die.

[76] Over the next four weeks, Marine Harvest plans to stock the Swanson Island Facility and one other site with about 1.95 million smolts. Both sites will be ready on March 23, 2018. The Swanson Island Facility is expected to receive 950,000 smolts between March 23 and April 5. If

the Swanson Island Facility is not available, all of the smolts will have to be stocked at the other prepared site. Such a high density of stocking goes against good aquaculture practices and will reduce growth and potentially increase mortality.

[77] If all 1.95 million smolts are stocked at the other facility, Mr. Erenst estimated a loss in production in the range of \$1.85 million. This is based on an estimated reduction in growth by 10-20% and an estimated increase in mortality by 5%, resulting in a loss of 284,000 kg of production at \$6.50 per kg. As well, if an injunction is granted, Marine Harvest would lose the capacity of the Swanson Island Facility.

[78] Furthermore, he stated that Marine Harvest has incurred approximately \$250,000 in costs to date to prepare the Swanson Island Facility for receipt of the smolts. It would cost an additional \$200,000 to remove the equipment if the site is not stocked.

VI. Preliminary Issues

[79] At the start of the hearing, the Applicant sought to introduce affidavits of Chief Svanvik and Dr. Kibenge in reply to the evidence filed by the Respondents on March 18, 2018. After hearing submissions by counsel on the admissibility of that evidence, I admitted the evidence of Dr. Kibenge in reply and denied the admissibility of Chief Svanvik's affidavit as not being proper reply evidence.

VII. Issues

[80] The following issues arise for decision:

- A. Has the Applicant established a serious question to be tried?
- B. Has the Applicant established that it would suffer irreparable harm if the application is refused?
- C. Does the balance of convenience favour the granting of an injunction?
- D. If an injunction is to be granted, should the Applicant give an undertaking as to damages?

VIII. Analysis

[81] The parties agree that the test for interlocutory relief was set out by the Supreme Court of Canada in *RJR-MacDonald Inc v Canada (AG)*, [1994] 1 SCR 311 [*RJR-MacDonald*] at 347-349, and comprises three elements:

- a) whether there is a serious question to be tried;
- b) whether the Applicant will suffer irreparable harm if the relief is refused; and
- c) whether the balance of convenience favours granting the relief sought.

[82] The test is conjunctive and all three criteria must be satisfied to obtain interlocutory relief. The fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case (*Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 25).

[83] Furthermore, Rule 373(2) of the *Federal Courts Rules* provides that unless the Court orders otherwise, a party bringing a motion for an interlocutory injunction shall undertake to abide by any order concerning damages caused by the granting of the injunction.

A. *Serious question to be tried*

[84] The parties all agree that there are serious issues to be tried. Those issues generally relate to the Minister's obligation to regulate fish transfers and duty to consult and accommodate the Applicant.

B. *Irreparable harm*

[85] As a preliminary objection, the Minister argues that this motion is an attempt to circumvent the underlying judicial review in this matter, by challenging the PRV Policy and the DFO's analysis of the science on which that policy is based, as well as by challenging the Minister's interpretation of subsection 56(b) of the *FGR*. Moreover, the Applicant's argument that there has not been adequate consultation is also an attempt to have the Court reach a final decision on an issue that should be left for the judicial review judge to decide based on a complete record.

[86] The Minister also takes the position that the expert evidence relied upon by the Applicant in this motion for interlocutory relief is in reality an attempt to rely upon extrinsic evidence in a judicial review application, and therefore that evidence is inadmissible and should be disregarded by the Court. I disagree.

[87] To the extent the Applicant seeks a determination of the reasonableness of the PRV Policy or decision to not consult with the Applicant, I will not and cannot decide those issues on this motion; it is for the Court in the underlying judicial review to decide.

[88] What I can and will decide is whether the evidence before me supports a finding of irreparable harm and a balance of convenience in favour of either the Applicant or the Respondents, such that an interlocutory injunction to prevent transfer of the impugned fish to the Swanson Island Facility is either granted or denied. That interlocutory relief is neither final nor usurping the role of the Court in determining the issues before it in the judicial review application.

[89] “Irreparable” refers to the nature of the harm suffered rather than its magnitude; it is harm that either cannot be quantified in monetary terms or cannot be cured (*RJR-MacDonald* at 341). The Applicant must adduce clear and non-speculative evidence that irreparable harm will follow if the motion for interlocutory relief is denied (*United States Steel Corporation v Canada (Attorney General)*, 2010 FCA 200 [*US Steel*] at para 7). It is not sufficient to demonstrate that irreparable harm is likely to be suffered, nor should the alleged harm be based on mere assertions (*US Steel* at para 7).

[90] However, Canadian appellate courts have also held that “clear proof of irreparable harm is not required” and have cautioned against requiring claimants to prove to a high degree of certainty that irreparable harm will conclusively result:

The purpose sought to be achieved by giving a judge the discretion to grant interlocutory relief will be “stultified,” to use Lord

Diplock's term, if he or she could consider in the balance of convenience only such irreparable harm as is certain or highly likely to occur.

Vancouver Aquarium Marine Science Centre v Charbonneau, 2017 BCCA 395 at para 59.

- [91] In considering the issue of irreparable harm, the Respondents argue:
- i. The Court should not consider the question of whether the Minister is acting consistent with the *Morton* decision, or whether the Minister erred in deciding to adopt the PRV Policy. I agree;
 - ii. The Minister adopted the PRV Policy based on evaluation of available relevant science in January 2017, and again in March 2018, and found that PRV is not a disease agent that may be harmful to the conservation and protection of fish;
 - iii. No irreparable harm has been established, given that Marine Harvest conducted tests on three samples of the impugned fish population and no PRV was detected;
 - iv. Those tests were conducted by a qualified veterinarian and an independent, certified laboratory; and
 - v. It is premature to determine that a lack of consultation can establish irreparable harm.
- [92] However, the evidence before the Court establishes the following:
- i. The approach taken by the DFO in managing the transfer of Atlantic salmon smolts to aquaculture facilities involves no supervisory control or objective criteria with respect to testing for PRV or HSMI in the fish being transferred;
 - ii. The wild salmon stocks in the Asserted Territory and wild salmon stocks migrating through that territory are at significant risk with severely declining stocks;
 - iii. The salmon fishery is of fundamental importance to the asserted Aboriginal rights of the Applicant, yet the Minister has refused to consult with respect to the PRV Policy, Transfer Licences and the potential risk to wild salmon populations and the stewardship of the salmon fishery in the Asserted Territory;
 - iv. The testing by Marine Harvest on three occasions of the impugned Atlantic salmon stock destined for Swanson Island is highly suspect, given that the sample size is extremely small and the DFO didn't know the test results or protocol used;
 - v. Research has shown that PRV is directly linked to HSMI;
 - vi. HSMI has been found to cause significant mortality and morbidity in farmed Atlantic salmon in Norway, and has recently been diagnosed in farmed Atlantic salmon in BC; and
 - vii. The Applicant's experts concluded that PRV can be transferred from farmed Atlantic salmon to wild Pacific salmon, will likely cause HSMI in wild Pacific salmon, and that farmed salmon in open-net pens are the most significant source of PRV in the marine environment.

[93] Based on the evidence before the Court, I have no difficulty in finding that the Applicant has established a serious risk of irreparable harm on a number of fronts: the complete lack of consultation by the Minister in respect of this transfer of Atlantic salmon into the Asserted Territory, notwithstanding a previous acknowledgement of a strong claim to Aboriginal fishing rights in that territory; evidence of the salmon fishery being of fundamental importance to the Applicant's culture and way of life; that fishery being at serious risk, given the depleted wild salmon populations in the Asserted Territory; and the recent science establishing the connection between PRV and HSMI and the resulting risk of disease and mortality. All of this is proof of a real and non-speculative likelihood of irreparable harm to the Applicant.

[94] The risk to the Applicant's way of life, culture and traditions in salmon fishing, and the lack of meaningful consultation regarding Transfer Licences that could adversely affect their asserted Aboriginal rights, is particularly compelling with respect to irreparable harm.

[95] As stated in *Homalco Indian Band v British Columbia (Minister of Agriculture, Food and Fisheries)*, 2004 BCSC 1764, at paras 62-63:

62 The starting point must be, I would suggest, the requirement that the government, be they the Federal government or the Provincial government, has a duty to consult with aboriginals in respect of matters affecting aboriginal lands. The right to be consulted, described and formulated most recently by the Supreme Court of Canada in *Haida*, does not give any native group a right of veto over any government's management of resources under its jurisdiction.

63 That said, however, a meaningful opportunity for consultation must be afforded. If in retrospect, one finds that a meaningful opportunity has not been afforded, then failing to provide immediate corrective remedies or to prevent further action under the impugned process or licensing rights, tends to sound a death

knell to the consultation process because the harm which could result from it might never be rectified.

C. *Balance of convenience*

[96] An interim and/or interlocutory injunction tries to strike a balance between parties' rights and fairness and equity on a relatively immediate basis – days, weeks or months at most – assuming the Court action proceeds as it should in the normal course.

[97] The balance of convenience analysis involves a determination of which of the two parties will suffer the greater harm from the granting or refusal of interlocutory relief, pending a decision on the merits (*RJR-MacDonald* at 342). In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account (*RJR-MacDonald* at 350).

[98] I agree with the parties that in applying the *RJR-MacDonald* test for interlocutory relief, the three criteria are interrelated and should not be assessed in isolation from one another. Those criteria provide a framework and the ultimate focus of the Court must always be on the justice and equity of the situation in issue (*Unilin Beheer BV et al v Triforest Inc et al*, 2017 FC 76 at para 12; *Potash Corp of Saskatchewan Inc v Mosaic Potash Esterhazy Limited Partnership*, 2011 SKCA 120 at para 26).

[99] The Applicant states that when the Court considers which party will suffer the greater harm in balancing the parties' rights and interests, the government doesn't have a monopoly on the public interest (*RJR-MacDonald* at 343). As well, there is significant public interest in reconciliation and in giving recognition to the Supreme Court of Canada's emphasis on

consultation and accommodation (*Ahousaht v Minister of Fisheries and Oceans*, 2014 FC 197 at paras 30-32)

[100] Furthermore, the Applicant argues:

- i. DFO and Marine Harvest were well aware of its concerns and objection to the transfer without consultation and PRV testing;
- ii. There is at least one alternative site for Marine Harvest to relocate the impugned Atlantic salmon smolts;
- iii. Any loss in economic terms is monetary in nature and can be compensated in damages;
- iv. The *status quo* is that the Swanson Island Facility is currently empty; and
- v. The risk of harm to the Applicant and its asserted Aboriginal rights, as well as the risk of harm to the already depleted salmon stocks, outweighs any potential economic losses or public interest put forward by the DFO or Marine Harvest.

[101] The Minister's position is that there will be harm to the public interest if the order is granted, as well as economic harm to the aquaculture industry, in that the DFO would effectively be prevented from exercising its statutory authority to manage the fishery and issue Transfer Licences.

[102] Marine Harvest claims there will be harm to the Atlantic salmon smolts proposed for transfer if they are not transferred to the marine environment within a certain time frame – the next few days. Furthermore, the Applicant's delay in bringing this motion has exacerbated this problem such that this harm can no longer be avoided.

[103] The parties' counsel agreed that this is an unusual case on the facts and I agree. Often in cases seeking interlocutory relief, if the Court finds there is both a serious issue and a likelihood of irreparable harm, the balance of convenience flows with the first two prongs of the *RJR-MacDonald* test.

[104] However, the Court must consider what constitutes a just and equitable result in the context of each case. Here, the facts concerning the *status quo*, expected economic losses of Marine Harvest, and delay on the part of the Applicant, favours Marine Harvest.

[105] The *status quo* favours Marine Harvest – although the Swanson Island Facility is currently empty, it has been operating for many years with regular transfers of Atlantic salmon, including a harvest of fish from that facility as recently as December 2017. Marine Harvest has complied with the DFO requirements for transfers of fish during that period of time. Regardless of whether the DFO has acted reasonably with respect to its PRV Policy, a matter to be determined on the underlying judicial review, Marine Harvest has not acted outside its legal rights to proceed as it has.

[106] Moreover, as set out in the affidavit of Mr. Erenst, only one other site could possibly be used to receive the smolts currently awaiting transfer to the Swanson Island Facility. That alternative site is already planned to receive a substantial number of other smolts. If Marine Harvest is forced to transfer both smolt populations to the alternative site, the fish would be reared at an undesirably high density, which goes against good aquaculture practice and will reduce growth and potentially increase mortality. Marine Harvest estimates this would result in approximately \$2.1 million in damages, when costs associated with current preparations of the Swanson Island Facility are also taken into account.

[107] Marine Harvest claims that it would take several weeks to prepare a different site to receive the impugned smolts. This option is not available, given that the fish are ready for

transfer now and that the transfer must begin immediately to avoid the adverse effects described above.

[108] The urgent need for a decision is largely due to the Applicant's unexplained delay in bringing this motion. In his affidavit, Chief Svanvik clearly states that the Applicant met with representatives from Marine Harvest on December 21, 2017, and was told that Marine Harvest planned to restock the Swanson Island Facility in March or April of 2018. This motion for interlocutory relief was not filed until March 9, 2018, mere days before the transfer was set to begin.

[109] While I accept that there has been a distinct lack of consultation on the part of the Minister, which harms Aboriginal rights and the public interest in reconciliation, I note that Aboriginal groups should not frustrate good faith attempts at consultation (*Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 42). Marine Harvest has maintained dialogue with the Applicant throughout, except for providing certain information requested by the Applicant such as its Transfer Licence application and PRV testing methods. It was not given any warning of an impending motion for interlocutory relief. Had the motion been filed shortly after the December 21 meeting, or Marine Harvest otherwise been informed that the Applicant would seek an injunction, other options may have been available with respect to finding a home for the impugned smolts.

[110] Given these circumstances, the balance of convenience weighs in favour of Marine Harvest and therefore the granting of an injunction would not be just and equitable in all of the circumstances.

[111] Finally, it is my opinion that the underlying application for judicial review should proceed as expeditiously as possible. The parties should therefore take immediate steps to seek orders or directions from the case management judge to fix a timetable for completion of steps leading to an expedited hearing of the application.

D. *Undertaking as to damages*

[112] Given that I find that the balance of convenience favours the Respondents in not granting interlocutory relief, I need not consider this issue.

IX. Conclusion

[113] The motion for interlocutory relief is dismissed. Costs in the cause.

ORDER in T-430-18

THIS COURT'S ORDER is that:

1. The motion is dismissed.
2. Costs in the cause.

"Michael D. Manson"

Judge

FEDERAL COURT**SOLICITORS OF RECORD**

DOCKET: T-430-18

STYLE OF CAUSE: 'NAMGIS FIRST NATION v MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST GUARD AND MARINE HARVEST CANADA INC

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: MARCH 19-20, 2018

ORDER AND REASONS: MANSON J.

DATED: MARCH 23, 2018

APPEARANCES:

Scott A. Smith
Paul Seaman
Sean P. Jones

FOR THE APPLICANT

Steven C. Postman
Lisa M.G. Nevens

FOR THE RESPONDENTS,
MINISTER OF FISHERIES, OCEANS AND
THE CANADIAN COAST GUARD

Christopher J. Watson

FOR THE RESPONDENT,
MARINE HARVEST CANADA INC.

SOLICITORS OF RECORD:

Gowling WLG (Canada) LLP
Barristers and Solicitors
Vancouver, British Columbia

FOR THE APPLICANT

Attorney General of Canada
Vancouver, British Columbia

FOR THE RESPONDENTS
MINISTER OF FISHERIES, OCEANS AND
THE CANADIAN COAST GUARD

Mackenzie Fujisawa LLP
Barristers and Solicitors
Vancouver, British Columbia

FOR THE RESPONDENT,
MARINE HARVEST CANADA INC

TAB 20

Canadian Broadcasting Corporation
Appellant

v.

Her Majesty The Queen *Respondent*

and

CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Postmedia Network Inc., Vice Studio Canada Inc., Aboriginal Peoples Television Network and AD IDEM/Canadian Media Lawyers Association *Interveners*

INDEXED AS: R. v. CANADIAN BROADCASTING CORP.

2018 SCC 5

File No.: 37360.

2017: November 1; 2018: February 9.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

Injunctions — Interlocutory injunctions — Publication bans — Mandatory publication ban issued pursuant to Criminal Code respecting identity of young victim — Media outlet refused to remove from its website articles which pre-existed publication ban and which identified victim by name and photograph — Crown bringing application for contempt and for mandatory interlocutory injunction requiring removal of information from media outlet’s website — Applicable framework for granting mandatory interlocutory injunction — Whether Crown must establish strong prima facie case or serious issue to be tried — Whether chambers judge erred in refusing interlocutory injunction because Crown failed to show strong prima facie case of criminal contempt — Criminal Code, R.S.C. 1985, c. C-46, s. 486.4(2.1), (2.2).

Société Radio-Canada *Appelante*

c.

Sa Majesté la Reine *Intimée*

et

CTV, une division de Bell Média inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Postmedia Network Inc., Studio Vice Canada Inc., Réseau de télévision des peuples autochtones et AD IDEM/Canadian Media Lawyers Association *Intervenants*

RÉPERTORIÉ : R. c. SOCIÉTÉ RADIO-CANADA

2018 CSC 5

N° du greffe : 37360.

2017 : 1 novembre; 2018 : 9 février.

Présents : La juge en chef McLachlin et les juges Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown et Rowe.

EN APPEL DE LA COUR D’APPEL DE L’ALBERTA

Injunctions — Injunctions interlocutoires — Interdictions de publication — Prononcé d’une interdiction de publication mandatoire en vertu du Code criminel quant à l’identité d’une jeune victime — Refus du média de retirer de son site Web les articles affichés avant l’interdiction de publication et identifiant la victime par son nom et sa photo — Demande par le ministère public pour que soient prononcées une assignation pour outrage au tribunal et une injonction interlocutoire mandatoire intimant le retrait des renseignements du site Web du média — Cadre d’analyse applicable à la délivrance d’une injonction interlocutoire mandatoire — Le ministère public doit-il établir une forte apparence de droit ou l’existence d’une question sérieuse à juger? — Le juge en cabinet a-t-il commis une erreur en refusant de délivrer une injonction interlocutoire parce que le ministère public n’a pas établi une forte apparence de droit quant à l’existence d’un outrage criminel? — Code criminel, L.R.C. 1985, c. C-46, art. 486.4(2.1), (2.2).

2018 SCC 5 (CanLII)

An accused was charged with the first degree murder of a person under the age of 18. Upon the Crown's request, a mandatory ban prohibiting the publication, broadcast or transmission in any way of any information that could identify the victim was ordered pursuant to s. 486.4(2.2) of the *Criminal Code*. Prior to the issuance of the publication ban, CBC posted information revealing the identity of the victim on its website. As a result of CBC's refusal to remove this information, the Crown sought an order citing CBC in criminal contempt of the publication ban and an interlocutory injunction directing the removal of the victim's identifying information. The chambers judge concluded that the Crown had not established the requirements for a mandatory interlocutory injunction, and dismissed its application. The majority of the Court of Appeal allowed the appeal and granted the mandatory interlocutory injunction.

Held: The appeal should be allowed.

To obtain a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the *RJR — MacDonald* test is not whether there is a serious issue to be tried, but rather whether the applicant has demonstrated a strong *prima facie* case. The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction further demand an extensive review of the merits at the interlocutory stage. This modified *RJR — MacDonald* test entails showing a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice. The applicant must also demonstrate that irreparable harm will result if the relief is not granted and that the balance of convenience favours granting the injunction.

In this case, a literal reading of the originating notice shows that the Crown brought an application for criminal contempt and sought an interim injunction in that proceeding. The Crown thus proceeded on the basis that its application for an interlocutory injunction was sought in respect of the citation for criminal contempt. The originating notice itself, and the sequencing therein of the relief sought, belies its putatively hybrid character. The two applications are linked, such that the latter is tied not to the mere placement by CBC of the victim's identifying information on its website, but to the sought-after criminal contempt citation. Each prayer for relief does not launch an independent proceeding; rather, both relate to

Un accusé a été inculpé du meurtre au premier degré d'une personne âgée de moins de 18 ans. À la demande du ministère public, une interdiction mandatoire de publier ou de diffuser de quelque façon que ce soit tout renseignement permettant d'identifier la victime a été délivrée en vertu du par. 486.4(2.2) du *Code criminel*. Avant la délivrance de l'interdiction de publication, la SRC a affiché sur son site Web des renseignements qui révélaient l'identité de la victime. Compte tenu du refus de la SRC de retirer ces renseignements de son site Web, le ministère public a sollicité une assignation pour outrage criminel contre la SRC pour violation de l'interdiction en question ainsi qu'une injonction interlocutoire exigeant le retrait des renseignements identifiant la victime. Le juge en cabinet a conclu que le ministère public n'avait pas satisfait aux exigences relatives à l'injonction interlocutoire mandatoire et a rejeté sa demande. Les juges majoritaires de la Cour d'appel ont accueilli l'appel et accordé l'injonction interlocutoire mandatoire.

Arrêt : L'appel est accueilli.

Pour obtenir une injonction interlocutoire mandatoire, le critère approprié pour juger de la solidité de la preuve du demandeur à la première étape du test énoncé dans *RJR — MacDonald* n'est pas celui de l'existence d'une question sérieuse à juger, mais plutôt celui de savoir si le demandeur a établi une forte apparence de droit. Les conséquences potentiellement sérieuses pour un défendeur de la délivrance d'une injonction interlocutoire mandatoire exigent en outre qu'un examen approfondi soit fait sur le fond à l'étape interlocutoire. Suivant cette version modifiée du test énoncé dans *RJR — MacDonald*, le demandeur doit démontrer une forte chance au regard du droit et de la preuve présentée que, au procès, il réussira ultimement à prouver les allégations énoncées dans l'acte introductif d'instance. Le demandeur doit aussi démontrer qu'il subira un préjudice irréparable si la réparation n'est pas accordée et que la prépondérance des inconvénients favorise la délivrance de l'injonction.

En l'espèce, une interprétation littérale de l'avis introductif d'instance démontre que le ministère public a intenté une action pour outrage criminel et a cherché à obtenir une injonction interlocutoire dans le cadre de cette instance. Le ministère public s'est donc fondé sur le fait que l'injonction interlocutoire était sollicitée à l'égard de la demande d'assignation pour outrage criminel. L'avis introductif d'instance en soi, ainsi que l'ordre dans lequel les réparations y sont demandées, contredit qu'il puisse avoir un caractère hybride. Les deux demandes sont liées, de sorte que la deuxième se rapporte non pas au simple affichage sur le site Web de la SRC des renseignements identifiant la victime, mais à l'assignation pour outrage

the alleged criminal contempt. In addition, an injunction is not a cause of action, in the sense of containing its own authorizing force. It is a remedy. An originating application must state both the claim and the basis for it and the remedy sought. Here, the Crown's originating notice discloses only a single basis for seeking a remedy: CBC's alleged criminal contempt of court. Therefore, the Crown was bound to show a strong *prima facie* case of criminal contempt of court. This case should not however be taken as standing for the proposition that injunctive relief is ordinarily or readily available in criminal matters. The delineation of the circumstances in which an interlocutory injunction may be sought and issued to enjoin allegedly criminal conduct is not decided here.

The decision to grant or refuse an interlocutory injunction is a discretionary exercise, with which an appellate court must not interfere solely because it would have exercised the discretion differently. Appellate intervention is justified only where the chambers judge proceeded on a misunderstanding of the law or of the evidence before him, where an inference can be demonstrated to be wrong by further evidence that has since become available, where there has been a change of circumstances or where the decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge could have reached it. In this case, the Crown's burden was not to show a case for criminal contempt that leans one way or another, but rather a case, based on the law and evidence presented, that has a strong likelihood that it would be successful in proving CBC's guilt of criminal contempt of court. This is not an easy burden to discharge and the Crown has failed to do so here. The chambers judge applied the correct legal test in deciding the Crown's application and his decision that the Crown's case failed to satisfy that test did not, in these circumstances, warrant appellate intervention.

Cases Cited

Applied: *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; **distinguished:** *Canada (Human Rights Commission) v. Canadian Liberty Net*,

criminel sollicitée. Chaque demande de réparation ne donne pas lieu à une instance distincte; elles sont plutôt toutes les deux liées à l'outrage criminel reproché. De plus, l'injonction n'est pas une cause d'action, en ce sens qu'elle ne contient pas son propre pouvoir d'autoriser l'action. Il s'agit d'une réparation. Une demande introductive d'instance doit énoncer tant l'objet de la demande et son fondement que la réparation demandée. En l'espèce, la demande introductive d'instance du ministère public n'indique qu'un motif pour lequel il veut obtenir une réparation : l'outrage criminel au tribunal reproché à la SRC. Le ministère public était donc tenu d'établir une forte apparence de droit quant à l'existence d'un outrage criminel au tribunal. L'issue du présent appel ne devrait cependant pas être interprétée comme signifiant que l'injonction est une réparation courante et facile à obtenir dans les affaires criminelles. La façon dont il faut définir les circonstances permettant de demander et de délivrer une injonction interlocutoire pour empêcher une conduite prétendument criminelle n'est pas tranchée ici.

La décision d'accorder ou de refuser une injonction interlocutoire relève d'un pouvoir discrétionnaire, et les cours d'appel ne doivent pas modifier la décision en découlant simplement parce qu'elles auraient exercé ce pouvoir différemment. Une intervention en appel est justifiée uniquement lorsque le juge en cabinet a pris une décision qui repose sur une erreur de droit ou sur une interprétation erronée de la preuve produite devant lui, lorsque le caractère erroné d'une conclusion peut être démontré par des éléments de preuve supplémentaires dont on dispose au moment de l'appel, lorsque les circonstances ont changé ou lorsque la décision du juge d'accorder ou de refuser l'injonction est à ce point aberrante qu'elle doit être infirmée pour le motif qu'aucun juge raisonnable n'aurait pu la rendre. En l'espèce, le fardeau du ministère public n'était pas de présenter une preuve d'outrage criminel qui penche dans un sens ou dans l'autre, mais plutôt une preuve qui, au regard du droit et des éléments de preuve présentés, avait une forte chance de réussir à prouver la culpabilité de la SRC pour outrage criminel au tribunal. Il n'est pas facile de s'acquitter d'un tel fardeau et le ministère public n'a pas réussi à le faire en l'espèce. Le juge en cabinet a appliqué le bon test juridique lorsqu'il s'est prononcé sur la demande du ministère public, et sa décision selon laquelle la preuve présentée par ce dernier ne satisfaisait pas à ce test ne justifiait pas, dans les circonstances, une intervention en appel.

Jurisprudence

Arrêt appliqué : *RJR — MacDonald Inc. c. Canada (Procureur général)*, [1994] 1 R.C.S. 311; **distinction d'avec l'arrêt :** *Canada (Commission des droits de la*

[1998] 1 S.C.R. 626; referred to: *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901; *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110; *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396; *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, [2017] 1 S.C.R. 824; *Medical Laboratory Consultants Inc. v. Calgary Health Region*, 2005 ABCA 97, 19 C.C.L.I. (4th) 161; *Modry v. Alberta Health Services*, 2015 ABCA 265, 388 D.L.R. (4th) 352; *Conway v. Zinkhofer*, 2006 ABCA 74; *D.E. & Sons Fisheries Ltd. v. Goreham*, 2004 NSCA 53, 223 N.S.R. (2d) 1; *AMEC E&C Services Ltd. v. Whitman Benn and Associates Ltd.*, 2003 NSSC 112, 214 N.S.R. (2d) 369, aff'd 2003 NSCA 126, 219 N.S.R. (2d) 126; *Cytrynbaum v. Look Communications Inc.*, 2013 ONCA 455, 307 O.A.C. 152; *Sawridge Band v. Canada*, 2004 FCA 16, [2004] 3 F.C.R. 274; *Jamieson Laboratories Ltd. v. Reckitt Benckiser LLC*, 2015 FCA 104, 130 C.P.R. (4th) 414; *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership*, 2011 SKCA 120, 341 D.L.R. (4th) 407; *La Plante v. Saskatchewan Society for the Prevention of Cruelty to Animals*, 2011 SKCA 43, [2012] 3 W.W.R. 293; *Summerside Seafood Supreme Inc. v. Prince Edward Island (Minister of Fisheries, Aquaculture and Environment)*, 2006 PESCAD 11, 256 Nfld. & P.E.I.R. 277; *National Commercial Bank Jamaica Ltd. v. Olint Corp. Ltd.*, [2009] UKPC 16, [2009] 1 W.L.R. 1405; *H&R Block Canada Inc. v. Inisoft Corp.*, 2009 CanLII 37911; *Fradenburgh v. Ontario Lottery and Gaming Corp.*, 2010 ONSC 5387; *Boehringer Ingelheim (Canada) Inc. v. Bristol-Myers Squibb Canada Inc.* (1998), 83 C.P.R. (3d) 51; *Shepherd Home Ltd. v. Sandham*, [1970] 3 All E.R. 402; *Barton-Reid Canada Ltd. v. Alfresh Beverages Canada Corp.*, 2002 CanLII 34862; *Bark & Fitz Inc. v. 2139138 Ontario Inc.*, 2010 ONSC 1793; *Quality Pallets and Recycling Inc. v. Canadian Pacific Railway Co.*, 2007 CanLII 13712; *West Nipissing Economic Development Corp. v. Weyerhaeuser Co.*, 2002 CanLII 26148; *Parker v. Canadian Tire Corp.*, [1998] O.J. No. 1720 (QL); *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042; *B.C. (A.G.) v. Wale*, [1987] 2 W.W.R. 331, aff'd [1991] 1 S.C.R. 62; *White Room Ltd. v. Calgary (City)*, 1998 ABCA 120, 62 Alta. L.R. (3d) 177; *Musqueam Indian Band v. Canada (Minister of Public Works and Government Services)*, 2008 FCA 214, 378 N.R. 335, leave to appeal refused, [2008] 3 S.C.R. viii.

Statutes and Regulations Cited

Alberta Rules of Court, Alta. Reg. 124/2010, r. 3.8(1).
Criminal Code, R.S.C. 1985, c. C-46, s. 486.4 (2.1), (2.2).

personne) c. *Canadian Liberty Net*, [1998] 1 R.C.S. 626; **arrêts mentionnés** : *United Nurses of Alberta c. Alberta (Procureur général)*, [1992] 1 R.C.S. 901; *Manitoba (Procureur général) c. Metropolitan Stores Ltd.*, [1987] 1 R.C.S. 110; *American Cyanamid Co. c. Ethicon Ltd.*, [1975] A.C. 396; *Google Inc. c. Equustek Solutions Inc.*, 2017 CSC 34, [2017] 1 R.C.S. 824; *Medical Laboratory Consultants Inc. c. Calgary Health Region*, 2005 ABCA 97, 19 C.C.L.I. (4th) 161; *Modry c. Alberta Health Services*, 2015 ABCA 265, 388 D.L.R. (4th) 352; *Conway c. Zinkhofer*, 2006 ABCA 74; *D.E. & Sons Fisheries Ltd. c. Goreham*, 2004 NSCA 53, 223 N.S.R. (2d) 1; *AMEC E&C Services Ltd. c. Whitman Benn and Associates Ltd.*, 2003 NSSC 112, 214 N.S.R. (2d) 369, conf. par 2003 NSCA 126, 219 N.S.R. (2d) 126; *Cytrynbaum c. Look Communications Inc.*, 2013 ONCA 455, 307 O.A.C. 152; *Bande de Sawridge c. Canada*, 2004 CAF 16, [2004] 3 R.C.F. 274; *Jamieson Laboratories Ltd. c. Reckitt Benckiser LLC*, 2015 CAF 104; *Potash Corp. of Saskatchewan Inc. c. Mosaic Potash Esterhazy Limited Partnership*, 2011 SKCA 120, 341 D.L.R. (4th) 407; *La Plante c. Saskatchewan Society for the Prevention of Cruelty to Animals*, 2011 SKCA 43, [2012] 3 W.W.R. 293; *Summerside Seafood Supreme Inc. c. Prince Edward Island (Minister of Fisheries, Aquaculture and Environment)*, 2006 PESCAD 11, 256 Nfld. & P.E.I.R. 277; *National Commercial Bank Jamaica Ltd. c. Olint Corp. Ltd.*, [2009] UKPC 16, [2009] 1 W.L.R. 1405; *H&R Block Canada Inc. c. Inisoft Corp.*, 2009 CanLII 37911; *Fradenburgh c. Ontario Lottery and Gaming Corp.*, 2010 ONSC 5387; *Boehringer Ingelheim (Canada) Inc. c. Bristol-Myers Squibb Canada Inc.* (1998), 83 C.P.R. (3d) 51; *Shepherd Home Ltd. c. Sandham*, [1970] 3 All E.R. 402; *Barton-Reid Canada Ltd. c. Alfresh Beverages Canada Corp.*, 2002 CanLII 34862; *Bark & Fitz Inc. c. 2139138 Ontario Inc.*, 2010 ONSC 1793; *Quality Pallets and Recycling Inc. c. Canadian Pacific Railway Co.*, 2007 CanLII 13712; *West Nipissing Economic Development Corp. c. Weyerhaeuser Co.*, 2002 CanLII 26148; *Parker c. Canadian Tire Corp.*, [1998] O.J. No. 1720 (QL); *Amchem Products Inc. c. Colombie-Britannique (Workers' Compensation Board)*, [1993] 1 R.C.S. 897; *Hadmor Productions Ltd. c. Hamilton*, [1982] 1 All E.R. 1042; *B.C. (A.G.) c. Wale*, [1987] 2 W.W.R. 331, conf. par [1991] 1 R.C.S. 62; *White Room Ltd. c. Calgary (City)*, 1998 ABCA 120, 62 Alta. L.R. (3d) 177; *Musqueam Indian Band c. Canada (Minister of Public Works and Government Services)*, 2008 CAF 214, 378 N.R. 335, autorisation d'appel refusée, [2008] 3 R.C.S. viii.

Lois et règlements cités

Alberta Rules of Court, Alta. Reg. 124/2010, art. 3.8(1).
Code criminel, L.R.C. 1985, c. C-46, art. 486.4 (2.1), (2.2).

Authors Cited

Sharpe, Robert J. *Injunctions and Specific Performance*, 4th ed. Toronto: Canada Law Book, 2012.

Vermette, Marie-Andrée. "A Strong Prima Facie Case for Rationalizing the Test Applicable to Interlocutory Mandatory Injunctions", in Todd L. Archibald and Randall Scott Echlin, eds., *Annual Review of Civil Litigation, 2011*. Toronto: Carswell, 2011, 367.

APPEAL from a judgment of the Alberta Court of Appeal (Slatter, McDonald and Greckol J.J.A.), 2016 ABCA 326, 404 D.L.R. (4th) 318, [2017] 3 W.W.R. 413, 43 Alta. L.R. (6th) 213, 93 C.P.C. (7th) 269, [2016] A.J. No. 1085 (QI.), 2016 CarswellAlta 2034 (WL Can.), setting aside a decision of Michalyshyn J., 2016 ABQB 204, [2016] 9 W.W.R. 613, 37 Alta. L.R. (6th) 299, 86 C.P.C. (7th) 373, [2016] A.J. No. 336 (QL), 2016 CarswellAlta 620 (WL Can.). Appeal allowed.

Frederick S. Kozak, Q.C., Sean Ward, Tess Layton and Sean Moreman, for the appellant.

Iwona Kuklicz and Julie Snowden, for the respondent.

Iain A. C. MacKinnon, for the interveners.

The judgment of the Court was delivered by

BROWN J. —

I. Introduction

[1] The background leading to this appeal was summarized in the reasons of the chambers judge:¹

On March 5, 2016, [the accused] was charged with the first degree murder of D.J.I., a person under the age of 18 ("the victim"). On March 15, 2016 the Crown requested and a judge ordered a mandatory ban under s. 486.4(2.2) of the *Criminal Code*, R.S.C., 1985, c. C-46. The order prohibits the publication, broadcast or transmission in any way of information that could identify the victim.

¹ 2016 ABQB 204, [2016] 9 W.W.R. 613, at paras. 2-6 (emphasis added).

Doctrine et autres documents cités

Sharpe, Robert J. *Injunctions and Specific Performance*, 4th ed. Toronto, Canada Law Book, 2012.

Vermette, Marie-Andrée. « A Strong Prima Facie Case for Rationalizing the Test Applicable to Interlocutory Mandatory Injunctions », in Todd L. Archibald and Randall Scott Echlin, eds., *Annual Review of Civil Litigation, 2011*. Toronto, Carswell, 2011, 367.

POURVOI contre un arrêt de la Cour d'appel de l'Alberta (les juges Slatter, McDonald et Greckol), 2016 ABCA 326, 404 D.L.R. (4th) 318, [2017] 3 W.W.R. 413, 43 Alta. L.R. (6th) 213, 93 C.P.C. (7th) 269, [2016] A.J. No. 1085 (QI.), 2016 CarswellAlta 2034 (WL Can.), qui a infirmé une décision du juge Michalyshyn, 2016 ABQB 204, [2016] 9 W.W.R. 613, 37 Alta. L.R. (6th) 299, 86 C.P.C. (7th) 373, [2016] A.J. No. 336 (QL), 2016 CarswellAlta 620 (WL Can.). Pouvoi accueilli.

Frederick S. Kozak, c.r., Sean Ward, Tess Layton et Sean Moreman, pour l'appelante.

Iwona Kuklicz et Julie Snowden, pour l'intimée.

Iain A. C. MacKinnon, pour les intervenants.

Version française du jugement de la Cour rendu par

LE JUGE BROWN —

I. Introduction

[1] Le contexte ayant mené au présent pourvoi est résumé dans les motifs du juge en cabinet¹ :

[TRADUCTION] Le 5 mars 2016, [l'accusé] a été inculpé de meurtre au premier degré de D. J.I., une personne âgée de moins de 18 ans (« la victime »). Le 15 mars 2016, le ministère public a demandé et obtenu une interdiction mandatoire en vertu du par. 486.4(2.2) du *Code criminel*, L.R.C. 1985, c. C-46. L'ordonnance interdit de publier ou de diffuser de quelque façon que ce soit tout renseignement qui permettrait d'établir l'identité de la victime.

¹ 2016 ABQB 204, [2016] 9 W.W.R. 613, par 2-6 (je souligne).

As of March 16, 2016, two articles which pre-existed the publication ban, and which identified the victim by name and photograph (“the articles”), continued to exist on the CBC Edmonton website.

In response to a March 16, 2016 Edmonton Police Service inquiry, a senior digital producer with CBC Edmonton advised that no future stories would contain the victim's identifying information.

On March 18, 2016, however, the pre-publication ban articles remained on the website, unaltered.

One of the articles contains some evidence that the victim's identity appears already in wide circulation, by way of social media, but also by reason of the fact the victim attended school and lived in a smaller Alberta community where the murder is alleged to have occurred.

[2] Because CBC would not remove from its website the victim's identifying information published prior to the order granting a publication ban, the Crown filed an Originating Notice seeking an order citing CBC in criminal contempt of the publication ban, and an interlocutory injunction² directing removal of that information from CBC's website. As the terms of that Originating Notice are important to my proposed disposition of this appeal, I reproduce them here, in relevant part:³

TAKE NOTICE that an Application will be made by the Attorney General of Alberta on behalf of her Majesty the Queen before the presiding Justice of the Court of Queen's Bench, . . . for an Order citing [CBC] in criminal contempt of court.

² The Crown's Originating Notice uses the term “interim injunction”. In substance, however, the Crown's application was for an interlocutory injunction. (See R. J. Sharpe, *Injunctions and Specific Performance* (4th ed. 2012), at paras. 2.15 and 2.55.)

³ A.R., at pp. 39-40.

En date du 16 mars 2016, deux articles publiés avant l'interdiction de publication, et qui révélaient l'identité de la victime par son nom et sa photo (« les articles »), figuraient encore sur le site Web de la SRC d'Edmonton.

Le 16 mars 2016, lors d'une conversation entre un détective du service de police d'Edmonton et un producteur principal de contenu numérique de la SRC d'Edmonton, ce dernier a affirmé qu'aucun article futur ne contiendrait de renseignements permettant d'établir l'identité de la victime.

Or, le 18 mars 2016, les articles publiés avant l'interdiction de publication figuraient toujours sur le site Web, sans qu'ils aient été modifiés.

Un des articles contient des éléments de preuve selon lesquels l'identité de la victime est déjà largement connue en raison des médias sociaux, mais aussi parce que la victime fréquentait l'école et vivait dans une petite collectivité de l'Alberta où le meurtre aurait été commis.

[2] Puisque la Société Radio-Canada (« SRC ») ne voulait pas retirer de son site Web les renseignements qui établissaient l'identité de la victime publiés avant la délivrance de l'ordonnance de non-publication, le ministère public a déposé un avis introductif d'instance afin de faire déclarer la SRC coupable d'outrage criminel pour violation de l'interdiction en question, et afin d'obtenir une injonction interlocutoire² exigeant le retrait des renseignements en cause du site Web de la SRC. Les mots utilisés dans l'avis introductif d'instance sont importants compte tenu de la décision que j'entends rendre dans le présent pourvoi; j'en reproduis donc ici les passages pertinents³ :

[TRADUCTION]

PRENEZ AVIS que le procureur général de l'Alberta, au nom de Sa Majesté la Reine, présentera une demande au juge président la Cour du Banc de la Reine [. . .] visant l'obtention d'une ordonnance déclarant [la SRC] coupable d'outrage criminel au tribunal.

² L'avis introductif d'instance du ministère public utilise le terme anglais « *interim injunction* » ([TRADUCTION] « injonction intérimaire »). Il s'agit toutefois en substance d'une demande d'injonction interlocutoire. (Voir R. J. Sharpe, *Injunctions and Specific Performance* (4^e éd. 2012), par. 2.15 et 2.55.)

³ *Id.*, p. 39-40.

AND FURTHER TAKE NOTICE that an application will be made for an interim injunction, directing that [CBC] remove any information from their website that could identify the complainant in the [subject] case.

ET EN OUTRE PRENEZ AVIS qu'une demande d'injonction intérimaire sera présentée afin qu'il soit ordonné à [la SRC] de retirer de son site Web tout renseignement qui permettrait d'établir l'identité de la plaignante dans [la présente] affaire.

RELIEF SOUGHT:

RÉPARATION DEMANDÉE :

- 1. That [CBC] be cited in criminal contempt of court.
- 2. That [CBC] be directed to remove any information from their website that could identify the complainant in the [subject] case.
- 3. That an appropriate sentence be imposed against [CBC].
- 4. Any such further order that this Honourable Court deems appropriate.

- 1. Que [la SRC] soit déclarée coupable d'outrage criminel au tribunal.
- 2. Qu'il soit ordonné à [la SRC] de retirer de son site Web tout renseignement qui permettrait d'établir l'identité de la plaignante dans [la présente] affaire.
- 3. Qu'une peine appropriée soit infligée à [la SRC].
- 4. Toute autre ordonnance que cette honorable Cour juge appropriée.

[3] The chambers judge concluded that the Crown had not established the requirements for a mandatory interlocutory injunction, and dismissed its application. On appeal, the Court of Appeal divided on whether the Crown was entitled to a mandatory interlocutory injunction. While the majority allowed the appeal and granted the injunction, Greckol J.A., in dissent, would have dismissed the appeal, finding that the majority applied incorrect legal principles to the Crown's application.⁴

[3] Le juge en cabinet a conclu que le ministère public n'avait pas satisfait aux exigences relatives à l'injonction interlocutoire mandatoire et a rejeté sa demande. En appel, les juges étaient divisés quant au droit du ministère public d'obtenir une telle injonction. Bien que les juges majoritaires aient accueilli l'appel et accordé l'injonction, la juge Greckol, dissidente, aurait rejeté l'appel, concluant que les juges majoritaires appliquaient des principes juridiques erronés à la demande du ministère public⁴.

[4] For the reasons that follow, I would allow the appeal. In my respectful view, the chambers judge applied the correct legal test in deciding the Crown's application, and his decision that the Crown's case failed to satisfy that test did not, in these circumstances, warrant appellate intervention.

[4] Pour les motifs qui suivent, j'accueillerais le pourvoi. À mon avis, le juge en cabinet a appliqué le bon test juridique lorsqu'il s'est prononcé sur la demande du ministère public, et sa décision selon laquelle la preuve présentée par ce dernier ne satisfaisait pas à ce test ne justifiait pas, dans les circonstances, une intervention en appel.

II. Legislative Provisions

II. Dispositions législatives

[5] Sections 486.4(2.1) and 486.4(2.2) of the *Criminal Code*,⁵ taken together, provide that a presiding judge or justice shall make an order, upon application by the victim or the prosecutor, for a publication ban in cases involving offences against victims under the age of 18 years. Specifically, the Crown or the victim

[5] Les paragraphes 486.4(2.1) et 486.4(2.2) du *Code criminel*⁵, considérés conjointement, prévoient que le juge ou le juge de paix qui préside est tenu, à la demande de la victime ou du poursuivant, de rendre une ordonnance d'interdiction de publication dans les affaires relatives à toute infraction dont la

⁴ 2016 ABCA 326, 404 D.L.R. (4th) 318.
⁵ R.S.C. 1985, c. C-46.

⁴ 2016 ABCA 326, 404 D.L.R. (4th) 318.
⁵ L.R.C. 1985, c. C-46.

is entitled to an order “directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way”.

III. Judicial History

A. *The Chambers Judge’s Reasons*

[6] Acceding to the parties’ submissions, the chambers judge applied a modified version of the tripartite test for an interlocutory injunction stated in *RJR — MacDonald Inc. v. Canada (Attorney General)*.⁶ This required the Crown to prove (1) a strong *prima facie* case for finding CBC in criminal contempt; (2) that the Crown would suffer irreparable harm were the injunction refused; and (3) that the balance of convenience favoured granting the injunction.

[7] As to the requirement of a strong *prima facie* case, the Crown had argued for a “broad interpretation” of s. 486.4(2.1)’s terms “publish[ed]” and “transmit[ed]”, such that it would catch web-based articles posted *prior* to the publication ban.⁷ The chambers judge, however, concluded that the case authorities did not support such an interpretation. In these circumstances, and applying the test for criminal contempt stated in *United Nurses of Alberta v. Alberta (Attorney General)*,⁸ he found that the Crown could not “likely succeed” in proving beyond a reasonable doubt that CBC, by leaving the victim’s identifying information on its website after the publication ban had been issued, was in “open and public defiance” of that order.⁹

[8] Regarding the requirement of irreparable harm, the Crown had argued such harm would be suffered by the administration of justice, since the ongoing

victime est âgée de moins de 18 ans. Plus particulièrement, le ministère public ou la victime a droit à une ordonnance « interdisant de publier ou de diffuser de quelque façon que ce soit tout renseignement qui permettrait d’établir l’identité de la victime ».

III. Historique judiciaire

A. *Motifs du juge en cabinet*

[6] Souscrivant aux arguments des parties, le juge en cabinet a appliqué une version modifiée du test en trois étapes applicable à l’octroi d’une injonction interlocutoire énoncé dans *RJR — MacDonald Inc. c. Canada (Procureur général)*,⁶ selon lequel le ministère public devait établir (1) une forte apparence de droit menant à la conclusion que la SRC était coupable d’outrage criminel; (2) que le ministère public subirait un préjudice irréparable si la demande d’injonction était rejetée; et (3) que la prépondérance des inconvénients favorisait l’octroi de l’injonction.

[7] En ce qui a trait à l’exigence relative à la forte apparence de droit, le ministère public a revendiqué une [TRADUCTION] « interprétation large » des mots « *publish[ed]* » et « *transmitt[ed]* » de la version anglaise du par. 486.4(2.1), de sorte que ceux-ci viseraient les articles mis en ligne *avant* le prononcé de l’interdiction de publication⁷. Le juge en cabinet a cependant conclu que la jurisprudence n’était pas une telle interprétation. Dans ces circonstances, et appliquant le test relatif à l’outrage criminel établi dans l’arrêt *United Nurses of Alberta c. Alberta (Procureur général)*,⁸ il a jugé que le ministère public ne pourrait « vraisemblablement » pas « réussir » à démontrer hors de tout doute raisonnable que la SRC, en laissant sur son site Web les renseignements identifiant la victime après la délivrance de l’interdiction de publication, était en « transgression patente et publique » de cette ordonnance⁹.

[8] En ce qui a trait à l’exigence relative au préjudice irréparable, le ministère public a soutenu que ce serait l’administration de la justice qui subirait un

⁶ [1994] 1 S.C.R. 311.

⁷ Chambers judge’s reasons, at para. 26.

⁸ [1992] 1 S.C.R. 901, at p. 933.

⁹ Chambers judge’s reasons, at para. 34.

⁶ [1994] 1 R.C.S. 311.

⁷ Motifs du juge en cabinet, par. 26.

⁸ [1992] 1 R.C.S. 901, p. 933.

⁹ Motifs du juge en cabinet, par. 34.

display of the victim’s identifying information on CBC’s website would deter others from seeking assistance or remedies. The chambers judge declined to so find, however, noting that the underlying policy objective of protecting a victim’s anonymity loses significance where the victim is deceased. And, in assessing balance of convenience, the chambers judge determined that the compromising of CBC’s freedom of expression, and of the public’s interest in that expression, outweighed any harm to the administration of justice that would result from leaving the two impugned articles on CBC’s website.

B. The Court of Appeal

[9] At the Court of Appeal, the majority (Slatter and McDonald JJ.A.) reversed the chambers judge’s decision and granted the mandatory interlocutory injunction sought by the Crown. The chambers judge, it held, had erred by characterizing this matter as requiring the Crown to demonstrate a strong *prima facie* case of criminal contempt. Rather, the Originating Notice, “[w]hile essentially civil in nature, . . . has a ‘hybrid’ aspect to it”,¹⁰ in that it seeks both a citation for criminal contempt *and* the removal of the victim’s identifying information from CBC’s website. The request for the interlocutory injunction, the majority explained, is “tied back” to the latter request for an order removing the identifying information, and not to the request for a criminal contempt citation.¹¹ The issue, therefore, was “whether the Crown has demonstrated a strong *prima facie* case entitling it to a mandatory order directing removal of the identifying material from the website”.¹²

[10] As to whether or not s. 486.4(2.1)’s reference to identifying information that is “published” is (as the Crown contends) met by the ongoing appearance

¹⁰ para. 5.
¹¹ para. 6.
¹² para. 7.

tel préjudice, puisque l’affichage continu des renseignements identifiant la victime sur le site Web de la SRC dissuaderait d’autres personnes de demander de l’aide ou de solliciter des réparations. Le juge en cabinet a refusé de tirer une telle conclusion, mais il a souligné que l’objectif de politique sous-jacent visant la protection de l’anonymat des victimes perd de son importance lorsque la victime est décédée. De plus, lorsqu’il a soupesé la prépondérance des inconvénients, le juge en cabinet a établi que l’atteinte à la liberté d’expression de la SRC, et à l’intérêt du public envers cette expression, l’emportait sur tout préjudice causé à l’administration de la justice qui découlerait du fait que les deux articles en cause soient laissés sur le site Web de la SRC.

B. La Cour d’appel

[9] En Cour d’appel, les juges majoritaires (les juges Slatter et McDonald) ont infirmé la décision du juge en cabinet et ont accordé l’injonction interlocutoire mandatoire demandée par le ministère public. Selon eux, le juge en cabinet avait commis une erreur en jugeant que le ministère public devait établir une forte apparence de droit quant à l’existence d’un outrage criminel. En effet, l’avis introductif d’instance, [TRANSCRIPTION] « [b]ien qu’il soit essentiellement de nature civile, [. . .] comporte un aspect “hybride” »¹⁰, dans la mesure où il vise l’obtention d’une assignation pour outrage criminel *et* le retrait du site Web de la SRC des renseignements identifiant la victime. Les juges majoritaires ont expliqué que la demande d’injonction interlocutoire « se rapportait » à la demande relative à l’ordonnance de retrait des renseignements identifiant la victime, et non à la demande relative à l’assignation pour outrage criminel¹¹. En conséquence, la question était de savoir si « le ministère public a établi une forte apparence de droit donnant ouverture en sa faveur à une ordonnance mandatoire visant le retrait du site Web des renseignements identifiant la victime »¹².

[10] Quant à la question de savoir si les renseignements identifiant la victime sont considérés comme « publi[és] » aux termes du par. 486.4(2.1) (comme

¹⁰ par. 5.
¹¹ par. 6.
¹² par. 7.

of such information on a website after it is first posted, the majority conceded that “either position is arguable”.¹³ That said, the majority viewed the Crown as having a strong *prima facie* case for a mandatory interlocutory injunction, since, if “published” is construed as a continuous activity, CBC is arguably wilfully disobeying the publication ban. Further, such disobedience is harmful to the integrity of the administration of justice, and contrary to Parliament’s direction that such orders are to be mandatory.¹⁴ Finally, the balance of convenience did not favour CBC, since the publication ban must be presumed to be constitutional at this stage of the proceedings, and freedom of expression would not, in any case, be a defence against the contempt charge.

[11] Justice Greckol would have dismissed the appeal. In her view, the majority’s characterization of the relief sought in the Originating Notice as “hybrid” was misplaced, since the Crown’s application for an interlocutory injunction was brought in respect of the sought-after citation for criminal contempt. The chambers judge asked the right question (being, whether the Crown could show a strong *prima facie* case of criminal contempt), and his exercise of discretion to refuse an injunction was entitled to deference. And here, where the proscriptions against “publish[ing]” and “transmitt[ing]” may reasonably bear two meanings, one capturing the impugned articles and one not, no strong *prima facie* case of criminal contempt could be shown. Further, and even allowing that open defiance of a facially valid court order may amount to irreparable harm to the administration of justice, the ambit of s. 486.4’s proscriptions is an unsettled question. And, as the victim in this case is deceased, the privacy of the victim is not vulnerable to harm. Finally, and even if the pertinent provisions of the *Criminal Code* are presumed constitutional, the chambers judge was entitled to

le prétend le ministère public) du fait qu’ils apparaissent de façon continue sur le site Web depuis qu’ils y ont été affichés pour la première fois, les juges majoritaires ont reconnu que [TRADUCTION] « les deux thèses sont défendables »¹³. Cela dit, selon eux, le ministère public avait établi une forte apparence de droit justifiant l’octroi d’une injonction interlocutoire mandatoire puisque, si le mot « publier » est interprété comme étant une activité continue, on peut faire valoir que la SRC a volontairement désobéi à l’interdiction de publication. En outre, une telle désobéissance porte préjudice à l’intégrité de l’administration de la justice, et est contraire à la directive du législateur selon laquelle de telles ordonnances sont mandatoires¹⁴. Enfin, pour les juges majoritaires, la prépondérance des inconvénients ne milite pas en faveur de la SRC, puisque, à cette étape de l’instance, il faut présumer que l’interdiction de publication est constitutionnelle et que la liberté d’expression ne peut, en aucun cas, constituer un moyen de défense contre l’accusation d’outrage.

[11] La juge Greckol aurait rejeté le pourvoi. À son avis, les juges majoritaires ont été mal avisés de qualifier d’« hybride » la réparation demandée dans l’avis introductif d’instance, puisque la demande d’injonction interlocutoire du ministère public a été présentée à l’égard de l’assignation sollicitée pour outrage criminel. Le juge en cabinet a posé la bonne question (soit celle de savoir si le ministère public pouvait établir une forte apparence de droit quant à l’existence d’un outrage criminel) et l’exercice de son pouvoir discrétionnaire de refuser de délivrer une injonction commandait la retenue. En outre, en l’espèce, où les proscriptions relatives à la « publication » et la « diffusion » peuvent raisonnablement comporter deux sens — un visant les articles en cause et l’autre non —, aucune forte apparence de droit quant à l’existence d’un outrage criminel ne peut être établie. De plus, même si on admet que la transgression patente d’une ordonnance judiciaire en apparence valide peut constituer un préjudice irréparable pour l’administration de la justice, la portée des proscriptions énoncées à l’art. 486.4 du *Code criminel* est une question non résolue. J’ajouterais que, comme

¹³ para. 10.

¹⁴ para. 11.

¹³ par. 10.

¹⁴ par. 11.

consider freedom of expression in assessing the balance of convenience.

IV. Analysis

A. *What Is the Applicable Framework for Granting a Mandatory Interlocutory Injunction?*

[12] In *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*¹⁵ and then again in *RJR — MacDonald*, this Court has said that applications for an interlocutory injunction must satisfy each of the three elements of a test which finds its origins in the judgment of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*¹⁶ At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a “serious question to be tried”, in the sense that the application is neither frivolous nor vexatious.¹⁷ The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused.¹⁸ Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.¹⁹

[13] This general framework is, however, just that — general. (Indeed, in *RJR — MacDonald*, the Court identified two exceptions which may call for “an extensive review of the merits” at the first stage of the analysis.²⁰) In this case, the parties have at every level of court agreed that, where a *mandatory* interlocutory injunction is sought, the appropriate inquiry at the first stage of the *RJR — MacDonald* test is into whether the applicants have shown a strong *prima*

¹⁵ [1987] 1 S.C.R. 110.

¹⁶ [1975] A.C. 396.

¹⁷ *RJR — MacDonald*, at pp. 334-335.

¹⁸ *RJR — MacDonald*, at pp. 334 and 348.

¹⁹ *RJR — MacDonald*, at p. 334.

²⁰ pp. 338-339.

la victime en l'espèce est décédée, sa vie privée n'est pas susceptible de subir un préjudice. Finalement, et même si les dispositions pertinentes du *Code criminel* sont présumées constitutionnelles, le juge en cabinet pouvait tenir compte de la liberté d'expression lorsqu'il a soupesé la prépondérance des inconvénients.

IV. Analyse

A. *Quel est le cadre d'analyse applicable à la délivrance d'une injonction interlocutoire mandatoire?*

[12] Dans l'arrêt *Manitoba (Procureur général) c. Metropolitan Stores Ltd.*¹⁵, et plus tard dans l'arrêt *RJR — MacDonald*, la Cour a affirmé que les demandes d'injonction interlocutoire devaient respecter chacun des trois volets du test qui tire son origine de la décision de la Chambre des Lords dans *American Cyanamid Co. c. Ethicon Ltd.*¹⁶ À la première étape, le juge de première instance doit procéder à un examen préliminaire du bien-fondé de l'affaire pour décider si le demandeur a fait la preuve de l'existence d'une « question sérieuse à juger », c'est-à-dire que la demande n'est ni futile ni vexatoire.¹⁷ À la deuxième étape, le demandeur doit convaincre la cour qu'il subira un préjudice irréparable si la demande d'injonction est rejetée.¹⁸ Enfin, à la troisième étape, il faut apprécier la prépondérance des inconvénients, afin d'établir quelle partie subirait le plus grand préjudice en attendant qu'une décision soit rendue sur le fond, selon que la demande d'injonction est accueillie ou rejetée.¹⁹

[13] Ce cadre d'analyse n'est toutefois que général. (En effet, dans *RJR — MacDonald*, la Cour a cerné deux exceptions qui pourraient commander un « examen plus approfondi du fond d'une affaire » à la première étape de l'analyse.²⁰) Dans le présent litige, les parties ont convenu à chaque palier judiciaire que, lorsqu'une injonction interlocutoire *mandatoire* est sollicitée, la question à trancher à la première étape du test énoncé dans *RJR — MacDonald* était celle de

¹⁵ [1987] 1 R.C.S. 110.

¹⁶ [1975] A.C. 396.

¹⁷ *RJR — MacDonald*, p. 334-335.

¹⁸ *RJR — MacDonald*, p. 334 et 348.

¹⁹ *RJR — MacDonald*, p. 334.

²⁰ p. 338-339.

facie case. I note that this heightened threshold was not applied by this Court in upholding such an injunction in *Google Inc. v. Equustek Solutions Inc.*²¹ In *Google*, however, the appellant did not argue that the first stage of the *RJR — MacDonald* test should be modified. Rather, the appellant agreed that only a “serious issue to be tried” needed to be shown and therefore the Court was not asked to consider whether a heightened threshold should apply.²² By contrast, in this case, the application by the courts below of a heightened threshold raises for the first time the question of just what threshold ought to be applied at the first stage where the applicant seeks a mandatory interlocutory injunction.

[14] Canadian courts have, since *RJR — MacDonald*, been divided on this question. In Alberta, Nova Scotia and Ontario, for example, the applicant must establish a strong *prima facie* case.²³ Conversely, other courts have applied the less searching “serious issue to be tried” threshold.²⁴

[15] In my view, on an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant’s case at the first stage of the *RJR — MacDonald* test is not whether there is a serious issue to be tried, but rather whether the applicant has shown a strong *prima facie*

savoir si les demandeurs ont établi une forte apparence de droit. J’observe que ce seuil plus exigeant n’a pas été appliqué par la Cour lorsqu’elle a maintenu une telle injonction dans *Google Inc. c. Equustek Solutions Inc.*²¹ Dans cet arrêt, l’appelante n’avait toutefois pas plaidé que la première étape du test énoncé dans *RJR — MacDonald* devait être modifiée. Elle avait plutôt reconnu qu’il suffisait de prouver l’existence d’une « question sérieuse à juger », de sorte que la Cour n’a pas été appelée à se pencher sur l’opportunité d’appliquer un seuil plus élevé.²² En revanche, en l’espèce, l’application par les tribunaux d’instances inférieures d’un seuil plus élevé pose pour la première fois la question du seuil qui devrait être effectivement appliqué à la première étape, lorsque le demandeur sollicite une injonction interlocutoire mandatoire.

[14] Depuis *RJR — MacDonald*, les tribunaux canadiens sont divisés quant à cette question. En Alberta, en Nouvelle-Écosse et en Ontario, par exemple, le demandeur doit établir une forte apparence de droit²³. À l’inverse, d’autres tribunaux ont appliqué le seuil moins exigeant, soit celui de la « question sérieuse à trancher »²⁴.

[15] À mon avis, lorsqu’il s’agit d’examiner une demande d’injonction interlocutoire mandatoire, le critère approprié pour juger de la solidité de la preuve du demandeur à la première étape du test énoncé dans *RJR — MacDonald* n’est pas celui de l’existence d’une question sérieuse à juger, mais plutôt celui de

²¹ 2017 SCC 34, [2017] 1 S.C.R. 824.

²² *Google*, at paras. 25-27.

²³ *Medical Laboratory Consultants Inc. v. Calgary Health Region*, 2005 ABCA 97, 19 C.C.L.I. (4th) 161, at para. 4; *Modry v. Alberta Health Services*, 2015 ABCA 265, 388 D.L.R. (4th) 352, at para. 40; *Conway v. Zinkhofer*, 2006 ABCA 74, at paras. 28-29 (CanLII); *D.E. & Sons Fisheries Ltd. v. Goreham*, 2004 NSCA 53, 223 N.S.R. (2d) 1, at para. 10; *AMEC E&C Services Ltd. v. Whitman Benn and Associates Ltd.*, 2003 NSSC 112, 214 N.S.R. (2d) 369, at para. 20, aff’d 2003 NSCA 126, 219 N.S.R. (2d) 126; *Cyrynbaum v. Look Communications Inc.*, 2013 ONCA 455, 307 O.A.C. 152, at para. 54; *Sawridge Band v. Canada*, 2004 FCA 16, [2004] 3 F.C.R. 274, at para. 45; *Jamieson Laboratories Ltd. v. Reckitt Benckiser LLC*, 2015 FCA 104, 130 C.P.R. (4th) 414, at paras. 1 and 22-25; *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership*, 2011 SKCA 120, 341 D.L.R. (4th) 407, at para. 42; *La Plante v. Saskatchewan Society for the Prevention of Cruelty to Animals*, 2011 SKCA 43, [2012] 3 W.W.R. 293, at paras. 16-17; *Summerside Seafood Supreme Inc. v. Prince Edward Island (Minister of Fisheries, Aquaculture and Environment)*, 2006 PESCAD 11, 256 Nfld. & P.E.I.R. 277, at para. 65.

²⁴ 2017 CSC 34, [2017] 1 R.C.S. 824.

²² *Google*, par. 25-27.

²³ *Medical Laboratory Consultants Inc. v. Calgary Health Region*, 2005 ABCA 97, 19 C.C.L.I. (4th) 161, par. 4; *Modry v. Alberta Health Services*, 2015 ABCA 265, 388 D.L.R. (4th) 352, par. 40; *Conway v. Zinkhofer*, 2006 ABCA 74, par. 28-29 (CanLII); *D.E. & Sons Fisheries Ltd. v. Goreham*, 2004 NSCA 53, 223 N.S.R. (2d) 1, par. 10; *AMEC E&C Services Ltd. v. Whitman Benn and Associates Ltd.*, 2003 NSSC 112, 214 N.S.R. (2d) 369, par. 20, conf. 2003 NSCA 126, 219 N.S.R. (2d) 126; *Cyrynbaum v. Look Communications Inc.*, 2013 ONCA 455, 307 O.A.C. 152, par. 54; *Band de Sawridge v. Canada*, 2004 CAF 16, [2004] 3 R.C.F. 274, par. 45; *Jamieson Laboratories Ltd. v. Reckitt Benckiser LLC*, 2015 CAF 104, par. 1 et 22-25 (CanLII); *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership*, 2011 SKCA 120, 341 D.L.R. (4th) 407, par. 42; *La Plante v. Saskatchewan Society for the Prevention of Cruelty to Animals*, 2011 SKCA 43, [2012] 3 W.W.R. 293, par. 16-17; *Summerside Seafood Supreme Inc. v. Prince Edward Island (Minister of Fisheries, Aquaculture and Environment)*, 2006 PESCAD 11, 256 Nfld. & P.E.I.R. 277, par. 65.

case. A mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the *status quo*, or to otherwise “put the situation back to what it should be”, which is often costly or burdensome for the defendant and which equity has long been reluctant to compel.²⁵ Such an order is also (generally speaking) difficult to justify at the interlocutory stage, since restorative relief can usually be obtained at trial. Or, as Justice Sharpe (writing extrajudicially) puts it, “the risk of harm to the defendant will [rarely] be less significant than the risk to the plaintiff resulting from the court staying its hand until trial”.²⁶ The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction, including the effective final determination of the action in favour of the plaintiff, further demand what the Court described in *RJR — MacDonald* as “extensive review of the merits” at the interlocutory stage.²⁷

savoir si le demandeur a établi une forte apparence de droit. Une injonction mandatoire intime au défendeur de faire quelque chose — comme de rétablir le *status quo* —, ou d'autrement [TRADUCTION] « restaurer la situation », ce qui est souvent coûteux et pénible pour le défendeur et ce que de longue date l'équité a été réticente à faire²⁵. Une telle ordonnance est également (en règle générale) difficile à justifier à l'étape interlocutoire, puisque la réparation qui vise à restaurer la situation peut habituellement être obtenue au procès. De plus, comme l'a exprimé le juge Sharpe (dans un ouvrage de doctrine), « le risque qu'un tort soit causé au défendeur est [rarement] moins important que le risque couru par le demandeur du fait de la décision du tribunal de ne pas agir avant le procès »²⁶. Les conséquences potentiellement sérieuses pour un défendeur du prononcé d'une injonction interlocutoire mandatoire, y compris la décision finale relativement à la poursuite en faveur du plaignant, exigent en outre ce que la Cour a décrit dans *RJR — MacDonald* comme étant « un examen approfondi sur le fond » à l'étape interlocutoire²⁷.

[16] A final consideration that may arise in some cases is that, because mandatory interlocutory injunctions require a defendant to take positive action, they can be more burdensome or costly for the defendant. It must, however, be borne in mind that complying with prohibitive injunctions can also entail costs that are just as burdensome as mandatory injunctions.²⁸ While holding that applications for mandatory interlocutory injunctions are to be subjected to a modified *RJR — MacDonald* test, I acknowledge that distinguishing between mandatory and prohibitive injunctions can be difficult, since an interlocutory injunction which is framed in prohibitive language may “have the effect of forcing the enjoined party to take . . . positive actions”.²⁹ For example, in this case, ceasing to transmit the victim’s identifying information would require an employee of CBC to take the necessary action to remove that

[16] Dans certains cas, un dernier élément devra être examiné, soit que, parce que les injonctions interlocutoires mandatoires requièrent que le défendeur fasse quelque chose, elles peuvent constituer un fardeau plus important ou avoir des conséquences coûteuses pour lui. Il faut toutefois garder à l'esprit que le respect d'injonctions prohibitives peut entraîner des coûts aussi lourds que ceux découlant des injonctions mandatoires²⁸. Tout en concluant que les demandes d'injonctions interlocutoires mandatoires doivent être examinées à la lumière d'une version modifiée du test énoncé dans *RJR — MacDonald*, je reconnais qu'il peut être difficile de faire une distinction entre les injonctions mandatoires et les injonctions prohibitives, puisqu'une injonction interlocutoire au libellé prohibitif peut avoir [TRADUCTION] « l'effet de forcer le défendeur à faire quelque chose »²⁹. Par exemple, en l'espèce, cesser de diffuser les renseignements

²⁵ *Injunctions and Specific Performance*, at paras. 1.510, 1.530 and 2.640.

²⁶ *Injunctions and Specific Performance*, at para. 2.640.

²⁷ *RJR — MacDonald*, at pp. 338-39.

²⁸ *Injunctions and Specific Performance*, at paras. 1.530 and 1.540. See also *Potash*, at paras. 43-44.

²⁹ *Potash*, at para. 44; see also *Injunctions and Specific Performance*, at para. 1.540.

²⁵ *Injunctions and Specific Performance*, par. 1.510, 1.530 et 2.640.

²⁶ *Injunctions and Specific Performance*, par. 2.640.

²⁷ *RJR — MacDonald*, p. 338-339.

²⁸ *Injunctions and Specific Performance*, par. 1.530 et 1.540. Voir aussi *Potash*, par. 43-44.

²⁹ *Potash*, par. 44; voir aussi *Injunctions and Specific Performance*, par. 1.540.

information from its website. Ultimately, the application judge, in characterizing the interlocutory injunction as mandatory or prohibitive, will have to look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought and, in light of the particular circumstances of the matter, “what the practical consequences of the . . . injunction are likely to be”.³⁰ In short, the application judge should examine whether, in substance, the overall effect of the injunction would be to require the defendant to do something, or to *refrain from doing* something.

[17] This brings me to just what is entailed by showing a “strong *prima facie* case”. Courts have employed various formulations, requiring the applicant to establish a “strong and clear chance of success”;³¹ a “strong and clear” or “unusually strong and clear” case;³² that he or she is “clearly right” or “clearly in the right”;³³ that he or she enjoys a “high probability” or “great likelihood of success”;³⁴ a “high degree of assurance” of success;³⁵ a “significant prospect” of success;³⁶ or “almost certain” success.³⁷ Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge

établissant l'identité de la victime requerrait qu'un employé de la SRC prenne les mesures nécessaires pour retirer ces renseignements du site Web de l'entreprise. En définitive, le juge de première instance, lorsqu'il qualifie l'injonction interlocutoire de mandatoire ou de prohibitive, doit regarder au-delà de la forme et du libellé de la demande sollicitant l'ordonnance de manière à déceler l'essence de ce qui est recherché et, à la lumière des circonstances particulières de l'affaire, à déterminer [TRADUCTION] « quelles risquent d'être les conséquences pratiques de l'injonction »³⁰. Bref, le juge de première instance doit examiner si, en substance, l'effet global de l'injonction consisterait à exiger du défendeur qu'il fasse quelque chose ou qu'il s'*abstienne* de le faire.

[17] Ceci m'amène à ce qu'implique l'établissement d'une « forte apparence de droit ». Les tribunaux ont utilisé diverses formulations, exigeant que le demandeur présente la preuve [TRADUCTION] « convaincante et manifeste d'une possibilité de succès »³¹; qu'il présente une preuve [TRADUCTION] « convaincante et manifeste » ou « exceptionnellement convaincante et manifeste »³²; qu'il a [TRADUCTION] « nettement raison »³³; qu'il y a une [TRADUCTION] « forte probabilité » ou une « forte chance de succès »³⁴; qu'il y a une [TRADUCTION] « grande assurance » quant au succès³⁵; une [TRADUCTION] « perspective importante » de succès³⁶; ou un succès [TRADUCTION] « presque assuré »³⁷. Toutes ces formulations ont en

³⁰ *National Commercial Bank Jamaica Ltd. v. Olint Corp. Ltd.*, [2009] UKPC 16, [2009] 1 W.L.R. 1405, at para. 20.

³¹ *H&R Block Canada Inc. v. Inisoft Corp.*, 2009 CanLII 37911 (Ont. S.C.J.), at para. 24.

³² *Fradenburgh v. Ontario Lottery and Gaming Corp.*, 2010 ONSC 5387, at para. 14 (CanLII); *Boehringer Ingelheim (Canada) Inc. v. Bristol-Myers Squibb Canada Inc.* (1998), 83 C.P.R. (3d) 51 (Ont. Ct. (Gen. Div.)), at paras. 49 and 52 (citing *Shepherd Home Ltd. v. Sandham*, [1970] 3 All E.R. 402 (Ch. D.), at p. 409).

³³ *Barton-Reid Canada Ltd. v. Alfresh Beverages Canada Corp.*, 2002 CanLII 34862 (Ont. S.C.J.), at para. 9; *Bark & Firz Inc. v. 2139138 Ontario Inc.*, 2010 ONSC 1793, at para. 12 (CanLII).

³⁴ *Quality Pullets and Recycling Inc. v. Canadian Pacific Railway Co.*, 2007 CanLII 13712 (Ont. S.C.J.), at para. 16.

³⁵ *West Nipissing Economic Development Corp. v. Weyerhaeuser Co.*, 2002 CanLII 26148 (Ont. S.C.J.), at para. 16.

³⁶ *Parker v. Canadian Tire Corp.*, [1998] O.J. No. 1720, at para. 11 (Q.L.).

³⁷ *Barton-Reid*, at paras. 9, 12 and 17. (See, generally, M.-A. Vermette, “A Strong Prima Facie Case for Rationalizing the Test Applicable to Interlocutory Mandatory Injunctions” in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation*, 2011 (2011), 367, at pp. 378-79.)

³⁰ *National Commercial Bank Jamaica Ltd. v. Olint Corp. Ltd.*, [2009] UKPC 16, [2009] 1 W.L.R. 1405, par. 20.

³¹ *H&R Block Canada Inc. v. Inisoft Corp.*, 2009 CanLII 37911 (C.S.J. Ont.), par. 24.

³² *Fradenburgh v. Ontario Lottery and Gaming Corp.*, 2010 ONSC 5387, par. 14 (CanLII); *Boehringer Ingelheim (Canada) Inc. v. Bristol-Myers Squibb Canada Inc.* (1998), 83 C.P.R. (3d) 51 (C. Ont. (div. gén.)), par. 49 et 52 (citant *Shepherd Home Ltd. v. Sandham*, [1970] 3 All E.R. 402 (Ch. D.), p. 409).

³³ *Barton-Reid Canada Ltd. v. Alfresh Beverages Canada Corp.*, 2002 CanLII 34862 (C.S.J. Ont.), par. 9; *Bark & Firz Inc. v. 2139138 Ontario Inc.*, 2010 ONSC 1793, par. 12 (CanLII).

³⁴ *Quality Pullets and Recycling Inc. v. Canadian Pacific Railway Co.*, 2007 CanLII 13712 (C.S.J. Ont.), par. 16.

³⁵ *West Nipissing Economic Development Corp. v. Weyerhaeuser Co.*, 2002 CanLII 26148 (C.S.J. Ont.), par. 16.

³⁶ *Parker v. Canadian Tire Corp.*, [1998] O.J. No. 1720, par. 11 (Q.L.).

³⁷ *Barton-Reid*, par. 9, 12 et 17. (Voir, plus généralement, M.-A. Vermette, « A Strong Prima Facie Case for Rationalizing the Test Applicable to Interlocutory Mandatory Injunctions », dans T. L. Archibald et R. S. Echlin, dir., *Annual Review of Civil Litigation*, 2011 (2011), 367, p. 378-379.)

must be satisfied that there is a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.

commun d'imposer au demandeur le fardeau de présenter une preuve telle qu'il serait très susceptible d'obtenir gain de cause au procès. Cela signifie que, lors de l'examen préliminaire de la preuve, le juge de première instance doit être convaincu qu'il y a une *forte chance* au regard du droit et de la preuve présentée que, au procès, le demandeur réussira ultimement à prouver les allégations énoncées dans l'acte introductif d'instance.

[18] In sum, to obtain a mandatory interlocutory injunction, an applicant must meet a modified *RJR — MacDonald* test, which proceeds as follows:

[18] En résumé, pour obtenir une injonction interlocutoire mandatoire, le demandeur doit satisfaire à la version modifiée que voici du test établi dans *RJR — MacDonald* :

- (1) The applicant must demonstrate a strong *prima facie* case that it will succeed at trial. This entails showing a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice;
- (2) The applicant must demonstrate that irreparable harm will result if the relief is not granted; and
- (3) The applicant must show that the balance of convenience favours granting the injunction.

- (1) Le demandeur doit établir une forte apparence de droit qu'il obtiendra gain de cause au procès. Cela implique qu'il doit démontrer une *forte chance* au regard du droit et de la preuve présentée que, au procès, il réussira ultimement à prouver les allégations énoncées dans l'acte introductif d'instance;
- (2) Le demandeur doit démontrer qu'il subira un préjudice irréparable si la demande d'injonction n'est pas accueillie;
- (3) Le demandeur doit démontrer que la prépondérance des inconvénients favorise la délivrance de l'injonction.

B. *Does the Liberty Net "Rarest and Clearest of Cases" Test Apply in These Circumstances?*

B. *Le test d'un cas parmi « les plus manifestes, et extrêmement rares » énoncé dans Liberty Net s'applique-t-il dans ces circonstances?*

[19] CBC argues that, on an application for an interlocutory injunction where a media organization's right to free expression is at stake, the application judge should apply the test stated in *Canada (Human Rights Commission) v. Canadian Liberty Net*.³⁸ This would entail the applicant showing "the rarest and clearest of cases",³⁹ such that the conduct complained of would be impossible to defend.

[19] Selon la SRC, dans le cas d'une demande d'injonction interlocutoire où la liberté d'expression d'un média est en jeu, le juge de première instance devrait appliquer le test énoncé dans l'arrêt *Canada (Commission des droits de la personne) c. Canadian Liberty Net*.³⁸ Ainsi, le demandeur serait tenu de prouver qu'il s'agit d'un cas parmi [TRADUCTION] « les plus manifestes, et extrêmement rares »³⁹, de sorte que le comportement reproché serait impossible à défendre.

³⁸ [1998] 1 S.C.R. 626.

³⁹ *Liberty Net*, at para. 49 (emphasis deleted).

³⁸ [1998] 1 R.C.S. 626.

³⁹ *Liberty Net*, par. 49 (soulignement omis).

[20] In *Liberty Net*, the Court explained that the *RJR — MacDonald* tripartite test is not appropriately applied to cases of “pure” speech, comprising the expression of “the non-commercial speaker where there is no tangible, immediate utility arising from the expression other than the freedom of expression itself”.⁴⁰ This appeal does not present such a case. The reason the Court gave in *Liberty Net* for not applying the *RJR — MacDonald* test to “pure” speech was that the defendant in such cases “has no tangible or measurable interest [also described as a ‘tangible, immediate utility’] other than the expression itself”.⁴¹ Where discriminatory hate speech or other potentially low-value speech is at issue (as was the case in *Liberty Net*), the *RJR — MacDonald* test would “stac[k] the cards” against the defendant at the second and third stages.⁴² In this appeal, however, the chambers judge correctly identified a “tangible, immediate utility” to CBC’s posting of the identifying information, being the “public’s interest” in CBC’s right to express that information, and in freedom of the press.⁴³ Because CBC does not therefore face the same disadvantage as defendants face at the second and third stages of the *RJR — MacDonald* test in cases of low- to no-value speech, it is unnecessary to apply the “clearest of cases” threshold, and I would not do so.

C. *What Strong Prima Facie Case Must the Crown Show?*

[21] As I have already canvassed, in this case, the majority at the Court of Appeal, in reversing the chambers judge, reasoned that he had mischaracterized the basis for which the Crown had sought the injunction. Specifically, the majority said that the

⁴⁰ paras. 47 and 49.

⁴¹ para. 47 (emphasis in original).

⁴² para. 47.

⁴³ Chambers judge’s reasons, at para. 59.

[20] Dans *Liberty Net*, la Cour a expliqué que le test en trois étapes établi dans *RJR — MacDonald* ne convient pas dans les affaires de liberté d’expression « seulement », ce qui comprend celle de la personne « qui s’exprime en dehors [du] contexte [commercial], lorsque le discours en cause n’a pas d’utilité concrète et directe à part la liberté d’expression elle-même »⁴⁰. Le présent appel n’est pas un cas de ce type. Pour expliquer sa décision dans *Liberty Net* de ne pas appliquer le test énoncé dans *RJR — MacDonald* pour les affaires de liberté d’expression « seulement », la Cour a affirmé que le défendeur dans de tels cas « n’a [. . .] aucun intérêt tangible ou mesurable [aussi appelé “utilité concrète et directe”] outre le discours lui-même »⁴¹. Lorsqu’un discours haineux discriminatoire ou un autre type de discours possiblement de peu de valeur est en cause (comme c’était le cas dans *Liberty Net*), le test énoncé dans *RJR — MacDonald* « joue[rait] contre » le défendeur aux deuxième et troisième étapes⁴². Cependant, dans le présent appel, le juge en cabinet a correctement discerné une « utilité concrète et directe » à ce que la SRC diffuse l’information permettant d’établir l’identité de la victime, soit [TRADUCTION] « l’intérêt public » à ce que la SRC ait le droit d’exprimer la teneur de ces renseignements, et la liberté de la presse⁴³. Puisque la SRC n’a donc pas à faire face au même désavantage que les défendeurs aux deuxième et troisième étapes du test énoncé dans *RJR — MacDonald* dans les cas où il est question d’un discours de peu ou pas de valeur, il n’est pas nécessaire d’appliquer le seuil du cas parmi « les plus manifestes » et je m’abstiendrais de le faire.

C. *Quelle forte apparence de droit le ministère public doit-il établir?*

[21] Comme je l’ai déjà évoqué, lorsque, en l’espèce, les juges majoritaires de la Cour d’appel ont infirmé la décision du juge en cabinet, ils ont estimé que celui-ci avait mal évalué le fondement de la demande d’injonction présentée par le ministère public.

⁴⁰ par. 47 et 49.

⁴¹ par. 47 (souligné dans l’original).

⁴² par. 47.

⁴³ Motifs du juge en cabinet, par. 59.

Originating Notice, properly read, was “hybrid”,⁴⁴ such that the application for the injunction did not “relate directly”⁴⁵ to the criminal contempt citation, but to the direction sought that CBC remove the victim’s identifying information from its website. The identical wording shared by part of the Originating Notice’s preamble (“AND FURTHER TAKE NOTICE that an application will be made for an interim injunction, directing that [CBC] remove any information from their website that could identify the complainant in the [subject] case”) and the part of the Originating Notice which sought an injunction (“That [CBC] be directed to remove any information from their website that could identify the complainant in the [subject] case”) was said to demonstrate “that the request for an interim injunction is tied back . . . to . . . the removal of the objectionable postings”.⁴⁶ The “strong *prima facie* case” which the Crown was bound to show, then, was *not* one of criminal contempt, but rather of an “entitl[ement] . . . to a mandatory order directing removal of the identifying material from the website”.⁴⁷

[22] In dissent, Greckol J.A. saw the matter differently. “A literal reading of the Originating Notice”, she said, “shows that the Crown brought an application for criminal contempt and sought an interim injunction in that proceeding”.⁴⁸ This was in her view confirmed by the record which reveals that the Crown had proceeded on the basis that its application for an interlocutory injunction was sought in respect of the citation for criminal contempt.

[23] For two reasons, I agree with Greckol J.A. First, the Originating Notice itself, and the sequencing therein of the relief sought, belies its putatively

⁴⁴ para. 5.

⁴⁵ para. 6.

⁴⁶ C.A. reasons, at para. 6.

⁴⁷ C.A. reasons, at para. 7.

⁴⁸ C.A. reasons, at para. 23 (emphasis added).

Plus précisément, les juges majoritaires ont affirmé que l’avis introductif d’instance, correctement interprété, était [TRADUCTION] « hybride »⁴⁴, de sorte que la demande d’injonction n’était pas « directement liée »⁴⁵ à la demande d’assignation pour outrage criminel, mais plutôt à la directive sollicitée exigeant que la SRC retire de son site Web tout renseignement identifiant la victime. Ils ont soutenu que le libellé identique du préambule de l’avis introductif d’instance ([TRADUCTION] « ET EN OUTRE PRENEZ AVIS qu’une demande d’injonction intérimaire sera présentée afin qu’il soit ordonné à [la SRC] de retirer de son site Web tout renseignement qui permettrait d’établir l’identité de la plaignante dans [la présente] affaire ») et de la partie de l’avis introductif d’instance où l’injonction est sollicitée (« Qu’il soit ordonné à [la SRC] de retirer de son site Web tout renseignement qui permettrait d’établir l’identité de la plaignante dans [la présente] affaire ») prouvait que « la demande d’injonction interlocutoire se rapportait [. . .] au [. . .] retrait des articles en cause »⁴⁶. Selon les juges majoritaires, la « forte apparence de droit » que le ministère public était tenu d’établir n’était donc *pas* celle quant à l’existence d’un outrage criminel, mais plutôt celle quant à l’existence du « droit [. . .] à une ordonnance mandatoire visant le retrait du site Web des renseignements identifiant la victime »⁴⁷.

[22] Dissidente, la juge Greckol a vu l’affaire d’un autre œil. Elle a affirmé qu’une [TRADUCTION] « interprétation littérale de l’avis introductif d’instance démontre que le ministère public a intenté une action pour outrage criminel et a cherché à obtenir une injonction interlocutoire dans le cadre de cette instance »⁴⁸. Selon elle, le dossier — qui révèle que le ministère public s’était fondé sur le fait que l’injonction interlocutoire était sollicitée à l’égard de la demande d’assignation pour outrage criminel — le confirmait.

[23] Je souscris à l’opinion de la juge Greckol pour deux raisons. Premièrement, l’avis introductif d’instance en soi, ainsi que l’ordre dans lequel les

⁴⁴ par. 5.

⁴⁵ par. 6.

⁴⁶ Motifs de la Cour d’appel, par. 6.

⁴⁷ Motifs de la Cour d’appel, par. 7.

⁴⁸ Motifs de la Cour d’appel, par. 23 (je souligne).

hybrid character. It begins by giving notice (“TAKE NOTICE”) of an “an [a]pplication . . . for an Order citing [CBC] in criminal contempt of court”. That notice is immediately followed by a *further* notice (“AND FURTHER TAKE NOTICE”) of an “application . . . for an interim injunction, directing that [CBC] remove any information from [its] website that could identify the complainant in the [subject] case”.⁴⁹ The text “AND FURTHER TAKE NOTICE” makes plain that the two applications are linked, such that the latter is tied *not* to the mere placement by CBC of the victim’s identifying information on its website, but to the sought-after criminal contempt citation. In other words, each prayer for relief does not launch an independent proceeding; rather, both relate to the alleged criminal contempt.

réparations y sont demandées, contredit qu’il puisse avoir un caractère théoriquement hybride. En effet, il commence par un avis ([TRADUCTION] « PRENEZ AVIS ») quant à la présentation d’une « demande [. . .] visant l’obtention d’une ordonnance déclarant [la SRC] coupable d’outrage criminel au tribunal ». Cet avis est immédiatement suivi d’un *autre* avis (« ET EN OUTRE PRENEZ AVIS ») quant à la présentation d’une « demande d’injonction intérimaire [. . .] afin qu’il soit ordonné à [la SRC] de retirer de son site Web tout renseignement qui permettrait d’établir l’identité de la plaignante dans [la présente] affaire »⁴⁹. L’expression « ET EN OUTRE PRENEZ AVIS » indique clairement que les deux demandes sont liées, de sorte que la deuxième se rapporte *non pas* au simple affichage sur le site Web de la SRC des renseignements identifiant la victime, mais à l’assignation pour outrage criminel sollicitée. Autrement dit, chaque demande de réparation ne donne pas lieu à une instance distincte; elles sont plutôt toutes les deux liées à l’outrage criminel reproché.

[24] The second reason goes to the fundamental nature of an injunction and its relation to a cause of action. Rule 3.8(1) of the *Alberta Rules of Court*⁵⁰ requires that an originating application state *both* “the claim and the basis for it”, and “the remedy sought”. In other words, an applicant must record both “a basis” and “[a] remedy”. An injunction is generally “a remedy ancillary to a cause of action”.⁵¹ And here, the Crown’s Originating Notice discloses only a single basis for seeking that remedy: CBC’s alleged criminal contempt of court. As I have already noted, this is consistent with how the Crown framed its case at the courts below.

[24] La deuxième raison pour laquelle je souscris à la conclusion de la juge Greckol se rapporte à la nature fondamentale d’une injonction et à son lien avec une cause d’action. Le paragraphe 3.8(1) des *Alberta Rules of Court*⁵⁰ prévoit qu’une demande introductive d’instance doit énoncer *tant* [TRADUCTION] « l’objet de la demande et son fondement », que « la réparation demandée ». Autrement dit, le demandeur doit indiquer *tant* « un fondement » qu’« [une] réparation ». En général, une injonction est « une réparation qui est subordonnée à une cause d’action »⁵¹. Or, en l’espèce, la demande introductive d’instance du ministère public n’indique qu’un motif pour lequel il veut obtenir cette réparation : l’outrage criminel au tribunal reproché à la SRC. Comme je l’ai déjà souligné, cette analyse est conforme à la façon dont le ministère public a présenté sa thèse aux tribunaux de juridictions inférieures.

[25] The majority’s conclusion at the Court of Appeal that the basis for the injunction is an “enti- t[le]ment] . . . to a mandatory order directing removal

[25] En conséquence, la conclusion des juges majoritaires de la Cour d’appel selon laquelle l’in- jonction repose sur le [TRADUCTION] « droit à une

⁴⁹ A.R., at p. 39.

⁵⁰ Alta. Reg. 124/2010.

⁵¹ *Amchem Products Inc. v. British Columbia (Workers’ Compensation Board)*, [1993] 1 S.C.R. 897, at p. 930 (emphasis added).

⁴⁹ *Id.*, p. 39.

⁵⁰ Alta. Reg. 124/2010.

⁵¹ *Amchem Products Inc. v. Colombie-Britannique (Workers’ Compensation Board)*, [1993] 1 R.C.S. 897, p. 930 (se souligne).

of the identifying material from the website”,⁵² therefore, simply begs the question: what, precisely, is the source in law of that entitlement? An injunction is not a cause of action, in the sense of containing its own authorizing force. It is, I repeat, a remedy. This is undoubtedly why, before both the chambers judge and the Court of Appeal, the Crown framed the matter as an application for an interlocutory injunction in the proceedings for a criminal contempt citation.⁵³ And, on that point, I respectfully endorse Greckol J.A.’s conclusion that it was not for the Court of Appeal to re-cast the Crown’s case as a civil application for an interlocutory injunction pending a permanent injunction. The Crown was bound to show a strong *prima facie* case of criminal contempt of court.

[26] I add this. It is implicit in the foregoing analysis that, in some circumstances, an interlocutory injunction may be sought and issued to enjoin allegedly criminal conduct. The delineation of those circumstances, however, I would not decide here. To be clear, the disposition of this appeal should not be taken as standing for the proposition that injunctive relief is ordinarily or readily available in criminal matters, or that — even had the Crown been able to show in this case a strong *prima facie* case of criminal contempt — an injunction would have been available.

D. *Is the Crown Entitled to a Mandatory Interlocutory Injunction?*

[27] The decision to grant or refuse an interlocutory injunction is a discretionary exercise, with which an appellate court must not interfere solely because it would have exercised the discretion differently. In

ordonnance mandatoire visant le retrait du site Web des renseignements identifiant la victime »⁵² soulève clairement la question de savoir quelle est la source précise de ce droit. L’injonction n’est pas une cause d’action, en ce sens qu’elle ne contient pas son propre pouvoir d’autoriser l’action. Il s’agit, je le répète, d’une réparation. C’est sans doute la raison pour laquelle, tant devant le juge en cabinet que devant la Cour d’appel, le ministère public a présenté l’affaire comme étant une demande d’injonction interlocutoire dans le cadre d’une demande d’assignation pour outrage criminel⁵³. À cet égard, je souscris respectueusement à la conclusion de la juge Greckol selon laquelle il n’appartient pas à la Cour d’appel de reformuler la thèse du ministère public comme s’il s’agissait d’une demande d’injonction interlocutoire au civil en attendant qu’une injonction permanente soit accordée. Le ministère public était tenu d’établir une forte apparence de droit quant à l’existence d’un outrage criminel au tribunal.

[26] J’ajouterais ceci. Dans l’analyse qui précède, il est implicite que, dans certaines circonstances, une injonction interlocutoire peut être demandée et délivrée pour empêcher une conduite prétendument criminelle. Je ne me prononcerai toutefois pas ici sur la façon dont il faudrait définir ces circonstances. Je tiens toutefois à préciser que l’issue du présent appel ne devrait pas être interprétée comme signifiant que l’injonction est une réparation courante et facile à obtenir dans les affaires criminelles, ou que — même si le ministère public avait été en mesure d’établir en l’espèce une forte apparence de droit quant à l’existence d’un outrage criminel — une injonction aurait pu être prononcée.

D. *Le ministère public a-t-il droit à une injonction interlocutoire mandatoire?*

[27] La décision d’accorder ou de refuser une injonction interlocutoire relève d’un pouvoir discrétionnaire, et les cours d’appel ne doivent pas modifier la décision en découlant simplement parce qu’elles

⁵² C.A. reasons, at para. 7.

⁵³ C.A. reasons, at paras. 25-26; chambers judge’s reasons, at para. 7.

⁵² Motifs de la Cour d’appel, par. 7.

⁵³ Motifs de la Cour d’appel, par. 25-26; motifs du juge en cabinet, par. 7.

Metropolitan Stores,⁵⁴ the Court endorsed this statement of Lord Diplock in *Hadmor Productions Ltd. v. Hamilton*⁵⁵ about the circumstances in which that exercise of discretion may be set aside. Appellate intervention is justified only where the chambers judge proceeded “on a misunderstanding of the law or of the evidence before him”, where an inference “can be demonstrated to be wrong by further evidence that has [since] become available”, where there has been a change of circumstances, or where the “decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge . . . could have reached it”.⁵⁶ This principle was recently affirmed in *Google*.⁵⁷

[28] In this case, and as I have explained, the first stage of the modified *RJR — MacDonald* test required the Crown to satisfy the chambers judge that there was a strong likelihood on the law and the evidence presented that it would be successful in proving CBC’s guilt of criminal contempt of court. This is not an easy burden to discharge and, as I shall explain, the Crown has failed to do so here.

[29] In *United Nurses of Alberta*, McLachlin J. (as she then was) described the elements of criminal contempt of court in these terms:

To establish criminal contempt the Crown must prove that the accused defied or disobeyed a court order in a public way (the *actus reus*), with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens*

auraient exercé ce pouvoir différemment. Dans l’arrêt *Metropolitan Stores*⁵⁴, la Cour a fait sienne l’affirmation de lord Diplock dans *Hadmor Productions Ltd. v. Hamilton*⁵⁵ concernant les circonstances dans lesquelles l’exercice de ce pouvoir discrétionnaire peut être infirmé. Une intervention en appel est justifiée uniquement lorsque le juge en cabinet a pris une décision qui [TRADUCTION] « repose sur une erreur de droit ou sur une interprétation erronée de la preuve produite devant lui », lorsque « le caractère erroné [d’une conclusion] peut être démontré par des éléments de preuve supplémentaires dont on dispose au moment de l’appel », lorsque les circonstances ont changé, ou lorsque la « décision du juge d’accorder ou de refuser l’injonction est à ce point aberrante qu’elle doit être infirmée pour le motif qu’aucun juge raisonnable [...] [n’]aurait pu la rendre »⁵⁶. Ce principe a récemment été confirmé dans *Google*.⁵⁷

[28] En l’espèce, comme je l’ai expliqué, la première étape de la version modifiée du test établi dans *RJR — MacDonald* exigeait que le ministère public convainque le juge en cabinet qu’il y avait une forte chance au regard du droit et de la preuve présentée qu’il réussirait à prouver la culpabilité de la SRC pour outrage criminel au tribunal. Il n’est pas facile de s’acquitter d’un tel fardeau et, comme je l’expliquerai plus loin, le ministère public n’a pas réussi à le faire en l’espèce.

[29] Dans l’arrêt *United Nurses of Alberta*, la juge McLachlin (maintenant juge en chef) a décrit les éléments de l’outrage criminel au tribunal de cette façon :

Pour démontrer l’outrage criminel, le ministère public doit prouver que l’accusé a transgressé une ordonnance d’un tribunal ou y a désobéi publiquement (l’*actus reus*), tout en voulant que cette désobéissance publique contribue à miner l’autorité de la cour, en le sachant ou sans s’en

⁵⁴ pp. 154-55.

[1982] 1 All E.R. 1042, at p. 1046 (H.L.).

⁵⁵ See also *B.C. (A.G.) v. Hale*, [1987] 2 W.W.R. 331 (B.C.C.A.), aff’d [1991] 1 S.C.R. 62; *White Room Ltd. v. Calgary (City)*, 1998 ABCA 120, 62 Alta. L.R. (3d) 177; *Musqueam Indian Band v. Canada (Minister of Public Works and Government Services)*, 2008 FCA 214, 378 N.R. 335, at para. 37, leave to appeal refused, [2008] 3 S.C.R. viii.

⁵⁶ para. 22.

⁵⁴ p. 154-155.

[1982] 1 All E.R. 1042, p. 1046 (H.L.).

⁵⁵ Voir aussi *B.C. (A.G.) v. Hale*, [1987] 2 W.W.R. 331 (C.A., C.-B.), conf. [1991] 1 R.C.S. 62; *White Room Ltd. v. Calgary (City)*, 1998 ABCA 120, 62 Alta. L.R. (3d) 177; *Musqueam Indian Band v. Canada (Minister of Public Works and Government Services)*, 2008 CAF 214, 378 N.R. 335, par. 37, autorisation d’appel refusée, [2008] 3 R.C.S. viii.

⁵⁶ par. 22.

rea). The Crown must prove these elements beyond a reasonable doubt.⁵⁸

[30] As to the *actus reus* — that is, as to whether the Crown could demonstrate a strong *prima facie* case that CBC “defied or disobeyed [the publication ban] in a public way”⁵⁹ by leaving the victim’s identifying information on its website — the chambers judge rejected the Crown’s submission that s. 486.4(2.1)’s terms “publish[ed]” and “transmit[ed]” should be “broad[ly]” interpreted.⁶⁰ In his view, the meaning of that text was not so obvious that the Crown could “likely succeed at trial” in showing that s. 486.4(2.1) would capture the impugned articles on CBC’s website, since they had been posted *prior* to the issuance of a publication ban. In other words, and as CBC argued before the chambers judge, the statutory text might also be reasonably taken as prohibiting only publication which occurred for the first time *after* a publication ban.

[31] Significantly, the majority at the Court of Appeal conceded that “either position is arguable”.⁶¹ In my respectful view, that was, in substance, an acknowledgment that the Crown had not shown a strong *prima facie* case of criminal contempt. Before us, the Crown urged this Court to infer that the majority nevertheless “leaned” towards the Crown’s preferred interpretation of “publish[ed]” when it stated that to see the matter otherwise would “significantly limit the scope of many legal rights and obligations that depend on making information available to third parties [and] [i]f publishing is a continuous activity, then it is also arguable that [CBC] is wilfully disobeying the court order”.⁶² But, even allowing that this may be so, the Crown’s burden was not to show a case for criminal contempt that “leans” one way or another, but rather a case, based on the law

⁵⁸ p. 933 (emphasis added).

⁵⁹ Chambers judge’s reasons, at para. 12.

⁶⁰ para. 33.

⁶¹ C.A. reasons, at para. 10.

⁶² C.A. reasons, at para. 10; transcript, at pp. 65 and 70-71.

soucier (*la mens rea*). Le ministère public doit prouver ces éléments hors de tout doute raisonnable.⁵⁸

[30] Pour ce qui est de l’*actus reus* — c’est-à-dire la question de savoir si le ministère public pouvait établir une forte apparence de droit selon laquelle la SCR a [TRADUCTION] « transgressé [l’interdiction de publication] ou y a désobéi publiquement »⁵⁹ en laissant sur son site Web les renseignements identifiant la victime —, le juge en cabinet a rejeté l’argument du ministère public voulant que les mots « *publish[ed]* » et « *transmitt[ed]* » de la version anglaise du par. 486.4(2.1) devaient recevoir une interprétation « large »⁶⁰. À son avis, le sens de ce texte n’était pas évident au point où le ministère public « aurait vraisemblablement eu gain de cause au procès » pour démontrer que le par. 486.4(2.1) viserait les articles qu’elle reprochait à la SRC d’avoir affichés sur son site Web, puisqu’ils avaient été affichés *avant* la délivrance de l’interdiction de publication. Autrement dit, et comme la SRC l’a soutenu devant le juge en cabinet, le texte de loi pourrait aussi être raisonnablement interprété comme interdisant seulement les publications diffusées pour la première fois *après* la délivrance d’une interdiction de publication.

[31] Je souligne que les juges majoritaires de la Cour d’appel ont reconnu que [TRADUCTION] « les deux thèses sont défendables »⁶¹, ce qui, à mon avis, constituait essentiellement une reconnaissance que le ministère public n’avait pas établi une forte apparence de droit quant à l’existence d’un outrage criminel. Ce dernier a demandé à la Cour de conclure que les juges majoritaires de la Cour d’appel avaient néanmoins « penché » vers l’interprétation du mot anglais « *publish[ed]* » qu’il privilégie lorsqu’ils ont affirmé que de voir l’affaire autrement « réduirait de façon importante la portée de nombreux droits et obligations qui dépendent de l’accès pour des tiers à des renseignements [et que] [s]i la publication est une activité continue, on peut aussi soutenir que [la SRC] désobéit volontairement à l’ordonnance de la cour »⁶². Or, même si on admettait que tel puisse

⁵⁸ p. 933 (je souligne).

⁵⁹ Motifs du juge en cabinet, par. 12.

⁶⁰ par. 33.

⁶¹ Motifs de la Cour d’appel, par. 10.

⁶² Motifs de la Cour d’appel, par. 10; transcription, p. 65 et 70-71.

and evidence presented, that has a *strong likelihood* of success at trial. And, again with respect, I see nothing in the chambers judge's reasons or, for that matter, in the majority reasons which persuades me that the chambers judge, in refusing the interlocutory injunction sought here, committed any of the errors described in *Hadmor* as justifying appellate intervention.

[32] My finding on this point is determinative, and obviates the need to consider *mens rea*, or the other two stages of the *RJR — MacDonald* test.

V. Conclusion

[33] I would allow this appeal.

Appeal allowed.

Solicitors for the appellant: Reynolds, Mirth, Richards & Farmer, Edmonton; Canadian Broadcasting Corporation, Toronto.

Solicitor for the respondent: Justice and Solicitor General, Appeals, Education & Prosecution Policy Branch, Calgary.

Solicitors for the interveners: Linden & Associates, Toronto.

être le cas, le fardeau du ministère public n'était pas de présenter une preuve d'outrage criminel qui « penche » dans un sens ou dans l'autre, mais plutôt une preuve qui, au regard du droit et des éléments de preuve présentés, avait une *forte chance* d'entraîner son succès au procès. En outre, rien dans ses motifs — ni d'ailleurs dans les motifs des juges majoritaires — ne me convainc que, lorsqu'il a rejeté la demande d'injonction interlocutoire en l'espèce, le juge en cabinet a commis une des erreurs décrites dans l'arrêt *Hadmor* qui justifierait une intervention en appel.

[32] Ma conclusion sur ce point étant déterminante; il est inutile que j'examine tant la *mens rea* que les deux autres étapes du test établi dans l'arrêt *RJR — MacDonald*.

V. Conclusion

[33] Je suis d'avis d'accueillir le pourvoi.

Pourvoi accueilli.

Procureurs de l'appelante : Reynolds, Mirth, Richards & Farmer, Edmonton; Société Radio-Canada, Toronto.

Procureur de l'intimée : Justice and Solicitor General, Appeals, Education & Prosecution Policy Branch, Calgary.

Procureurs des intervenants : Linden & Associates, Toronto.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20121009

Docket: A-357-12

Citation: 2012 FCA 255

Present: STRATAS J.A.

BETWEEN:

GLOOSCAP HERITAGE SOCIETY

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Heard at Ottawa, Ontario, on October 5, 2012.

Order delivered at Ottawa, Ontario, on October 9, 2012.

REASONS FOR ORDER BY:

STRATAS J.A.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20121009**Docket:** A-357-12**Citation:** 2012 FCA 255**Present:** STRATAS J.A.**BETWEEN:****GLOOSCAP HERITAGE SOCIETY****Applicant****and****THE MINISTER OF NATIONAL REVENUE****Respondent****REASONS FOR ORDER****STRATAS J.A.**

[1] The applicant, Glooscap Heritage Society, is a registered charity under the *Income Tax Act*. The Minister has notified Glooscap that he will exercise his authority under the Act and revoke Glooscap's registration as a charity. Glooscap intends to challenge the revocation.

[2] Under the Act the revocation can take place before Glooscap can challenge it. This will be explained in more detail below.

[3] In this application, Glooscap seeks an order delaying the revocation until this Court hears its challenge.

[4] In order to delay the revocation, Glooscap must satisfy the Court that it has met the normal test for the granting of stays and injunctions: *International Charity Association Network v. Minister of National Revenue*, 2008 FCA 114 at paragraph 5. Glooscap must show it has an arguable case against the revocation, it will suffer irreparable harm if the revocation is allowed to happen, and the balance of convenience lies in its favour: *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

[5] For the reasons set out below, Glooscap has not satisfied this test. Therefore, I shall dismiss Glooscap's application to delay the revocation of its registration as a charity, with costs.

A. Preliminary matter

[6] Initially, Her Majesty the Queen was named as the respondent to this application. The parties agree that the correct respondent is the Minister of National Revenue. I agree and will so order. The style of cause on these reasons and my order dismissing Glooscap's application shall reflect this change.

B. Facts

(1) The legislative scheme

[7] When the Minister concludes that a charity's registration should be revoked, he issues a notice of intention to revoke it: *Income Tax Act*, subsection 168(1). The revocation only takes effect when notice of it is published in the *Canada Gazette*.

[8] Where the charity has not requested the revocation, the publication of the notice is deferred for 30 days in order to allow the charity to challenge it: paragraph 168(2)(b). The challenge consists of the making of an objection and, if necessary, an appeal to this Court: Act, section 172.

[9] Any time before the Court determines the appeal, the Court may extend the 30 day period for non-publication of the notice of revocation. Before the appeal is brought, the extension may be granted on the basis of an application brought under Rule 300(b) of the *Federal Courts Rules*. After the appeal is brought, an extension may be granted by way of notice of motion within the appeal. See *International Charity Association Network (ICAN) v. Minister of National Revenue*, 2008 FCA 62 at paragraph 7.

(2) The basic facts of this case

[10] Since May 2005, Glooscap has been a registered charity under the Act.

[11] At that time, broadly stated, its objects were to research, study, exhibit, and publicize artifacts and evidence relating to the history of the Mi'kmaq First Nation in central Nova Scotia. In conjunction with the Central Nova Tourist Association, Glooscap operates the Glooscap Heritage Centre and Mi'kmaw Museum. The museum is located on the Millbrook First National reserve on the outskirts of Truro, Nova Scotia.

[12] Some of artifacts and exhibits in the museum come from charitable donations. But the bulk of the museum's artifacts and exhibits – some 80% – are on loan from another museum.

[13] The evidence filed before the Court suggests that the relationship between the tourist association and Glooscap – an aboriginal/non-aboriginal partnership in a tourism endeavour – is special and rare, and formed only after overcoming initial resistance. Putting aside Glooscap's involvement with the tax shelter, described below, the evidence filed before the Court demonstrates that Glooscap's activities are socially worthy and important to the community.

[14] But in this application, Glooscap's involvement with the tax shelter is central.

[15] The Minister alleges that from 2006 to 2011, Glooscap issued donation receipts in the following approximate totals: \$166,000 (2006), \$0 (2007), \$11,590,000 (2008), \$13,312,000

(2009), \$37,131,000 (2010), \$54,985,000 (2011). This shows a massive increase in donations since 2006 – ranging from 6,880% to over 33,000%.

[16] The Minister says this increase was due to Glooscap's involvement, starting in 2008, with an illegitimate tax shelter known as the Global Learning Gifting Initiative.

[17] In this regard, the Minister makes several allegations, largely on the basis of an audit it has conducted. On this application, it is not the role of the Court to determine whether these allegations are true. The Minister's allegations, to the extent they have a *prima facie* basis, are primarily relevant to the assessment of the public interest under the balance of convenience branch of the *RJR-Macdonald* test.

[18] The Minister's alleges that the illegitimate tax shelter worked in the following way:

- Each participant made a cash payment to Glooscap.
- Each participant then applied to become a capital beneficiary of the Global Learning Trust.
- The trust provided each participant with free courseware.

- Each participant donated the courseware to a registered charity that was participating in the tax shelter. In 2009 and 2010, participants donated the courseware to Glooscap.
- Each participant received an official donation receipt for the cash payment and the donated courseware.
- Although each participant purportedly donated the courseware at fair market value, Glooscap issued receipts for the courseware that were typically at least three times the amount of the cash payment the participant had made to Glooscap.
- Under this arrangement, Glooscap kept very little of the cash payments from participants. For example, in 2009, Glooscap retained 11.6% of the payments, with the promoter of the scheme receiving 88.4% of the payments.

[19] Following an audit, the Canada Revenue Agency concluded, among other things, that:

- Glooscap was not operating exclusively for charitable purposes as required under the Act, and instead was operating for the primary purpose of activities benefiting the tax shelter.

- Glooscap improperly issued receipts for cash and courseware that were not valid gifts under the Act.

[20] In an administrative fairness letter, the Canada Revenue Agency notified Glooscap of its concerns and invited Glooscap to respond. In a responding letter, Glooscap defended itself, urged that its registration as a charity not be revoked, and advised that it had terminated its relationship with the tax shelter.

[21] After some months, on July 17, 2012, the Canada Revenue Agency issued a Notice of Intention to revoke Glooscap's registration as a charity under the Act. Further, the Minister has told participants in the tax shelter their deductions arising from the scheme will be disallowed, and they will be reassessed for back taxes, interest and penalties.

[22] In the oral hearing of this application, Glooscap advised the Court that it has just filed an objection to the Minister's Notice of Intention.

[23] Assuming that the Canada Revenue Agency maintains its position, Glooscap will soon be able to challenge in this Court the Minister's planned – or, by then, actual – revocation of its registration as a charity. In the meantime, Glooscap wants this Court to stop the Minister from revoking its registration.

C. Analysis

(I) Arguable case

[24] On the first branch of the threefold test for a stay, Glooscap must establish that there will be a serious question to be tried when it challenges the Minister's position in this Court. Although it has not filed its objection to the Minister's Notice of Intention, it has filed its responding letter to the Minister's administrative fairness letter.

[25] The threshold for seriousness is "a low one" and "liberal": *RJR-Macdonald, supra* at page 337; *143471 Canada Inc. v. Quebec (Attorney General)*, [1994] 2 S.C.R. 339 at page 358, *per* La Forest J. (dissenting, with apparent concurrence on this point from the majority). Glooscap need only show that the matter is not destined to fail or that it is "neither vexatious nor frivolous": *RJR-Macdonald, supra* at page 337.

[26] Given the low threshold for "arguable case," the Minister has conceded that Glooscap has met this branch of the *RJR-Macdonald* test.

(2) Irreparable harm

[27] Glooscap submits that if its registration as a charity is revoked, it will suffer irreparable harm. It points to reputational effects upon itself, the First Nation with which it is associated, the First Nation's business relationships, and business collaborations between aboriginal and non-aboriginal communities. It also says that potential donors to the museum will donate to other museums that can provide a donation receipt, and they will not lightly come back.

[28] Glooscap adds that under the irreparable harm branch of the test, the Court is to look at the nature of the harm – whether it can be remedied later – and not the quantity of harm.

[29] The Minister submits that the irreparable harm must be that of the moving party, here Glooscap. Harm to third parties may be considered under the balance of convenience branch of the test, but not under the irreparable harm branch of the test. The Minister also points to the general, unparticularized nature of the harm and the absence of proof of a real likelihood of harm.

[30] On the law governing irreparable harm and on the record before the Court, the Minister's submissions carry some force.

[31] To establish irreparable harm, there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted. Assumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight. See *Dywidag Systems International, Canada, Ltd. v. Garford Pty Ltd.*,

2010 FCA 232 at paragraph 14; *Stoney First Nation v. Shotclose*, 2011 FCA 232 at paragraph 48; *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25, 268 N.R. 328 at paragraph 12; *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84 at paragraph 17.

[32] The reason behind this was explained in *Stoney First Nation* as follows (paragraph 48):

It is all too easy for those seeking a stay in a case like this to enumerate problems, call them serious, and then, when describing the harm that might result, to use broad, expressive terms that essentially just assert – not demonstrate to the Court's satisfaction – that the harm is irreparable.

[33] Finally, only harm suffered by the moving party qualifies under this branch of the test. As was said in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 at page 128, “[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm.” It is “the applicants’ own interests” that fall to be considered under this branch of the test, not that of third parties: *RJR-MacDonald*, *supra* at page 341.

[34] In cases such as this, a modest modification of this principle has been made. The interests of those who are dependent on the registered charity may also be considered under this branch of the test: *Holy Alpha and Omega Church of Toronto v. Attorney General of Canada*, 2009 FCA 265 at paragraph 17.

[35] Glooscap has adduced evidence from very well-placed deponents: the executive director of the tourist association with which Glooscap is partnered, a multi-decade councillor with the Millbrook First Nation reserve, and the general manager of the museum. However, much of the evidence of harm given by these deponents consists of sweeping, unparticularized assertions and declarations that difficulties would arise that *might* result in actual harm.

[36] Without a better understanding of Glooscap's overall financial situation and fundraising ability, I cannot conclude that a loss of donations would result in any irreparable harm to it or its activities.

[37] Glooscap submits that revocation of its registration as a charity will cause harm to its relationships, particularly with non-aboriginal organizations, and these injuries are not capable of later remediation. However, its evidence goes no higher than to identify "jeopardy" or a risk to those relationships: see paragraphs 11 and 13 of the Mingo Affidavit.

[38] The Court does accept that Glooscap will suffer some reputational harm. However, as explained below, much of the reputational harm, especially in the donor community, will be caused not by the revocation of Glooscap's registration as a charity, but rather by the reassessment of the donors to the tax shelter.

[39] Ultimately fatal to Glooscap's application is the requirement that it establish irreparable harm that is *unavoidable*, i.e., irreparable harm that will be caused by the failure to get a stay, not harm caused by its own conduct in running a clearly-known risk that it actually knew about, could

have avoided, but deliberately chose to accept: *Dywidag Systems International, supra* at paragraphs 14 and 16.

[40] In *Dywidag Systems International*, the irreparable harm was said to be the disclosure of confidential documents. Often the release of confidential documents causes irreparable harm. But in *Dywidag*, this irreparable harm was avoidable: months earlier, *Dywidag* was invited to agree upon a confidentiality order protecting the documents, but it did nothing.

[41] In this case, *Glooscap* knew about the sizeable advantages of registered charitable status: exemption from income tax and the ability to issue receipts for donations received. It was warned at an early stage that it might lose its advantageous charitable status if it associated with this tax shelter. Part of that risk is the very thing that has now materialized – the revocation of its charitable status before it can challenge the revocation in this Court. Warnings about involvement with this tax shelter came from the Canada Revenue Agency (two emails and a meeting), *Glooscap*'s own lawyer (two letters) and its own auditor. *Glooscap*'s auditor resigned, at least in part over the issue. There were also warnings that involvement in the tax shelter would require an amendment to *Glooscap*'s objects and the approval of the Canada Revenue Agency. Yet, knowing of the risks, *Glooscap* chose to continue its association with the tax shelter, and in fact renewed its association in 2009.

[42] *Glooscap* submits that it exercised good faith throughout. In support of that submission, among other things, *Glooscap* points to confirmatory testimony given on cross-examination of a representative of the Canada Revenue Agency. That may be so, but the fact remains that at an early

stage Glooscap knew of the risk of the very harm that has eventuated here and it chose to run that risk.

[43] If Glooscap blundered itself into involvement in this tax shelter, oblivious to any real risk, the irreparable harm might not be fairly laid at its feet. Similarly, circumstances such as mistaken advice, mistake as to the facts, trickery, duress or unauthorized conduct by someone wrongly purporting to act for Glooscap might cause a different view to be taken of the matter. But in this case none of these circumstances are present.

(3) Balance of convenience

[44] Were it necessary to proceed to this branch of the test, this Court would have found that the balance of convenience lies against the granting of relief to Glooscap.

[45] This Court recognizes the high significance and importance of the aboriginal/non-aboriginal partnership in this case between Glooscap and the tourist association, especially when viewed against the regrettable, often abysmal, sometimes unspeakable events surrounding Canada's history of aboriginal/non-aboriginal relations: *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Backward*, vol. 1 (Ottawa: Canada Communication Group Publishing, 1996).

[46] As mentioned in paragraph 37 above, the evidence offered by Glooscap falls short of establishing a real likelihood that this partnership will fail or that the broader aboriginal/non-aboriginal relationship will suffer if Glooscap's charitable status is revoked. That being said, the evidence does describe a risk – albeit undefined, abstract and perhaps speculative – of that happening.

[47] The Court also accepts that if Glooscap's registration as a charity is revoked, the reputations of it and perhaps those associated with it will suffer, with possible, undefined, perhaps speculative detrimental effects on their businesses and activities.

[48] However, one would expect that the Minister's reassessment of all of Glooscap's donors who participated in the tax shelter will cause negative news to spread through all of the donor community, if not the wider community. This will happen regardless of whether the Court grants Glooscap the relief it seeks in this application.

[49] Glooscap's evidence falls short of establishing that the museum will fail, or that its educational mission will be detrimentally affected. No financial information has been given that would allow such a finding to be made.

[50] Putting aside the donations involving the tax shelter, Glooscap has received only \$19,775 in total donations during 2007-2011, and no evidence has been provided suggesting that the loss of this level of donation will cause any significant harm.

[51] On the Minister's side, is the public interest in enforcement – a matter deserving of significant weight in this case. The Minister's allegations in support of revocation of Glooscap's registration as a charity are supported, on a *prima facie* basis, by the conclusions of the audit that appears in the record before the Court. Therefore, the public interest in enforcement, as contemplated by the Act, is in play.

[52] Glooscap seeks to prevent the Minister from revoking its registration, something the Act permits the Minister to do at this time, subject, of course, to later challenge. Where the moving party seeks to prevent statutory actors from carrying out their statutory duties, a "very important" public interest "weigh[s] heavily" in the balance: *143471 Canada Inc.*, *supra* at page 383, Cory J. (for the majority); *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764, 2000 SCC 57 at paragraph 9; *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84 at paragraph 12.

[53] The weight to be accorded to that public interest, already significant, is driven upward by the sizeable amounts said to be in issue in this case: \$116,999,482 given in receipts to participants in the tax shelter in 2008-2011, in circumstances where valid non-tax shelter donations over the same period totalled only \$19,775. It is also driven up by Glooscap's decision to involve itself in the tax shelter despite the clear warnings it received.

[54] In assessing and weighing the public interest considerations in this case against the considerations offered by Glooscap, I can do no better than to adopt the words of my colleague, Sharlow J.A., in *International Charity Association Network*, *supra* at paragraph 12 (2008 FCA 62):

The Minister takes the position, properly in my view, that the public has a legitimate interest in the integrity of the charitable sector. It is reasonable for the Minister to attempt to safeguard that integrity by carefully scrutinizing tax shelter schemes involving charitable donations of property and, where there are reasonable grounds to believe that the property has been overvalued, by taking appropriate corrective action. In the circumstances of this case, the Minister's factual allegations, while untested, are sufficiently serious to outweigh any advantage [the charity] might derive from an order deferring the revocation of its registration as a charity.

D. Disposition

[55] For the foregoing reasons, I shall dismiss Glooscap's application to delay the revocation of its registration as a charity. The Minister shall have his costs of the application.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

DOCKET: A-357-12

STYLE OF CAUSE: Glooscap Heritage Society v. The
Minister of National Revenue

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: October 5, 2012

REASONS FOR ORDER BY: Stratas J.A.

DATED: October 9, 2012

APPEARANCES:

Bruce S. Russell, Q.C. FOR THE APPLICANT

Rosemary Fincham FOR THE RESPONDENT
April Tate

SOLICITORS OF RECORD:

McInnes Cooper FOR THE APPLICANT
Halifax, Nova Scotia

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada

Air Passenger Rights
Applicant

Canadian Transportation Agency
Respondent

Court File No.: A-102-20

FEDERAL COURT OF APPEAL

Proceeding commenced at VANCOUVER

**MOTION RECORD OF THE PROPOSED
INTERVENER, THE NATIONAL AIRLINES
COUNCIL OF CANADA, FOR LEAVE TO
INTERVENE**

Volume 3 of 3

PATERSON MacDOUGALL LLP

Barristers, Solicitors
Box 100, Suite 900
1 Queen Street East
Toronto, Ontario
M5C 2W5

Clay S. Hunter 1.S#: 31896M
E-mail: CHunter@pmlaw.com
Tel: (416) 643-3324
Fax: (416) 366-3743

Counsel for the Proposed Intervener, The
National Airlines Council of Canada