Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

REPLY OF THE MOVING PARTY / APPLICANT, AIR PASSENGER RIGHTS

Motion for Interlocutory Prohibitory and Mandatory Injunctions
(Pursuant to Rules 369 and 373-374 of the *Federal Courts Rules*)

Expedited pursuant to the April 16, 2020 Order of Locke, J.A.

VOLUME 1 of 2

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TO: **CANADIAN TRANSPORTATION AGENCY**

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CANADIAN TRANSPORTATION AGENCY

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REPLY OF THE MOVING PARTY / APPLICANT

A. Overview in Reply

1. The Applicant asks for this Honourable Court's urgent intervention to restrain the Agency's unlawful acts in misguiding passengers into swallowing vouchers instead of demanding cash refunds, while benefiting airlines with billions in interest-free loans.

2. The Agency misquotes the substance of the Application and the Motion, inviting the Court to assess the Agency's Statement on Vouchers in a vacuum. The Agency already admitted that the Statement was "widely disseminated"[1]. The uncontradicted evidence is that widespread and actual confusion has ensued from the Statement's dissemination, the Agency's usage of it on the COVID-19 Info Page and Twitter account, and/or reliance on the Statement by third parties to curtail passengers from refunds.

3. Indeed, viewing the Statement and the COVID-19 Info Page from the perspective of the target audiences (i.e., lay passengers who are not technical subject-matter experts), it has great potential to improperly sway passengers to believe that a voucher is the best option. The Agency's indiscriminate regurgitation thereof to passengers inquiring about refunds furthers that misconception. Regular Canadians are not expected to "lawyer up" or to spend hours critically analyzing the communications of the very entity that is supposedly tasked with the mandate to protect those passengers' interest.

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[1] Order of Locke, J.A., dated April 16, 2020, pp. 3-4.

4. The Agency's posting of a new FAQ almost two weeks **after being served** with the Applicant's motion could not assist their cause, nor address the Applicant's concerns. Legally, *ex post facto* acts cannot and should not be considered. Substantively, the Agency gave no sworn evidence on its motivation for posting an FAQ. Nor is there *any* evidence that this FAQ was seen by passengers that previously saw the Statement or that, prospectively, passengers that see the Statement would have unobstructed access to the FAQ, which in any event continues to be an advocacy piece benefiting air carriers.

5. The Court should exercise caution in accepting the Agency's conclusions on many factual assertions, as there is no evidentiary support on many critical points. Examples include the authorship, approval, and purpose for the Statement and other publications. The Court should draw adverse inferences from their unexplained omissions.

6. The Agency advances three legal arguments in opposition of the present motion:

(a) The Statement is a prudent expression of a policy guidance in extraordinary circumstances, serving the purpose of protecting the airlines' economic viability.

(b) The Agency's "policy guidance" is not subject to judicial review and cannot give rise to reasonable apprehension of bias.

(c) The Applicant does not meet the criteria for a *mandamus*, and a mandatory injunction is not available on a judicial review.

7. The Agency's submissions are devoid of any merit for the following reasons:

(a) The Agency's mandate is to *carry out* policies of Parliament, not to make them. Protecting airlines' economic viability is *ultra vires* the Agency. Parliament explicitly assigned to Cabinet the issuance of policies and addressing extraordinary disruptions of the national transportation system. In 2007, Parliament removed economic viability considerations from the Agency's mandate.

(b) It is settled law that policy statements issued by statutory bodies must conform to the law, and as such, they are subject to judicial review. The line of authorities following *Ainsley Financial Corp. v. Ontario (Securities Commission)* also confirm that policy statements may give rise to reasonable apprehension of bias.

(c) The Applicant is seeking prohibitory and mandatory injunctions, **not** a *mandamus*. A long line of authorities following *Canada (Human Rights Commission) v. Canadian Liberty Net* confirm that the Federal Courts may issue mandatory injunctions pursuant to s. 18, 18.2, and/or 44 of the *Federal Courts Act*.

B. The Agency's Submissions Confirm that it Acted Both outside of its Statutory Mandate and Unlawfully

8. In an effort to obscure the legal issues in this case, the Agency submitted that the Statement is simply an expression of policy guidance to protect the airlines' economic viability in extraordinary circumstances. This Honourable Court ought to decline the Agency's invitation to convert the case into a debate on the the efficacy of public policy.

9. It is settled law that any policy guidance, irrespective of whether it imposes duties or obligations enforceable in a court of law, must be within the strict confines of the statutory body's mandate and cannot contravene the text of statutory instruments.[2]

10. The Statement and the COVID-19 Info Page [**Publications**] fail to meet these basic legal requirements, because: (i) formulating policy to protect the airlines' economic viability in extraordinary circumstances is beyond the Agency's mandate; (ii) the Publications were posted in contravention of the Agency's own *Code of Conduct*; and (iii) the Publications advocate **against** applying both the letter and spirit of the law.

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[2] *Latimer v. Canada (Attorney General)*, 2010 FC 806 at para. 53 [Vol. 2, Tab 25, p. 689]; *Sander Holdings Ltd. v. Canada (Attorney General)*, 2005 FCA 9 at paras. 50 and 53 [Vol. 2, Tab 43, p. 925]; and *Moresby Explorers Ltd. v. Canada (Attorney General)*, 2007 FCA 273 at para. 24 [Vol. 2, Tab 33, pp. 798-799] (leave to appeal ref'd: [Vol. 2, Tab 34, p. 805]).

i. It is not the Agency's mandate to protect airlines' economic viability

11. It is common ground that the Agency is a statutory creature that performs two functions: as a quasi-judicial arbiter in resolving specific commercial and consumer transportation-related disputes; and as an economic regulator issuing permits and licenses for transportation providers.[3] The Agency must always discharge these functions in accordance with its enabling statute, the *Canada Transportation Act* [***Act***].

12. The Agency's reliance on its own website self-proclaiming that its mandate includes protection of "those who work and invest in" transportation businesses (i.e., the jobs of the air carriers' employees and the investment of the air carriers' shareholders)[4] is misguided, and flies in the face of the text, legislative history, and purpose of the *Act*.

13. Firstly, the Agency's role is to **implement** policies, not to formulate them. In enacting ss. 24 and 43-47 of the *Act*, Parliament completely codified and explicitly assigned to Cabinet, and not to the Agency, the authority to **formulate** policy decisions, or to take action to remedy extraordinary disruptions to the transportation system.[5] Parliament also saw fit to provide detailed legislation on the manner Cabinet is to exercise these powers under strict Parliamentary oversight requiring a swift reference to a House committee.[6] Consistent with these legislative provisions, this Court held that the Agency's role is "to ensure that the policies pursued by the legislator are carried out."[7]

14. Secondly, Parliament clearly spoke when they repealed s. 5(h) of the *Act* as part of the 2007 reform to the regulatory scheme. While the pre-2007 text of the *Act*

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3 *Lukács v. CTA*, 2015 FCA 140 at paras. 48-51 [Vol. 2, Tab 28, pp. 738-739].
4 Agency's Memorandum, para. 7(a) [p. 232, l. 1].
5 *A.G. v. De Keyser's Royal Hotel, Ltd.*, [1920] A.C. 508, cited in: *Breckenridge Speedway Ltd. v. R.*, 1967 CarswellAlta 58 at paras. 181-182 [Vol. 2, Tab 5, p. 152]
6 *Canada Transportation Act*, ss. 24 and 43-47 [pp. 43 and44-45].
7 *Lukács v. Canadian Transportation Agency*, 2016 FCA 220 at para. 19 (emphasis added) [Vol. 2, Tab 30, p. 758]; var'd on other grounds: *Delta Air Lines v. Lukács*, 2018 SCC 2.

included reference to the "economic viability" of modes of transportation in the "National Transportation Policy" in s. 5(h),[8] the legislature made a deliberate choice to remove this consideration from the *Act*. The Agency must respect Parliament's will.

15. Thirdly, protecting the "economic viability" (i.e., cash flow and liquidity) of the entity being regulated is inconsistent with the role of an "economic regulator." Indeed, in the context of telecommunications, this Court held that economic regulation does not extend to the CRTC dealing with a business's costs of production or their liquidity. Both of these roles were within the exclusive purview of the business owner.[9]

ii. The Publications are contrary to the Agency's *Code of Conduct*

16. The Agency argues that the *Code of Conduct* has no application because it "is not a public statement made by any Member about any case" and further claims that the Statement was issued in their role as an economic regulator.[10] This has no merit.

17. Firstly, s. 7(2) of the *Act* states that the Agency shall consist of its Members,[11] irrespective of which function it is carrying out (i.e., quasi-judicial or regulatory).

18. Secondly, the prohibition of the *Code of Conduct* against public commenting by Members is not limited to the quasi-judicial function of the Agency. Indeed, as the Agency correctly conceded, the *Code of Conduct* prohibits Members not only from publicly commenting on "past, current or potential cases" but also from commenting on "any other issue related to the work of the Agency."[12]

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[8] *Canada Transportation Act*, s. 5 **current version** [pp. 40-41] *vs.* **original version** [p. 51]; legislative history of s. 5: *Jackson v. Canadian National Railway*, 2012 ABQB 652 at paras. 57, 59, and 60 [Vol. 2, Tab 22, pp. 620-623]; see also: *Canadian National Railway v. Moffatt*, 2001 FCA 327 at para. 27 [Vol. 2, Tab 11, p. 324].

[9] *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2014 FCA 84 at para. 84 [Vol. 2, Tab 10, p. 310] (rev'd on other grounds: 2015 SCC 57).

[10] Agency's Memorandum, paras. 79-80.

[11] *Canada Transportation Act*, s. 7(2) [p. 42].

[12] Agency's Memorandum, para. 79.

19. Thirdly, the affidavit filed by the Agency speaks loudly in what it fails to address.[13] Article 4 of the *Code of Conduct* prohibits delegation of the Members' regulatory powers. There is no evidence from the Agency to contradict the inevitable conclusion from a plain reading of the Publications that the Members were involved in the preparation of the Publications and approved its subsequent wide dissemination.

iii. The Publications are contrary to the law

20. The basic legal principle is that a statutory body's administrative publication must not conflict with legislative instruments, irrespective of whether that body intended those publications to be binding.[14] The Publications herein violate this fundamental principle in two ways.

21. Firstly, as the Agency correctly conceded, the *Air Passenger Protection Regulations* [***APPR***] mandates refunds to original forms of payment[15] in "situations within airline control" and "situations within airline control but required for safety."[16] The Agency provided no explanation why the Agency's COVID-19 Info Page indiscriminately "suggests" vouchers as a form of refund for passengers, thereby encouraging airlines to flagrantly disobey the plain text of the *APPR* for *all* cancellations.

22. Secondly, in its Publications and before this Court, the Agency misstated the existing law in claiming that a refund is not required for "situations outside airline control."[17] Contrary to the Agency's submission, the *Act* and the *Air Transportation Regulations* [***ATR***] specifically mandate carriers to establish reasonable policies for

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[13] *E.A. Manning Ltd. v. Ontario (Securities Commission)*, 1994 CarswellOnt 1015 at para. 53 [Vol. 2, Tab 16, p. 494]; aff'd: 1995 CarswellOnt 1057 [Vol. 2, Tab 17, p. 497].

[14] *East Durham Wind, Inc. v. West Grey (Municipality)*, 2014 ONSC 4669 at para. 26 [Vol. 2, Tab 15, p. 468]; and *Wpd Sumac Ridge Wind Inc. v. Kawartha Lakes (City)*, 2015 ONSC 4164 at paras. 26-28 [Vol. 2, Tab 48, p. 1000].

[15] *Air Passenger Protection Regulations*, s. 17(7) [p. 31].

[16] Agency's Memorandum, paras. 16-17.

[17] Agency's Memorandum, para. 18.

refunds in situations when the airline is unable to provide the service for any reason.[18] The Agency has repeatedly found, based on the *Act* and the *ATR*, that passengers have a fundamental right to a refund and not mere "credit shells" if a flight is cancelled, even in situations outside the airline's control.[19] The legislative provisions that are the genesis for this fundamental right were further *supplemented*, not displaced, by the *APPR*.

C. The Application Raises Reviewable Issues and Remedies within the Court's Supervisory Jurisdiction

23. The Agency argues that the Statement is a mere policy suggestion that cannot be judicially reviewed, nor can it give rise to a reasonable apprehension of bias. To reach that conclusion, the Agency has **misinformed** the Court on the Applicant's position, transforming the Applicant's position that "the Statement is not a binding decision" into a dramatically different position that "the Applicant concedes that the Agency's Statement does not affect the rights of passengers nor the obligations of airlines."[20] These were the Agency's own words.[21] **The Applicant never made that concession**.

24. On the contrary, Locke, J.A. noted that the Applicant seeks this Honourable Court's intervention because the Applicant's position is that the Publications are being used to irrevocably affect passengers' rights. Indeed, Locke J.A. found that "the timing of the publication of the Statement on Vouchers (in the midst of the COVID-19 pandemic) suggests that it was intended to have an immediate effect on relations between air carriers and their passengers."[22] The attempted intervention by an airline lobby group (NACC) *ipso facto* demonstrates the Publications affect their obligations towards passengers, warranting their interference to protect their "economic viability."[23]

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[18] *Air Transportation Regulations*, ss. 107(1)(n)(xii), 122(c)(xii), and 111(1) [pp. 34, 37, and 36]; and *Canada Transportation Act*, s. 67.2(1) [p. 47].
[19] See Applicant's Memorandum, paras. 27-30 [Motion Record, pp. 192-193].
[20] Agency's Memorandum, para. 61.
[21] Desnoyers Affidavit, Exhibit "O" [Agency's Motion Record, p. 217, line 2].
[22] Order of Locke, J.A., dated April 16, 2020, p. 3.
[23] Order of Boivin, J.A., dated May 1, 2020.

i. The Publications are reviewable by this Honourable Court

25. The meaning of "matter" or "act" in the *Federal Courts Act* has been settled more than two decades since *Krause*, *Markevich*, and *Larny*, and continues to apply.[24] The Agency improperly invites the Court to resurrect this debate on the present motion.

26. The Agency asserts that they were exercising powers under the *Act* to "economically regulate" the financial viability of airlines, which is the most classic scenario for a court to review a tribunal's purported exercise of powers.[25] Yet, the Agency claims their conduct to be immune from this Honourable Court's scrutiny, because there is allegedly no "matter" or "act" for review, and as such, this Court has no jurisdiction.[26] This is not correct in law.

27. It is trite law that a "matter" or "act" broadly captures a diverse range of administrative actions, and includes non-obligatory policy statements and guidelines—precisely what the Agency claims the Publications to be. The argument that "a non-binding opinion as to how provisions of a statute are perceived to apply do not fall within the types of decision of a federal board" has been carefully analyzed and **rejected** by Nadon, J. (as he then was) in *Larny*.

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[24] *Krause v. Canada*, 1999 CarswellNat 211 at paras. 22-24 [Vol. 2, Tab 23, pp. 656-657]; *Markevich v. Canada*, 1999 CarswellNat 218 at paras. 9-13 [Vol. 2, Tab 31, pp. 765-766]; *Larny Holdings Ltd. v. Canada (Minister of Health)*, 2002 FCT 750 at paras. 14-22 [Vol. 2, Tab 24, pp. 665-670]. See also: *Moresby Explorers Ltd. v. Canada*, 2007 FCA 273 at para. 24 [Vol. 2, Tab 33, pp. 798-799] (leave to appeal ref'd: [Vol. 2, Tab 34, p. 805]); *Morneault v. Canada*, 2000 CarswellNat 980 at para. 42 [Vol. 2, Tab 35, p. 827]; *Dhillon v. Canada (Attorney General)*, 2016 FC 456 at paras. 22-24 [Vol. 2, Tab 14, pp. 451-452]; *David Suzuki Foundation v. Canada*, 2018 FC 380 at paras. 156-157 and 173 [Vol. 2, Tab 12, pp. 374 and 378-379]; and *H.J. Heinz Co. of Canada Ltd. v. Canada*, 2006 SCC 13 at para. 44 [Vol. 2, Tab 19, p. 543].

[25] *Wenham v. Canada*, 2018 FCA 199 at para. 61 [Vol. 2, Tab 47, pp. 984-985]; and *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735 at para. 23 [Vol. 2, Tab 21, p. 595].

[26] Agency's Memorandum, paras. 39-51.

28. The *Democracy Watch* case the Agency heavily relies upon does not relate to the legality of *actions taken* by administrative bodies, but rather the alleged *failure* of officers of Parliament to act on their duties owed to Parliament, and to Parliament alone.

ii. The Agency's conduct directly affects and/or prejudices passengers

29. The Agency's claim that the Publications have no direct effect on passengers and that indiscriminately disseminating the Publications to all passengers who cry for help on a refund does not create any prejudice[27] is disingenuous.[28] The Agency's purported preliminary challenge on public interest standing[29] is similarly devoid of merit.[30] As gleaned from the Agency's position and NACC's attempted intervention, the very essence for widely disseminating the Publications was to tilt the overall cash balance for the airlines' benefit for their "economic viability," thereby creating a corresponding financial prejudice when many lay passengers "give up" seeking their cash refund.

30. The flawed premise in the Agency's argument is that they invite the Court to conclude that the passengers are aviation law experts capable of piercing through a tribunal's incomplete or inaccurate technical representations, and thereafter still have confidence to bring a formal claim before the same tribunal that has officially "suggested" from the outset that cash refunds are *generally* considered as unreasonable.

31. With all due respect, the Agency's "lack of prejudice" argument here was similarly rejected both by Evans J. (as he then was) in *Markevich* and by Nadon J. (as he then was) in *Larny*.[31] It does not lie in the Agency's mouth to say that being "bullied out" of seeking recourse, and swallowing a bland voucher, is non-prejudicial.

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[27] Agency's Memorandum, paras. 52-56.

[28] *Laurentian Pilotage Authority v. Corporation des Pilotes de Saint-Laurent Central Inc.*, 2019 FCA 83 at paras. 31-32 [Vol. 2, Tab 26, p. 709].

[29] Agency's Memorandum, paras. 59-61.

[30] *Lukács v. CTA*, 2016 FCA 174 at para. 6 [Vol. 2, Tab 29, p. 750].

[31] *Larny Holdings Ltd. v. Canada (Minister of Health)*, 2002 FCT 750 at paras. 22 and 30-33 [Vol. 2, Tab 24, pp. 670 and 672-673]; and *Markevich v. Canada*, 1999 CarswellNat 218 at paras. 11-13 [Vol. 2, Tab 31, pp. 765-766].

iii. The Court may issue a mandatory injunction to remove the Publications

32. The Agency's argument that the Applicant does not meet the test for *mandamus* is a red-herring and should be disregarded.[32] The Applicant **is not** seeking a *mandamus*, but rather prohibitory or mandatory injunctions, which are distinct from a *mandamus*.[33]

33. The Agency also argues that this Court's powers on judicial review are limited to the two narrow provisions under s. 18.1(3) of the *Federal Courts Act*.[34] The Agency's argument is misguided.

34. All levels of federal courts, including the Supreme Court of Canada in *Canadian Liberty Net*, have confirmed the federal courts' broad and plenary powers in their supervision of federal tribunals to grant all forms of remedies, including declarations and permanent and interim injunctions—the very remedies sought by the Applicant.[35]

iv. The Court may restrain Members from dealing with refund complaints

35. The Agency boldly claimed that there is "no legal authority" for restraining a tribunal on the basis of reasonable apprehension of bias, and thus the relief of temporarily restraining the Agency's Members from dealing with COVID-19 related refund complaints is unavailable.[36] The Agency's claim is not correct in law.

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[32] Agency's Memorandum, paras. 85-88.

[33] *Martell v. Canada (Attorney General)*, 2019 FC 737 at para. 24 [Vol. 2, Tab 32, p. 785].

[34] Agency's Memorandum, paras. 66-68, 71, and 86-88.

[35] *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 at paras. 36-37 [Vol. 2, Tab 9, p. 277]. See also: *H.J. Heinz Co. of Canada Ltd. v. Canada*, 2006 SCC 13 at para. 44 [Vol. 2, Tab 19, p. 543]; *Toutsaint v. Canada (Attorney General)*, 2019 FC 817 at para. 65 [Vol. 2, Tab 46, p. 962]; *Bilodeau-Massé v. Canada (Procureur général)*, 2017 FC 604 at para. 78 [Vol. 2, Tab 4, pp. 121-122]; *Martell v. Canada (Attorney General)*, 2019 FC 737 at paras. 24-28 [Vol. 2, Tab 32, p. 785]; and *Canadian Council for Refugees v. R.*, 2006 FC 1046 at paras. 8-9 [Vol. 2, Tab 8, p. 251].

[36] Agency's Memorandum, paras. 91-93.

36. *E.A. Manning*, and the related *Ainsley* case, strikingly resemble the circumstances herein.[37] In *Ainsley*, the courts concluded that a tribunal acted inappropriately and outside of its statutory powers by issuing a non-binding "policy guidance" about the sales practice of penny stock dealers.[38] The Ontario Divisional Court held then in *E.A. Manning* that the illegitimate issuance of the "policy guidance" constituted prejudgment, and on that basis the court restrained **all tribunal members** who participated in issuing that "policy guidance" from adjudicating a case on penny stock dealers.[39]

37. The court also concluded in *E.A. Manning* that the tribunal's swaying into an advocacy role to argue the merits of the penny stock dealers' case in *Ainsley* demonstrated that it acted outside the role of an impartial arbiter.[40] The Agency's conduct in vigorously justifying the wisdom of the "economic guidance" and misstating the law on refunds closely resembles the conduct in *E.A. Manning* and *Ainsley*. These lines of authorities were widely adopted by courts across Canada, including the Federal Courts.[41]

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[37] *Alberta (Securities Commission) v. Workum*, 2010 ABCA 405 at para. 63 [Vol. 2, Tab 3, p. 97].

[38] *Ainsley Financial Corp. v. Ontario (Sec. Comm.)*, 1993 CarswellOnt 150 at paras. 1, 3, 25, 34, 36, 69 and 70 [Vol. 2, Tab 1, pp. 63, 69, 71, and 79]; aff'd: 1994 CarswellOnt 1021 at paras. 3, 5, 14, and 17-19 [Vol. 2, Tab 2, pp. 85-86 and 88-90].

[39] *E.A. Manning Ltd. v. Ontario (Sec. Comm.)*, 1994 CarswellOnt 1015 at paras. 51-55 [Vol. 2, Tab 16, pp. 493-494]; aff'd: 1995 CarswellOnt 1057 [Vol. 2, Tab 17, pp. 497].

[40] *E.A. Manning Ltd. v. Ontario (Sec. Comm.)*, 1994 CarswellOnt 1015 at para. 52 [Vol. 2, Tab 16, p. 494].

[41] *Sander Holdings Ltd. v. Canada (Attorney General)*, 2005 FCA 9 at paras. 50 and 53 [Vol. 2, Tab 43, p. 925]; *Latimer v. Canada (Attorney General)*, 2010 FC 806 at para. 53 [Vol. 2, Tab 25, p. 689]; and *Delisle c. Canada (Procureur général)*, 2006 FC 933 at para. 128 [Vol. 2, Tab 13, pp. 435-436].

D. The Agency Could Not Dispel the Need for Urgent Judicial Intervention

i. The Agency failed to rebut the strong merits of the Applicant's case

38. The Agency incorrectly claims that the strong *prima facie* case standard applies throughout.[42] That standard applies only to the *mandatory* injunction for removal of the Publications and clarifications to those affected. For a *prohibitory* injunction restraining Members from addressing refund claims, the Applicant only needs to satisfy the Court that there is a *serious issue to be tried* that the Members violated the *Code of Conduct*, or that the Members' conduct demonstrated a reasonable apprehension of bias.

39. The Agency's attempted rebuttal of the Applicant's case again rests largely on their stretching of "the Publications are non-binding" into an unthinkable argument that "the Publications are non-prejudicial," which is unmeritorious as demonstrated above.

40. Given the seriousness of the motion, and being granted a generous timeline for response,[43] the Agency should already have put their best foot forward.[44] The complete silence in their affidavit is baffling. There was no explanation for making the Publications, **nor** *any* evidence to rebut the conclusion that the Members were involved.[45]

41. The Agency's factual defense is based on counsel's representations that the Agency was issuing economic "policy guidance." The Agency was previously rebuked for introducing facts in this way.[46] Then, without providing any evidence on the Publications' authorship, the Agency argues that the Members be exonerated from the clear *Code of Conduct* violation merely because the Agency left the Publications unattributed.

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[42] Agency's Memorandum, para. 104.
[43] Order of Locke, J.A. dated April 16, 2020.
[44] *Eco-Industrial Business Park Inc. v. Alberta Diluent Terminal Ltd.*, 2014 ABQB 302 at para. 31 [Vol. 2, Tab 18, pp. 524-525].
[45] *E.A. Manning Ltd. v. Ontario (Sec. Comm.)*, 1994 CarswellOnt 1015 at para. 53 [Vol. 2, Tab 16, p. 494]; aff'd: 1995 CarswellOnt 1057 [Vol. 2, Tab 17, p. 497].
[46] *Lukács v. CTA*, 2014 FCA 239 at para. 9 [Vol. 2, Tab 27, p. 722].

42. Although an affiant's failure to attend cross-examination[47] normally leads to striking their affidavit entirely,[48] the Applicant submits that the more suitable course here is to draw adverse inferences on this motion, owing to the Agency's choice not to present evidence.[49] The Court should infer that all Members were involved in preparing the Publications and approved its wide dissemination. The Court should similarly infer that the Publications and related conduct were the direct result of "cooperation" between airlines and the Agency to guard airlines' liquidity, at passengers' expense.[50]

43. The Agency provided an "FAQ" dated April 22, 2020,[51] containing unsworn arguments purporting to explain the earlier Publications, but at the same time re-emphasizing the same prevarication from the Publications. Notably, the manner the Agency cited the FAQ in its affidavit and Memorandum gives the impression the FAQ was posted alongside or immediately after the Statement. Other than a lone footnote with a date, the Agency **did not** specifically bring to this Court's attention that the FAQ was in fact published almost **two weeks after** being served with the Applicant's Motion.

44. The FAQ and exhibits dated after April 9, 2020 (date the Applicant's Motion was served) smacks of bootstrapping,[52] and **must not** be considered in assessing the strength of the Applicant's case.[53] Indeed, the Agency's Memorandum exceedingly relies on the phrases "not a binding decision" and "doesn't affect airlines' obligations or passengers' rights", which only appeared for the first time in that FAQ, and were **never**

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47 Certificate of Non-Attendance, dated May 1, 2020 [filed by email on May 1, 2020].
48 *Federal Courts Rules*, Rule 97(c) [p. 62].
49 *Ottawa Athletic Club Inc. v. Athletic Club Group Inc.*, 2014 FC 672 at paras. 108-110 [Vol. 2, Tab 40, pp. 876-877].
50 Lukács Affidavit, para. 45 [Applicant's Motion Record, Tab 2, p. 23].
51 Desnoyers Affidavit, Exhibit "O" [Agency's Motion Record, p. 215].
52 *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299 at para. 41 [Vol. 2, Tab 45, p. 941]; and *'Namgis First Nation v. Canada (Fisheries and Oceans)*, 2019 FCA 149 at para. 7 [Vol. 2, Tab 36, p. 834].
53 *Shipdock Amsterdam BV v. Cast Group*, 1999 CarswellNat 2513 at paras. 7-8 (*per* Lafrenière, P. as he was then) [Vol. 2, Tab 44, p. 931]; and *Odyssey TV Network Inc v. Ellas TV Broadcasting Inc*, 2018 FC 337 at para. 42 [Vol. 2, Tab 39, p. 867].

part of the earlier Publications. There is a serious question what the subsequent FAQ was seeking to accomplish, especially when it remains unattributed and unexplained.

45. The three instances of "non-binding guidances" the Agency seeks to rely upon significantly differ from the Statement on Vouchers, even on their face.[54] Those examples were either rooted in binding Agency rulings,[55] had clear disclaimers that legislation prevails in the face of inconsistencies,[56] related to true economic regulation matters (i.e., issuance of licensing and permits) that do not involve interjecting into a live controversy between diametrically opposed parties,[57] or suggest undermining the laws on the basis of it being an "appropriate approach" in the circumstances.[58]

ii. Irreparable harm to passengers will ensue with any further delays

46. The Agency misstated the issue as whether the Statement causes passengers to lose a right to sue, or a tribunal to lose jurisdiction.[59] Those **are not** the real harms. The Agency avoids answering the key point that lay passengers stuck in a cloud of misinformation will not step out of the cloud or otherwise second-guess a government body that portrays themselves as protecting the passengers' interest. The harm here is that lay passengers have been, and will be, provided with misinformation or unseemly suggestions to irrevocably swallow a subpar reparation, unjustly benefiting the airlines.

47. The Agency's subsequent FAQ does not repair harm to passengers who saw the Statement between March 25 and April 22, nor assist those after April 22. The FAQ endorses the same illegality,[60] continues to advocate on contentious issues outside

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[54] Agency's Memorandum, para. 8.
[55] Desnoyers Affidavit, Exhibit "B" [Agency's Motion Record, p. 14 **at the top**].
[56] Desnoyers Affidavit, Exhibits "B", "C", and "D" [Agency's Motion Record, pp. 38, 41, and 51].
[57] Desnoyers Affidavit, Exh. "C" and "D" [Agency's Motion Record, pp. 40 and 48].
[58] See paras. 20-22 on pp. 6-7, *supra*.
[59] Agency's Memorandum, para. 97.
[60] See paras. 20-22 on pp. 6-7, *supra*.

their role,[61] and violates the *Code of Conduct*.[62] The Agency's introduction of "Do I have to accept a voucher...?" in the FAQ misses the mark. The concern is not informed passengers voluntarily accepting vouchers, but rather airlines setting up the Statement as a shield to silence lay passengers from even requesting refunds. The Agency should refrain from making available an illegitimate shield to the bully in the debate.

48. The Agency also sidestepped the harm that will visit upon passengers if they were to bring their claims before an arbiter that is not seen to be impartial. Those passengers deserve to have any doubt about the arbiter's impartiality swiftly addressed by the Court, rather than relying on that arbiter's own say-so that they will act fairly.[63]

49. In any event, commissions of illegal or improper acts or conduct may in and of itself constitute irreparable harm for purposes of obtaining injunctive relief, particularly in the public law context where a claim for damages is not available on a judicial review.[64] In this proceeding, the Applicant is acting in the public interest for the benefit of passengers and could not hold the Agency liable for damages on a judicial review, further driving the need for an immediate judicial response to halt the continuing harms.[65]

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[61] See paras. 11-15 on pp. 4-5, *supra*.

[62] See paras. 16-19 on pp. 5-6, *supra*.

[63] *Piikani Nation v. McMullen*, 2020 ABCA 183 at paras. 24-25 [Vol. 2, Tab 41, p. 885].

[64] *Martell v. Canada (Attorney General)*, 2019 FC 737 at para. 46 [Vol. 2, Tab 32, p. 789].

[65] *Newlab Clinical Research Inc. v. N.A.P.E.*, 2003 NLSCTD 167 at paras. 42-44 and 49 [Vol. 2, Tab 38, pp. 855-857]; *Prince Edward Island Court of Appeal*, 1987 CarswellPEI 50 at para. 29 [Vol. 2, Tab 20, p. 583]; *N.A.P.E. v. Western Regional Integrated Health Authority*, 2008 NLTD 20 at para. 9 [Vol. 2, Tab 37, p. 843]; *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2018 BCSC 2084 at paras. 125-128 and 163-170 [Vol. 2, Tab. 6, pp. 198-199 and 211-213]; leave to appeal ref'd: 2019 BCCA 29 at paras. 18-19 [Vol. 2, Tab 7, pp. 226-227]; and *PT v. Alberta*, 2019 ABCA 158 at para. 69 [Vol. 2, Tab 42, p. 902].

iii. The balance of convenience favours granting of the injunctions

50. The Agency did not claim that it will be inconvenienced. Indeed, the Agency could easily, using minimal resources, remove the Publications and issue clarifications.

51. The Agency incorrectly asserts that the mandatory injunction to remove the Publications will inconvenience the public, specifically passengers and airlines.[66] There is **no evidence** of passengers begging to keep this "economic guidance" online—the opposite is true. Only airlines hope to indefinitely maintain the Publications as a "shield" to deter passengers' refund demands, as evident from the NACC's attempted intervention. The Agency misrepresents the airlines' private financial interests as if it were a public interest, while failing to protect the passengers' interest and uphold the law.

52. The Agency further claims that an injunction restraining the Members from dealing with refund claims would inconvenience passengers that cannot seek access to justice. The law is clear that reasonable apprehensions of bias issues are to be dealt with swiftly at the earliest opportunity.[67] It does not lie in the Agency's mouth to make this argument when the Agency already suspended all airline-related dispute resolutions from March 18 to June 30, 2020, with possibility of an extension—for the alleged purpose of allowing airlines "to focus on immediate and urgent operational demands."[68]

53. The Agency's proposed course of referring unsatisfied passengers to this Court[69] instead of granting the prohibitory injunction would likely hopelessly flood this Court with similar and repetitive leave to appeal applications and appeals. That would not be in the interest of justice, nor would it be proper use of scarce judicial resources.

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[66] Agency's Memorandum, para. 101.
[67] *Piikani Nation v. McMullen*, 2020 ABCA 183 at paras. 24-25 [Vol. 2, Tab 41, p. 885].
[68] Agency's Memorandum, para. 24.
[69] Agency's Memorandum, para. 64.

54. A more suitable course would be enjoining the Members from addressing the COVID-19 refund claims pending determination of the merits of the Application, and simultaneously expediting the Application, as requested by the Applicant. It is apparent that any inconvenience to the passengers will be minimal since the Agency will not be dealing with passenger dispute resolutions until June 30, 2020 at the earliest. The public interest in addressing the serious issue of the Members' impartiality outweighs any inconvenience arising from a short delay in seeking reimbursement.

E. Residual Procedural Matters

i. Applicant's request to expedite the Application

55. The Applicant is prepared to expedite the Application. Contrary to the Agency's assertion,[70] the Court already recognized the need for expeditious determination of the issues on the Application.[71] There is substantial public interest in a prompt merits hearing on the legality of the Agency's conduct. Certainty is needed not only for passengers that have yet to accept vouchers and need guidance on the appropriate course of action, but also for other affected persons such as airlines, travel agents, and travel insurers, who need to know if they can rely on the Publications at face value.

ii. The Agency's purported motion to strike is not before the Court

56. Substantial portions of the Agency's Memorandum seek to subvert this motion for interlocutory relief into a Respondent's motion to strike the Application,[72] and should not be considered. Firstly, the Agency failed to comply with the *Federal Courts Rules* and no such motion is before the Court. Secondly, the Agency was not granted leave to proceed with their motion during the Suspension Period. Despite the Agency advising the Court of an intent to bring a motion to strike, Locke, J.A. permitted only

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[70] Agency's Memorandum, para. 105.
[71] Order of Locke, J.A. dated April 16, 2020.
[72] Agency's Memorandum, paras. 106-110; see also paras. 66-93.

the Applicant's motion to proceed at this time. Thirdly, unlike an injunction motion, a motion to strike an Application could be granted only by a panel, not by a single judge.

iii. Costs of the Motion be addressed after determination of the Motion

57. Deferring full submissions on costs until after the Court has decided this motion avoids delays to the resolution of the injunction issues, the main impetus for this Court's expedited order. The motion's public interest dimension may warrant departure from the usual practice on costs. The Agency's conduct should be scrutinized, including their failure to attend cross-examination, provision of inaccurate legal submissions (often unsupported by any evidence), and omissions of pertinent authorities.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

May 7, 2020

"Simon Lin"

SIMON LIN
Counsel for the Applicant,
Air Passenger Rights

LIST OF AUTHORITIES

Statutes and Regulations

Air Passenger Protection Regulations, SOR/2019-150,
ss. 10-12 and 17

Air Transportation Regulations, SOR/88-58,
ss. 107, 111, and 122

Canada Transportation Act, S.C. 1996, c. 10,
ss. 5, 7, 24, 43-47, and 67.2

Original text of the *Canada Transportation Act*, S.C. 1996, c. 10,
s. 5(h)

Federal Courts Act, R.S.C., 1985, c. F-7,
ss. 18.2, 28, and 44

Federal Courts Rules, SOR/98-106,
Rule 97

Case Law

Ainsley Financial Corp. v. Ontario (Securities Commission), 1993 CarswellOnt 150

Ainsley Financial Corp. v. Ontario (Securities Commission), 1994 CarswellOnt 1021

Alberta (Securities Commission) v. Workum, 2010 ABCA 405

Bilodeau-Massé v. Canada (Procureur général), 2017 FC 604

Breckenridge Speedway Ltd. v. R., 1967 CarswellAlta 58

Cambie Surgeries Corporation v. British Columbia (Attorney General), 2018 BCSC 2084

Cambie Surgeries Corporation v. British Columbia (Attorney General), 2019 BCCA 29

Canadian Council for Refugees v. R., 2006 FC 1046

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

Canadian Broadcasting Corp. v. SODRAC 2003 Inc., 2014 FCA 84

Canadian National Railway v. Moffatt, 2001 FCA 327

David Suzuki Foundation v. Canada (Health), 2018 FC 380

Delisle c. Canada (Procureur général), 2006 FC 933

Dhillon v. Canada (Attorney General), 2016 FC 456

East Durham Wind, Inc. v. West Grey (Municipality), 2014 ONSC 4669

E.A. Manning Ltd. v. Ontario (Securities Commission), 1994 CarswellOnt 1015

E.A. Manning Ltd. v. Ontario (Securities Commission), 1995 CarswellOnt 1057

Eco-Industrial Business Park Inc. v. Alberta Diluent Terminal Ltd., 2014 ABQB 302

H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General), 2006 SCC 13

Prince Edward Island Court of Appeal, 1987 CarswellPEI 50

Inuit Tapirisat of Canada v. Canada (Attorney General), [1980] 2 S.C.R. 735

Jackson v. Canadian National Railway, 2012 ABQB 652

Krause v. Canada, 1999 CarswellNat 211

Larny Holdings Ltd. v. Canada (Minister of Health), 2002 FCT 750

Latimer v. Canada (Attorney General), 2010 FC 806

Laurentian Pilotage Authority v. Corporation des Pilotes de Saint-Laurent Central Inc., 2019 FCA 83

Lukács v. Canada Transportation Agency, 2014 FCA 239

Lukács v. Canadian Transportation Agency, 2015 FCA 140

Lukács v. Canadian Transportation Agency, 2016 FCA 174

Lukács v. Canadian Transportation Agency, 2016 FCA 220

Markevich v. Canada, 1999 CarswellNat 218

Martell v. Canada (Attorney General), 2019 FC 737

Moresby Explorers Ltd. v. Canada (Attorney General), 2007 FCA 273

Moresby Explorers Ltd. v. Canada (Attorney General), 2008 CarswellNat 388

Morneault v. Canada (Attorney General), 2000 CarswellNat 980

'Namgis First Nation v. Canada (Fisheries and Oceans), 2019 FCA 149

N.A.P.E. v. Western Regional Integrated Health Authority, 2008 NLTD 20

Newlab Clinical Research Inc. v. N.A.P.E., 2003 NLSCTD 167

Odyssey Television Network Inc. v. Ellas TV Broadcasting Inc., 2018 FC 337

Ottawa Athletic Club Inc. v. Athletic Club Group Inc., 2014 FC 672

Piikani Nation v. McMullen, 2020 ABCA 183

PT v. Alberta, 2019 ABCA 158

Sander Holdings Ltd. v. Canada (Attorney General), 2005 FCA 9

Shipdock Amsterdam B.V. v. Cast Group Inc., 1999 CarswellNat 2513

Stemijon Investments Ltd. v. Canada (Attorney General), 2011 FCA 299

Toutsaint v. Canada (Attorney General), 2019 FC 817

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

Wpd Sumac Ridge Wind Inc. v. Kawartha Lakes (City), 2015 ONSC 4164

CANADA

CONSOLIDATION

CODIFICATION

Air Passenger Protection Regulations

Règlement sur la protection des passagers aériens

SOR/2019-150

DORS/2019-150

Current to March 5, 2020

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(a) three hours after the aircraft doors have been closed for take-off; and

(b) three hours after the flight has landed, or at any earlier time if it is feasible.

Take-off imminent

(2) However, a carrier is not required to provide an opportunity for passengers to disembark if it is likely that take-off will occur less than three hours and 45 minutes after the doors of the aircraft are closed for take-off or after the flight has landed and the carrier is able to continue to provide the standard of treatment referred to in section 8.

Priority disembarkation

(3) A carrier that allows passengers to disembark must, if it is feasible, give passengers with disabilities and their support person, service animal or emotional support animal, if any, the opportunity to disembark first.

Exceptions

(4) This section does not apply if providing an opportunity for passengers to disembark is not possible, including if it is not possible for reasons related to safety and security or to air traffic or customs control.

Obligations — situations outside carrier's control

10 (1) This section applies to a carrier when there is delay, cancellation or denial of boarding due to situations outside the carrier's control, including but not limited to the following:

(a) war or political instability;

(b) illegal acts or sabotage;

(c) meteorological conditions or natural disasters that make the safe operation of the aircraft impossible;

(d) instructions from air traffic control;

(e) a *NOTAM*, as defined in subsection 101.01(1) of the *Canadian Aviation Regulations*;

(f) a security threat;

(g) airport operation issues;

(h) a medical emergency;

(i) a collision with wildlife;

a) trois heures après la fermeture des portes en prévision du décollage;

b) trois heures après l'atterrissage ou plus tôt si cela est possible.

Décollage imminent

(2) Le transporteur n'est toutefois pas tenu de permettre aux passagers de débarquer de l'aéronef s'il est probable que le décollage aura lieu dans moins de trois heures et quarante-cinq minutes après la fermeture des portes en prévision du décollage ou après l'atterrissage et que le transporteur peut continuer à appliquer les normes de traitement prévues à l'article 8.

Priorité de débarquement

(3) Le transporteur qui permet aux passagers de débarquer de l'aéronef offre, si possible, la priorité de débarquement aux personnes handicapées et, le cas échéant, à leur personne de soutien, à leur animal d'assistance ou à leur animal de soutien émotionnel.

Exceptions

(4) Le présent article ne s'applique pas au transporteur qui n'est pas en mesure de permettre aux passagers de débarquer de l'aéronef notamment pour des raisons de sécurité, de sûreté, de contrôle de la circulation aérienne ou de contrôle douanier.

Obligations — situations indépendantes de la volonté du transporteur

10 (1) Le présent article s'applique au transporteur lorsque le retard ou l'annulation de vol ou le refus d'embarquement est attribuable à une situation indépendante de sa volonté, notamment :

a) une guerre ou une situation d'instabilité politique;

b) un acte illégal ou un acte de sabotage;

c) des conditions météorologiques ou une catastrophe naturelle qui rendent impossible l'exploitation sécuritaire de l'aéronef;

d) des instructions du contrôle de la circulation aérienne;

e) un *NOTAM* au sens du paragraphe 101.01(1) du *Règlement de l'aviation canadien*;

f) une menace à la sûreté;

g) des problèmes liés à l'exploitation de l'aéroport;

h) une urgence médicale;

(j) a labour disruption within the carrier or within an essential service provider such as an airport or an air navigation service provider;

(k) a manufacturing defect in an aircraft that reduces the safety of passengers and that was identified by the manufacturer of the aircraft concerned, or by a competent authority; and

(l) an order or instruction from an official of a state or a law enforcement agency or from a person responsible for airport security.

i) une collision avec un animal sauvage;

j) un conflit de travail chez le transporteur, un fournisseur de services essentiels comme un aéroport ou un fournisseur de services de navigation aérienne;

k) un défaut de fabrication de l'aéronef, qui réduit la sécurité des passagers, découvert par le fabricant de l'aéronef ou par une autorité compétente;

l) une instruction ou un ordre de tout représentant d'un État ou d'un organisme chargé de l'application de la loi ou d'un responsable de la sûreté d'un aéroport.

Earlier flight disruption

(2) A delay, cancellation or denial of boarding that is directly attributable to an earlier delay or cancellation that is due to situations outside the carrier's control, is considered to also be due to situations outside that carrier's control if that carrier took all reasonable measures to mitigate the impact of the earlier flight delay or cancellation.

Pertubation de vols précédents

(2) Le retard ou l'annulation de vol ou le refus d'embarquement qui est directement imputable à un retard ou à une annulation précédent attribuable à une situation indépendante de la volonté du transporteur est également considéré comme attribuable à une situation indépendante de la volonté du transporteur si ce dernier a pris toutes les mesures raisonnables pour atténuer les conséquences du retard ou de l'annulation précédent.

Obligations

(3) When there is delay, cancellation or denial of boarding due to situations outside the carrier's control, it must

(a) provide passengers with the information set out in section 13;

(b) in the case of a delay of three hours or more, provide alternate travel arrangements, in the manner set out in section 18, to a passenger who desires such arrangements; and

(c) in the case of a cancellation or a denial of boarding, provide alternate travel arrangements in the manner set out in section 18.

Obligations

(3) Lorsque le retard ou l'annulation de vol ou le refus d'embarquement est attribuable à une situation indépendante de la volonté du transporteur, ce dernier :

a) fournit aux passagers les renseignements prévus à l'article 13;

b) dans le cas d'un retard de trois heures ou plus, fournit aux passagers qui le désirent des arrangements de voyage alternatifs aux termes de l'article 18;

c) dans le cas d'une annulation ou d'un refus d'embarquement, fournit des arrangements de voyage alternatifs aux termes de l'article 18.

Obligations when required for safety purposes

11 (1) Subject to subsection 10(2), this section applies to a carrier when there is delay, cancellation or denial of boarding that is within the carrier's control but is required for safety purposes.

Obligations — nécessaires par souci de sécurité

11 (1) Sous réserve du paragraphe 10(2), cet article s'applique au transporteur dans le cas du retard ou de l'annulation de vol ou du refus d'embarquement qui lui est attribuable, mais qui est nécessaire par souci de sécurité.

Earlier flight disruption

(2) A delay, cancellation or denial of boarding that is directly attributable to an earlier delay or cancellation that is within that carrier's control but is required for safety purposes, is considered to also be within that carrier's control but required for safety purposes if that carrier took all reasonable measures to mitigate the impact of the earlier flight delay or cancellation.

Retard, annulation et refus d'embarquement subséquents

(2) Le retard ou l'annulation de vol ou le refus d'embarquement qui est directement imputable à un retard ou à une annulation précédent attribuable au transporteur, mais nécessaire par souci de sécurité, est également considéré comme attribuable au transporteur mais nécessaire par souci de sécurité si le transporteur a pris

Delay

(3) In the case of a delay, the carrier must

(a) provide passengers with the information set out in section 13;

(b) if a passenger is informed of the delay less than 12 hours before the departure time that is indicated on their original ticket, provide the standard of treatment set out in section 14; and

(c) if the delay is a delay of three hours or more, provide alternate travel arrangements or a refund, in the manner set out in section 17, to a passenger who desires such arrangements.

Cancellation

(4) In the case of a cancellation, the carrier must

(a) provide passengers with the information set out in section 13;

(b) if a passenger is informed of the cancellation less than 12 hours before the departure time that is indicated on their original ticket, provide the standard of treatment set out in section 14; and

(c) provide alternate travel arrangements or a refund, in the manner set out in section 17.

Denial of boarding

(5) In the case of a denial of boarding, the carrier must

(a) provide passengers affected by the denial of boarding with the information set out in section 13;

(b) deny boarding in accordance with section 15 and provide the standard of treatment set out in section 16 to passengers affected by the denial of boarding; and

(c) provide alternate travel arrangements or a refund, in the manner set out in section 17.

Obligations when within carrier's control

12 (1) Subject to subsection 10(2), this section applies to a carrier when there is delay, cancellation or denial of boarding that is within the carrier's control but is not referred to in subsections 11(1) or (2).

toutes les mesures raisonnables pour atténuer les conséquences du retard ou annulation précédent.

Retard

(3) Dans le cas du retard, le transporteur :

a) fournit aux passagers les renseignements prévus à l'article 13;

b) si le retard a été communiqué aux passagers moins de douze heures avant l'heure de départ indiquée sur leur titre de transport initial, applique les normes de traitement prévues à l'article 14;

c) s'il s'agit d'un retard de trois heures ou plus, fournit aux passagers qui le désirent des arrangements de voyage alternatifs ou un remboursement aux termes de l'article 17.

Annulation

(4) Dans le cas de l'annulation de vol, le transporteur :

a) fournit aux passagers les renseignements prévus à l'article 13;

b) si l'annulation a été communiquée aux passagers moins de douze heures avant l'heure de départ indiquée sur leur titre de transport initial, applique les normes de traitement prévues à l'article 14;

c) fournit aux passagers des arrangements de voyage alternatifs ou un remboursement aux termes de l'article 17.

Refus d'embarquement

(5) Dans le cas du refus d'embarquement, le transporteur :

a) fournit aux passagers concernés les renseignements prévus à l'article 13;

b) refuse l'embarquement conformément à l'article 15 et applique à l'égard des passagers concernés les normes de traitement prévues à l'article 16;

c) fournit aux passagers des arrangements de voyage alternatifs ou un remboursement aux termes de l'article 17.

Obligations — attribuable au transporteur

12 (1) Sous réserve du paragraphe 10(2), le présent article s'applique au transporteur dans le cas du retard ou de l'annulation de vol ou d'un refus d'embarquement qui lui est attribuable mais qui n'est pas visé aux paragraphes 11(1) ou (2).

Delay

(2) In the case of a delay, the carrier must

(a) provide passengers with the information set out in section 13;

(b) if a passenger is informed of the delay less than 12 hours before the departure time that is indicated on their original ticket, provide them with the standard of treatment set out in section 14;

(c) if the delay is a delay of three hours or more, provide alternate travel arrangements or a refund, in the manner set out in section 17, to a passenger who desires such arrangements; and

(d) if a passenger is informed 14 days or less before the departure time on their original ticket that the arrival of their flight at the destination that is indicated on that original ticket will be delayed, provide the minimum compensation for inconvenience in the manner set out in section 19.

Cancellation

(3) In the case of a cancellation, the carrier must

(a) provide passengers with the information set out in section 13;

(b) if a passenger is informed of the cancellation less than 12 hours before the departure time that is indicated on their original ticket, provide the standard of treatment set out in section 14;

(c) provide alternate travel arrangements or a refund, in the manner set out in section 17; and

(d) if a passenger is informed 14 days or less before the original departure time that the arrival of their flight at the destination that is indicated on their ticket will be delayed, provide the minimum compensation for inconvenience in the manner set out in section 19.

Denial of boarding

(4) In the case of a denial of boarding, the carrier must

(a) provide passengers affected by the denial of boarding with the information set out in section 13;

(b) deny boarding in accordance with section 15 and provide the standard of treatment set out in section 16 to passengers affected by the denial of boarding;

(c) provide alternate travel arrangements or a refund, in the manner set out in section 17; and

Retard

(2) Dans le cas du retard, le transporteur :

a) fournit aux passagers les renseignements prévus à l'article 13 ;

b) si le retard a été communiqué aux passagers moins de douze heures avant l'heure de départ indiquée sur leur titre de transport initial, applique les normes de traitement prévues à l'article 14;

c) s'il s'agit d'un retard de trois heures ou plus, fournit aux passagers qui le désirent des arrangements de voyage alternatifs ou un remboursement aux termes de l'article 17;

d) s'ils ont été informés quatorze jours ou moins avant l'heure de départ indiquée sur leur titre de transport initial que leur arrivée à la destination indiquée sur ce titre de transport sera retardée, verse aux passagers l'indemnité minimale prévue à l'article 19 pour les inconvénients subis.

Annulation de vol

(3) Dans le cas de l'annulation, le transporteur :

a) fournit aux passagers les renseignements prévus à l'article 13 ;

b) si l'annulation de vol a été communiquée aux passagers moins de douze heures avant l'heure de départ indiquée sur leur titre de transport initial, applique les normes de traitement prévues à l'article 14;

c) fournit des arrangements de voyage alternatifs ou un remboursement aux termes de à l'article 17;

d) s'ils ont été informés quatorze jours ou moins avant l'heure de départ indiquée sur leur titre de transport initial que leur arrivée à la destination indiquée sur ce titre de transport sera retardée, verse aux passagers l'indemnité minimale prévue à l'article 19 pour les inconvénients subis.

Refus d'embarquement

(4) Dans le cas du refus d'embarquement, le transporteur :

a) fournit aux passagers concernés les renseignements prévus à l'article 13;

b) refuse l'embarquement conformément à l'article 15 et applique à l'égard des passagers concernés les normes de traitement prévues à l'article 16;

(d) provide the minimum compensation for inconvenience for denial of boarding in the manner set out in section 20.

c) fournit aux passagers des arrangements de voyage alternatifs ou un remboursement aux termes de l'article 17.;

d) verse l'indemnité minimale prévue à l'article 20 pour les inconvénients subis.

Information — cancellation, delay, denial of boarding

13 (1) A carrier must provide the following information to the passengers who are affected by a cancellation, delay or a denial of boarding:

(a) the reason for the delay, cancellation or denial of boarding;

(b) the compensation to which the passenger may be entitled for the inconvenience;

(c) the standard of treatment for passengers, if any; and

(d) the recourse available against the carrier, including their recourse to the Agency.

Renseignements fournis à la suite d'un retard, d'une annulation ou d'un refus d'embarquement

13 (1) Le transporteur fournit aux passagers visés par le retard ou l'annulation de vol ou le refus d'embarquement les renseignements suivants :

a) la raison du retard, de l'annulation de vol ou du refus d'embarquement;

b) les indemnités qui peuvent être versées pour les inconvénients subis;

c) les normes de traitement des passagers applicables, le cas échéant;

d) les recours possibles contre lui, notamment ceux auprès de l'Office.

Communication every 30 minutes

(2) In the case of a delay, the carrier must communicate status updates to passengers every 30 minutes until a new departure time for the flight is set or alternate travel arrangements have been made for the affected passenger.

Mises à jour toutes les trente minutes

(2) Dans le cas du retard, le transporteur fournit aux passagers une mise à jour toutes les trente minutes sur la situation, et ce, jusqu'à ce qu'une nouvelle heure de départ soit fixée ou jusqu'à ce que des arrangements de voyage alternatifs aient été pris.

New information

(3) The carrier must communicate to passengers any new information as soon as feasible.

Nouveau renseignement

(3) Le transporteur fournit aux passagers tout nouveau renseignement dès que possible.

Audible and visible announcement

(4) The information referred to in subsection (1) must be provided by means of audible announcements and, upon request, by means of visible announcements.

Annonces audio et visuelle

(4) Les renseignements visés au paragraphe (1) sont fournis au moyen d'annonces faites sur support audio et, sur demande, sur support visuel.

Method of communication

(5) The information referred to in subsection (1) must also be provided to the passenger using the available communication method that they have indicated that they prefer, including a method that is compatible with adaptive technologies intended to assist persons with disabilities.

Moyen de communication

(5) Les renseignements visés au paragraphe (1) sont également fournis aux passagers à l'aide du moyen de communication disponible pour lequel ils ont indiqué une préférence, y compris un moyen qui est compatible avec les technologies d'adaptation visant à aider les personnes handicapées.

Standards of treatment

14 (1) If paragraph 11(3)(b) or (4)(b) or 12(2)(b) or (3)(b) applies to a carrier, and a passenger has waited two hours after the departure time that is indicated on

Normes de traitement

14 (1) Si les alinéas 11(3)b) ou (4)b), ou 12(2)b) ou (3)b), s'appliquent au transporteur et qu'il s'est écoulé deux heures depuis l'heure de départ indiquée sur le titre

their original ticket, the carrier must provide the passenger with the following treatment free of charge:

(a) food and drink in reasonable quantities, taking into account the length of the wait, the time of day and the location of the passenger; and

(b) access to a means of communication.

de transport initial du passager, le transporteur fournit, sans frais supplémentaires :

a) de la nourriture et des boissons en quantité raisonnable compte tenu de la durée de l'attente, du moment de la journée et du lieu où se trouve le passager;

b) l'accès à un moyen de communication.

Accommodations

(2) If paragraph 11(3)(b) or (4)(b) or 12(2)(b) or (3)(b) applies to a carrier and the carrier expects that the passenger will be required to wait overnight for their original flight or for a flight reserved as part of alternate travel arrangements, the air carrier must offer, free of charge, hotel or other comparable accommodation that is reasonable in relation to the location of the passenger, as well as transportation to the hotel or other accommodation and back to the airport.

Hébergement

(2) Si les alinéas 11(3)b) ou (4)b), ou 12(2)b) ou (3)b) s'appliquent au transporteur et que celui-ci prévoit que le passager devra attendre toute la nuit le vol retardé ou le vol faisant partie des arrangements de voyage alternatifs, le transporteur fournit au passager, sans frais supplémentaire, une chambre d'hôtel ou un lieu d'hébergement comparable qui est raisonnable compte tenu du lieu où se trouve le passager ainsi que le transport pour aller à l'hôtel ou au lieu d'hébergement et revenir à l'aéroport.

Refusing or limiting treatment

(3) The carrier may limit or refuse to provide a standard of treatment referred to in subsection (1) or (2) if providing that treatment would further delay the passenger.

Refus ou limite des normes de traitement

(3) Le transporteur peut limiter les normes de traitement prévues aux paragraphes (1) ou (2), ou refuser de les appliquer, si leur application entraînerait un retard plus important pour le passager.

Denial of boarding — request for volunteers

15 (1) If paragraph 11(5)(b) or 12(4)(b) applies to a carrier, it must not deny boarding to a passenger unless it has asked all passengers if they are willing to give up their seat.

Refus d'embarquement — demande de volontaires

15 (1) Si les alinéas 11(5)b) ou 12(4)b) s'appliquent au transporteur, celui-ci ne peut refuser l'embarquement à un passager avant d'avoir demandé aux autres passagers si l'un d'eux accepterait de laisser son siège.

Passenger on aircraft

(2) The carrier must not deny boarding to a passenger who is already on board the aircraft, unless the denial of boarding is required for reasons of safety.

Passager déjà à bord

(2) Le passager déjà à bord de l'aéronef ne peut faire l'objet d'un refus d'embarquement, sauf pour des raisons de sécurité.

Confirmation of benefit

(3) If a carrier offers a benefit in exchange for a passenger willingly giving up their seat in accordance with subsection (1) and a passenger accepts the offer, it must provide the passenger with a written confirmation of that benefit before the flight departs.

Confirmation des avantages

(3) Le transporteur qui offre un avantage aux passagers afin que l'un d'eux accepte de laisser son siège conformément au paragraphe (1), fournit aux passagers qui acceptent l'offre une confirmation écrite de l'avantage avant le départ du vol.

Priority for boarding

(4) If denial of boarding is necessary, the carrier must select the passengers who will be denied boarding, giving priority for boarding to passengers in the following order:

(a) an unaccompanied minor;

Priorité d'embarquement

(4) Lorsque le refus d'embarquement est nécessaire, le transporteur sélectionne les passagers qui se verront refuser l'embarquement en accordant la priorité d'embarquement aux passagers dans l'ordre suivant :

a) un mineur non accompagné;

(b) a person with a disability and their support person, service animal, or emotional support animal, if any;

(c) a passenger who is travelling with family members; and

(d) a passenger who was previously denied boarding on the same ticket.

b) une personne handicapée et, le cas échéant, à leur personne de soutien, à leur animal d'assistance ou à leur animal de soutien émotionnel;

c) un passager qui voyage avec des membres de sa famille;

d) un passager qui s'est déjà vu refuser l'embarquement pour le même titre de transport.

Treatment when boarding is denied

16 (1) If paragraph 11(5)(b) or 12(4)(b) applies to a carrier, it must, before a passenger boards the flight reserved as part of an alternate travel arrangement, provide them with the following treatment free of charge:

(a) food and drink in reasonable quantities, taking into account the length of the wait, the time of day and the location of the passenger; and

(b) access to a means of communication.

Normes de traitement des passagers lors du refus d'embarquement

16 (1) Si les alinéas 11(5)b) ou 12(4)b) s'appliquent au transporteur, celui-ci fournit au passager, avant son embarquement à bord d'un vol faisant partie des arrangements de voyage alternatifs, sans frais supplémentaires :

a) de la nourriture et des boissons en quantité raisonnable compte tenu de la durée de l'attente, du moment de la journée et du lieu où se trouve le passager;

b) l'accès à un moyen de communication.

Accommodations

(2) If the carrier expects that the passenger will be required to wait overnight for a flight reserved as part of alternate travel arrangements, the carrier must offer, free of charge, hotel or other comparable accommodation that is reasonable in relation to the location of the passenger, as well as transportation to the hotel or other accommodation and back to the airport.

Hébergement

(2) Si le transporteur prévoit que le passager devra attendre toute la nuit le vol faisant partie des arrangements de voyage alternatifs, il lui fournit, sans frais supplémentaires, une chambre d'hôtel ou un lieu d'hébergement comparable qui est raisonnable compte tenu du lieu où se trouve le passager, ainsi que le transport pour aller à l'hôtel ou au lieu d'hébergement et revenir à l'aéroport.

Refusing or limiting treatment

(3) The carrier may limit or refuse to provide a standard of treatment referred to in subsection (1) or (2) if providing that treatment would further delay the passenger.

Refus ou limite des normes de traitement

(3) Le transporteur peut limiter les normes de traitement prévues aux paragraphes (1) ou (2), ou refuser de les appliquer, si leur application entraînerait un retard plus important pour le passager.

Alternate arrangements — within carrier's control

17 (1) If paragraph 11(3)(c), (4)(c) or (5)(c) or 12(2)(c), (3)(c) or (4)(c) applies to a carrier, it must provide the following alternate travel arrangements free of charge to ensure that passengers complete their itinerary as soon as feasible:

(a) in the case of a large carrier,

(i) a confirmed reservation for the next available flight that is operated by the original carrier, or a carrier with which the original carrier has a commercial agreement, is travelling on any reasonable air route from the airport at which the passenger is located to the destination that is indicated on the passenger's original ticket and departs within nine

Arrangements alternatifs — situation attribuable au transporteur

17 (1) Si les alinéas 11(3)c), (4)c) ou (5)c), ou 12(2)c), (3)c) ou (4)c) s'appliquent au transporteur, celui-ci fournit aux passagers, sans frais supplémentaires, les arrangements de voyage alternatifs ci-après pour que les passagers puissent compléter leur itinéraire prévu dès que possible :

a) dans le cas d'un gros transporteur :

(i) une réservation confirmée pour le prochain vol disponible exploité par lui, ou par un transporteur avec lequel il a une entente commerciale, suivant toute route aérienne raisonnable à partir de l'aéroport où se situe le passager vers la destination indiquée sur le titre de transport initial du passager et

hours of the departure time that is indicated on that original ticket,

(ii) a confirmed reservation for a flight that is operated by any carrier and is travelling on any reasonable air route from the airport at which the passenger is located to the destination that is indicated on the passenger's original ticket and departs within 48 hours of the departure time that is indicated on that original ticket if the carrier cannot provide a confirmed reservation that complies with subparagraph (i), or

(iii) transportation to another airport that is within a reasonable distance of the airport at which the passenger is located and a confirmed reservation for a flight that is operated by any carrier and is travelling on any reasonable air route from that other airport to the destination that is indicated on the passenger's original ticket, if the carrier cannot provide a confirmed reservation that complies with subparagraphs (i) or (ii); and

(b) in the case of a small carrier, a confirmed reservation for the next available flight that is operated by the original carrier, or a carrier with which the original carrier has a commercial agreement, and is travelling on any reasonable air route from the airport at which the passenger is located to the destination that is indicated on the passenger's original ticket.

dont le départ a lieu dans les neuf heures suivant l'heure de départ indiquée sur ce titre de transport,

(ii) s'il ne peut fournir une réservation confirmée visée au sous-alinéa (i), une réservation confirmée pour un vol exploité par tout transporteur, suivant toute route aérienne raisonnable à partir de l'aéroport où se situe le passager vers la destination indiquée sur son titre de transport initial et dont le départ a lieu dans les quarante-huit heure,

(iii) s'il ne peut fournir une réservation confirmée visée aux sous-alinéas (i) ou (ii), le transport vers un aéroport se trouvant à une distance raisonnable de celui où se trouve le passager et une réservation confirmée vers la destination indiquée sur le titre de transport initial du passager suivant toute route aérienne raisonnable exploitée par tout transporteur en partance de cet aéroport;

b) dans le cas d'un petit transporteur, une réservation confirmée pour le prochain vol disponible exploité par lui, ou par un transporteur avec lequel il a une entente commerciale, suivant toute route aérienne raisonnable à partir de l'aéroport où se situe le passager, vers la destination indiquée sur le titre de transport initial du passager.

Refund

(2) If the alternate travel arrangements offered in accordance with subsection (1) do not accommodate the passenger's travel needs, the carrier must

(a) in the case where the passenger is no longer at the point of origin that is indicated on the ticket and the travel no longer serves a purpose because of the delay, cancellation or denial of boarding, refund the ticket and provide the passenger with a confirmed reservation that

(i) is for a flight to that point of origin, and

(ii) accommodates the passenger's travel needs; and

(b) in any other case, refund the unused portion of the ticket.

Remboursement

(2) Si les arrangements de voyage alternatifs fournis conformément au paragraphe (1) ne satisfont pas aux besoins de voyage du passager, le transporteur :

a) dans le cas où le passager n'est plus au point de départ indiqué sur le titre de transport et que le voyage n'a plus sa raison d'être en raison du retard, de l'annulation de vol ou du refus d'embarquement, rembourse le titre de transport et fournit au passager une réservation confirmée :

(i) pour un vol à destination de ce point de départ,

(ii) qui satisfait aux besoins de voyage du passager;

b) dans tous les autres cas, rembourse les portions inutilisées du titre de transport.

Comparable services

(3) To the extent possible, the alternate travel arrangements must provide services that are comparable to those of the original ticket.

Services comparables

(3) Dans la mesure du possible, les vols faisant partie des arrangements de voyage alternatifs offrent des services comparables à ceux prévus dans le titre de transport initial.

Refund of additional services

(4) A carrier must refund the cost of any additional services purchased by a passenger in connection with their original ticket if

(a) the passenger did not receive those services on the alternate flight; or

(b) the passenger paid for those services a second time.

Higher class of service

(5) If the alternate travel arrangements provide for a higher class of service than the original ticket, the carrier must not request supplementary payment.

Lower class of service

(6) If the alternate travel arrangements provide for a lower class of service than the original ticket, the carrier must refund the difference in the cost of the applicable portion of the ticket.

Method used for refund

(7) Refunds under this section must be paid by the method used for the original payment and to the person who purchased the ticket or additional service.

Alternate arrangements — outside carrier's control

18 (1) If paragraph 10(3)(b) or (c) applies to a carrier, it must provide the following alternate travel arrangements free of charge to ensure that passengers complete their itinerary as soon as feasible:

(a) in the case of a large carrier,

(i) a confirmed reservation for the next available flight that is operated by the original carrier, or a carrier with which the original carrier has a commercial agreement, is travelling on any reasonable air route from the airport at which the passenger is located to the destination that is indicated on the passenger's original ticket and departs within 48 hours of the end of the event that caused the delay, cancellation or denial of boarding,

(ii) if the carrier cannot provide a confirmed reservation that complies with subparagraph (i),

(A) a confirmed reservation for a flight that is operated by any carrier and is travelling on any reasonable air route from the airport at which

Remboursement d'un service additionnel

(4) Le transporteur rembourse le passager de tout service additionnel acheté en lien avec son titre de transport initial dans les cas suivants :

a) le passager n'a pas reçu ce service lors du vol alternatif;

b) le passager a payé de nouveau pour ce service.

Classe de service supérieure

(5) Si les arrangements de voyage alternatifs prévoient que le passager voyage dans une classe de service supérieure à celle prévue dans le titre de transport initial, le transporteur ne peut exiger le versement d'un supplément.

Classe de service inférieure

(6) Si les arrangements de voyage alternatifs prévoient que le passager voyage dans une classe de service inférieure à celle prévue dans le titre de transport initial, le transporteur rembourse la portion applicable du titre de transport.

Moyen utilisé pour le remboursement

(7) Les remboursements prévus au présent article sont versés, selon le mode de paiement initial à la personne qui a acheté le titre de transport ou le service additionnel.

Arrangements alternatifs — situation indépendante de la volonté du transporteur

18 (1) Si les alinéas 10(3)b) ou c) s'appliquent au transporteur, celui-ci fournit aux passagers, sans frais supplémentaires, les arrangements de voyage alternatifs ci-après pour que les passagers puissent compléter l'itinéraire prévu dès que possible :

a) dans le cas d'un gros transporteur :

(i) une réservation confirmée pour le prochain vol disponible exploité par lui, ou par un transporteur avec lequel il a une entente commerciale, suivant toute route aérienne raisonnable à partir de l'aéroport où se trouve le passager vers la destination indiquée sur le titre de transport initial du passager et dont le départ aura lieu dans les quarante-huit heures suivant la fin de l'évènement ayant causé le retard ou l'annulation de vol ou le refus d'embarquement,

(ii) s'il ne peut fournir une réservation confirmée visée au sous-alinéa (i) :

CANADA

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Air Transportation Regulations

Règlement sur les transports aériens

SOR/88-58

DORS/88-58

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Exception

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

SOR/96-335, s. 53.

Exception

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

DORS/96-335, art. 53.

Contents of Tariffs

107 (1) Every tariff shall contain

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

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

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

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

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

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

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

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

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

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

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

Contenu des tarifs

107 (1) Tout tarif doit contenir :

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

b) le numéro du tarif et son titre descriptif;

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

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

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

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

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

h) un index des points en provenance et à destination desquels ou entre lesquels s'appliquent les taxes, avec mention de la province ou du territoire où ils sont situés;

i) la liste des aérodromes, aéroports ou autres installations utilisés pour chaque point mentionné dans le tarif;

j) s'il y a lieu, les renseignements concernant les exigences et les restrictions de paiement à l'avance ainsi que le refus et la non-livraison des marchandises; toutefois, ces renseignements ne sont pas nécessaires si un renvoi est fait au numéro d'un autre tarif qui contient ces renseignements;

reference thereon to the page on which the explanation is given;

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

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

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

(i) the carriage of persons with disabilities,

(ii) the carriage of children,

(iii) unaccompanied minors, including those who are travelling under the carrier's supervision,

(iv) the assignment of seats to children who are under the age of 14 years,

(v) failure to operate the service or failure to operate the air service according to schedule,

(vi) flight delay,

(vii) flight cancellation,

(viii) delay on the tarmac,

(ix) denial of boarding,

(x) the re-routing of passengers,

(xi) whether the carrier is bound by the obligations of a large carrier or the obligations of a small carrier that are set out in the *Air Passenger Protection Regulations*,

(xii) refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason,

(xiii) ticket reservation, cancellation, confirmation, validity and loss,

(xiv) refusal to transport passengers or goods,

(xv) method of calculation of charges not specifically set out in the tariff,

k) l'explication complète des abréviations, notes, appels de notes, symboles et termes techniques employés dans le tarif et, lorsque des appels de notes ou des symboles figurent sur une page, leur explication sur la page même ou un renvoi à la page qui en donne l'explication;

l) les conditions générales régissant le tarif, énoncées en des termes qui expliquent clairement leur application aux taxes énumérées;

m) les conditions particulières qui s'appliquent à une taxe donnée et, sur la page où figure la taxe, un renvoi à la page où se trouvent les conditions;

n) les conditions de transport, dans lesquelles est énoncée clairement la politique du transporteur aérien concernant au moins les éléments suivants :

(i) le transport des personnes handicapées,

(ii) le transport des enfants,

(iii) les mineurs non accompagnés, notamment ceux qui voyagent sous la supervision du transporteur,

(iv) l'attribution de sièges aux enfants de moins de quatorze ans,

(v) l'inexécution du service aérien ou le non-respect de l'horaire prévu pour le service aérien,

(vi) les vols retardés,

(vii) les vols annulés,

(viii) les retards sur l'aire de trafic,

(ix) les refus d'embarquement,

(x) le réacheminement des passagers,

(xi) si le transporteur est tenu de respecter les obligations applicable aux gros transporteur ou aux petits transporteurs qui sont prévues par le *Règlement sur la protection des passagers aériens*,

(xii) le remboursement des services achetés mais non utilisés, intégralement ou partiellement, par suite de la décision du client de ne pas poursuivre son trajet ou de son incapacité à le faire, ou encore de l'inaptitude du transporteur aérien à fournir le service pour une raison quelconque,

(xiii) la réservation, l'annulation de vol, la confirmation, la validité et la perte des billets,

(xvi) the carriage of baggage including the loss, delay or damaging of baggage,

(xvii) the transportation of musical instruments,

(xviii) limits of liability respecting passengers and goods,

(xix) exclusions from liability respecting passengers and goods,

(xx) procedures to be followed, and time limitations, respecting claims, and

(xxi) any other terms and conditions deemed under subsection 86.11(4) of the Act to be included in the tariff;

(o) the tolls, shown in Canadian currency, together with the names of the points from, to or between which the tolls apply, arranged in a simple and systematic manner with, in the case of commodity tolls, goods clearly identified;

(p) the routings related to the tolls unless reference is made in the tariff to another tariff in which the routings appear; and

(q) the official descriptive title of each type of passenger fare, together with any name or abbreviation thereof.

(2) Every original tariff page shall be designated "Original Page", and changes in, or additions to, the material contained on the page shall be made by revising the page and renumbering it accordingly.

(3) Where an additional page is required within a series of pages in a tariff, that page shall be given the same number as the page it follows but a letter shall be added to the number.

(4) and (5) [Repealed, SOR/96-335, s. 54]

SOR/93-253, s. 2; SOR/93-449, s. 1; SOR/96-335, s. 54; SOR/2017-19, s. 7(F); SOR/2019-150, s. 40.

Interest

107.1 Where the Agency, by order, directs an air carrier to refund specified amounts to persons that have been

(xiv) le refus de transporter des passagers ou des marchandises,

(xv) la méthode de calcul des frais non précisés dans le tarif,

(xvi) le transport des bagages, y compris la perte, le retard ou le endommagement de ceux-ci,

(xvii) le transport des instruments de musique,

(xviii) les limites de responsabilité à l'égard des passagers et des marchandises,

(xix) les exclusions de responsabilité à l'égard des passagers et des marchandises,

(xx) la marche à suivre ainsi que les délais fixés pour les réclamations,

(xxi) toute autre modalité réputée figurer au tarif du transporteur au titre du paragraphe 86.11(4) de la Loi;

o) les taxes, exprimées en monnaie canadienne, et les noms des points en provenance et à destination desquels ou entre lesquels elles s'appliquent, le tout étant disposé d'une manière simple et méthodique et les marchandises étant indiquées clairement dans le cas des taxes spécifiques;

p) les itinéraires visés par les taxes; toutefois, ces itinéraires n'ont pas à être indiqués si un renvoi est fait à un autre tarif qui les contient;

q) le titre descriptif officiel de chaque type de prix passagers, ainsi que tout nom ou abréviation servant à désigner ce prix.

(2) Les pages originales du tarif doivent porter la mention «page originale» et, lorsque des changements ou des ajouts sont apportés, la page visée doit être révisée et numérotée en conséquence.

(3) S'il faut intercaler une page supplémentaire dans une série de pages d'un tarif, cette page doit porter le même numéro que la page qui la précède, auquel une lettre est ajoutée.

(4) et (5) [Abrogés, DORS/96-335, art. 54]

DORS/93-253, art. 2; DORS/93-449, art. 1; DORS/96-335, art. 54; DORS/2017-19, art. 7(F); DORS/2019-150, art. 40.

Intérêts

107.1 Dans le cas où, en vertu de l'alinéa 66(1)c) de la Loi, l'Office enjoint, par ordonnance, à un transporteur

(b) the toll has been disallowed or suspended by the Agency.

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

(5) No air carrier or agent thereof shall offer, grant, give, solicit, accept or receive any rebate, concession or privilege in respect of the transportation of any persons or goods by the air carrier whereby such persons or goods are or would be, by any device whatever, transported at a toll that differs from that named in the tariffs then in force or under terms and conditions of carriage other than those set out in such tariffs.

SOR/96-335, s. 56; SOR/98-197, s. 6(E).

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

(2) No air carrier shall, in respect of tolls or the terms and conditions of carriage,

(a) make any unjust discrimination against any person or other air carrier;

(b) give any undue or unreasonable preference or advantage to or in favour of any person or other air carrier in any respect whatever; or

(c) subject any person or other air carrier or any description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatever.

(3) The Agency may determine whether traffic is to be, is or has been carried under substantially similar circumstances and conditions and whether, in any case, there is or has been unjust discrimination or undue or unreasonable preference or advantage, or prejudice or disadvantage, within the meaning of this section, or whether in any case the air carrier has complied with the provisions of this section or section 110.

SOR/93-253, s. 2; SOR/96-335, s. 57.

(4) Lorsqu'un tarif déposé porte une date de publication et une date d'entrée en vigueur et qu'il est conforme au présent règlement et aux arrêtés de l'Office, les taxes et les conditions de transport qu'il contient, sous réserve de leur rejet, de leur refus ou de leur suspension par l'Office, ou de leur remplacement par un nouveau tarif, prennent effet à la date indiquée dans le tarif, et le transporteur aérien doit les appliquer à compter de cette date.

(5) Il est interdit au transporteur aérien ou à ses agents d'offrir, d'accorder, de donner, de solliciter, d'accepter ou de recevoir un rabais, une concession ou un privilège permettant, par un moyen quelconque, le transport de personnes ou de marchandises à une taxe ou à des conditions qui diffèrent de celles que prévoit le tarif en vigueur.

DORS/96-335, art. 56; DORS/98-197, art. 6(A).

111 (1) Les taxes et les conditions de transport établies par le transporteur aérien, y compris le transport à titre gratuit ou à taux réduit, doivent être justes et raisonnables et doivent, dans des circonstances et des conditions sensiblement analogues, être imposées uniformément pour tout le trafic du même genre.

(2) En ce qui concerne les taxes et les conditions de transport, il est interdit au transporteur aérien :

a) d'établir une distinction injuste à l'endroit de toute personne ou de tout autre transporteur aérien;

b) d'accorder une préférence ou un avantage indu ou déraisonnable, de quelque nature que ce soit, à l'égard ou en faveur d'une personne ou d'un autre transporteur aérien;

c) de soumettre une personne, un autre transporteur aérien ou un genre de trafic à un désavantage ou à un préjudice indu ou déraisonnable de quelque nature que ce soit.

(3) L'Office peut décider si le trafic doit être, est ou a été acheminé dans des circonstances et à des conditions sensiblement analogues et s'il y a ou s'il y a eu une distinction injuste, une préférence ou un avantage indu ou déraisonnable, ou encore un préjudice ou un désavantage au sens du présent article, ou si le transporteur aérien s'est conformé au présent article ou à l'article 110.

DORS/93-253, art. 2; DORS/96-335, art. 57.

Contents of Tariffs

122 Every tariff shall contain

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

(b) the tolls, together with the names of the points from and to which or between which the tolls apply, arranged in a simple and systematic manner with, in the case of commodity tolls, goods clearly identified;

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

(i) the carriage of persons with disabilities,

(ii) the carriage of children,

(iii) unaccompanied minors, including those who are travelling under the carrier's supervision,

(iv) the assignment of seats to children who are under the age of 14 years,

(v) failure to operate the service or failure to operate the air service according to schedule,

(vi) flight delay,

(vii) flight cancellation,

(viii) delay on the tarmac,

(ix) denial of boarding,

(x) the re-routing of passengers,

(xi) whether the carrier is bound by the obligations of a large carrier or the obligations of a small carrier that are set out in the *Air Passenger Protection Regulations*,

(xii) refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason,

(xiii) ticket reservation, cancellation, confirmation, validity and loss,

(xiv) refusal to transport passengers or goods,

Contenu des tarifs

122 Les tarifs doivent contenir :

a) les conditions générales régissant le tarif, énoncées en des termes qui expliquent clairement leur application aux taxes énumérées;

b) les taxes ainsi que les noms des points en provenance et à destination desquels ou entre lesquels elles s'appliquent, le tout étant disposé d'une manière simple et méthodique et les marchandises étant indiquées clairement dans le cas des taxes spécifiques;

c) les conditions de transport, dans lesquelles est énoncée clairement la politique du transporteur aérien concernant au moins les éléments suivants :

(i) le transport des personnes handicapées,

(ii) le transport des enfants,

(iii) les mineurs non accompagnés, notamment ceux qui voyagent sous la supervision du transporteur,

(iv) l'attribution de sièges aux enfants de moins de quatorze ans,

(v) l'inexécution du service aérien ou le non-respect de l'horaire prévu pour le service aérien,

(vi) les vols retardés,

(vii) les vols annulés,

(viii) les retards sur l'aire de trafic,

(ix) les refus d'embarquement,

(x) le réacheminement des passagers,

(xi) si le transporteur est tenu de respecter les obligations applicable aux gros transporteur ou aux petits transporteurs qui sont prévues par le *Règlement sur la protection des passagers aériens*,

(xii) le remboursement des services achetés mais non utilisés, intégralement ou partiellement, par suite de la décision du client de ne pas poursuivre son trajet ou de son incapacité à le faire, ou encore de l'inaptitude du transporteur aérien à fournir le service pour une raison quelconque,

(xiii) la réservation, l'annulation de vol, la confirmation, la validité et la perte des billets,

(xv) method of calculation of charges not specifically set out in the tariff,

(xvi) the carriage of baggage including the loss, delay or damaging of baggage,

(xvii) the transportation of musical instruments,

(xviii) limits of liability respecting passengers and goods,

(xix) exclusions from liability respecting passengers and goods,

(xx) procedures to be followed, and time limitations, respecting claims, and

(xxi) any other terms and conditions deemed under subsection 86.11(4) of the Act to be included in the tariff; and

(d) a policy respecting the refusal to transport a person who is less than five years old unless that person is accompanied by their parent or a person who is at least 16 years old.

SOR/93-253, s. 2; SOR/96-335, s. 65; SOR/2019-150, s. 42.

123 [Repealed, SOR/96-335, s. 65]

Supplements

124 (1) A supplement to a tariff on paper shall be in book or pamphlet form and shall be published only for the purpose of amending or cancelling that tariff.

(2) Every supplement shall be prepared in accordance with a standard form provided by the Agency.

(3) Supplements are governed by the same provisions of these Regulations as are applicable to the tariff that the supplements amend or cancel.

SOR/93-253, s. 2(F); SOR/96-335, s. 66.

Symbols

125 All abbreviations, notes, reference marks, symbols and technical terms shall be defined at the beginning of the tariff.

SOR/96-335, s. 66; SOR/2017-19, s. 9(E).

(xiv) le refus de transporter des passagers ou des marchandises,

(xv) la méthode de calcul des frais non précisés dans le tarif,

(xvi) le transport des bagages, y compris la perte, le retard ou le endommagement,

(xvii) le transport des instruments de musique,

(xviii) les limites de responsabilité à l'égard des passagers et des marchandises,

(xix) les exclusions de responsabilité à l'égard des passagers et des marchandises,

(xx) la marche à suivre ainsi que les délais fixés pour les réclamations,

(xxi) toute autre modalité réputée figurer au tarif du transporteur au titre du paragraphe 86.11(4) de la Loi;

d) la politique concernant le refus de transport d'un enfant de moins de cinq ans à moins qu'il ne soit accompagné par son parent ou par une personne âgée de seize ans ou plus.

DORS/93-253, art. 2; DORS/96-335, art. 65; DORS/2019-150, art. 42.

123 [Abrogé, DORS/96-335, art. 65]

Suppléments

124 (1) Les suppléments à un tarif sur papier doivent être publiés sous forme de livres ou de brochures et ne doivent servir qu'à modifier ou annuler le tarif.

(2) Les suppléments doivent être conformes au modèle fourni par l'Office.

(3) Les suppléments sont régis par les dispositions du présent règlement qui s'appliquent aux tarifs qu'ils modifient ou annulent.

DORS/93-253, art. 2(F); DORS/96-335, art. 66.

Symboles

125 Les abréviations, notes, appels de notes, symboles et termes techniques doivent être définis au début du tarif.

DORS/96-335, art. 66; DORS/2017-19, art. 9(A).

CANADA

CONSOLIDATION

CODIFICATION

Canada Transportation Act

Loi sur les transports au Canada

S.C. 1996, c. 10

L.C. 1996, ch. 10

Current to March 5, 2020

Last amended on July 11, 2019

À jour au 5 mars 2020

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Parliament in respect of that particular mode of transportation, the order or regulation made under this Act prevails.

Competition Act

(2) Subject to subsection (3), nothing in or done under the authority of this Act, other than Division IV of Part III, affects the operation of the *Competition Act*.

International agreements respecting air services

(3) In the event of any inconsistency or conflict between an international agreement or convention respecting air services to which Canada is a party and the *Competition Act*, the provisions of the agreement or convention prevail to the extent of the inconsistency or conflict.

1996, c. 10, s. 4; 2007, c. 19, s. 1.

Loi sur la concurrence

(2) Sous réserve du paragraphe (3), les dispositions de la présente loi — sauf celles de la section IV de la partie III — et les actes accomplis sous leur régime ne portent pas atteinte à l'application de la *Loi sur la concurrence*.

Conventions ou accords internationaux sur les services aériens

(3) En cas d'incompatibilité ou de conflit entre une convention internationale ou un accord international sur les services aériens dont le Canada est signataire et les dispositions de la *Loi sur la concurrence*, la convention ou l'accord l'emporte dans la mesure de l'incompatibilité ou du conflit.

1996, ch. 10, art. 4; 2007, ch. 19, art. 1.

National Transportation Policy

Declaration

5 It is declared that a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards and contributes to a sustainable environment and makes the best use of all modes of transportation at the lowest total cost is essential to serve the needs of its users, advance the well-being of Canadians and enable competitiveness and economic growth in both urban and rural areas throughout Canada. Those objectives are most likely to be achieved when

(a) competition and market forces, both within and among the various modes of transportation, are the prime agents in providing viable and effective transportation services;

(b) regulation and strategic public intervention are used to achieve economic, safety, security, environmental or social outcomes that cannot be achieved satisfactorily by competition and market forces and do not unduly favour, or reduce the inherent advantages of, any particular mode of transportation;

(c) rates and conditions do not constitute an undue obstacle to the movement of traffic within Canada or to the export of goods from Canada;

(d) the transportation system is accessible without undue obstacle to the mobility of all persons;

Politique nationale des transports

Déclaration

5 Il est déclaré qu'un système de transport national compétitif et rentable qui respecte les plus hautes normes possibles de sûreté et de sécurité, qui favorise un environnement durable et qui utilise tous les modes de transport au mieux et au coût le plus bas possible est essentiel à la satisfaction des besoins de ses usagers et au bien-être des Canadiens et favorise la compétitivité et la croissance économique dans les régions rurales et urbaines partout au Canada. Ces objectifs sont plus susceptibles d'être atteints si :

a) la concurrence et les forces du marché, au sein des divers modes de transport et entre eux, sont les principaux facteurs en jeu dans la prestation de services de transport viables et efficaces;

b) la réglementation et les mesures publiques stratégiques sont utilisées pour l'obtention de résultats de nature économique, environnementale ou sociale ou de résultats dans le domaine de la sûreté et de la sécurité que la concurrence et les forces du marché ne permettent pas d'atteindre de manière satisfaisante, sans pour autant favoriser indûment un mode de transport donné ou en réduire les avantages inhérents;

c) les prix et modalités ne constituent pas un obstacle abusif au trafic à l'intérieur du Canada ou à l'exportation des marchandises du Canada;

(d.1) the transportation system is accessible without barriers to persons with disabilities; and

(e) governments and the private sector work together for an integrated transportation system.

1996, c. 10, s. 5; 2007, c. 19, s. 2; 2019, c. 10, s. 166.

Interpretation

Definitions

6 In this Act,

Agency means the Canadian Transportation Agency continued by subsection 7(1); (*Office*)

carrier means a person who is engaged in the transport of goods or passengers by any means of transport under the legislative authority of Parliament; (*transporteur*)

Chairperson means the Chairperson of the Agency; (*président*)

class 1 rail carrier means

(a) the Canadian National Railway Company,

(b) the Canadian Pacific Railway Company,

(c) BNSF Railway Company,

(d) CSX Transportation, Inc.,

(e) Norfolk Southern Railway Company,

(f) Union Pacific Railroad Company, and

(g) any *railway company*, as defined in section 87, that is specified in the regulations; (*transporteur ferroviaire de catégorie 1*)

goods includes rolling stock and mail; (*marchandises*)

member means a member of the Agency appointed under subsection 7(2) and includes a temporary member; (*membre*)

Minister means the Minister of Transport; (*ministre*)

radioactive material has the same meaning as in subsection 1(1) of the *Packaging and Transport of Nuclear Substances Regulations, 2015*. It includes a dangerous good with any of UN numbers 2908 to 2913, 2915 to 2917, 2919, 2977, 2978, 3321 to 3333 and 3507 that are set out in

d) le système de transport est accessible sans obstacle abusif à la circulation de tous;

d.1) le système de transport est accessible sans obstacle aux personnes handicapées;

e) les secteurs public et privé travaillent ensemble pour le maintien d'un système de transport intégré.

1996, ch. 10, art. 5; 2007, ch. 19, art. 2; 2019, ch. 10, art. 166.

Définitions

Définitions

6 Les définitions qui suivent s'appliquent à la présente loi.

cour supérieure

a) La Cour supérieure de justice de l'Ontario;

b) la Cour supérieure du Québec;

c) la Cour du Banc de la Reine du Nouveau-Brunswick, du Manitoba, de la Saskatchewan ou de l'Alberta;

d) la Cour suprême de la Nouvelle-Écosse, de la Colombie-Britannique, de l'Île-du-Prince-Édouard, du Yukon ou des Territoires du Nord-Ouest;

e) la Section de première instance de la Cour suprême de Terre-Neuve-et-Labrador;

f) la Cour de justice du Nunavut. (*superior court*)

expéditeur Personne qui expédie des marchandises par transporteur, ou en reçoit de celui-ci, ou qui a l'intention de le faire. (*shipper*)

jour de séance Tout jour où l'une ou l'autre chambre du Parlement siège. (*sitting day of Parliament*)

marchandises Y sont assimilés le matériel roulant et le courrier. (*goods*)

matériel roulant Toute sorte de voitures et de matériel muni de roues destinés à servir sur les rails d'un chemin de fer, y compris les locomotives, machines actionnées par quelque force motrice, voitures automotrices, tenders, chasse-neige et *flangers*. (*rolling stock*)

matière radioactive S'entend au sens du paragraphe 1(1) du *Règlement sur l'emballage et le transport des substances nucléaires (2015)*. Sont notamment visées par la présente définition les marchandises dangereuses dont le numéro ONU — indiqué à la colonne 1 de la Liste des

PART I

Administration

Canadian Transportation Agency

Continuation and Organization

Agency continued

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

Composition of Agency

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

Chairperson and Vice-Chairperson

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

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

Term of members

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

Reappointment

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

Continuation in office

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

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

PARTIE I

Administration

Office des transports du Canada

Maintien et composition

Maintien de l'Office

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

Composition

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

Président et vice-président

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

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

Durée du mandat

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

Renouvellement du mandat

(2) Les mandats sont renouvelables.

Continuation de mandat

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

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

the Chairperson to act in the absence shall issue under the seal of the Agency to the applicant a certified copy of any rule, order, regulation or any other document that has been issued by the Agency.

fixés par celui-ci, des copies certifiées conformes des règles, arrêtés, règlements ou autres documents de l'Office.

Judicial notice of documents

23 (1) Judicial notice shall be taken of a document issued by the Agency under its seal without proof of the signature or official character of the person appearing to have signed it.

Admission d'office

23 (1) Les documents délivrés par l'Office sous son sceau sont admis d'office en justice sans qu'il soit nécessaire de prouver l'authenticité de la signature qui y est apposée ou la qualité officielle du signataire.

Evidence of deposited documents

(2) A document purporting to be certified by the Secretary of the Agency as being a true copy of a document deposited or filed with or approved by the Agency, or any portion of such a document, is evidence that the document is so deposited, filed or approved and, if stated in the certificate, of the time when the document was deposited, filed or approved.

Preuve

(2) Le document censé être en tout ou en partie la copie certifiée conforme, par le secrétaire de l'Office, d'un document déposé auprès de celui-ci, ou approuvé par celui-ci, fait foi du dépôt ou de l'approbation ainsi que de la date, si elle est indiquée sur la copie, de ce dépôt ou de cette approbation.

Powers of Agency

Attributions de l'Office

Policy governs Agency

24 The powers, duties and functions of the Agency respecting any matter that comes within its jurisdiction under an Act of Parliament shall be exercised and performed in conformity with any policy direction issued to the Agency under section 43.

Directives

24 Les attributions de l'Office relatives à une affaire dont il est saisi en application d'une loi fédérale sont exercées en conformité avec les directives générales qui lui sont données en vertu de l'article 43.

Agency powers in general

25 The Agency has, with respect to all matters necessary or proper for the exercise of its jurisdiction, the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders or regulations and the entry on and inspection of property, all the powers, rights and privileges that are vested in a superior court.

Pouvoirs généraux

25 L'Office a, à toute fin liée à l'exercice de sa compétence, la comparution et l'interrogatoire des témoins, la production et l'examen des pièces, l'exécution de ses arrêtés ou règlements et la visite d'un lieu, les attributions d'une cour supérieure.

Power to award costs

25.1 (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.

Pouvoirs relatifs à l'adjudication des frais

25.1 (1) Sous réserve des paragraphes (2) à (4), l'Office a tous les pouvoirs de la Cour fédérale en ce qui a trait à l'adjudication des frais relativement à toute procédure prise devant lui.

Costs may be fixed or taxed

(2) Costs may be fixed in any case at a sum certain or may be taxed.

Frais fixés ou taxés

(2) Les frais peuvent être fixés à une somme déterminée, ou taxés.

Payment

(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.

Paiement

(3) L'Office peut ordonner par qui et à qui les frais doivent être payés et par qui ils doivent être taxés et alloués.

Governor in Council

Directions to Agency

Policy directions

43 (1) The Governor in Council may, at the request of the Agency or of the Governor in Council's own motion, issue policy directions to the Agency concerning any matter that comes within the jurisdiction of the Agency and every such direction shall be carried out by the Agency under the Act of Parliament that establishes the powers, duties and functions of the Agency in relation to the subject-matter of the direction.

Limitation on directions

(2) A direction issued under subsection (1) shall not affect a matter that is before the Agency on the date of the direction and that relates to a particular person.

Delay of binding effect

44 A direction issued under section 43 is not binding on the Agency until the expiration of the thirtieth sitting day of Parliament after the direction has been laid before both Houses of Parliament by or on behalf of the Minister, unless the direction has been previously laid before both Houses of Parliament in proposed form by or on behalf of the Minister and thirty sitting days of Parliament have expired after the proposed direction was laid.

Referral to committee

45 Where a direction referred to in section 43 is issued or a proposed direction referred to in section 44 is laid before a House of Parliament, it shall be referred without delay by that House to the committee of that House that it considers appropriate to deal with the subject-matter of the direction or proposed direction.

Consultation required

46 Before a direction referred to in section 43 is issued or a proposed direction referred to in section 44 is laid before a House of Parliament, the Minister shall consult with the Agency with respect to the nature and subject-matter of the direction or proposed direction.

Extraordinary Disruptions

Governor in Council may prevent disruptions

47 (1) Where the Governor in Council is of the opinion that

Gouverneur en conseil

Directives à l'Office

Directives générales

43 (1) Le gouverneur en conseil peut, à la demande de l'Office ou de sa propre initiative, donner des directives générales à l'Office sur toute question relevant de la compétence de celui-ci; l'Office exécute ces directives dans le cadre de la loi fédérale qui détermine ses attributions relatives au domaine visé par les directives.

Restrictions

(2) Les directives visées au paragraphe (1) n'ont pas d'effet sur les questions relatives à des personnes déterminées et dont l'Office est déjà saisi à la date où elles sont données.

Dépôt au Parlement

44 Pour que les directives visées à l'article 43 lient l'Office, il faut que trente jours de séance se soient écoulés depuis leur dépôt, sous forme définitive ou sous forme de projet, devant chaque chambre du Parlement par le ministre ou pour son compte.

Renvoi en comité

45 Dès le dépôt des directives générales sous forme définitive ou sous forme de projet devant une chambre du Parlement, celle-ci les renvoie à celui de ses comités qu'elle estime compétent dans le domaine qu'elles touchent.

Consultation

46 Avant que soient données les directives visées à l'article 43 ou qu'elles soient déposées sous forme de projet devant une chambre du Parlement, le ministre consulte l'Office sur leur nature et leur objet.

Perturbations extraordinaires

Mesures d'urgence prises par le gouverneur en conseil

47 (1) Le gouverneur en conseil peut, par décret, sur recommandation du ministre et du ministre responsable du Bureau de la politique de concurrence, prendre les mesures qu'il estime essentielles à la stabilisation du

(a) an extraordinary disruption to the effective continued operation of the national transportation system exists or is imminent, other than a labour disruption,

(b) failure to act under this section would be contrary to the interests of users and operators of the national transportation system, and

(c) there are no other provisions in this Act or in any other Act of Parliament that are sufficient and appropriate to remedy the situation and counter the actual or anticipated damage caused by the disruption,

the Governor in Council may, on the recommendation of the Minister and the minister responsible for the Bureau of Competition Policy, by order, take any steps, or direct the Agency to take any steps, that the Governor in Council considers essential to stabilize the national transportation system, including the imposition of capacity and pricing restraints.

réseau national des transports ou ordonner à l'Office de prendre de telles mesures et, notamment, imposer des restrictions relativement à la capacité et aux prix s'il estime :

a) qu'une perturbation extraordinaire de la bonne exploitation continuelle du réseau des transports — autre qu'en conflit de travail — existe ou est imminente;

b) que le fait de ne pas prendre un tel décret serait contraire aux intérêts des exploitants et des usagers du réseau national des transports;

c) qu'aucune autre disposition de la présente loi ou d'une autre loi fédérale ne permettrait de corriger la situation et de remédier à des dommages ou en prévenir.

Minister may consult affected persons

(2) Before recommending that an order be made under this section, the Minister may consult with any person who the Minister considers may be affected by the order.

Consultations

(2) Avant de recommander un décret aux termes du présent article, le ministre peut consulter les personnes qu'il croit susceptibles d'être touchées par celui-ci.

Order is temporary

(3) An order made under this section shall have effect for no more than ninety days after the order is made.

Mesure temporaire

(3) Le décret pris aux termes du présent article ne vaut que pour une période de quatre-vingt-dix jours.

Order to be tabled in Parliament

(4) The Minister shall cause any order made under this section to be laid before both Houses of Parliament within seven sitting days after the order is made.

Dépôt du décret au Parlement

(4) Le ministre fait déposer le décret devant chaque chambre du Parlement dans les sept premiers jours de séance suivant sa prise.

Reference to Parliamentary Committee

(5) Every order laid before Parliament under subsection (4) shall be referred for review to the Standing committee designated by Parliament for the purpose.

Renvoi en comité

(5) Le décret est renvoyé pour examen au comité permanent désigné à cette fin par le Parlement.

Resolution of Parliament revoking order

(6) Where a resolution directing that an order made under this section be revoked is adopted by both Houses of Parliament before the expiration of thirty sitting days of Parliament after the order is laid before both Houses of Parliament, the order shall cease to have effect on the day that the resolution is adopted or, if the adopted resolution specifies a day on which the order shall cease to have effect, on that specified day.

Résolution de révocation

(6) Tout décret pris aux termes du présent article cesse d'avoir effet le jour de l'adoption d'une résolution de révocation par les deux chambres du Parlement ou, le cas échéant, le jour que prévoit cette résolution, si celle-ci est adoptée dans les trente jours de séance suivant le jour du dépôt du décret devant les deux chambres du Parlement.

Competition Act

(7) Notwithstanding subsection 4(2), this section and anything done under the authority of this section prevail over the *Competition Act*.

Loi sur la concurrence

(7) Malgré le paragraphe 4(2), le présent article et les mesures prises sous son régime l'emportent sur la *Loi sur la concurrence*.

Offence

(8) Every person who contravenes an order made under this section is guilty of an offence and liable on summary conviction

(a) in the case of an individual, to a fine not exceeding $5,000, and

(b) in the case of a corporation, to a fine not exceeding $100,000,

for each day the person contravenes the order.

Minister

48 [Repealed, 2018, c. 10, s. 7]

Inquiries

Minister may request inquiry

49 (1) The Minister may direct the Agency to inquire into any matter or thing concerning transportation to which the legislative authority of Parliament extends and report the findings on the inquiry to the Minister as and when the Minister may require.

Powers

(2) For greater certainty, sections 38 and 39 apply in respect of an inquiry.

Summary of findings

(3) The Agency shall make public a summary of its findings that does not include any confidential information.

1996, c. 10, s. 49; 2018, c. 10, s. 8.

Transportation Information

Regulations re information

50 (1) The Governor in Council may make regulations requiring any persons referred to in subsection (1.1) who are subject to the legislative authority of Parliament to provide information, other than personal information as defined in section 3 of the *Privacy Act*, to the Minister, when and in the form and manner that the regulations may specify, for the purposes of

(a) national transportation policy development;

(b) reporting under section 52;

(c) operational planning;

Infraction à un décret

(8) L'inobservation d'un décret pris au titre du présent article constitue une infraction passible, sur déclaration de culpabilité par procédure sommaire :

a) dans le cas d'une personne physique, d'une amende maximale de 5 000 $ pour chaque jour que dure l'infraction;

b) dans le cas d'une personne morale, d'une amende maximale de 100 000 $ pour chaque jour que dure l'infraction.

Ministre

48 [Abrogé, 2018, ch. 10, art. 7]

Enquêtes

Enquêtes ordonnées par le ministre

49 (1) Le ministre peut déléguer à l'Office la charge d'enquêter sur toute question de transport relevant de la compétence législative du Parlement et de lui faire rapport de ses conclusions selon les modalités et dans le délai qu'il fixe.

Pouvoirs

(2) Il est entendu que les articles 38 et 39 s'appliquent à l'égard de l'enquête.

Résumé des conclusions

(3) L'Office rend public un résumé de ses conclusions qui ne contient aucun renseignement confidentiel.

1996, ch. 10, art. 49; 2018, ch. 10, art. 8.

Renseignements relatifs aux transports

Règlements relatifs aux renseignements

50 (1) Le gouverneur en conseil peut, par règlement, exiger des personnes visées au paragraphe (1.1) qui sont assujetties à la compétence législative du Parlement qu'elles fournissent au ministre des renseignements, autres que les renseignements personnels au sens de l'article 3 de la *Loi sur la protection des renseignements personnels*, aux dates, en la forme et de la manière que le règlement peut préciser, en vue :

a) de l'élaboration d'une politique nationale des transports;

b) de l'établissement du rapport prévu à l'article 52;

(c) retain a record of its tariffs for a period of not less than three years after the tariffs have ceased to have effect.

Prescribed tariff information to be included

(2) A tariff referred to in subsection (1) shall include such information as may be prescribed.

No fares, etc., unless set out in tariff

(3) The holder of a domestic licence shall not apply any fare, rate, charge or term or condition of carriage applicable to the domestic service it offers unless the fare, rate, charge, term or condition is set out in a tariff that has been published or displayed under subsection (1) and is in effect.

Copy of tariff on payment of fee

(4) The holder of a domestic licence shall provide a copy or excerpt of its tariffs to any person on request and on payment of a fee not exceeding the cost of making the copy or excerpt.

1996, c. 10, s. 67; 2000, c. 15, s. 5; 2007, c. 19, s. 20.

Fares or rates not set out in tariff

67.1 If, on complaint in writing to the Agency by any person, the Agency finds that, contrary to subsection 67(3), the holder of a domestic licence has applied a fare, rate, charge or term or condition of carriage applicable to the domestic service it offers that is not set out in its tariffs, the Agency may order the licensee to

(a) apply a fare, rate, charge or term or condition of carriage that is set out in its tariffs;

(b) compensate any person adversely affected for any expenses they incurred as a result of the licensee's failure to apply a fare, rate, charge or term or condition of carriage that was set out in its tariffs; and

(c) take any other appropriate corrective measures.

2000, c. 15, s. 6; 2007, c. 19, s. 21.

When unreasonable or unduly discriminatory terms or conditions

67.2 (1) If, on complaint in writing to the Agency by any person, the Agency finds that the holder of a domestic licence has applied terms or conditions of carriage applicable to the domestic service it offers that are unreasonable or unduly discriminatory, the Agency may suspend or disallow those terms or conditions and substitute other terms or conditions in their place.

Renseignements tarifaires

(2) Les tarifs comportent les renseignements exigés par règlement.

Interdiction

(3) Le titulaire d'une licence intérieure ne peut appliquer à l'égard d'un service intérieur que le prix, le taux, les frais ou les conditions de transport applicables figurant dans le tarif en vigueur publié ou affiché conformément au paragraphe (1).

Exemplaire du tarif

(4) Il fournit un exemplaire de tout ou partie de ses tarifs sur demande et paiement de frais non supérieurs au coût de reproduction de l'exemplaire.

1996, ch. 10, art. 67; 2000, ch. 15, art. 5; 2007, ch. 19, art. 20.

Prix, taux, frais ou conditions non inclus au tarif

67.1 S'il conclut, sur dépôt d'une plainte, que le titulaire d'une licence intérieure a, contrairement au paragraphe 67(3), appliqué à l'un de ses services intérieurs un prix, un taux, des frais ou d'autres conditions de transport ne figurant pas au tarif, l'Office peut, par ordonnance, lui enjoindre :

a) d'appliquer un prix, un taux, des frais ou d'autres conditions de transport figurant au tarif;

b) d'indemniser toute personne lésée des dépenses qu'elle a supportées consécutivement à la non-application du prix, du taux, des frais ou des autres conditions qui figuraient au tarif;

c) de prendre toute autre mesure corrective indiquée.

2000, ch. 15, art. 6; 2007, ch. 19, art. 21.

Conditions déraisonnables

67.2 (1) S'il conclut, sur dépôt d'une plainte, que le titulaire d'une licence intérieure a appliqué pour un de ses services intérieurs des conditions de transport déraisonnables ou injustement discriminatoires, l'Office peut suspendre ou annuler ces conditions et leur en substituer de nouvelles.

Prohibition on advertising

(2) The holder of a domestic licence shall not advertise or apply any term or condition of carriage that is suspended or has been disallowed.

2000, c. 15, s. 6; 2007, c. 19, s. 22(F).

Person affected

67.3 Despite sections 67.1 and 67.2, a complaint against the holder of a domestic license related to any term or condition of carriage concerning any obligation prescribed by regulations made under subsection 86.11(1) may only be filed by a person adversely affected.

2018, c. 10, s. 17.

Applying decision to other passengers

67.4 The Agency may, to the extent that it considers it appropriate, make applicable to some or to all passengers of the same flight as the complainant all or part of its decision respecting a complaint related to any term or condition of carriage concerning any obligation prescribed by regulations made under paragraph 86.11(1)(b).

2018, c. 10, s. 17.

Non-application of fares, etc.

68 (1) Sections 66 to 67.2 do not apply in respect of fares, rates or charges applicable to a domestic service provided for under a contract between a holder of a domestic licence and another person whereby the parties to the contract agree to keep its provisions confidential.

Non-application of terms and conditions

(1.1) Sections 66 to 67.2 do not apply in respect of terms and conditions of carriage applicable to a domestic service provided for under a contract referred to in subsection (1) to which an employer is a party and that relates to travel by its employees.

Provisions regarding exclusive use of services

(2) The parties to the contract shall not include in it provisions with respect to the exclusive use by the other person of a domestic service operated by the holder of the domestic licence between two points in accordance with a published timetable or on a regular basis, unless the contract is for all or a significant portion of the capacity of a flight or a series of flights.

Retention of contract required

(3) The holder of a domestic licence who is a party to the contract shall retain a copy of it for a period of not less than three years after it has ceased to have effect and, on request made within that period, shall provide a copy of it to the Agency.

1996, c. 10, s. 68; 2000, c. 15, s. 7; 2007, c. 19, s. 23.

Interdiction d'annoncer

(2) Il est interdit au titulaire d'une licence intérieure d'annoncer ou d'appliquer une condition de transport suspendue ou annulée.

2000, ch. 15, art. 6; 2007, ch. 19, art. 22(F).

Personne lésée

67.3 Malgré les articles 67.1 et 67.2, seule une personne lésée peut déposer une plainte contre le titulaire d'une licence intérieure relativement à toute condition de transport visant une obligation prévue par un règlement pris en vertu du paragraphe 86.11(1).

2018, ch. 10, art. 17.

Application de la décision à d'autres passagers

67.4 L'Office peut, dans la mesure qu'il estime indiquée, rendre applicable à une partie ou à l'ensemble des passagers du même vol que le plaignant, tout ou partie de sa décision relative à la plainte de celui-ci portant sur une condition de transport visant une obligation prévue par un règlement pris en vertu de l'alinéa 86.11(1)b).

2018, ch. 10, art. 17.

Non-application de certaines dispositions

68 (1) Les articles 66 à 67.2 ne s'appliquent pas aux prix, taux ou frais applicables au service intérieur qui fait l'objet d'un contrat entre le titulaire d'une licence intérieure et une autre personne et par lequel les parties conviennent d'en garder les stipulations confidentielles.

Non-application aux conditions de transport

(1.1) Les articles 66 à 67.2 ne s'appliquent pas aux conditions de transport applicables au service intérieur qui fait l'objet d'un contrat visé au paragraphe (1) portant sur les voyages d'employés faits pour le compte d'un employeur qui est partie au contrat.

Stipulations interdites

(2) Le contrat ne peut comporter aucune clause relative à l'usage exclusif par l'autre partie des services intérieurs offerts entre deux points par le titulaire de la licence intérieure, soit régulièrement, soit conformément à un horaire publié, sauf s'il porte sur la totalité ou une partie importante des places disponibles sur un vol ou une série de vols.

Double à conserver

(3) Le titulaire d'une licence intérieure est tenu de conserver, au moins trois ans après son expiration, un double du contrat et d'en fournir un exemplaire à l'Office pendant cette période s'il lui en fait la demande.

1996, ch. 10, art. 68; 2000, ch. 15, art. 7; 2007, ch. 19, art. 23.

45 ELIZABETH II

45 ELIZABETH II

CHAPTER 10

CHAPITRE 10

An Act to continue the National Transportation Agency as the Canadian Transportation Agency, to consolidate and revise the National Transportation Act, 1987 and the Railway Act and to amend or repeal other Acts as a consequence

Loi maintenant l'Office national des transports sous le nom d'Office des transports du Canada, codifiant et remaniant la Loi de 1987 sur les transports nationaux et la Loi sur les chemins de fer et modifiant ou abrogeant certaines lois

[*Assented to 29th May, 1996*]

[*Sanctionnée le 29 mai 1996*]

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

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

SHORT TITLE

Short title

1. This Act may be cited as the *Canada Transportation Act.*

TITRE ABRÉGÉ

1. *Loi sur les transports au Canada.*

Titre abrégé

HER MAJESTY

Binding on Her Majesty

2. This Act is binding on Her Majesty in right of Canada or a province.

SA MAJESTÉ

2. La présente loi lie Sa Majesté du chef du Canada ou d'une province.

Obligation de Sa Majesté

APPLICATION

Application generally

3. This Act applies in respect of transportation matters under the legislative authority of Parliament.

APPLICATION

3. La présente loi s'applique aux questions de transport relevant de la compétence législative du Parlement.

Champ d'application

Conflicts

4. (1) Subject to subsection (2), where there is a conflict between any order or regulation made under this Act in respect of a particular mode of transportation and any rule, order or regulation made under any other Act of Parliament in respect of that particular mode of transportation, the order or regulation made under this Act prevails.

4. (1) Sous réserve du paragraphe (2), les arrêtés ou règlements pris sous le régime de la présente loi à l'égard d'un mode de transport l'emportent sur les règles, arrêtés ou règlements incompatibles pris sous celui d'autres lois fédérales.

Incompatibilité

Competition Act

(2) Nothing in or done under the authority of this Act affects the operation of the *Competition Act.*

(2) La présente loi et les actes accomplis sous son régime ne portent pas atteinte à la *Loi sur la concurrence.*

Loi sur la concurrence

NATIONAL TRANSPORTATION POLICY

Declaration

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,

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

(*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,

POLITIQUE NATIONALE DES TRANSPORTS

Déclaration

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

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

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 la compétence législative du Parlement en matière de transports.

INTERPRETATION

Definitions

6. In this Act,

"Agency" « *Office* »

"Agency" means the Canadian Transportation Agency continued by subsection 7(1);

"carrier" « *transporteur* »

"carrier" means a person who is engaged in the transport of goods or passengers by any means of transport under the legislative authority of Parliament;

"Chairperson" « *président* »

"Chairperson" means the Chairperson of the Agency;

"goods" « *marchandises* »

"goods" includes rolling stock and mail;

DÉFINITIONS

Définitions

6. Les définitions qui suivent s'appliquent à la présente loi.

« cour supérieure »

« cour supérieure » "*superior court*"

a) La Cour de l'Ontario (Division générale);

b) la Cour supérieure du Québec;

c) la Cour du Banc de la Reine du Nouveau-Brunswick, du Manitoba, de la Saskatchewan ou de l'Alberta;

CANADA

CONSOLIDATION

CODIFICATION

Federal Courts Act

Loi sur les Cours fédérales

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

L.R.C. (1985), ch. F-7

Current to March 5, 2020

Last amended on August 28, 2019

À jour au 5 mars 2020

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

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

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

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

Extraordinary remedies, members of Canadian Forces

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

Recours extraordinaires : Forces canadiennes

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

Remedies to be obtained on application

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

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

Exercice des recours

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

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

Application for judicial review

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

Demande de contrôle judiciaire

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

Time limitation

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

Délai de présentation

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

Powers of Federal Court

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

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

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

Pouvoirs de la Cour fédérale

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

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

proceeding of a federal board, commission or other tribunal.

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

Grounds of review

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

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

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

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

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

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

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

Motifs

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

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

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

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

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

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

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

Defect in form or technical irregularity

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

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

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

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

Vice de forme

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

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

Interim orders

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

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

Mesures provisoires

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

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

Reference by federal tribunal

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

Reference by Attorney General of Canada

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

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

Hearings in summary way

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

Exception

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

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

Exception to sections 18 and 18.1

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

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

Intergovernmental disputes

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

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

Renvoi d'un office fédéral

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

Renvoi du procureur général

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

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

Procédure sommaire d'audition

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

Exception

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

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

Dérogation aux art. 18 et 18.1

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

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

Différends entre gouvernements

19 Lorsqu'une loi d'une province reconnaît sa compétence en l'espèce, — qu'elle y soit désignée sous le nom de Cour fédérale, Cour fédérale du Canada ou Cour de l'Échiquier du Canada — la Cour fédérale est compétente pour juger les cas de litige entre le Canada et cette province ou entre cette province et une ou plusieurs autres provinces ayant adopté une loi semblable.

L.R. (1985), ch. F-7, art. 19; 2002, ch. 8, art. 28.

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

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

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

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

Hearing in summary way

(1.4) An appeal under subsection (1.2) shall be heard and determined without delay and in a summary way.

Procédure sommaire

(1.4) L'appel interjeté en vertu du paragraphe (1.2) est entendu et tranché immédiatement et selon une procédure sommaire.

Notice of appeal

(2) An appeal under this section shall be brought by filing a notice of appeal in the Registry of the Federal Court of Appeal

(a) in the case of an interlocutory judgment, within 10 days after the pronouncement of the judgment or within any further time that a judge of the Federal Court of Appeal may fix or allow before or after the end of those 10 days; and

(b) in any other case, within 30 days, not including any days in July and August, after the pronouncement of the judgment or determination appealed from or within any further time that a judge of the Federal Court of Appeal may fix or allow before or after the end of those 30 days.

Avis d'appel

(2) L'appel interjeté dans le cadre du présent article est formé par le dépôt d'un avis au greffe de la Cour d'appel fédérale, dans le délai imparti à compter du prononcé du jugement en cause ou dans le délai supplémentaire qu'un juge de la Cour d'appel fédérale peut, soit avant soit après l'expiration de celui-ci, accorder. Le délai imparti est de :

a) dix jours, dans le cas d'un jugement interlocutoire;

b) trente jours, compte non tenu de juillet et août, dans le cas des autres jugements.

Service

(3) All parties directly affected by an appeal under this section shall be served without delay with a true copy of the notice of appeal, and evidence of the service shall be filed in the Registry of the Federal Court of Appeal.

Signification

(3) L'appel est signifié sans délai à toutes les parties directement concernées par une copie certifiée conforme de l'avis. La preuve de la signification doit être déposée au greffe de la Cour d'appel fédérale.

Final judgment

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

R.S., 1985, c. F-7, s. 27; R.S., 1985, c. 51 (4th Supp.), s. 11; 1990, c. 8, ss. 7, 78(E); 1993, c. 27, s. 214; 2002, c. 8, s. 34.

Jugement définitif

(4) Pour l'application du présent article, est assimilé au jugement définitif le jugement qui statue au fond sur un droit, à l'exception des questions renvoyées à l'arbitrage par le jugement.

L.R. (1985), ch. F-7, art. 27; L.R. (1985), ch. 51 (4e suppl.), art. 11; 1990, ch. 8, art. 7 et 78(A); 1993, ch. 27, art. 214; 2002, ch. 8, art. 34.

Judicial review

28 (1) The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals:

(a) [Repealed, 2012, c. 24, s. 86]

(b) the Review Tribunal continued by subsection 27(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*;

Contrôle judiciaire

28 (1) La Cour d'appel fédérale a compétence pour connaître des demandes de contrôle judiciaire visant les offices fédéraux suivants :

a) [Abrogé, 2012, ch. 24, art. 86]

b) la commission de révision prorogée par le paragraphe 27(1) de la *Loi sur les sanctions administratives pécuniaires en matière d'agriculture et d'agroalimentaire*;

(b.1) the Conflict of Interest and Ethics Commissioner appointed under section 81 of the *Parliament of Canada Act*;

(c) the Canadian Radio-television and Telecommunications Commission established by the *Canadian Radio-television and Telecommunications Commission Act*;

(d) [Repealed, 2012, c. 19, s. 272]

(e) the Canadian International Trade Tribunal established by the *Canadian International Trade Tribunal Act*;

(f) the Canadian Energy Regulator established by the *Canadian Energy Regulator Act*;

(g) the Governor in Council, when the Governor in Council makes an order under subsection 186(1) of the *Canadian Energy Regulator Act*;

(g) the Appeal Division of the Social Security Tribunal established under section 44 of the *Department of Employment and Social Development Act*, unless the decision is made under subsection 57(2) or section 58 of that Act or relates to an appeal brought under subsection 53(3) of that Act or an appeal respecting a decision relating to further time to make a request under subsection 52(2) of that Act, section 81 of the *Canada Pension Plan*, section 27.1 of the *Old Age Security Act* or section 112 of the *Employment Insurance Act*;

(h) the Canada Industrial Relations Board established by the *Canada Labour Code*;

(i) the Federal Public Sector Labour Relations and Employment Board referred to in subsection 4(1) of the *Federal Public Sector Labour Relations and Employment Board Act*;

(i.1) adjudicators as defined in subsection 2(1) of the *Federal Public Sector Labour Relations Act*;

(j) the Copyright Board established by the *Copyright Act*;

(k) the Canadian Transportation Agency established by the *Canada Transportation Act*;

(l) [Repealed, 2002, c. 8, s. 35]

(m) [Repealed, 2012, c. 19, s. 272]

(n) the Competition Tribunal established by the *Competition Tribunal Act*;

b.1) le commissaire aux conflits d'intérêts et à l'éthique nommé en vertu de l'article 81 de la *Loi sur le Parlement du Canada*;

c) le Conseil de la radiodiffusion et des télécommunications canadiennes constitué par la *Loi sur le Conseil de la radiodiffusion et des télécommunications canadiennes*;

d) [Abrogé, 2012, ch. 19, art. 272]

e) le Tribunal canadien du commerce extérieur constitué par la *Loi sur le Tribunal canadien du commerce extérieur*;

f) la Régie canadienne de l'énergie constituée par la *Loi sur la Régie canadienne de l'énergie*;

g) le gouverneur en conseil, quand il prend un décret en vertu du paragraphe 186(1) de la *Loi sur la Régie canadienne de l'énergie*;

g) la division d'appel du Tribunal de la sécurité sociale, constitué par l'article 44 de la *Loi sur le ministère de l'Emploi et du Développement social*, sauf dans le cas d'une décision qui est rendue au titre du paragraphe 57(2) ou de l'article 58 de cette loi ou qui vise soit un appel interjeté au titre du paragraphe 53(3) de cette loi, soit un appel concernant une décision relative au délai supplémentaire visée au paragraphe 52(2) de cette loi, à l'article 81 du *Régime de pensions du Canada*, à l'article 27.1 de la *Loi sur la sécurité de la vieillesse* ou à l'article 112 de la *Loi sur l'assurance-emploi*;

h) le Conseil canadien des relations industrielles au sens du *Code canadien du travail*;

i) la Commission des relations de travail et de l'emploi dans le secteur public fédéral visée par le paragraphe 4(1) de la *Loi sur la Commission des relations de travail et de l'emploi dans le secteur public fédéral*;

i.1) les arbitres de grief, au sens du paragraphe 2(1) de la *Loi sur les relations de travail dans le secteur public fédéral*;

j) la Commission du droit d'auteur constituée par la *Loi sur le droit d'auteur*;

k) l'Office des transports du Canada constitué par la *Loi sur les transports au Canada*;

l) [Abrogé, 2002, ch. 8, art. 35]

m) [Abrogé, 2012, ch. 19, art. 272]

(o) assessors appointed under the *Canada Deposit Insurance Corporation Act*;

(p) [Repealed, 2012, c. 19, s. 572]

(q) the Public Servants Disclosure Protection Tribunal established by the *Public Servants Disclosure Protection Act*; and

(r) the Specific Claims Tribunal established by the *Specific Claims Tribunal Act*.

n) le Tribunal de la concurrence constitué par la *Loi sur le Tribunal de la concurrence*;

o) les évaluateurs nommés en application de la *Loi sur la Société d'assurance-dépôts du Canada*;

p) [Abrogé, 2012, ch. 19, art. 572]

q) le Tribunal de la protection des fonctionnaires divulgateurs d'actes répréhensibles constitué par la *Loi sur la protection des fonctionnaires divulgateurs d'actes répréhensibles*;

r) le Tribunal des revendications particulières constitué par la *Loi sur le Tribunal des revendications particulières*.

Sections apply

(2) Sections 18 to 18.5, except subsection 18.4(2), apply, with any modifications that the circumstances require, in respect of any matter within the jurisdiction of the Federal Court of Appeal under subsection (1) and, when they apply, a reference to the Federal Court shall be read as a reference to the Federal Court of Appeal.

Dispositions applicables

(2) Les articles 18 à 18.5 s'appliquent, exception faite du paragraphe 18.4(2) et compte tenu des adaptations de circonstance, à la Cour d'appel fédérale comme si elle y était mentionnée lorsqu'elle est saisie en vertu du paragraphe (1) d'une demande de contrôle judiciaire.

Federal Court deprived of jurisdiction

(3) If the Federal Court of Appeal has jurisdiction to hear and determine a matter, the Federal Court has no jurisdiction to entertain any proceeding in respect of that matter.

R.S., 1985, c. F-7, s. 28; R.S., 1985, c. 30 (2nd Supp.), s. 61; 1990, c. 8, s. 8; 1992, c. 26, s. 17, c. 33, s. 69, c. 49, s. 128; 1993, c. 34, s. 70; 1996, c. 10, s. 229, c. 23, s. 187; 1998, c. 26, s. 73; 1999, c. 31, s. 92(E); 2002, c. 8, s. 35; 2003, c. 22, ss. 167(E), 262; 2005, c. 46, s. 56.1; 2006, c. 9, ss. 6, 222; 2008, c. 22, s. 46; 2012, c. 19, ss. 110, 272, 572, c. 24, s. 86; 2013, c. 40, ss. 236, 439; 2014, c. 20, s. 236; 2017, c. 9, ss. 43, 55; 2019, c. 28, s. 102.

Incompétence de la Cour fédérale

(3) La Cour fédérale ne peut être saisie des questions qui relèvent de la Cour d'appel fédérale.

L.R. (1985), ch. F-7, art. 28; L.R. (1985), ch. 30 (2e suppl.), art. 61; 1990, ch. 8, art. 8; 1992, ch. 26, art. 17, ch. 33, art. 69, ch. 49, art. 128; 1993, ch. 34, art. 70; 1996, ch. 10, art. 229, ch. 23, art. 187; 1998, ch. 26, art. 73; 1999, ch. 31, art. 92(A); 2002, ch. 8, art. 35; 2003, ch. 22, art. 167(A) et 262; 2005, ch. 46, art. 56.1; 2006, ch. 9, art. 6 et 222; 2008, ch. 22, art. 46; 2012, ch. 19, art. 110, 272 et 572, ch. 24, art. 86; 2013, ch. 40, art. 236 et 439; 2014, ch. 20, art. 236; 2017, ch. 9, art. 43 et 55; 2019, ch. 28, art. 102.

29 to 35 [Repealed, 1990, c. 8, s. 8]

29 à 35 [Abrogés, 1990, ch. 8, art. 8]

Substantive Provisions

Prejudgment interest — cause of action within province

36 (1) Except as otherwise provided in any other Act of Parliament, and subject to subsection (2), the laws relating to prejudgment interest in proceedings between subject and subject that are in force in a province apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.

Prejudgment interest — cause of action outside province

(2) A person who is entitled to an order for the payment of money in respect of a cause of action arising outside a province or in respect of causes of action arising in more than one province is entitled to claim and have included

Dispositions de fond

Intérêt avant jugement — Fait survenu dans une province

36 (1) Sauf disposition contraire de toute autre loi fédérale, et sous réserve du paragraphe (2), les règles de droit en matière d'intérêt avant jugement qui, dans une province, régissent les rapports entre particuliers s'appliquent à toute instance devant la Cour d'appel fédérale ou la Cour fédérale et dont le fait générateur est survenu dans cette province.

Intérêt avant jugement — Fait non survenu dans une seule province

(2) Dans toute instance devant la Cour d'appel fédérale ou la Cour fédérale et dont le fait générateur n'est pas survenu dans une province ou dont les faits générateurs sont survenus dans plusieurs provinces, les intérêts avant

exclusivement une mission non commerciale au moment où a été formulée la demande ou intentée l'action les concernant.

Arrest

(8) The jurisdiction conferred on the Federal Court by section 22 may be exercised *in rem* against any ship that, at the time the action is brought, is owned by the beneficial owner of the ship that is the subject of the action.

Saisie de navire

(8) La compétence de la Cour fédérale peut, aux termes de l'article 22, être exercée en matière réelle à l'égard de tout navire qui, au moment où l'action est intentée, appartient au véritable propriétaire du navire en cause dans l'action.

Reciprocal security

(9) In an action for a collision in which a ship, an aircraft or other property of a defendant has been arrested, or security has been given to answer judgment against the defendant, and in which the defendant has instituted a cross-action or counter-claim in which a ship, an aircraft or other property of the plaintiff is liable to arrest but cannot be arrested, the Federal Court may stay the proceedings in the principal action until security has been given to answer judgment in the cross-action or counter-claim.

R.S., 1985, c. F-7, s. 43; 1990, c. 8, s. 12; 1996, c. 31, s. 83; 2002, c. 8, s. 40; 2009, c. 21, s. 18(E).

Garantie réciproque

(9) Dans une action pour collision où un navire, aéronef ou autre bien du défendeur est saisi, ou un cautionnement est fourni, et où le défendeur présente une demande reconventionnelle en vertu de laquelle un navire, aéronef ou autre bien du demandeur est saisissable, la Cour fédérale peut, s'il ne peut être procédé à la saisie de ces derniers biens, suspendre l'action principale jusqu'au dépôt d'un cautionnement par le demandeur.

L.R. (1985), ch. F-7, art. 43; 1990, ch. 8, art. 12; 1996, ch. 31, art. 83; 2002, ch. 8, art. 40; 2009, ch. 21, art. 18(A).

***Mandamus*, injunction, specific performance or appointment of receiver**

44 In addition to any other relief that the Federal Court of Appeal or the Federal Court may grant or award, a *mandamus*, an injunction or an order for specific performance may be granted or a receiver appointed by that court in all cases in which it appears to the court to be just or convenient to do so. The order may be made either unconditionally or on any terms and conditions that the court considers just.

R.S., 1985, c. F-7, s. 44; 2002, c. 8, s. 41.

***Mandamus*, injonction, exécution intégrale ou nomination d'un séquestre**

44 Indépendamment de toute autre forme de réparation qu'elle peut accorder, la Cour d'appel fédérale ou la Cour fédérale peut, dans tous les cas où il lui paraît juste ou opportun de le faire, décerner un *mandamus*, une injonction ou une ordonnance d'exécution intégrale, ou nommer un séquestre, soit sans condition, soit selon les modalités qu'elle juge équitables.

L.R. (1985), ch. F-7, art. 44; 2002, ch. 8, art. 41.

Procedure

Giving of judgment after judge ceases to hold office

45 (1) A judge of the Federal Court of Appeal or the Federal Court who resigns or is appointed to another court or otherwise ceases to hold office may, at the request of the Chief Justice of that court, at any time within eight weeks after that event, give judgment in any cause, action or matter previously tried by or heard before the judge as if he or she had continued in office.

Taking part in giving of judgment after judge of Federal Court of Appeal ceases to hold office

(2) If a judge of the Federal Court of Appeal who resigns or is appointed to another court or otherwise ceases to hold office has heard a cause, an action or a matter in the Federal Court of Appeal jointly with other judges of that

Procédure

Jugement rendu après cessation de fonctions

45 (1) Le juge de la Cour d'appel fédérale ou de la Cour fédérale qui a cessé d'occuper sa charge, notamment par suite de démission ou de nomination à un autre poste, peut, dans les huit semaines qui suivent et à la demande du juge en chef du tribunal concerné, rendre son jugement dans toute affaire qu'il a instruite.

Participation au jugement après cessation de fonctions

(2) À la demande du juge en chef de la Cour d'appel fédérale, le juge de celle-ci qui se trouve dans la situation visée au paragraphe (1) après y avoir instruit une affaire conjointement avec d'autres juges peut, dans le délai fixé

CANADA

CONSOLIDATION

CODIFICATION

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Règles des Cours fédérales

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produce for inspection any document or other material requested in a direction to attend, if the Court is of the opinion that the document or other material requested is irrelevant or, by reason of its nature or the number of documents or amount of material requested, it would be unduly onerous to require the person or party to produce it.

pour examen certains des documents ou éléments matériels demandés dans l'assignation à comparaître, si elle estime que ces documents ou éléments ne sont pas pertinents ou qu'il serait trop onéreux de les produire du fait de leur nombre ou de leur nature.

Objections

95 (1) A person who objects to a question that is asked in an oral examination shall briefly state the grounds for the objection for the record.

Objection

95 (1) La personne qui soulève une objection au sujet d'une question posée au cours d'un interrogatoire oral énonce brièvement les motifs de son objection pour qu'ils soient inscrits au dossier.

Preliminary answer

(2) A person may answer a question that was objected to in an oral examination subject to the right to have the propriety of the question determined, on motion, before the answer is used at trial.

Réponse préliminaire

(2) Une personne peut répondre à une question au sujet de laquelle une objection a été formulée à l'interrogatoire oral, sous réserve de son droit de faire déterminer, sur requête, le bien-fondé de la question avant que la réponse soit utilisée à l'instruction.

Improper conduct

96 (1) A person being examined may adjourn an oral examination and bring a motion for directions if the person believes that he or she is being subjected to an excessive number of questions or to improper questions, or that the examination is being conducted in bad faith or in an abusive manner.

Questions injustifiées

96 (1) La personne qui est interrogée peut ajourner l'interrogatoire oral et demander des directives par voie de requête, si elle croit qu'elle est soumise à un nombre excessif de questions ou à des questions inopportunes, ou que l'interrogatoire est effectué de mauvaise foi ou de façon abusive.

Adjournment to seek directions

(2) A person conducting an oral examination may adjourn the examination and bring a motion for directions if the person believes answers to questions being provided are evasive or if the person being examined fails to produce a document or other material requested under rule 94.

Ajournement

(2) La personne qui interroge peut ajourner l'interrogatoire oral et demander des directives par voie de requête, si elle croit que les réponses données aux questions sont évasives ou qu'un document ou un élément matériel demandé en application de la règle 94 n'a pas été produit.

Sanctions

(3) On a motion under subsection (1) or (2), the Court may sanction, through costs, a person whose conduct necessitated the motion or a person who unnecessarily adjourned the examination.

Sanctions

(3) À la suite de la requête visée aux paragraphes (1) ou (2), la Cour peut condamner aux dépens la personne dont la conduite a rendu nécessaire la présentation de la requête ou la personne qui a ajourné l'interrogatoire sans raison valable.

Failure to attend or misconduct

97 Where a person fails to attend an oral examination or refuses to take an oath, answer a proper question, produce a document or other material required to be produced or comply with an order made under rule 96, the Court may

(a) order the person to attend or re-attend, as the case may be, at his or her own expense;

Défaut de comparaître ou inconduite

97 Si une personne ne se présente pas à un interrogatoire oral ou si elle refuse de prêter serment, de répondre à une question légitime, de produire un document ou un élément matériel demandés ou de se conformer à une ordonnance rendue en application de la règle 96, la Cour peut :

(b) order the person to answer a question that was improperly objected to and any proper question arising from the answer;

(c) strike all or part of the person's evidence, including an affidavit made by the person;

(d) dismiss the proceeding or give judgment by default, as the case may be; or

(e) order the person or the party on whose behalf the person is being examined to pay the costs of the examination.

a) ordonner à cette personne de subir l'interrogatoire ou un nouvel interrogatoire oral, selon le cas, à ses frais;

b) ordonner à cette personne de répondre à toute question à l'égard de laquelle une objection a été jugée injustifiée ainsi qu'à toute question légitime découlant de sa réponse;

c) ordonner la radiation de tout ou partie de la preuve de cette personne, y compris ses affidavits;

d) ordonner que l'instance soit rejetée ou rendre jugement par défaut, selon le cas;

e) ordonner que la personne ou la partie au nom de laquelle la personne est interrogée paie les frais de l'interrogatoire oral.

Contempt order

98 A person who does not comply with an order made under rule 96 or 97 may be found in contempt.

Ordonnance pour outrage au tribunal

98 Quiconque ne se conforme pas à une ordonnance rendue en application des règles 96 ou 97 peut être reconnu coupable d'outrage au tribunal.

Written Examinations

Interrogatoire écrit

Written examination

99 (1) A party who intends to examine a person by way of a written examination shall serve a list of concise, separately numbered questions in Form 99A for the person to answer.

Interrogatoire par écrit

99 (1) La partie qui désire procéder par écrit à l'interrogatoire d'une personne dresse une liste, selon la formule 99A, de questions concises, numérotées séparément, auxquelles celle-ci devra répondre et lui signifie cette liste.

Objections

(2) A person who objects to a question in a written examination may bring a motion to have the question struck out.

Objection

(2) La personne qui soulève une objection au sujet d'une question posée dans le cadre d'un interrogatoire écrit peut, par voie de requête, demander à la Cour de rejeter la question.

Answers to written examination

(3) A person examined by way of a written examination shall answer by way of an affidavit.

Réponses

(3) La personne interrogée par écrit est tenue de répondre par affidavit établi selon la formule 99B.

Service of answers

(4) An affidavit referred to in subsection (3) shall be in Form 99B and be served on every other party within 30 days after service of the written examination under subsection (1).

Signification des réponses

(4) L'affidavit visé au paragraphe (3) est signifié à toutes les parties dans les 30 jours suivant la signification de l'interrogatoire écrit.

Application of oral examination rules

100 Rules 94, 95, 97 and 98 apply to written examinations, with such modifications as are necessary.

Application

100 Les règles 94, 95, 97 et 98 s'appliquent à l'interrogatoire écrit, avec les adaptations nécessaires.

Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

REPLY OF THE MOVING PARTY / APPLICANT, AIR PASSENGER RIGHTS

Motion for Interlocutory Prohibitory and Mandatory Injunctions
(Pursuant to Rules 369 and 373-374 of the *Federal Courts Rules*)

Expedited pursuant to the April 16, 2020 Order of Locke, J.A.

VOLUME 2 of 2

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TO: **CANADIAN TRANSPORTATION AGENCY**

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AINSLEY FINANCIAL CORPORATION, ARLINGTON SECURITIES INC., BREGMAN SECURITIES CORP., E.A. MANNING LTD., GLENDALE SECURITIES INC., GORDON-DALY GRENADIER SECURITIES, MARCHMENT & MCKAY LIMITED, NORWICH SECURITIES LTD., and OXBRIDGE SECURITIES INC. v. ONTARIO SECURITIES COMMISSION and DONALD PAGE

R.A. Blair J.

Judgment: August 13, 1993
Docket: Docs. B46/93, 92-CQ-26469

Counsel: *Bryan Finlay, Q.C.*, *J. Gregory Richards* and *Philip Anisman*, for plaintiffs.
John I. Laskin and *James Doris*, for defendants.

Subject: Securities; Corporate and Commercial; Public

Application for summary judgment.

***R.A. Blair J.*:**

I — Overview

1 These proceedings bring into contention the validity of a policy statement issued by the Ontario Securities Commission and the jurisdiction of the O.S.C. to promulgate such policy statements.

2 O.S.C. Policy Statement 1.10, with which the Commission expects securities dealers to comply, contains very detailed and embracive measures regarding the trading of speculative penny stocks. Trading in such stocks comprises the predominant portion of the plaintiffs' business. They say that Policy 1.10 will drive them out of business and is designed to do just that.

3 The plaintiffs submit that the policy is invalid. As a result, they ask on this motion for:

(1) an order for summary judgment in the form of a declaration that the Commission is without jurisdiction to issue the policy statement; or, in the alternative,

(2) an interlocutory injunction restraining the Commission from requiring any of the plaintiffs to adhere to the policy pending the trial of the action.

4 In the action the plaintiffs seek declaratory and related relief, and damages. They submit:

(a) that the policy is invalid because the Commission has no jurisdiction to issue it; and, in the alternative,

(b) that the policy is invalid because: (i) it fetters the Commission's discretion; (ii) it was adopted for an improper purpose; (iii) it is unreasonable in that it lacks a sufficient evidentiary basis, is unworkable, uncertain and arbitrary; (iv) it was issued in bad faith; (v) it is discriminatory; and, (vi) it is prohibitive in its effect.

II — Facts

5

Securities Dealers

6 The plaintiffs are registered as securities dealers under the Ontario *Securities Act*, R.S.O. 1990, c. S.5 (the "Act").

7 A "securities dealer" is a category of registrant under s. 98(9) of the Regulation made under the Act (R.R.O. 1990, Reg. 1015, as amended). Securities dealers are persons or companies that are registered for trading in securities and that engage in the business of trading in securities in the capacity of agent or principal, but who do not come within another category in s.98 of the Regulation. The securities dealer category does not include "brokers", who are members of the Toronto Stock Exchange ("TSE") or "investment dealers", who are members of the Investment Dealers Association of Canada ("IDA"). The registration and examination requirements for securities dealers are the same as those for members of the TSE and the IDA, and securities dealers are entitled to the same trading rights as members of those organizations.

8 There is, however, no statutory or regulatory requirement that securities dealers be members of a self-regulatory organization such as the TSE or IDA. No such organization exists for securities dealers. Thus, they are governed exclusively by the provisions of the Act, the Regulation and the regulatory supervision of the Commission.

9 While there are approximately 64 securities dealers registered in the province, only the plaintiffs (and one other company which is not affected by the policy) are engaged predominantly

in the business of dealing in the trading of penny stocks. Consequently, it is the plain tiffs which are primarily affected by the promulgation of the policy, and, indeed, there seems to be little controversy that it is the activities of the plaintiff securities dealers which the policy is intent upon reaching.

Policy 1.10

10 Policy Statement 1.10, entitled "Marketing and Sale of Penny Stocks", was issued in its final form on March 25, 1993, to come into effect on June 1, 1993. The Commission has agreed to hold the policy in abeyance pending the release of this decision.

Purpose of the Policy

11 Policy 1.10 was developed by the Commission as result of a growing concern over the employment of high pressure and unfair sales practices by securities dealers on a widespread basis in connection with the marketing and trading of low cost, highly speculative penny stocks in the over-the-counter market. The policy is designed to redress the abuses perceived by the Commission in this respect.

12 The purpose of the policy is stated at some length in the body of the text. I set out that statement of purpose in full, because it is of some importance. The policy asserts:

> **Purpose of this Policy**
>
> The Act and the regulations under the Act (the "Regulations") require, among other things, that registrants "know their clients" and deal "fairly, honestly and in good faith" with their customers and clients. The Commission is concerned that securities dealers engaged in unfair sales practices like those mentioned above are not complying with these obligations and are recommending investments in penny stocks that are highly speculative and often are not appropriate for an investor given his/her personal circumstances, investment experience, investment objectives and financial means. The Commission is also concerned that, as a result of the sales practices employed, investors often purchase penny stocks unaware of the risks involved and without adequate consideration being given to the suitability of the purchase. Losses of a significant portion of an investment in penny stocks are common. The Commission has concluded that these sales practices have a significant adverse impact on the fairness and integrity of the capital markets in Ontario.
>
> The Commission is issuing this Policy as a guide to identify what the Commission believes are appropriate business practices to assist securities dealers and their employees in satisfying their obligations under the Act in connection with the marketing and sale of penny stocks. This Policy is intended to inform interested parties that the Commission will be guided by this Policy in exercising its public interest jurisdiction under subsection 27(1) of the Act and

66

its general public interest jurisdiction to protect investors and promote and maintain fair, equitable and efficient capital markets in Ontario.

The Commission believes that the business practices set out in this Policy should be adopted by securities dealers when selling penny stocks. The Commission believes that such practices are in the public interest to promote and maintain fair, equitable and efficient capital markets in Ontario and to protect investors from high pressure and other unfair sales practices employed in the marketing and sale of penny stocks and that these business practices are consistent with the duty of securities dealers and their officers, partners, salespersons and directors to deal fairly, honestly and in good faith with their customers and clients. Subsection 27(1) of the Act provides that the Commission, after giving a registrant an opportunity to be heard, may suspend, cancel, restrict or impose terms and conditions upon the registration of or reprimand a registrant where in its opinion such action is in the public interest. In determining whether any failure to comply with this Policy constitutes grounds for the Commission taking action under subsection 27(1) of the Act or any other section of the Act, the Commission will continue to consider the particular facts and circumstances of each case.

This policy is not intended to restrict unduly legitimate investment opportunities in the penny stock market or capital formation for small businesses but merely to regulate the high pressure and other unfair sales practices often employed in the marketing and sale of penny stocks. The Commission believes that this Policy will carry out its purposes without unduly inhibiting legitimate investment opportunities in the penny stock market or capital formation for small businesses.

13 In a section entitled "Appropriate Business Practices", the policy states:

The Commission has concluded that it is in the public interest that the business practices identified in this Policy be adopted by securities dealers in connection with the marketing and sale of penny stocks.

14 The operative portions of Policy 1.10 call for the following, in furtherance of this conclusion and the objectives of the policy:

(1) *the furnishing of a Risk Disclosure Statement* to the client — in Form 1, attached to the policy — together with a sufficient explanation of its contents to the client that the client understands he or she is purchasing a penny stock and is aware of and willing to assume the risks associated with such an investment; and, before any order to purchase a penny stock can be accepted,

(2) *the provision of a Suitability Statement* in Form 2 (also attached to the policy) to the client, completed and signed by the salesperson, together with an explanation of its contents; and

(3) *the return of the Suitability Statement, signed by the client*, to the securities dealer; *and thereafter*,

(4) *an agreement between the client and the securities dealer* with respect to the price of the penny stock to be purchased.

15 *In addition*, Policy 1.10 provides,

(5) that the securities dealer is to disclose to the client in advance of the trade that it is acting as principal or as agent for another securities dealer acting as principal on the transaction where that is so; *and*,

(6) that the securities dealer is to disclose "the nature and amount of all compensation payable to the securities dealer, its salespersons, employees, agents and associates or any other person", including mark-ups, bonuses and commissions.

16 Only one risk disclosure statement is called for — "prior to effecting the first transaction in a penny stock with a client" — and a suitability statement "need not" be provided to or executed by a client after two transactions in penny stocks and the client's election not to have any further suitability statements provided.

Risk Disclosure Statement

17 Form 1, the Risk Disclosure Statement, is essentially a warning to those contemplating an investment in penny stocks, a "red flag", as it were. It states in bold block capitals that "THERE ARE SIGNIFICANT RISKS ASSOCIATED WITH INVESTING IN PENNY STOCKS", and explains under seven different headings the various ways and areas in which this is so, concluding with the bolded admonition in upper case letters:

Remember

IF YOU CANNOT AFFORD TO LOSE YOUR INVESTMENT YOU SHOULD NOT BE INVESTING IN PENNY STOCKS

Suitability Statement

18 Form 2, the Suitability Statement, is more complex and a greater source of concern and object of attack by the plaintiffs. Part A consists of a Client Information section to be completed by the salesperson. Part B is a Suitability Recommendation, also to be completed and signed by the salesperson, to the effect that the investment is suitable for and recommended to the client. Part C, entitled "Dealer Compensation", contains information for the client as to whether the dealer is acting as agent/principal and as to the details of all compensation or remuneration to be received.

68

Finally, Part D, to be completed and signed by the client, is the Client Acknowledgement stating that the client,

> a) has received a copy of the penny stock risk disclosure statement;
>
> b) has reviewed the client information set out and that it is accurate;
>
> c) has reviewed the suitability recommendation and dealer compensation set out and agrees to purchase the stock in question "subject to agreement with respect to the price of [the securities]".

Exemptions

19 Policy 1.10 is to apply to all trades in penny stocks (as defined under the policy) conducted by securities dealers who are not members of the TSE or the IDA. There are some other exemptions, but they are not relevant. The Commission reserves to itself the right to determine, on what appears to be a transaction by transaction basis, that the practices need not be adopted.

20 The rationale for the exemption of members of the TSE and the IDA from the provisions of the policy is that they are members of self-regulatory organizations, whereas the plaintiffs are not. Accordingly, the plaintiffs are not subject to the wide array of compliance, investigation, enforcement, disciplinary and other rules, regulations, policies and by-laws of such self-regulatory organizations.

21 The plaintiffs submit, on the other hand, that members of the TSE and IDA compete with them in the sale of penny stocks. They argue that the policy is targeted at them, the plaintiffs, for the purpose of putting them out of business or, at least, of driving them into the arms of the TSE or the IDA. Indeed, one of their group, A.C. MacPherson, is not a plaintiff because it has already made application to become a member of the IDA. In support of this contention, the plaintiffs point to the acknowledgement of the Commission itself that such an eventuality is likely. The Commission's minutes of November 19, 1991 reflect that staff was instructed to obtain an outside legal opinion on the *Charter* implications "of an approach which would have a disproportionate adverse impact upon a particular segment of the industry." In addition, the Commission minutes of July 14, 1992, noted "that the Policy could be expected to prompt broker-dealers to apply to become members of the TSE and the IDA."

Review of the Penny Stock Industry by the Commission

22 The Commission argues that Policy 1.10 is a reasonable response to a continuing incidence of investor complaints and mounting evidence of abusive and unfair sales practices employed by securities dealers. Staff and the Commission conducted a comprehensive review of the penny stock industry in Ontario. This examination included, amongst other things,

a) a review of recent Court and Commission decisions involving abusive or unfair practices in the sale of penny stocks by securities dealers;

b) a systematic review of investor complaints;

c) interviews of investors who had lodged complaints, and of registered salespersons formerly employed by securities dealers;

d) a study of the regulatory response in the United States to abusive sales practices in the penny stock industry, including meetings with officials of the S.E.C. and including an examination of the provisions of the U.S. *Penny Stock Act* enacted by Congress and the U.S. Penny Stock Rules arising thereunder; and,

e) meetings with representatives of various groups in the securities industry.

23 With the completion of this review, the Commission was satisfied that it had found cogent evidence of abusive and unfair sales practices in the marketing of penny stocks, and in addition, I think it is fair to say, had concluded that these abuses were centered in the prac tices of the plaintiff securities dealers. It set out to remedy the situation for the reasons and in the manner outlined above.

III — Law and Analysis

24

A. Role and Jurisdiction of the O.S.C.

General

25 The Ontario Securities Commission is a creature of statute. Whatever power and authority it has must be derived from that source: see, for example, *R. v. Greenbaum*, [1993] 1 S.C.R. 674 at pp. 687-689; Wade, *Administrative Law*, 6th ed. (Oxford: Clarendon Press, 1988), at pp. 4-5.

26 As a statutory tribunal, the Commission has no inherent jurisdiction. Under the Ontario *Securities Act*, it has no statutory jurisdiction of a general discretionary nature, nor is there any general "mandating" section of a sweeping nature anywhere in the Act. The Commission has a discretionary jurisdiction, to be sure — and a broad one, at that — but its discretionary powers are to be found in a myriad of specific sections, each delegating to the Commission a particular task in the exercise of its regulatory function in the securities industry.

27 The role of the O.S.C. under the Act, in general terms, is to protect the investing public and to preserve the integrity of the capital markets in Ontario: see, for example, *Gordon Capital Corp. v. Ontario (Securities Commission)* (1991), 1 Admin. L.R. (2d) 199, at p. 208 (Div. Ct.,

70 per Craig J.). In *W.D. Latimer Co. v. Ontario (Attorney General)* (1973), 2 O.R. (2d) 391 at 393 (Div. Ct.), aff'd (1974), 6 O.R. (2d) 129 (C.A.), Wright J. (in the Divisional Court) described the Commission's mandate as follows:

> The Commission exists by virtue of the *Securities Act*, as amended by 1971, Vol. 2, c. 31. It can be said generally that it is the public agency charged by that statute with specific duties in relation to securities offered to or traded by the public in Ontario. The statute and the Regulations made under it give wide and strong powers of registration, administration, regulation, and investigation to the Commission with regard to securities, stock exchanges, dealers, salesmen, underwriters, promoters, advisers, offerings to the public, take-over bids, company practice, insider trading, financial disclosure and like matters.
>
> I propose to set out the provisions of the *Securities Act* which particularly concern the actions of the Commission here before us. *Before doing so I should state my conclusion from all the terms of that Act that the Commission has been given very wide powers and immunities and very heavy responsibilities and very broad discre tions to control those who seek the money of members of the public for securities or who deal in or are concerned with them. The Securities Act and the Commission are to protect the investing public in Ontario from grave and pressing perils clearly apprehended by the Legislature and calling for potent and unorthodox measures of control and protection*. (emphasis added)

28 These statements, and judicial pronouncements in a host of other decisions, make it abundantly clear that within its discretionary bounds the Commission and its decisions are to be accorded great curial deference. The exercise of its discretionary authority will not be interfered with unless it has been wielded in a fashion which fetters the application of the discretion, and provided it has been exercised in good faith, with an obvious and honest concern for the public interest and with evidence to support its opinion: *C.T.C. Dealer Holdings Ltd. v. Ontario (Securities Commission)* (1987), 37 D.L.R. (4th) 94, at pp. 110-113.

29 The special regulatory character of securities commissions and their paramount obligation to protect the public was commented upon by the Supreme Court of Canada in *Brosseau v. Albert (Securities Commission)* (1989), 57 D.L.R. (4th) 458, where L'Heureux-Dubé J. said, at p. 467:

> Securities Acts in general can be said to be aimed at regulating the market and protecting the general public. This role was recognized by this court in *Gregory & Co. Inc. v. Quebec Securities Com'n* (1961), 28 D.L.R. (2d) 721 at p. 725, [1961] S.C.R. 584 at p. 588, where Fauteux J. observed:
>
> > The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the Province or elsewhere,

> from being defrauded as a result of certain activities initiated in the Province by persons therein carrying on such a business.
>
> This protective role, common to all securities commissions, gives a special character to such bodies which must be recognized when assessing the way in which their functions are carried out under their Acts.

30 To attract such judicial deference and to be insusceptible of attack in the courts, however, the Commission must be exercising a public interest discretion entrusted to it by the Act or the regulations. It must be acting within the scope of its statutory mandate. The question for determination in this case is whether it is doing so in the promulgation of Policy 1.10.

31 I have concluded that it is not.

32 Policy 1.10 states that it "is intended to inform interested parties that the Commission will be guided by [the] Policy in exercising its public interest jurisdiction under subsection 27(1) of the Act and its general public interest jurisdiction to protect investors and promote and maintain fair, equitable and efficient capital markets in Ontario". These two sources would appear to be the jurisdictional underpinnings relied upon by the Commission in support of its authority to issue the policy, although in argument Mr. Laskin stated, on behalf of the Commission, that the Commission did not seek to rely upon s. 27(1) for that purpose.

33 In my opinion, the jurisdictional foundation for Policy 1.10 cannot be erected on either footing. The public interest jurisdiction of the Commission under section 27(1) of the Act does not support the promulgation of what is, in effect and by its own language, a regulation. The general public interest jurisdiction on which the Commission purportedly relied does not exist.

Is There a Need for the Policy?

34 Before pursuing this jurisdictional inquiry further, I pause to make the following, perhaps extraneous, observation. In concluding, as I have, that the Commission has exceeded its jurisdiction in issuing Policy 1.10, I am not meaning to suggest there may be no need for some sort of investor protection such as the measures provided for in it. There may, indeed, be such a need.

35 Much was made by the plaintiffs, in argument, of the nature and perceived frailties of the "evidence" relied upon by the Commission in making its determination to issue the policy statement and in devising the contents of that policy. I am satisfied, however, that the information which the Commission had before it, in its various forms, amply justified its concern and was adequate for the Commission's purposes in triggering the Commission's desire to act.

36 What is at issue here is not whether what the Commission proposes to do by way of Policy 1.10 is, or is not, a good idea. The issue is whether it has the jurisdiction to do what it purports to have done.

Does the O.S.C. Possess a General Public Interest Jurisdiction?

37 In arriving at my determination that the Commission has no general jurisdiction to regulate the securities industry in the public interest, I have considered carefully the various provisions of the *Securities Act* and the regulations made thereunder.

38 In a number of specific instances, in addition to s. 27(1), the Legislature has delegated to the Commission a discretion to act in the public interest. For example, the Commission may grant exemptions from prospectus requirements and from the requirements of Part XX dealing with take-over and issuer bids "where it is satisfied that to do so would not be prejudicial to the public interest" (ss. 74 and 104(2)(*c*)). It may order that the continued distribution of securities under a prospectus cease (s. 70) or that trading in a security cease (s. 127), each on a public interest basis. Finally, the Commission has the important power to order that various exemptions granted under the Act do not apply (s. 128) where, in its opinion, it is in the public interest to do so.

39 None of these provisions can support the jurisdiction to promulgate Policy 1.10, however.

40 There is nothing in the Act or the regulations which delegates to the Commission a general jurisdiction to regulate the securities industries in the public interest. Nor is there even a broad-sweeping mandating section of the sort found, for example, in the Quebec counterpart to Ontario's legislation.

41 In Quebec, section 276 of the Quebec *Securities Act*, R.S.Q., c. V-1.1, declares:

> *276.* ...
>
> The function of the [Quebec Securities] Commission is
>
> (1) to promote efficiency in the securities market;
>
> (2) to protect investors against unfair, improper or fraudulent practices;
>
> (3) *to regulate the information that must be disclosed to security holders and to the public in respect of persons engaged in the distribution of securities and of the securities issued by these persons;* (emphasis added)
>
> (4) to define a framework for the professional activities of persons dealing in securities, for associations of such persons and for bodies entrusted with supervising the securities market.

42 In addition, s. 274 of the Quebec statute permits the Quebec Securities Commission to draw up policy statements defining the requirements following from the application of s. 276, within its discretionary powers.

43 Nor does the O.S.C. possess the rule-making power entrusted by Congress to its U.S. counterpart, the S.E.C.

44 Section 5(1) of the *Broadcasting Act*, S.C. 1991, Chap. 11, which provides that the Canadian Radio & Television Commission "shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in section 3(1) ...", is an example of an open-ended mandating provi sion of the sort which the Ontario *Securities Act* does not contain. It was in the context of this wide mandate under the old *Broadcasting Act* that the Supreme Court of Canada upheld a CRTC policy statement in *Capital Cities Communications Inc. v. Canada (Canadian Radio-Television & Telecommunications Commission)*, [1978] 2 S.C.R. 141.

45 In *Capital Cities Communications*, the appellants alleged an excess of jurisdiction because the CRTC's decision which was under attack had been based on a policy statement and not on law or regulation. Chief Justice Laskin framed the question for the Court in this fashion, at p. 170:

> The issue that arises therefore is whether the [CRTC] or its Executive Committee acting under its licensing authority, is entitled to exercise that authority by reference to policy statements or whether it is limited in the way it deals with licence applications or with applications to amend licenses to conformity with regulations. I have no doubt that if regulations are in force which relate to the licensing function they would have to be followed even if there were policy statements that were at odds with the regulations. The regulations would prevail against any policy statements. However, absent any regulations, is the Commission obliged to act only *ad hoc* in respect of any application for a licence or an amendment thereto, and is it precluded from announcing policies upon which it may act when considering any such applications?

46 The Chief Justice answered that question in the negative as follows (at p. 171):

> In my opinion, *having regard to the embracive objects committed to the Commission under s. 15 of the Act* [now s. 5(1)], objects which extend to the supervision of "all aspect of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of the Act", it was eminently proper that it lay down *guidelines* from time to time as it did in respect of cable television. The guidelines on this matter were arrived at after extensive hearings at which interested parties were present and made submissions. An overall policy is demanded in the interests of prospective licensees and of the public under such a regulatory regime as is set up by the *Broadcasting Act*. Although one could mature as a result of a succession of applications, there is merit in having it known in advance. (emphasis added)

47 The Commission relies heavily on this authority in support of its position that it possesses a broad power to implement policy statements in the exercise of a general public interest jurisdiction, even in the absence of a specific provision in its constating legislation, or the regulations

thereunder, to that effect. There are a number of distinguishing features between the two situations, however. The first is that the *Securities Act* does not contain any broad mandating section like s. 5 of the *Broadcasting Act*, as I have already noted. The second is that Policy 1.10 is not a "guideline", in my view; it is a mandatory requirement of a regulatory nature. The third is that the CRTC policy statement had been arrived at after extensive hearings involving the interested parties, which is not the case here. I do not find, in the *Capital Cities Communications* decision, authority for the proposition that the O.S.C. has the jurisdiction to proclaim policy statements like Policy 1.10 in the absence of specific statutory authority to do so.

Policy 1.10: Its Mandatory and Regulatory Nature

48 In spite of the efforts of the Commission to cast Policy 1.10 in the light of a mere guideline, the policy is mandatory and regulatory in nature, in my view. Its language, the practical effect of failing to comply with its tenets, and the evidence with respect to the expectations of the Commission and staff regarding its implementation, all confirm this.

49 The policy is not simply, as it purports to be, "a guide to identify what the Commission believes are appropriate business practices to assist securities dealers and their employees in satisfying their obligations under the *Act* in connection with the sale of penny stocks", focusing in that respect on the use of two forms, namely the risk disclosure statement and the suitability statement. Its effect is to impose a positive obligation upon securities dealers to follow those practices, thus *creating their status* as "appropriate practices". Failure to comply raises the spectre of disciplinary proceedings. The juxtaposition between the statement of the Commission's belief that the business practices set out in the policy should be adopted in the public interest — to be found in the section of the policy entitled "Purpose of the Policy" — and the reference to the draconian powers of the Commission under s. 27(1) of the Act — in the same paragraph — is telling in this respect.

50 This is regulation of the conduct of those engaging in the business of trading in penny stocks. Whatever the desirability of such regulation may be, the O.S.C. simply does not have the statutory mandate to regulate in such a fashion.

51 Very revealing as to the regulatory intention of Policy 1.10 is its wording in the final paragraph of the section outlining the purpose of the policy. I repeat the final paragraph here. It states:

> *This Policy is not intended* to restrict unduly legitimate investment opportunities in the penny stock market or capital formation for small businesses but merely to regulate the high pressure and other unfair sales practices often employed in the marketing and sale of penny stocks. The Commission believes that this Policy will carry out its purposes without unduly inhibiting legitimate investment opportunities in the penny stock market or capital formation for small businesses. (emphasis added)

52 As the notice announcing the issuance of Policy 1.10 on March 25, 1993 states, the policy "contemplates that, except in specified circumstances, a penny stock risk disclosure statement *will be provided* ... and that a written suitability statement *will be obtained* ..." (emphasis added).

53 Both the notice and the policy go on to provide that in certain circumstances the contemplated business practices "need not be adopted", implying, at least, that save for the exceptions, those business practices "need" (i.e., "must") be adopted. Indeed, under the heading "Appropriate Business Practices" the Commission states flatly its conclusion "that it is in the public interest that the business practices identified in this Policy *be adopted* by securities dealers in connection with the marketing and sale of penny stocks." Having enunciated such a position, in what conceivable circumstances could the Commission resile therefrom and conclude "on the particular facts and circumstances of each case" — which it says it will continue to consider — that the failure to comply with such business practices did not contravene the public interest? When I asked counsel for the Commission for an example of such a circumstance, no answer was forthcoming.

54 Confirmation of the mandatory nature of the policy may be found in the approach of the Commission staff towards its implementation. In the staff report to the Commission, prior to the announcement of the policy, the following passage is found:

> We believe that *the key to the success of the Policy* in significantly reducing the unfair sales practices by broker/dealers in the sale of penny stocks *is strict enforcement of its terms and provisions*. The Policy provides a framework for enabling staff of the Commission to verify that broker/dealers are complying with their know-your-client and suitability obligations as well as their obligation to deal fairly, honestly and in good faith with their clients. *In this regard it is recommended that the Compliance Unit conduct regular unannounced spot checks* of the various broker/dealers *to determine that suitability statements are being completed in compliance with the requirements of the Policy*. (emphasis added)

55 To conclude, in view of all of the foregoing, that the effect of Policy 1.10 is not to impose standards and a code of conduct upon the securities dealers affected by it, which are obligatory in nature, would be to ignore the plain language of the document itself and the reality of the regulatory environment in which it is to be implemented.

Section 27(1) and the Public Interest

56 The Commission has very broad powers to discipline and to sanction errant registrants. These are found in section 27 of the Act, which provides as follows:

> **Suspension, cancellation, etc.**

> *27. — (1)* The Commission, after giving a registrant an opportunity to be heard, may suspend, cancel, restrict or impose terms and conditions upon the registration or reprimand the registrant where in its opinion such action is in the public interest.

57 Section 27(1) contains the disciplinary teeth for the Commission's regulatory role under the Act and regulations. It is beyond dispute that the Commission is entitled to particular judicial deference and "a particularly broad latitude in formulating its opinion as to the public interest in matters relating to the activities of registrants ... under subs. [27(1)] of the Act": see, *Gordon Capital Corp. v. Ontario (Securities Commission)*, supra, at pp. 208 and 211. Speaking on behalf of the Divisional Court in that case, Craig J. said (at p. 211):

> There is no definition of the phrase "the public interest" in the Act. It is the function and duty of the OSC to form an opinion, according to the exigencies of the individual cases that come before it, as to the public interest and, in so doing, the OSC is given wide powers of discretion: *Ontario (Securities Commission) v. Mitchell* [[1957] O.W.N. 595], at p. 599.
>
> The scope of the OSC's discretion in defining "the public interest" standard under subs. 26(1) [now s. 27(1)] is limited only by the general purpose of the Act, being the regulation of the securities industry in Ontario, and the broad powers of the OSC thereunder to preserve the integrity of the Ontario capital markets and protect the investing public ...

58 In spite of all of this, however, section 27(1) cannot provide the jurisdictional foundation for a policy statement such as Policy 1.10. It requires a hearing. No hearing was held. Indeed, one of the complaints of the plaintiffs in the action is that they were not consulted in any meaningful way, whereas others who would have been affected by the proposed policy — their competitors, the plaintiffs say, the registered brokers and investment dealers — were consulted (and, as an aftermath of the consultation, exempted from the dictates of the policy).

59 Even if the Commission had purported to hold a hearing under s. 27(1) for purposes of entertaining submissions regarding the promulgation of the policy, the section and the hearing would not sup port the jurisdiction for the policy, in my opinion. The Commission's discretionary jurisdiction under s. 27(1) is grounded in the consideration of specific cases. As Craig J. said in *Gordon Capital*, quoted above: "It is the function and duty of the OSC to form an opinion, *according to the exigencies of the individual cases that come before it*, as to the public interest ..." It is in that context in which the Commission's public interest discretion under this provision of the Act, and the broad latitude and judicial deference which the exercise of that discretion is afforded, must be considered. Section 27(1) does not clothe the Commission with authority to make prospective proclamations of general application for all affected registrants.

60 Policy 1.10 is regulatory in nature. Its effect is to set up what are tantamount to mandatory requirements, as I have outlined above. It contemplates — with the sort of vigorous enforcement

support called for in the staff report referred to earlier — that two specific types of forms "will be" utilized by the affected securities dealers and that certain specific information "must be" provided to investors prior to taking an order for the purchase of penny stocks. Included in the "guide" as to the disclosure of information regarding the securities dealer's compensation are instructions as to how the mark-up aspect of that remuneration is to be calculated.

61 To "regulate" is "to control, govern, or direct by rule or regulations; to subject to guidance or restrictions", and "regulation" is "the act of regulating": *The Shorter Oxford English Dictionary*, 3rd ed., p. 1784. Policy 1.10 is regulation.

62 Even if the policy is not mandatory in its nature, as I have concluded, but simply issued "as a guide" which is "intended to inform interested parties that the Commission will be guided by [it] in exercising its public interest jurisdiction under subsection 27(1) of the Act", it still constitutes regulation, or is tantamount thereto, in my view. In either case it is clear that a failure to meet the "expectations" of the policy will attract disciplinary procedures under the Act, or at least carries with it the threat or intimation of such proceedings. Neither those whose activities in the securities industry are the object of the policy, nor their advisors, are likely to lose sight of the reality of the situation. The mere existence of such a state of affairs is a very effective weapon in the regulator's arsenal, of course.

63 It may be said — as the general section of the O.S.C.'s published collection of policy statements says — that "*O.S.C. Policy Statements do not have the force of law and are not intended to have such effect*". In the case of Policy 1.10, however, its language, its contents and its effect make such a statement meaningless. Moreover, the same section goes on to say — in the same passage as that cited above — that the policy statements "are intended to set forth certain basic policies of the Commission relating to securities regulation in the Province of Ontario and the role of the Commission with respect thereto and accordingly the *Commission expects issuers to comply with the O.S.C. Policy Statements unless compliance is waived*" (emphasis added).

64 The difference between something that is intended to have the force and effect of law, and something that is merely expected to be complied with unless compliance is waived by the agency proclaiming it, is a mystery to me.

65 The securities industry is a highly regulated area of endeavour. Provincial and federal legislation, and regulations made under such legislation, weave an intricate — and very necessary — web of legislative and administrative supervision and control over the industry. Ontario's *Securities Act* occupies about 90 pages of the Carswell compilation. Regulation 910, with forms and amending regulations, occupies 321 pages! Of these, Regulation 910 itself takes up 93 pages and the forms about 185. In short, the securities industry is governed by a carefully balanced blend of legislative edict, regulatory standards, and delegated administrative authority. The division of authority in different ways is not accidental.

66 In an interesting article entitled "The Excessive Use of Policy Statements by Canadian Securities Regulators", published in (1992), 1 Corporate Financing 19, an industry periodical, Professor Jeffrey G. MacIntosh emphasized this dichotomy. At p. 20 he wrote:

> It is vitally important to recognize, however, that the "public interest power" was never intended to be, nor could it logically be construed to be unlimited in nature. Had the legislature intended it to be unlimited, then it need not have troubled itself with the task of devising a *Securities Act*. The Ontario legislature, for example, need only have created the Ontario Securities Commission, ceded to it plenary powers, and instructed it to act "in the public interest". It need not have outlined in great detail precisely that which the Lieutenant Governor in Council can (and, implicitly, that which he cannot) do to add to the statutory rules by way of regulation. That the provincial legislatures have both created legislative law and limits to regulatory powers is not merely accidental.
>
> While it is clear that the ability to act remedially "in the public interest" cedes *some* residual discretionary authority to the regulators, *it was obviously the intention of the legislature not to delegate to the Ontario Securities Commission the power to make substantive law of a legislative or regulatory character*. Indeed, had the legislature wished to do so, it could have easily accomplished that objective by giving the OSC rule-making authority like that possessed by the SEC in the United States. However much this might be a good idea, it has not been done. *It is thus impossible to escape the conclusion that policy statements must not be used [to] create substantive legal requirements of a legislative or regulatory character. Any other conclusion would be inconsistent with the Rule of Law*. (emphasis added)

67 I agree with this statement.

68 The Ontario Securities Commission is the regulator of the securities industry, but it is not empowered to make the regulations. That power has been delegated by the Legislature to the Lieutenant Governor in Council by the Act. Under s. 143 of the Act, the Lieutenant Governor in Council is granted the power to make regulations. The subject matter of Policy 1.10 falls directly within several of these regulation-making areas. It deals, for instance, with "the furnishing of information to the public ... by a registrant in connection with securities or trades therein": s. 143, No. 8. It involves regulation of "the trading of securities" in the over-the-counter market (i.e. "other than on a stock exchange recognized by the Commission"): No. 10. It prescribes "documents, ... statements, agreements and other information and the form, content and other particulars relating thereto that are required to be filed, furnished or delivered ..." and prescribes "forms for use under [the] Act and the regulations" (s. 143, Nos. 16 and 18). Finally, it encompasses matters "respecting the content and distribution of written, printed or visual material ... that may be distributed or used by a person or company with respect to a security whether in the course of distribution or otherwise" (s. 143, No. 32).

69 Where the Legislature has intended a regulation-making power to be delegated to the Commission, it has expressly said so. For example, in paragraph No. 1 of s. 143, the Lieutenant Governor in Council is entitled to make regulations "prescribing categories ... and the manner of allocating persons and companies to categories, including permitting the Director to make such allocations". Under paragraph 37 of the same section, regulations may be made permitting the Commission or the Director to grant exemptions from the various provisions of the regulations. In section 105 of the Regulation itself, the Commission is authorized to "prescribe conditions of registration" after holding a hearing to afford an opportunity for those affected by the proposed conditions to be heard (it has apparently chosen not to follow this route in paving the way for the introduction of the policy). Nowhere, however, is the Commission delegated the power to make regulations in the areas which are outlined above and which comprise so much of the substance of Policy 1.10.

70 Where the field has been occupied, as it were, by the Legislature or by the Lieutenant Governor in Council pursuant to s. 143 of the Act, the Commission has no authority to adopt measures of a regulatory nature in that occupied area, particularly where the measures have the effect of augmenting or amending what the Act and/or regulations say will suffice: see, *Pezim v. British Columbia (Superintendent of Brokers)* (1992), 96 D.L.R. (4th) 137 (B.C. C.A.); appeal to the Supreme Court of Canada pending [leave to appeal to S.C.C. granted (1993), 75 B.C.L.R. (2d) xxxii (note), 151 N.R. 132 (note)]); *Elizabeth Fry Society of Saskatchewan Inc. v. Saskatchewan (Legal Aid Commission)* (1988), 56 D.L.R. (4th) 95 (Sask. C.A.).

71 In *Pezim*, supra, the British Columbia Court of Appeal had before it a somewhat analogous situation to the case at bar. There, some of the directors and senior management of certain mining corporations were found by the B.C. Securities Commission to have violated the "material change" disclosure requirements of the British Columbia *Securities Act*. During the course of various option transactions they had received information concerning the results of the companies' drilling program but had not issued a press release disclosing that information. The Court concluded that the information in question did not constitute a "material change" in the affairs of the companies. Although possession of the information may have involved knowledge of a "material fact", and although insider trading in the face of such knowledge was forbidden under another section of the Act, there was no requirement under the Act to disclose such a "material fact" to the public. It was argued further, however, that even if this were so, the results from the drilling program were material facts which affected the market price or value of the securities of the companies and, accordingly, that there was an obligation to disclose the information as a result of the standards of the securities business as set out in National Policy No. 40, dealing with "Timely Disclosure".

72 The Court of Appeal rejected this argument for reasons that seem apt to the case at bar. I cite from the majority decision of Lambert J.A., at p. 150:

80

> Without reaching any decision about whether there is any power in the Commission to inquire into and impose penalties for conduct falling short of what the Commission judges to be a proper standard of conduct for those engaged in the securities business, it is my opinion that where the particular type of conduct that is being considered is conduct that is so closely governed by legislative provisions as is the conduct relating to disclosure of material changes or material facts, the Commission does not have the power to impose different and more exacting standards than those specifically adopted and imposed by the legislature and then to make penal orders for a breach of those standards which is not a breach of the legislative standards.
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> That is not to say that higher standards are not desirable. That is a question of careful policy judgment. But they should not be regarded as mandatory where the legislature, in balancing the policy considerations, has specifically chosen not to make them mandatory.

73 Governance by policy statements and the sweep of such pronouncements have been matters of controversy and the subject of commentary by academics and members of the industry for some time. In addition to the article by Professor MacIntosh cited above, I have read the following: Hudson N. Janisch, "Regulating the Regulator: Administrative Structure of Securities Commissions and Ministerial Responsibility", Law Society of Upper Canada, Special Lectures, 1989, p. 97; James C. Baillie and Victor P. Alboini, "The National Sea Decision — Exploring the Parameters of Administrative Discretion", Canadian Business Law Journal, Vol.2 (1977-1978), 454 at 468; W.J. Braithwaite, "Comment on Healy: National Policy Statement No. 41", Law Society of Upper Canada, Special Lectures, 1989, p. 379; James C. Baillie, "Coercion by Commission" (June 1990), CA Magazine, p. 20; Remarks of Robert J. Wright, "Ticker Club", October 19, 1990 (1990), 13 O.S.C.B. 4326 at 4327; Charles Salter, Q.C., "The Priorities of the O.S.C." (1991), 14 O.S.C.B. 2134 at 2142.

74 The issue of administrative agencies, such as the O.S.C., expanding their regulatory reach through the exercise, or purported exercise, of broad discretionary powers is an important one. The exercise of discretion is an essential tool for the effective supervision of an industry as complex as the securities industry. From a practical point of view, it would be impossible for the Commission to carry out its mandate, in either a long-term or day-to-day sense, without the broad discretionary powers delegated to it by the Act and regulations. And, if those ample discretionary powers are to be exercised, "there is merit", as Chief Justice Laskin noted in *Capital Cities Communications*, supra, at p. 171, "in having it known [how that will be done] in advance."

75 Resort to convenience and practicality can only be justified, however, when the measures adopted by the administrative agency in question fall within the scope of its statutory mandate. Were it otherwise, the carefully constructed legislative schemes governing the powers and conduct

of the O.S.C., and other such agencies, would be rendered meaningless. The rule of law, a central concept in our legal system, would be undermined.

76 The importance of preserving the integrity of the legal framework within which the administrative agency must operate is emphasized in several of the commentaries referred to above, and is well stated in the following passage from Professor Wade's text, *Administrative Law*, supra, at p. 5, as follows:

> The primary purpose of administrative law is to keep the powers of government within their legal bounds so as to protect the citizen against their abuse. The powerful engines of authority must be prevented from running amok. "Abuse", it should be made clear, carries no necessary innuendo of malice or bad faith. Government departments may misunderstand their legal position as easily as may other people, and the law they have to administer is frequently complex and uncertain. Abuse is therefore inevitable, and it is all the more necessary that the law should provide means to check it.

77 Elsewhere in that same text, Professor Wade describes the import of the rule of law in the following terms, which are excerpted from the section of the text at pp. 23-24:

> The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be a wrong ..., or which infringes a [person's] liberty ..., must be able to justify its action as authorised by law — and in nearly every case this will mean authorised by Act of Parliament. *Every act of governmental power*, i.e. every act which affects the legal rights, duties or liberties of any persons, *must be shown to have a strictly legal pedigree*. The affected person may always resort to the courts of law, and *if the legal pedigree is not found to be perfectly in order the court will invalidate the act*, which [the person] can then safely disregard. (emphasis added)
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> . . . . .
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> The secondary meaning of the rule of law ... is that government should be conducted within a framework of recognised rules and principles which restrict discretionary power ... An essential part of the rule of law, accordingly, is a system of rules for preventing the abuse of discretionary power ... The rule of law requires that the courts should prevent its abuse ...

78 These passages accent the significance of requiring an administrative tribunal to observe its statutory limits.

79 For the foregoing reasons, I am satisfied that the O.S.C. lacks the statutory mandate to provide it with the jurisdiction to issue Policy 1.10. As there are no facts in dispute or other questions on this issue which require a trial for their resolution, this is a proper case for the granting of summary judgment under rule 20.01: see *Irving Ungerman Ltd. v. Galanis* (1991), 1 C.P.C. (3d) 248 (Ont. C.A.); *Pizza Pizza Ltd. v. Gillespie* (1990), 45 C.P.C. (2d) 168 (Ont. Ct. (Gen. Div.)).

Alternative Relief Claimed

80 In view of my disposition of this matter on the jurisdictional point, it is not necessary to deal at length with the alternative submissions made on behalf of the plaintiffs.

81 The plaintiffs' alternative assertions in the action, it will be recalled, are that Policy 1.10 is invalid because: (i) it fetters the Commission's discretion; (ii) it was adopted for an improper purpose; (iii) it is unreasonable in that it lacks a sufficient evidentiary basis, is unworkable, uncertain and arbitrary; (iv) it was issued in bad faith; (v) it is discriminatory; and, (vi) it is prohibitive in its effect. They seek an interlocutory injunction restraining the Commission from implementing the policy pending the trial of these issues.

82 Had I concluded that the promulgation of policy statements such as Policy 1.10 fell within the statutory mandate of the Commission, I would have declined to grant such an injunction.

83 I am satisfied on the materials before me that the plaintiffs have met the threshold test of establishing a serious question to be tried on the merits with respect to at least some of the alternative grounds put forward. This is particularly so, I think, with respect to the argument that the policy fetters the Commission's discretion, for the reasons outlined above regarding jurisdiction; with respect to the argument that it is unworkable in terms of its impact on the way securities dealers are to conduct their business; and with respect to the argument that the policy is discriminatory in that it is targeted at the plaintiffs and does not apply to members of the TSE and the IDA who also engage in the trading of low cost, highly speculative penny stocks.

84 It seems to me, as well, that the plaintiffs are likely to suffer irreparable harm if the policy were to be put into operation wrongly. Having regard to its detailed provisions and the impact they would have upon the plaintiffs' business operations, it is unlikely that any harm they would suffer could be adequately compensated for by the common law remedy of damages.

85 When it comes to a consideration of the balance of convenience and the question of maintaining the status quo, however, the scales tip in favour of declining an interlocutory injunction.

86 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.

87 I assume for the purposes of this discussion that the Commission was acting within its jurisdiction in issuing Policy 1.10. In such circumstances the Court should be reluctant to prevent

the exercise of the Commission's statutory power, even where the challenge to the exercise of that authority is a serious one: see *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.* (1987), 38 D.L.R. (4th) 321 (S.C.C.); *Esquimalt Anglers' Assoc. v. R.* (1988), 21 F.T.R. 304 (T.D.).

88 In the *Metropolitan Stores* case the Supreme Court of Canada was asked to consider the propriety of a stay of proceedings before the Manitoba Labour Relations Board. At stake was the constitutional validity of Manitoba's legislation empowering the board to impose a first collective agreement in labour disputes. The Court set aside the stay, applying the same principles that govern the granting of interlocutory injunctions, and holding that no such restraint should have been imposed in the circumstances.

89 Giving judgment on behalf of the Court, Mr. Justice Beetz reviewed the debate over the appropriate test to be applied upon the granting of an interlocutory injunction. He concluded, with respect to constitutional cases, that the "serious question to be tried" formulation of *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, was sufficient, provided that the public interest is taken into consideration in determining the balance of convenience. The consequences for the public as well as for the parties, of the granting of a stay or an injunction, he held to be "special factors" in assessing the balance of convenience. See pp. 333-334.

90 Cases in which it is sought to enjoin the law enforcement agency or administrative tribunal from enforcing the impugned provisions until their validity has been finally determined, Beetz J. referred to as "suspension cases". With regard to such cases he had this to say, at pp. 338-339:

> 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 democratically elected legislatures and are generally passed for the common good, for instance, ... the controlling of economic activity such as the containing of inflation, the regulation of labour relations, etc. It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases ... is susceptible temporarily to frustrate the pursuit of the common good.
>
> While respect for the Constitution must remain paramount, *the question then arises whether it is equitable and just to deprive the public, or important sectors thereof, from the protection and advantages of impugned legislation, the invalidity of which is merely uncertain, unless the public interest is taken into consideration in the balance of convenience and is given the weight it deserves. As could be expected, the courts have generally answered this question in the negative. In looking at the balance of convenience, they have found it necessary to rise above the interests of private litigants up to the level of the public interest*, and, in cases involving interlocutory injunctions directed at statutory authorities, they have correctly held it is erroneous to deal with these authorities as if they have any interest distinct from that of the public to which they owe the duties imposed upon them by statute. (emphasis added)

91 While these remarks are made in the context of an attack upon the constitutional validity of provincial legislation, I see no distinction in principle between that kind of situation and one in which what is challenged is the validity of a measure imposed by an administrative tribunal or law enforcement agency acting within its jurisdiction.

92 Assuming as I have, for the purposes of this part of my decision, that the O.S.C. had the power within its statutory mandate to issue Policy 1.10 and that the validity of the measure is attacked on other grounds, I would refuse to grant the interlocutory injunction sought on the ground that the balance of convenience militates against it. In my view, the public interest in having the protection of the impugned provisions would outweigh the interests of the plaintiffs, as private litigants, in having the relief granted.

III — Conclusion

93 It was argued on behalf of the Commission that the plaintiffs' action was premature, and that they should await the bringing of disciplinary proceedings against them before raising the arguments put forward. However, the right of a litigant to challenge the jurisdiction of an administrative body to make rules, regulations or by-laws by bringing an action for a declaration that the administrative body has exceeded its jurisdiction under its enabling statute in issuing the disputed provisions, is well settled; see, *Dyson v. Attorney General*, [1911] 1 K.B. 410 (C.A.) [subsequent proceedings] [1912] 1 Ch 158 (C.A.); *Jones v. Gamache*, [1969] S.C.R. 119; *Turner's Dairy Ltd. v. Lower Mainland Dairy Products Board*, [1941] S.C.R. 573.

94 As I have already indicated, the case is a proper one, in my view, for the granting of summary judgment under the *Rules of Civil Procedure* on the jurisdictional issue. Accordingly, judgment is granted in favour of the plaintiffs in the form of a declaration that Policy 1.10 is invalid, the Commission having exceeded its jurisdiction under its enabling legislation in promulgating it.

95 In view of that disposition, it is not necessary to make any further order in relation to the interlocutory injunctive relief claimed. I may be spoken to with respect to costs.

96 I would like to thank all counsel for their thorough and skilful assistance in this difficult matter.

Application allowed.

1994 CarswellOnt 1021
Ontario Court of Appeal

Ainsley Financial Corp. v. Ontario (Securities Commission)

1994 CarswellOnt 1021, [1994] O.J. No. 2966, 121 D.L.R. (4th) 79, 18 O.S.C.B. 43, 21 O.R. (3d) 104, 28 Admin. L.R. (2d) 1, 52 A.C.W.S. (3d) 453, 6 C.C.L.S. 241, 77 O.A.C. 155

AINSLEY FINANCIAL CORPORATION, ARLINGTON SECURITIES INC., BREGMAN SECURITIES CORP., E.A. MANNING LTD., GLENDALE SECURITIES INC., GORDON-DALY GRENADIER SECURITIES, MARCHMENT & MACKAY LIMITED, NORWICH SECURITIES LTD. and OXBRIDGE SECURITIES INC. v. ONTARIO SECURITIES COMMISSION and DONALD PAGE

Dubin C.J.O., Labrosse and Doherty JJ.A.

Heard: November 28-30, 1994
Judgment: December 21, 1994
Docket: Doc. CA C16489

Counsel: *Dennis O'Connor, Q.C.*, and *James Doris*, for appellants.
Brian Finlay, Q.C., Philip Anisman and *J. Gregory Richards*, for respondents.

Subject: Securities; Public; Corporate and Commercial

Appeal from judgment reported at (1993), 17 Admin. L.R. (2d) 281, 1 C.C.L.S. 1, 16 O.S.C.B. 4077, 14 O.R. (3d) 280, 10 B.L.R. (2d) 173, 106 D.L.R. (4th) 507 (Gen. Div. [Commercial List]) declaring Ontario Securities Commission policy statement invalid.

The judgment of the court was delivered by *Doherty J.A.*:

1 In August of 1992, the Ontario Securities Commission (the Commission) issued Draft Policy Statement 1.10. The statement related to the marketing and sale of penny stocks and was directed at securities dealers like the respondents, who were not members of the Toronto Stock Exchange or the Investment Dealers Association of Canada. The Commission formally adopted the draft with some minor modifications in March of 1993.

2 In September 1992, the respondents commenced an action against the Commission claiming, among other things, that the Commission had no authority to issue Policy Statement 1.10. In April 1993, the respondents brought a motion in their action for summary judgment seeking a declaration

that Policy Statement 1.10 was invalid. After a lengthy hearing, Blair J. granted the motion and declared Policy Statement 1.10 invalid. The Commission appeals from that judgment.

3 Policy Statement 1.10 was held in abeyance pending the decision of Blair J. It has, of course, not been issued in light of that decision. The respondents' action against the Commission continues with respect to the other claims advanced by the respondents.

4 The reasons of Blair J., now reported at (1993), 14 O.R. (3d) 280, 106 D.L.R. (4th) 507 (Gen. Div. [Commercial List]), provide a detailed account of the events culminating in the adoption of Policy Statement 1.10 and make extensive reference to the content of the Policy Statement and related documents. As I agree with the conclu sion reached by Blair J. and am in substantial agreement with his reasons, I will not rework the ground so fully tilled by him. These reasons should be read in conjunction with those of Blair J.

5 Counsel, whose excellent presentations were of great assistance, agree that this appeal turns on the proper characterization of Policy Statement 1.10. The Commission submits that Policy Statement 1.10 is a guide to the business practices which the Commission regards as appropriate for those engaged in the marketing and sale of penny stocks. The Commission submits that the *Securities Act*, R.S.O. 1990, c. S.5 and Regulations passed under that Act impose certain obligations on securities dealers engaged in the marketing and sale of securities. The Commission further submits that Policy Statement 1.10 was put forward to assist security dealers in understanding and complying with those obligations by informing them of the Commission's view as to what constituted appropriate business practices in the context of the marketing and sale of penny stocks. The Commission contends that Policy Statement 1.10 does not forbid any specific practice or declare that the practices set out in the statement are obligatory. Nor, according to the Commission, does Policy Statement 1.10 indicate that non-compliance with the statement will be regarded as per se sanctionable conduct.

6 The respondents submit that Policy Statement 1.10 is mandatory and establishes an onerous and detailed scheme intended to dictate the manner in which the respondents must carry on their business. The respondents further argue that the Commission's reference to its prescribed practices as being "in the public interest" necessarily implies that the failure to follow those practices will render the respondents liable to sanction under the various "public interest" provisions of the *Securities Act*.[1] The respondents contend that Policy Statement 1.10 is de facto legislation and beyond the authority of the Commission.

7 I understand counsel for the respondents to concede the validity of Policy Statement 1.10 if the Commission's characterization of that statement is correct. I also understand counsel for the Commission to concede the invalidity of Policy Statement 1.10 if the respondents' characterization of it is correct.

8 In my opinion, counsel have captured the essence of this appeal.

9 Various statutory provisions charge the Commission with the primary regulatory authority in the securities field. That field is necessarily subject to detailed and far-reaching regulation. The Commission also has a recognized policy-making function: *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at p. 596. Furthermore, the Commission has an important adjudicative function and is given a broad discretion to take various steps and impose various sanctions where, in the Commission's opinion, the public interest so requires. All of these powers and duties must be exercised with a view to protecting the investing public and enhancing the efficiency and integrity of capital markets: *Pezim*, supra, at p. 589.

10 The Commission performs its duties and exercises its discretion within the framework established by the pertinent statutory provisions and Regulations. These statutory instruments do not, however, tell the whole regulatory story. The Commission has developed various techniques, including policy statements, designed to inform its constituency and further the goals described above. These non-statutory instruments have increased in number and gained in prominence as securities regulation has become more complex and the problems to which the Commission must respond more diverse. Contemporary securities regulation involves an amalgam of statutory and non-statutory pronouncements and seeks to regulate by means of retrospective, ad hoc, fact-specific decision making and prospective statements of policy and principles intended to guide the conduct of those subject to regulation.

11 The authority of a regulator, like the Commission, to issue non-binding statements or guidelines intended to inform and guide those subject to regulation is well established in Canada. The *jurisprudence* clearly recognizes that regulators may, as a matter of sound administrative practice, and without any specific statutory authority for doing so, issue guidelines and other non-binding instruments: *Hopedale Developments Ltd. v. Oakville (Town)*, [1965] 1 O.R. 259 at p. 263 (C.A.); *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 at pp. 6-7; *Re Capital Cities Communications Inc.* (sub nom. *Capital Cities Communications Inc. v. Canada (Canadian Radio-Television & Telecommunications Commission)*) (1977), 81 D.L.R. (3d) 609 at p. 629 (S.C.C.); *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at p. 35; *Pezim*, supra, at p. 596; *Law Reform Commission of Canada, Report 26, Report on Independent Administrative Agencies: Framework for Decision Making* (1985), at pp. 29-31.

12 Non-statutory instruments, like guidelines, are not necessarily issued pursuant to any statutory grant of the power to issue such instruments. Rather, they are an administrative tool available to the regulator so that it can exercise its statutory authority and fulfil its regulatory mandate in a fairer, more open and more efficient manner. While there may be considerable merit in providing for resort to non- statutory instruments in the regulator's enabling statute, such a provision is not a prerequisite for the use of those instruments by the regulator. The case law provides ample support

for the opinion expressed by the Ontario Task Force on *Securities Regulation: Responsibility and Responsiveness* (June 1994) at pp. 11-12:

> A sound system of securities regulation is more than legislation and regulations. Policy statements, rulings, speeches, communiqués, and Staff notes are all valuable parts of a mature and sophisticated regulatory system. ...

13 To the extent that the reasons of Blair J. may be read as requiring some statutory authority for the issuing of such guidelines, I must, with respect, disagree with those reasons. Nor, in my view, are pronouncements which are true guidelines rendered invalid merely because they regulate, in the broadest sense, the conduct of those at whom they are directed. Any pronouncement by a regulator will impact on the conduct of the regulated. A guideline remains a guideline even if those affected by it change their practice to conform with the guideline.

14 Having recognized the Commission's authority to use non-statutory instruments to fulfil its mandate, the limits on the use of those instruments must also be acknowledged. A non-statutory instrument can have no effect in the face of contradictory statutory provision or Regulation: *Capital Cities Communications Inc.*, supra, at p. 629; Janisch, "Reregulating the Regulator: Administrative Structure of Securities Commissions and Ministerial Responsibility" (1989), Special Lectures of the Law Society of Upper Canada: Securities Law in the Modern Financial Marketplace, p. 97 at p. 107. Nor can a non-statutory instrument preempt the exercise of a regulator's discretion in a particular case: *Hopedale Developments Ltd.*, supra, at p. 263. Most importantly, for present purposes, a non-statutory instrument cannot impose mandatory requirements enforceable by sanction; that is, the regulator cannot issue de facto laws disguised as guidelines. Iacobucci J. put it this way in *Pezim* at p. 596:

> However, it is important to note that the Commission's policy-making role is limited. By that I mean that their policies cannot be elevated to the status of law; they are not to be treated as legal pronouncements absent legal authority mandating such treatment.

15 If Policy Statement 1.10 has crossed the Rubicon between a non-mandatory guideline and a mandatory pronouncement having the same effect as a statutory instrument, then I agree with Blair J. that the Commission could only issue that statement if it had statutory authority to do so. The Commission concedes that as the legislation stood at the relevant time[2] it had no such statutory authorization.

16 There is no bright line which always separates a guideline from a mandatory provision having the effect of law. At the centre of the regulatory continuum one shades into the other. Nor is the language of the particular instrument determinative. There is no magic to the use of the word "guideline," just as no definitive conclusion can be drawn from the use of the word "regulate." An examination of the language of the instrument is but a part, albeit an important part, of the

characterization process. In analyzing the language of the instrument, the focus must be on the thrust of the language considered in its entirety and not on isolated words or passages.

17 In submitting that Policy Statement 1.10 is a guideline, Mr. O'Connor urged the court to accept the language of Policy Statement 1.10 at face value. He relies on the following passages from the Policy Statement as clearly indicating that it was not intended to either impose specific obligations on those at whom it was directed or fetter the public interest discretion of the Commission:

> This Policy is intended to inform interested parties that the Commission will be guided by this Policy in exercising its public interest jurisdiction under subsection 27(1) of the Act and its general public interest jurisdiction to protect investors and promote and maintain fair, equitable and efficient capital markets in Ontario.
>
> . . . . .
>
> Subsection 27(1) of the Act provides that the Commission, after giving a registrant an opportunity to be heard, may suspend, cancel, restrict or impose terms and conditions upon the registration of or reprimand a registrant where in its opinion such action is in the public interest. In determining whether any failure to comply with this Policy constitutes grounds for the Commission taking action under subsection 27(1) of the Act or any other section of the Act, the Commission will continue to consider the particular facts and circumstances of each case.

18 Blair J. considered these passages but ultimately held that Policy Statement 1.10 was mandatory and invalid. Two passages from his reasons capture his conclusion (pp. 294 and 296 O.R.):

> In spite of the efforts of the Commission to cast Policy 1.10 in the light of a mere guideline, the policy is mandatory and regulatory in nature, in my view. Its language, the practical effect of failing to comply with its tenets, and the evidence with respect to the expectations of the Commission and staff regarding its implementation, all confirm this.
>
> . . . . .
>
> To conclude, in view of all of the foregoing, that the effect of Policy 1.10 is not to impose standards and a code of conduct upon the securities dealers affected by it, which are obligatory in nature, would be to ignore the plain language of the document itself and the reality of the regulatory environment in which it is to be implemented.

19 I agree with Justice Blair's conclusion and also rely on the factors he assembles in support of it (at pp. 294-98 O.R.). Two of those factors are particularly significant. The first factor is the format of the statement. Guidelines connote general statements of principles, standards, criteria or factors intended to elucidate and give direction. Policy Statement 1.10 sets out a minutely detailed regime complete with prescribed forms, exemptions from the regime, and exceptions to the exemptions. Policy Statement 1.10 reads like a statute or Regulation setting down a code of conduct (the phrase

used in the Commission minutes to describe Policy Statement 1.10) and not like a statement of guiding principles.

20 The second factor is the linkage made in Policy Statement 1.10 between the Commission's power to sanction in the public interest and its pronouncement that the practices set out in the policy statement accord with the public interest. That connection gives the Policy Statement a coercive tone. Policy Statement 1.10 suggests that non-compliance could evoke the Commission's sanction powers. The threat of sanction for non-compliance is the essence of a mandatory requirement. The coercive effect of Policy Statement 1.10 is also apparent in the Commission staff's attitude toward the statement as reflected in the Staff Report submitted to the Commissioners. The Report demonstrates that the staff of the Commission, who are the individuals with their fingers on the enforcement trigger, would treat Policy Statement 1.10 as if it were the equivalent of a statutory provision or Regulation.

Conclusion

21 Policy Statement 1.10 must be characterized as mandatory and an attempt by the Commission to impose on the respondents a de facto legislative scheme complete with detailed substantive requirements. The Commission could not impose such a scheme without the ap propriate statutory authority. None existed. Policy Statement 1.10 is invalid. The appeal must be dismissed with costs.

Appeal dismissed.

Footnotes

1 The *Securities Act* was substantially amended and renumbered by the *Financial Services Statute Law Reform Amendment Act, 1994*, S.O. 1994, c. 11. Those amendments came into force in July of 1994. The powers formerly found in s. 27 of the Act are now found in s. 127.

2 Bill 190 presently before the Ontario Legislature will amend the *Securities Act* to permit the Commission to issue statutory instruments referred to as rules (s. 143) and will also recognize the Commission's authority to issue non-statutory instruments referred to as policies (s. 143.8). Paragraph 14 of s. 143(1) gives the Commission the power to make rules with respect to "trading or advising in penny stocks." Section 143.8(1) defines the word "policy."

2010 ABCA 405
Alberta Court of Appeal

Alberta (Securities Commission) v. Workum

2010 CarswellAlta 2478, 2010 ABCA 405, [2010] A.J. No. 1468, [2011] 7 W.W.R. 492, [2011] A.W.L.D. 498, [2011] A.W.L.D. 588, 199 A.C.W.S. (3d) 1353, 21 Admin. L.R. (5th) 12, 327 D.L.R. (4th) 383, 41 Alta. L.R. (5th) 48, 493 A.R. 1, 502 W.A.C. 1

Alberta Securities Commission (Respondent / Applicant) and Peter J. Workum (Appellant / Respondent) and Theodor Hennig, Strategic Investment Fund, Cheshire Capital Inc., Lexington Capital Ltd., Ashland Holdings Corp. and Cofima Finanz AG (Not Parties to the Appeal)

Alberta Securities Commission (Respondent / Applicant) and Peter J. Workum (Appellant / Respondent) and Theodor Hennig, Strategic Investment Fund, Cheshire Capital Inc., Lexington Capital Ltd., Ashland Holdings Corp. and Cofima Finanz AG (Not Parties to the Appeal)

Alberta Securities Commission (Respondent / Applicant) and Theodor Hennig (Appellant / Respondent) and Peter J. Workum, Cheshire Capital Inc. and Strategic Investments Fund (Not Parties to the Appeal)

Elizabeth McFadyen, Clifton O'Brien, J.D. Bruce McDonald JJ.A.

Heard: March 9, 2010
Judgment: December 20, 2010
Docket: Calgary Appeal 0901-0012-AC, 0901-0013-AC, 0901-0019-AC

Counsel: D.A. Young, D.M. Volk for Respondent, Alberta Securities Commission
J. Groia for Appellant, Workum
J.K. Phillips for Appellant, Hennig
R.J. Normey for Intervener, Alberta Justice

Subject: Occupational Health and Safety; Corporate and Commercial; Securities; Public; Human Rights

APPEAL by W and H from decision of Alberta Securities Commission, holding them liable for breaches of *Securities Act* and imposing sanctions.

***J.D. Bruce McDonald J.A.*:**

I. Introduction

1 The appellants, Theodor Hennig (Hennig) and Peter Workum (Workum), were sanctioned by the Alberta Securities Commission (the Commission) for firstly, conduct contrary to the public interest or contraventions of Alberta securities laws arising from financial disclosures related to issuance of certain financial statements by Proprietary Industries Inc. (PPI) which were not prepared in accordance with Generally Accepted Accounting Principles (GAAP) and contained misrepresentations. Secondly, Workum and Hennig were sanctioned for receiving undisclosed financial benefits related to secret commissions, market manipulation, failure to report insider trades and misrepresentations to Alberta Securities Commission staff (ASC Staff). Neither Hennig nor Workum testified at the hearing.

2 The appellants appeal pursuant to section 38 of the *Securities Act*, RSA 2000, c S-4 (the *Securities Act*) from three decisions of the Commission: the Decision dated the 29th day of August, 2005 (the Institutional Bias Ruling), the Decision dated the 7th day of June, 2008 (the Merits Decision) and the Decision dated the 18th day of December, 2008 (the Sanctions Decision).

3 These decisions arise out of two Notices of Hearing, both subsequently amended, issued by the respondent. The first Notice of Hearing was issued on January 31, 2001 (the First Notice of Hearing) and the second was issued on August 21, 2002 (the Second Notice of Hearing). Both were amended on September 19, 2003 and copies of the Amended First Notice of Hearing and Amended Second Notice of Hearing are attached as Schedule "A" and "B" respectively to these reasons.

4 The First Notice of Hearing named as respondents, PPI, Hennig and Workum and related, broadly speaking, to financial disclosure or more properly the lack of proper financial disclosure.

5 The Second Notice of Hearing named as respondents in addition to Hennig and Workum, Chester Cheshire Capital Inc. (Cheshire), Lexington Capital Ltd. (Lexington), Strategic Investments Fund (Strategic) and Ashland Holdings Corp. (Ashland). The Second Notice of Hearing includes allegations of market manipulation, secret commissions, failure to file insider trading reports and misrepresentations. For the reasons set out herein, the appeals are dismissed.

II. Background

6 The appellants were directors and the two most senior officers of PPI, a junior capital pool company which became a reporting issuer in Alberta in 1993. In 2001, PPI described itself as aiming to be a parent holding company and merchant bank for separate public companies with interests in natural resources, banking and real estate.

7 The allegations covered the period 1998-2000. The Merits hearing ran for a total of 38 days, heard 24 witnesses and included a large volume of documentary evidence. As regards the Sanctions

proceeding, the Commission received written submissions from each of ASC Staff, Workum and Hennig.

8 Workum also brought forward a "Notice of Constitutional Question", stating his intention to question the constitutional validity of the application of section 199 of the *Securities Act*. The Attorney General of Alberta made written submissions as an intervener in that matter.

9 The financial disclosure allegations involved three sets of purported transactions, the sales of shares of three companies or interests with gains reported in 1998, 1999 and 2000. The Commission concluded that PPI's financial statements for 1998, 1999 and 2000 were not prepared in accordance with GAAP and contained misrepresentations contrary to the public interest. Furthermore, misrepresentations were made when the statements were reported in other disclosures and the appellants were responsible for these as well.

10 The sales in each year represented almost all of PPI's gains for that particular year. The shares sold in 1998 were reacquired in 2000, documentation was inconsistent and/or incomplete, and the Commission found that there was no expectation that the purchaser would pay PPI any money. In the second and third cases — which were complicated sales involving a number of parties and steps — payment included a promissory note given by the purchaser where that purchaser's ability to satisfy the same was in issue.

11 When new management took over PPI in 2002, these gains were largely or wholly reversed on restated financial statements. Hennig and Workum severed their ties with PPI by the end of the summer of 2002.

12 The Commission heard the expert testimony of its Chief Accountant on the application to the financial statements in question of GAAP and the Handbook of the Canadian Institute of Chartered Accountants. The Commission dismissed objections that the expert witness was in an inherent conflict of interest position as the witness was not a prosecutor and his evidence centered on fundamental principles and was not determinative of the issues. The appellants cross-examined the chief accountant and chose not to call their own expert.

13 The Commission discussed the basis for and policy behind misrepresentations in financial statements and its approach to the contraventions in question. The Commission considered the motivation for the transactions in assessing whether they were bona fide. It concluded that while there were some plausible bona fide motives, the primary motive was accounting, i.e., recording a gain. The Commission further concluded that the transactions lacked essential elements of a sale. It looked in detail at the transactions and found the transactions were misleading and intended to mislead. It concluded PPI's 1998, 1999 and 2000 financial statements were contrary to the public interest because they were not prepared in accordance with GAAP and contained misrepresentations. The Commission further found that the appellants were each responsible for the improper financial disclosures.

14 The undisclosed financial benefits were commissions which were concealed and diverted to accounts of offshore companies. The appellants did not dispute the commissions paid by PPI were directed to accounts of the offshore companies but disclaimed ownership or that they instructed the disbursements. The allegation of ownership was not pursued by ASC Staff but changed to the allegation that the accounts were controlled and directed by the appellants.

15 The Commission found that the appellants each obtained financial benefits, from or through the securities trading accounts of Strategic, Cheshire, Lexington and Ashland (sometimes collectively referred to as the Four Trading Accounts) and the Mandolin Inc. Offshore Bank Account, which were funded by commission payments made by PPI on private placements and other transactions. The Commission, based largely on documentary evidence, found that the appellants exercised control and direction over the securities trading accounts and through that control and direction benefitted personally from the money paid into those accounts. Although this was not in itself necessarily improper, the arrangement was not disclosed as required, and the Commission concluded this was contrary to the public interest. The Commission found some of the evidence indicated that ownership of the accounts was being concealed but held it did not need to determine ownership.

16 The amounts involved were significant. PPI paid a total of at least $5,148,750 in commissions under this arrangement. The Commission concluded that the Mandolin Inc. Offshore Bank Account and the Four Trading Accounts "were operated to funnel money from PPI" to the appellants, (Merits Decision at para 1062), with at least $2 million passing from PPI to the benefit of the appellants.

17 On the allegation of market manipulation, the appellants were found to have directly and indirectly traded and purchased Newmex Minerals Inc. shares knowing it would create an artificial price. The shares purchases were effected through one of the witnesses, Glenn Olnick (Olnick), whom the Commission agreed not to sanction in return for his permanent resignation as a registered investment dealer. The Commission found that the market was manipulated and the appellants enlisted Olnick to undertake the manipulation.

18 The Commission also found that the appellants failed to report insider trades in companies which PPI owned shares and effected through the Four Trading Accounts. The appellants were found to have control and direction over those accounts.

19 The Commission further found that the appellants made numerous misrepresentations to the Commission and ASC Staff orally and in writing. The Commission found this was "a pattern of conduct" and the appellants "repeatedly lied" to ASC Staff (Merits decision at para 1294).

20 In the Sanctions Decision, the Commission ordered Workum to permanently cease trading in any securities or exchange contracts, resign all positions as a director and officer and permanently

prohibited him from acting as a director or officer. He was also ordered to pay an administrative penalty of $750,000 and pay $200,000 of the costs of the investigation and hearing.

21 Hennig was ordered to cease trading for 20 years from the date of the decision, resign all positions as director and officer and prohibited him from becoming a director or officer permanently, and to pay an administrative penalty of $400,000 and $175,000 in costs.

III. Grounds of Appeal

22 Hennig's grounds of appeal as argued in oral submissions before this court were that the Commission erred:

> a) in allowing its Chief Accountant to give expert testimony and in so doing created a reasonable apprehension of bias;
>
> b) its findings relating to the second notice of hearing (secret commissions, market manipulations, insider trading, and misrepresentations to the Commission) were based upon no evidence and as such resulted in an unreasonable finding against Hennig;
>
> c) the reasons given by the Commission, although lengthy, were not adequate as they relate to Hennig and therefore the Commission breached procedural fairness (and can be judged in this regard on the standard of correctness); and
>
> d) in retroactively applying the increased sanctions enacted by amendments to section 199 of the *Securities Act*, RSA 2000, c S-4 (the *Securities Act*) in 2005 when all the conduct complained of predated the date of that amendment.

23 Workum's grounds of appeal as argued in oral submissions before this court were that the Commission erred:

> a) in relying upon the uncorroborated documentary evidence by or from Olnick;
>
> b) in concluding that Workum and Hennig breached section 70.1(b) of the *Securities Act* as it existed at the time, based as it was largely on the testimony of Olnick;
>
> c) in concluding that both Workum and Hennig breached section 144 of the ASC Rules (preparing financial statements in accordance with GAAP); and
>
> d) the actions and the structure of the Commission created a reasonable apprehension of bias.

Counsel for both Workum and Hennig adopted each other's argument before this court.

24 Additionally, both Workum and Hennig had argued that section 199 of the *Securities Act* violated section 1(a) of the *Alberta Bill of Rights*, RSA 2000, C A-14 [*Alberta Bill of Rights*].

96

speculation along with second or third hand opinion in the form of newspaper articles, legislative debates and the position papers attached to the Affidavits. Not a single witness was called to testify in support of the Institutional Bias application. The panel commented on the insufficiency of the "uncontroverted evidence" at paras 73-79 of its Institutional Bias decision:

> [73] Three types of exhibits to the Monopoli Affidavits touched on the Alleged Controversy. The largest category consisted of copies of media reports or commentary that referred to the Commission, certain of its current or former personnel or its operations. Others were excerpts from Alberta Hansard of comments made in the legislature touching on the same topics. A third category consisted of statements by or on behalf of part-time Commission Members.
>
> [74] As noted, the Respondents pointed to case law to support the admissibility of the news reports. That, though, was not in dispute. We allowed the Monopoli Affidavits (including the appended news reports and other material) into evidence. However, we find that this evidence lacks probity and utility for the following reasons.
>
> [75] The first category of the exhibits to the Monopoli Affidavits involved, with varying degrees of editorial comment, second-or third-hand accounts of various sorts of claims — none proved — apparently levied against certain individuals associated with the Commission. The actual claims, assuming they existed and were reduced to writing, were not in evidence. No actual complainants gave evidence. What we have is, at best, hearsay evidence, sometimes more than once removed, of allegations and suppositions. At most, it is a mixture of speculation, subjective impression and an indication of media and political interest. To the extent this is evidence of anything, it is no more than evidence that various people have spoken of speculation or subjective belief. This is very different from the newspaper evidence in *Newfoundland Telephone*, where the reports contained actual quotations of statements by a hearing panel member specifically referring to the case before him.
>
> [76] The second category of the exhibits to the Monopoli Affidavits involved comments made by legislators. At most we discern from them some questions and answers and expressions of opinion, none in our view demonstrating anything conclusive in support of the Respondents' contentions.
>
> [77] Turning to the third category of the exhibits to the Monopoli Affidavits, the statements of part-time Commission members, those were first person statements made by individuals who did have some direct knowledge of the matters being discussed. In those statements they disavow some of the complaints apparently made. In other words, the Respondents' own evidence shows that the claims of impropriety had been publicly controverted.
>
> [78] Moreover, none of this evidence appended to the Monopoli Affidavits makes any mention whatsoever of the Hearing, the Proceedings, either Respondent or any of the companies with which they were involved or alleged to have been involved.

> [79] The Monopoli Affidavits thus demonstrate, at most, that various sorts of claims have been made; some individuals with knowledge have strongly disputed them; and a variety of sources and commentators further removed have disseminated some of these positions and in some cases added their own views. To the extent that the Monopoli Affidavits reflect the public record, that public record shows interest in and competing views about unproved claims, and no more than that.

60 During his oral submissions, counsel for Workum acknowledged to the Court of Appeal that he did not allege that there was any actual bias on the part of the Commission or ASC Staff. Furthermore, he made it clear that he was not in any way arguing the merits of the Alleged Controversy. He further conceded that he had no specific knowledge that any of the hearings held by the Commission with respect to this matter were in any way referenced in the Mack Report. Nor was there anything raised in Wayne Alford's letter of complaint to Minister Greg Melchin, dated January 9, 2004, (which first broached the Alleged Controversy) that pointed to this particular investigation either.

61 He did however make specific reference to the decision of the Ontario Court of Appeal in *E.A. Manning Ltd. v. Ontario (Securities Commission)* (1995), 23 O.R. (3d) 257, 80 O.A.C. 321 (Ont. C.A.) [Manning]. Briefly stated, the facts in *Manning* were as follows. E.A. Manning Limited (Manning) was a registered securities dealer in Ontario that dealt in penny stocks during the early 1990s. The Ontario Securities Commission (OSC) was concerned at that time about the business practices of penny stock dealers, such as calling citizens at home to solicit sales and using high pressure sales tactics. The OSC created a policy to remedy these abuses. One month after the policy was issued, Manning and other securities dealers commenced an action against the OSC alleging that the policy was *ultra vires*. They were successful in the first instance and the decision was upheld on appeal.

62 Approximately a year after the policy was struck down, the OSC issued notices of hearing against Manning on allegations that it had engaged in high-pressure sales tactics, failing to disclose that they were selling securities as principals instead of agents and failing to disclose that markups were included in the purchase price. Some of the OSC Commissioners set to hear the case had been involved in the adoption of the policy. Manning applied to court to prohibit the OSC from proceeding with the hearings on the basis that the Commissioners involved with the policy were likely to have prejudged the case against Manning.

63 In the first instance before the Ontario Divisional Court, (reported at *E.A. Manning Ltd. v. Ontario (Securities Commission)* (1994), 18 O.R. (3d) 97, 72 O.A.C. 34 (Ont. Div. Ct.)) Manning was partly successful. Montgomery J., speaking for the Divisional Court, found that there was a reasonable apprehension of bias on the part of the Commissioners who had taken part in the adoption of the policy, as they may have closed their minds to the issue of penny stock dealers engaging in unfair sales practices. In addition, the fact that the OSC had defended the policy on

appeal was evidence of prejudgment because it had gone beyond merely defending its jurisdiction, to argue that Manning and others were guilty of unfair practices.

64 However, Montgomery J. found that there was no reasonable apprehension of bias on the part of Commissioners appointed after the adoption of the policy. The application for prohibition was dismissed and the hearings were allowed to proceed before a panel of Commissioners appointed after the adoption of the policy. Manning appealed the dismissal of its application to the Ontario Court of Appeal.

65 Dubin C.J.O., speaking for the Court, considered the statutory framework within which the OSC functioned. Within that framework, the OSC was the investigator, prosecutor and the judge. Absent statutory authority, this structure would normally be found to violate basic principles of fairness. However, quoting the decision of L'Heureux-Dub_ J. in *Barry*, Dubin C.J.O. held that such overlapping functions did not give rise to a reasonable apprehension of bias where the overlap was authorized by statute. The prohibition sought by Manning could not be granted because the structure of the OSC alone did not give rise to a reasonable apprehension of bias.

66 By contrast, the appellants have not pointed to anything in their arguments that the Commission had a particular interest in convicting either or both of them due to the Alleged Controversy. As this court stated in *Ironside* at para 103:

> A bias claimant must do more than make bald assertions of bias or apprehension of bias whether said to rest on (a) institutional concerns or (b) case-specific accusations. Either form of claim requires substance. It is not the perspective of the "very sensitive or scrupulous conscience" ...

The appellants have therefore not established a case of reasonable apprehension of bias arising from the Alleged Controversy. Accordingly, I dismiss this ground of appeal.

The Alberta Bill of Rights

67 During oral submissions, counsel for Hennig rightly acknowledged this to be a weak argument and later went on to abandon it altogether. Therefore it need not be addressed in these reasons.

C. Reasonable apprehension of bias created by the Commission calling its Chief Accountant to give evidence

68 An analysis of this ground of appeal also engages the standard of correctness.

69 During the course of oral submissions, counsel for Hennig argued that in qualifying its own Chief Accountant Snell to testify as an expert on accounting principles, the Commission was biased in favour of his evidence because it was an "institutional impossibility" that the Commission would find against the evidence given by its own Chief Accountant. Counsel for Hennig went on

2017 FC 604, 2017 CF 604
Federal Court

Bilodeau-Massé v. Canada (Procureur général)

2017 CarswellNat 3179, 2017 CarswellNat 3280, 2017 FC 604, 2017 CF 604, 140 W.C.B. (2d) 168, 388 C.R.R. (2d) 66

JIMMY BILODEAU-MASSÉ (demandeur) et PROCUREUR GÉNÉRAL DU CANADA (défendeur)

Luc Martineau J.

Heard: March 27, 2017
Judgment: June 19, 2017
Docket: T-1159-16

Counsel: Me Nadia Golmier, pour le demandeur
Me Marc Ribeiro, Me Virginie Harvey, pour le défendeur

Subject: Constitutional; Criminal; Human Rights

APPLICATION by offender for judicial review of decision of Parole Board Canada maintaining long-term supervision order after offender brought request for in-person post-suspension hearing.

***Luc Martineau J.*:**

[ENGLISH TRANSLATION]

I. Introduction

1 Under subsection 52(1) of the *Constitution Act, 1982*, adopted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), the Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. In this case, does the Federal Court have jurisdiction to rule on the validity of subsections 140(1) and (2) of the *Corrections and Conditional Release Act*, SC 1992, c. 20 [CCRA], and, if it does, would it be appropriate to grant declaratory relief today in this case?

2 At issue is the extent of the obligations of the Parole Board of Canada [the Board] with respect to natural justice, the law and/or the *Canadian Charter of Rights and Freedoms* — Part I of the *Constitution Act, 1982* [*Charter*], when, following the suspension of a long-term supervision order [LTSO], it decides under subsection 135.1(6) of the CCRA to maintain the suspension of

100 the LTSO and/or to recommend that an information be laid charging the offender with an offence under section 753.3 of the *Criminal Code*, RSC 1985, c. C-46.

3 Subsection 140(1) of the CCRA stipulates that a hearing is mandatory in the cases listed in paragraphs (a) to (e) of subsection (1). However, according to subsection 140(2) of the CCRA, the Board has the discretion to hold a hearing in other cases, which includes a post-suspension hearing following the suspension of an LTSO (section 135.1 of the CCRA).

4 These provisions are reproduced below:

> 140(1) The Board shall conduct the review of the case of an offender by way of a hearing, conducted in whichever of the two official languages of Canada is requested by the offender, unless the offender waives the right to a hearing in writing or refuses to attend the hearing, in the following classes of cases:
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> (a) the first review for day parole pursuant to subsection 122(1), except in respect of an offender serving a sentence of less than two years;
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> (b) the first review for full parole under subsection 123(1) and subsequent reviews under subsection 123(5), (5.01) or (5.1);
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> (c) a review conducted under section 129 or subsection 130(1) or 131(1) or (1.1);
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> (d) a review following a cancellation of parole; and
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> (e) any review of a class specified in the regulations.
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> (2) The Board may elect to conduct a review of the case of an offender by way of a hearing in any case not referred to in subsection (1).
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> 140(1) La Commission tient une audience, dans la langue officielle du Canada que choisit le délinquant, dans les cas suivants, sauf si le délinquant a renoncé par écrit à son droit à une audience ou refuse d'être présent:
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> a) le premier examen du cas qui suit la demande de semi-liberté présentée en vertu du paragraphe 122(1), sauf dans le cas d'une peine d'emprisonnement de moins de deux ans;
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> b) l'examen prévu au paragraphe 123(1) et chaque réexamen prévu en vertu des paragraphes 123(5), (5.01) et (5.1);
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> c) les examens ou réexamens prévus à l'article 129 et aux paragraphes 130(1) et 131(1) et (1.1);
>
> d) les examens qui suivent l'annulation de la libération conditionnelle;
>
> e) les autres examens prévus par règlement.

(2) La Commission peut décider de tenir une audience dans les autres cas non visés au paragraphe (1).

5 The applicant, Jimmy Bilodeau-Massé, is a long-term offender subject to an LTSO. In this case, the Board maintained the suspension of the LTSO and recommended that an information be laid charging the applicant with an offence under section 753.3 of the *Criminal Code*. In addition, in exercising the discretion conferred upon it under subsection 140(2) of the CCRA, it determined that an oral hearing was not warranted in this case, hence this application for judicial review and declaratory relief.

6 The Attorney General of Canada is the respondent in this case. In accordance with section 57 of the *Federal Courts Act*, RSC 1985, c. F-7, a notice of constitutional question was duly served on the respondent, as well as on the attorney general of each province, though they decided not to participate in the hearing. It is not disputed that subsection 91(27) of the *Constitution Act, 1867* confers on Parliament exclusive jurisdiction over criminal law and procedure (except the constitution of courts of criminal jurisdiction), that the provisions of the CCRA and the *Criminal Code* on the supervision of long-term offenders in the community fall under federal jurisdiction, and that the legality of any decision by the Board may be reviewed by the Federal Court under sections 18 and 18.1 of the *Federal Courts Act*.

7 This Court heard the parties' submissions on the merits concurrently with the application for judicial review and declaratory judgment of another long-term offender regarding a similar decision by the Board, raising the same questions of administrative and constitut ional law (see *Blacksmith v Attorney General of Canada*, 2017 FC 605).

8 At the hearing, counsel for the two applicants stated that the applicants were abandoning any claim regarding the violation of section 9 of the *Charter*, which provides that "[e]veryone has the right not to be arbitrarily detained or imprisoned." Nevertheless, counsel for the applicants argues that the lack of guarantee of a post-suspension hearing violates section 7 of the *Charter* [constitutional question]. For one, the suspension of the LTSO and the resulting reincarceration affect the offender's residual liberty. Moreover, the principles of fundamental justice require that the offender be able, *in all cases*, to appear in person before the Board for a post-suspension hearing. The hearing must be held prior to the expiration of the statutory time limit of 90 days set out in section 135.1 of the CCRA, unless the offender waives this right in writing or refuses to attend the hearing. In addition, the two applicants argue that the Board also breached procedural fairness, or otherwise rendered an unreasonable decision, by refusing to hold a post-suspension hearing, which warrants Court intervention.

9 Although the Federal Court has jurisdiction to decide the constitutional question and make a formal declaration of invalidity, the respondent defends the constitutionality of subsections 140(1) and (2) of the CCRA. The Board acted under the authority of the law. The discretion to hold

102 a hearing granted to the Board in subsection 140(2) of the CCRA does not violate section 7 of the *Charter*: the offender's freedom is not involved, and the discretion to hold a post-suspension hearing is not incompatible with the principles of fundamental justice. The Court must interpret the legislation in a manner that is consistent with these principles. A hearing is not necessarily required *in all cases*. Because the authority to hold a post-suspension hearing is not removed, subsections 140(1) and (2) of the CCRA do not violate section 7 of the *Charter*. Additionally, any violation is justifiable under section 1. Regardless, there was no breach of procedural fairness, and the impugned decision by the Board is reasonable in all regards.

10 The standard of correctness applies to the review of the constitutional question, to the determination of the legal scope of the rules of natural justice or procedural fairness, as well as to the question as to whether — given the particular facts of the case — the Board breached procedural fairness by maintaining the suspension of the LTSO and recommending that an information be laid charging the offender with an offence under section 753.3 of the *Criminal Code*, without having held a hearing. At the same time, the standard of reasonableness applies to the review of the Board's determinations regarding the case (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] SCJ No. 9; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] SCJ No. 12[*Khosa*]; *Gallone v. Canada (Attorney General)*, 2015 FC 608, [2015] FCJ No. 598at paragraph 7 [*Gallone*]; *Laferrière v. Canada (Attorney General)*, 2015 FC 612, [2015] FCJ No. 578[*Laferrière FC*]).

11 In light of the particular facts of the case and the applicable federal statutory provisions, and having considered all of the parties' submissions and the relevant case law, I am satisfied that the Federal Court has jurisdiction to decide the constitutional question. It is also appropriate to issue a declaratory judgment on the constitutionality of subsections 140(1) and (2) of the CCRA and clarifying the extent of the Board's obligations under the principles of fundamental justice. The immediate result of the declaratory judgment that follows these reasons will be to bind the parties to the case and the tribunal against which it is rendered.

II. Background

12 The applicant is single and has no children. He is currently 24 years old. He has various cognitive limitations and the mental age of a child in elementary school. He has attention deficit hyperactivity disorder, conduct disorders, borderline personality disorder and a potential autism spectrum disorder. He is unable, partially and permanently, to ensure the protection of his person, to exercise his civil rights and to administer his property. Since 2015, the applicant has been under the protection of the Public Curator of Quebec.

13 The applicant's record shows persistent criminal behaviour since his criminal record began in 2008 and a violence problem characterized by a strong, immature and explosive personality. However, despite his intellectual disability, the applicant does not have any psychiatric pathology that could explain his violent behaviour. The problem seems to be that when he gets bored or is

facing a situation he feels is unfair, he tends to break the rules or demonstrate disruptive behaviour. Reintegration potential, accountability and motivation are all assessed as low. That being said, medication plays a key role in managing the risk the applicant poses to himself and society.

14 On January 23, 2012, the applicant was charged with assault with a weapon and assault causing bodily harm against two staff members of the Institut universitaire en santé mentale de Québec. On January 22, 2012, he hit a nurse on the head twice with an iron bar while she was sitting at the station. He was also charged with uttering death threats the following day against another staff member and for failing to comply with an undertaking to be of good behaviour. The applicant pleaded guilty to these criminal charges.

15 On February 25, 2013, the Court of Quebec ordered a pre-sentence psychiatric assessment as well as a dangerous or long-term offender assessment. The applicant was found to be responsible for his actions. On July 17, 2013, the Court of Quebec sentenced him to nine months in prison, in addition to the time already served on remand. At that time, he was declared a long-term offender.

16 The applicant is under the legal authority of the Correctional Service of Canada [Service] and is subject to an LTSO that will expire in 2019. Specifically, the Board imposed on him supervision conditions it considered reasonable and necessary to protect society and facilitate his reintegration. The LTSO, which was amended a few times, stipulates that he must reside at the Martineau Community Correctional Centre [CCC], a specialized centre for offenders with mental health issues; participate in a treatment program to address his risk factors; and take medication as prescribed by a health practitioner. He was released into the community on April 16, 2014.

17 The Service suspended the applicant's community supervision multiple times as a result of various breaches of these conditions. Each time, he was reincarcerated at the Regional Mental Health Centre at Archambault Institution.

18 Although post-suspension interviews were conducted with Service representatives and the applicant's case was referred to the Board three times, he appeared before the Board in person only once. This was in August 2015. On that occasion (the sixth suspension), the Board recommended that an information be laid under section 753.3 of the *Criminal Code*. Charges for breach of LTSO were laid in September 2015. During the applicant's appearance, his counsel requested a reassessment. He was declared fit to appear. In October 2015, the case was postponed, and the applicant was released on a promise to appear. He returned to the Martineau CCC on October 19, 2015, under a residency condition.

19 On October 31, 2015, the applicant's LTSO was suspended a seventh time. The applicant had stolen the medical identity cards of two other offenders and had demonstrated threatening or intimidating behaviour — actions that he later said he regretted. The case was referred to the Board, which agreed to moderate. On January 13, 2016, the Board conducted a paper review and decided to cancel the suspension of the LTSO, while formally advising the applicant that it was

104 dissatisfied with his behaviour and expected the supervisors not to tolerate any further misconduct. Given the regret the applicant expressed, the Board did not recommend that additional charges be laid against him under section 753.3 of the *Criminal Code*.

20 On March 30, 2016, the Service suspended the applicant's supervision for the eighth time. The applicant had threatened a resident of the unit and had attempted to strangle another. He then fled from the unit. He was found several hours later. While fleeing, he hit and damaged a vehicle.

21 On April 14, 2016, the applicant was confronted with the facts alleged against him during a post-suspension interview conducted by an authorized Service representative. The Service maintained the suspension and referred the case to the Board.

22 On April 22, 2016, the Service prepared an "Assessment for Decision" [Assessment], including a recommendation that an information be laid charging the applicant with an offence under section 753.3 of the *Criminal Code*. The Assessment, which must be read in conjunction with the most recent correctional plan update and the applicant's criminal profile, was shared with the applicant in late May 2016.

23 On June 5, 2016, counsel for the applicant submitted written representations to the Board, while requesting an in-person post-suspension hearing on the ground that the applicant [TRANSLATION] "has limited intellectual abilities, and his situation raises serious questions about the appropriate medication and treatment for his condition." Counsel also submitted the report prepared by Dr. Pierre Gagné, Director of the Clinique médico-légale de l'Université de Sherbrooke, indicating that the applicant's medication was not appropriate for his situation and therefore impeded his ability to comply with his LTSO conditions.

24 The request for a post-suspension hearing was based on two arguments:

> a) Subsection 140(2) of the CCRA — which provides for a discretionary post-suspension hearing for offenders subject to an LTSO — violates sections 7 and 9 of the *Charter* [the *Charter* argument]; and
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> b) The hearing is all the more important in the applicant's case in order to ensure procedural fairness, because he has limited intellectual abilities and his situation raises serious questions about the appropriate medication and treatment for his condition [the administrative law argument].

25 The Board considered the information in its possession to be [TRANSLATION] "reliable and relevant" and enabled it to make an [TRANSLATION] "informed decision." With regard to the *Charter* and administrative law arguments, the Board said nothing in its June 7, 2016, decision except that it had [TRANSLATION] "read all of the representations from [counsel for the applicant]," but ultimately did not share her opinion because [TRANSLATION] "[i]t finds that a

hearing is not warranted." The Board noted that the specialists agreed that, despite his intellectual disability, the applicant had no psychiatric illness and was responsible for his actions. Examining his behaviour in terms of public safety and the protection of society, the Board maintained the suspension of the LTSO and recommended that a new information be laid under section 753.3 of the *Criminal Code*, finding that no supervision program could adequately protect society against the applicant's risk of recidivism and that, by all appearances, he had failed to comply with his supervision conditions.

26 That decision is the subject of this application.

27 On June 21, 2016, new criminal charges were brought against the applicant for breach of LTSO.

28 On November 10, 2016, the applicant pleaded guilty to those charges and received a concurrent sentence of 18 months in prison.

III. Mootness of certain questions raised or of certain remedies sought by the applicant

29 Recall that under subsection 18(1) of the *Federal Courts Act*, subject to section 28, the Federal Court has exclusive original jurisdiction (a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal. In addition, subsections 18.1(3) and (4) of the *Federal Courts Act* authorize the Court to declare invalid or unlawful or quash a decision of a federal board, commission or other tribunal and, if applicable, to refer the matter back for determination in accordance with such directions as it considers to be appropriate — meaning that the Court may order that a hearing be held in cases of breach of natural justice or procedural fairness, and particularly of violation of the law.

30 Moreover, in accordance with the well-established principles on prerogative writs and other discretionary remedies, a court of law may refuse to hear an application or to decide a question that has become moot (*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342[*Borowski*]). And, even when an unlawful act was committed and a dispute still exists between the parties, the appropriate remedy is left to the Court's discretion. For example, the Federal Court may issue a declaration in lieu of any other judicial remedy (*MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] SCJ No. 2at paragraph 43 [*MiningWatch Canada*]; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] SCJ No. 3at paragraphs 2 and 46-47).

31 During the hearing before this Court, counsel for the applicant was confronted with the question as to whether this application for judicial review had become moot — either partially or

106 totally — following the filing of charges under section 753.3 of the *Criminal Code* and her client's subsequent conviction. The questionable actions that resulted in the suspensions of the LTSO — including the one in spring 2016 that led to the impugned decision in this case — are not really at issue.

32 However, counsel for the applicant argues that her client continues to be subject to an LTSO, meaning that the problematic situation alleged in this application for judicial review and declaratory relief is likely to recur more than once (for proof, one need only look at the number of suspensions of the LTSO in this case). Furthermore, other offenders are in a similar situation, which is notably the case for the applicant in the other case heard concurrently (*Blacksmith v. Attorney General of Canada*, 2017 FC 605). The suspensions of the LTSO are frequent, and the statutory time limit of 90 days for review is very short. In addition, the applicants make it a compelling question of law: because credibility issues are often at play before the Board, the principles of fundamental justice protected under section 7 of the *Charter* require that an oral post-suspension hearing be held when an LTSO is suspended. This is not frivolous: *Charter* and/or administrative law arguments are serious and warrant acknowledgement and an adequate response by this Court.

33 Counsel for the respondent does not challenge this rhetoric that the offender must return to square one if this Court does not clarify the issue raised by the applicants in the meantime.

34 I agree with counsel.

35 Quashing the June 7, 2016 decision and referring the matter back to the Board for redetermination could no longer have any practical or legal effect on what was already accomplished; the fact remains that criminal charges were laid and that the applicant was found guilty of committing the offence set out in section 753.3 of the *Criminal Code*. However, the Court can still do something useful by deciding the real issue in this case: is the offender automatically entitled to an oral hearing as in the cases referred to in subsection 140(1) of the CCRA?

36 The *Charter* and/or administrative law arguments were debated at length at the hearing, so, at first glance, it would seem appropriate to issue a declaratory judgment to clarify the question at issue. More often than not — when it would serve no useful purpose to quash a decision or order the resumption of an administrative process — in exercising judicial discretion, a declaratory judgment is a valid alternative remedy to prevent the repetition of systemic administrative practices that violate the law (*MiningWatch Canada* at paragraphs 50-52), or even the *Charter* or the *Canadian Bill of Rights*, SC 1960, c. 44 (*Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177at paragraphs 76-79, 81-85 and 124-125 [*Singh*]); *Re Singh and M.E.I.*, 1986 CanLII 3950 (FCA), [1986] 3 FCR 388 at paragraphs 8-9). For a recent example of a declaratory judgment of general application from the Federal Court affecting an entire group of people who challenged the constitutionality and/or validity of certain provisions of the *Citizenship Act*, RSC 1985, c. C-29, as amended by the *Strengthening Canadian Citizenship Act*, SC 2014, c. 22, see: *Hassouna v. Canada*

(Citizenship and Immigration), 2017 FC 473, [2017] FCJ No. 544. In addition to prohibiting the Minister of Citizenship and Immigration from applying subsections 10(3) and (4) of the *Citizenship Act*, RSC 1985, c. C-29, as amended, against the applicants, because those subsections are incompatible with the *Canadian Bill of Rights*, SC 1960, c. 44, the Court declared subsections 10(1), (3) and (4) to be inoperative, because they violate paragraph 2(e) of the *Canadian Bill of Rights* in a manner that cannot be avoided by interpretation. In so doing, the Court stayed judgment for a period of 60 days or for any other period that the Court may authorize at the request of one of the parties.

37 However, a declaration of unconstitutionality is a discretionary remedy (*Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441at page 481 [*Operation Dismantle*], citing *Solosky v. The Queen*, [1980] 1 S.C.R. 821[*Solosky*]) and can be "an effective and flexible remedy for the settlement of real disputes" (*R v. Gamble*, [1988] 2 S.C.R. 595at page 649 [*Gamble*]). Therefore, a court can properly issue a declaratory remedy so long as it has the jurisdiction over the issue at bar, the question before the court is real and not theoretical, and the person raising it has a real interest to raise it (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3at paragraph 46 [*Khadr*]). This Court must first ascertain that it has jurisdiction over the issue, and, if it does, be satisfied that its declaratory judgment may have a useful effect on the application of the CCRA when the Service refers a case to the Board following the suspension of an LTSO.

IV. Federal Court's jurisdiction to grant declaratory relief with respect to a constitutional and administrative issue

38 Firstly, I am satisfied that this Court has jurisdiction to render a declaratory judgment on the constitutional validity, applicability or operability of subsections 140(1) and (2) of the CCRA, as well as on the extent of the Board's obligations under the principles of fundamental justice and/or administrative law.

A. Words conferring jurisdiction

39 The Federal Court, a successor to the Exchequer Court of Canada, established in 1875, was maintained in 1970 as an "additional court of law, equity and admiralty in and for Canada, for the better administration of the laws of Canada" (section 4 of the *Federal Courts Act*). With the status of "a superior court of record having civil and criminal jurisdiction" (section 4 of the *Federal Courts Act*), the Federal Court may grant declaratory relief against any federal board, commission or other tribunal (subsection 18(1) of the *Federal Courts Act*) or against the Crown, including an officer, servant or agent of the Crown for anything done or omitted to be done in the performance of the duties of that person (section 17 of the *Federal Courts Act*). However, to better understand the genesis of the Federal Court's jurisdiction, it is appropriate to review the background, without repeating everything that might have been said on this topic in previous decisions (for example

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Felipa v. Canada (Citizenship and Immigration), 2010 FC 89[*Felipa FC*], reversed by 2011 FCA 272 though for reasons unrelated to the historical analysis of the Court's jurisdiction).

40 In 1875, the legislation creating the Exchequer Court gave it concurrent original jurisdiction in "...any matter which might in England be the subject of a suit or action in the Court of Exchequer on its revenue side against the Crown," while the procedure was in principle "regulated by the practice and procedure of Her Majesty's Court of Exchequer at Westminster" (see sections 58 and 61 of the *Supreme and Exchequer Court Act*, SC 1875, c. 11). At that time, in England, the Court of Exchequer was a high court (*Supreme Court of Judicature Act, 1873* (U.K.), 36 & 37 Vict., c. 66, section 3, 4). While the Exchequer Court's jurisdiction was originally limited to revenue-related actions against the federal government, over the years, it gradually extended to actions against the Crown, in addition to admiralty matters, suits between citizens regarding industrial property (now intellectual property), and tax, citizenship and railway cases.

41 Long before the Federal Court was granted statutory jurisdiction in 1970 to review the legality of decisions by a federal board, commission or other tribunal (section 18 of the *Federal Courts Act*), aside from the petition of right procedure, it was possible to obtain a declaratory judgment from the Exchequer Court as additional relief against the Crown, by bringing an ordinary action against the Attorney General of Canada. For example, in *Jones et Maheux v. Gamache*, [1969] S.C.R. 119[*Jones et Maheux*], the Supreme Court of Canada ruled that the Exchequer Court had jurisdiction to issue a declaration of nullity of the General By-laws of the Quebec Pilotage Authority establishing classes of pilots — the pilotage authority for the district of Quebec being the Minister of Transport. In his action, the plaintiff said that important and prejudicial restrictions in the exercise of his profession were inflicted upon him as a direct consequence of the application of the invalid by-laws. Ultimately, the Supreme Court dismissed without costs the action against the individual defendants, but, at the same time, allowed the plaintiff's action against the Minister of Transport as "officer of the Crown for anything done or omitted to be done in the performance of his duty as such officer" (paragraph 29(c) of the *Exchequer Court Act*, RSC 1952, c. 98).

42 The Supreme Court's conclusion in 1968 in *Jones et Maheux* is unsurprising and is consistent with a long line of case law. Initially, the declaratory judgment was a discretionary remedy that could be granted in England by the Courts of equity, long before the adoption in 1850 of the *Chancery Act* (U.K.), 13 & 14 Vict., c. 35 and in 1852 of the *Chancery Procedure Amendment Act* (U.K.), c. 86, as well as the clarifications made in 1883 by the rules committee established under the *Supreme Court of Judicature Act, 1873* (U.K.), 36 & 37 Vict., c. 66, on the declaratory authority of the High Court of Justice. The Court of Exchequer in England also had equitable jurisdiction to issue declaratory judgments against the Crown (Lazar Sarna, *The Law of Declaratory Judgments*, Thomson Carswell, Fourth edition, 2016 at pages 9-10 and 24-25 [Sarna]).

43 That being said, it is important not to confuse the declaratory jurisdiction of the Courts of equity with that of the superior courts in prerogative writs. This important distinction was

highlighted in 1975 by Justice Addy, who explained the following in *B v Canada (Commission of Inquiry Relating to the Department of Manpower and Immigration)*, [1975] FC 602 at paragraphs 14 to 17:

> [14] At common law, the prerogative writs of prohibition, *certiorari* and *mandamus* (i.e., the old prerogative writ of *mandamus* as opposed to equitable *mandamus* to enforce a legal right or as contrasted with the equitable mandatory order or injunction) were granted exclusively by the common law Courts of the King's or Queen's Bench and constituted a class of process by which inferior bodies, including those which are an emanation of the Crown, were answerable to the controlling jurisdiction of superior Courts. The proceedings, leading to the issue of such prerogative writs, could not be instituted by ordinary action for the simple reason that the Courts and the judicial bodies, who were subject to such process being used against them, were not liable to be sued; the only persons liable to be sued were individuals and corporations. Therefore, the proceedings for prerogative writs had to be instituted by special application to the Court by way of motion: see *Rich v. Melancthon Board of Health* (1912), 2 D.L.R. 866, 26 O.L.R. 48, and *Hollinger Bus Lines Ltd. v. Ontario Labour Relations Board*, [1952] 3 D.L.R. 162 at pp. 167-8, [1952] O.R. 366 at p. 379).
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> [15] On the other hand, relief by way of injunction, declaratory judgment, mandatory injunction or equitable mandatory order were exclusive equitable remedies and the proceedings were instituted in the Court of Chancery by means of a bill in equity. The Exchequer Court in England originally possessed also the equitable jurisdiction to issue declaratory judgments against the Crown.
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> [16] A true distinction between these remedies became obscured to some extent when the Courts of equity and of common law were fused and, in more recent years, the distinction became further obscured because in most jurisdictions all of these remedies, whatever may have been their origin, are now enforceable in the same manner, that is, by way of direct order of the Court. Furthermore, where the proceedings for the prerogative common law remedies, for the reasons previously stated, could be initiated only by special application to the Court, in certain Courts today such as the Federal Court of Canada (see Rule 603), the proceedings may now be instituted by way of a statement of claim.
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> [17] But neither the fact that all the above-mentioned remedies may now be obtained from the same forum, nor the fact that the relief may be initiated by means of the same type of proceedings, nor the fact that the method of enforcing all of these remedies (by Court order) is identical, in any way changes or alters their basic nature or purpose, and it is still the law that where prohibition or *certiorari* lies neither injunction nor any other equitable remedy such as specific performance, mandatory injunction or equitable mandamus will lie and the converse is equally true: see *Hollinger Bus*, *supra*, and *Howe Sound Co. v. Int'l Union of Mine, Mill & Smelter Workers (Canada), Local 663* (1962), 33 D.L.R. (2d) 1, [1962] S.C.R. 318, 37 W.W.R. 646).

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[My emphasis.]

44 Furthermore, declaratory action has been particularly useful in cases where the validity of a procedure or the legality of an action undertaken by the Crown was challenged by a subject. This method was confirmed in *Dyson v. Attorney General*, [1911] 1 K.B. 410 (CA) [*Dyson*], where the Court of Appeal of England declared that a tax notice sent to the plaintiff (and to eight million other people) was not authorized by law. In that case, the defendant was the Attorney General, not the Crown, because for centuries before the English Court of Chancery, and particularly before a court of equity, it was the Attorney General who defended the interests of the Crown (*Jones et Maheux* at pages 129-131, citing *Dyson*). As could be expected, the declaratory action against the Crown became commonplace in Canada, Australia and New Zealand (*Liebmann v. Canada (Minister of National Defence)*, [1994] 2 F.C. 3 (TD). In 1970, in transferring the supervisory jurisdiction over federal boards, commissions or other tribunals, Parliament took care to specify in section 18 of the *Federal Court Act*, RSC 1970 (2nd Supp.), c. 10, that in addition to the prerogative writs mentioned in the Trial Division, the Federal Court could render a declaratory judgment. The declaratory powers of a court of equity and a superior court were then concentrated in one federal court.

45 Incidentally, apart from questions of interest or mootness, the Supreme Court of Canada had already recognized before the patriation of the Constitution, in *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138at pages 157-159, the right of taxpayers to invoke the interposition of a court of equity to challenge the constitutionality of legislation involving expenditure of public money where no other means of challenge was open. This continued with the coming into force of the *Charter*. For example, following the bringing of a declaratory action before the Trial Division, the Federal Court of Appeal allowed the appeal of a taxpayer, who had been unsuccessful at trial, who was challenging the constitutionality of section 231.4 of the *Income Tax Act*, RSC 1985, c. 1 (5th Supp.), and summonses issued by tax authorities pursuant to that provision. The Federal Court of Appeal ruled that they were inoperative under subsection 52(1) of the *Constitution Act, 1982* (*Del Zotto v. Canada*, [1997] 3 F.C. 40, 147 DLR (4th) 457 (CA), rev'd on other grounds, [1999] 1 SCR 3).

46 In *A.G. Can. v. Law Society of B.C.*, [1982] 2 S.C.R. 307[*Jabour*], with regard to the declaratory action, the Supreme Court noted that "[t]his form of action takes on much greater significance in a federal system *where it has been found to be efficient as a means of challenging the constitutionality of legislation*" (page 323) [my emphasis]. While avoiding saying that the Federal Court did not have jurisdiction under section 17 of the *Federal Courts Act* to make a "Dyson" declaration (page 326), the Supreme Court took a pragmatic approach: the jurisdiction found in section 17 does not remove "[t]he jurisdiction of superior courts, and indeed other courts in the provinces, to review the constitutionality of federal statutes" (page 327) [my emphasis].

47 In *Canadian Transit Company v. Windsor (Corporation of the City)*, 2015 FCA 88[*Windsor FCA*], Justice Stratas explains in paragraphs 56 to 58 how the Exchequer Court was able, since its establishment in 1875, like other Canadian courts, to review the validity of legislation for various proceedings against the Crown:

> [56] In 1875, the Exchequer Court of Canada was created. Like all courts, it had to act according to law, interpreting and applying the law. At the time of the Exchequer Court's birth, one law on the books was the *Colonial Laws Validity Act, 1865* (U.K.), 28 & 29 Vict. c. 63. Under section 2 of that Act, all Canadian courts, including the Exchequer Court, had to declare "void and inoperative" any federal or provincial laws inconsistent with those of the Parliament of the United Kingdom, including the *British North America Act, 1867*: see also the discussion in *Re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721 at page 746, 19 D.L.R. (4th) 1. The Exchequer Court recognized this power and understood that in appropriate cases it could decline to apply legislation that conflicted with a law of the Parliament of the United Kingdom: see, e.g., *Algoma Central Railway Co. v. Canada* (1901), 7 Ex. C.R. 239 at pages 254-255, rev'd on other grounds (1902), 1902 CanLII 76 (SCC), 32 S.C.R. 277, aff'd [1903] A.C. 478 (P.C.). Even before the Exchequer Court came into existence, other Canadian courts regularly exercised the power to declare legislation invalid or inoperative: see, e.g., *R. v. Chandler* (1868), 2 Cart. 421, 1 Hannay 556 (N.B.S.C.); *Pope v. Griffith* (1872), 2 Cart. 291, 16 L.C.J. 169 (Que. Q.B.); *Ex p. Dansereau* (1875), 2 Cart. 165 at page 190, 19 L.C.J. 210 (Que. Q.B.); *L'Union St. Jacques v. Belisle* (1872), 1 Cart. 72, 20 L.C.J. 29 (Que. Q.B.), rev'd (1874), L.R. 6 P.C. 31 (P.C.). Thus, from the very outset, all Canadian courts, including the Exchequer Court, could measure legislation up against laws of the Parliament of the United Kingdom, including the *British North America Act, 1867*, and determine whether they were invalid or inoperative.
>
> [57] From 1875 to 1982, the doctrines of paramountcy and interjurisdictional immunity developed as part of the jurisprudence under sections 91 and 92 of the *British North America Act, 1867*. For example, as early as 1895, the doctrine of paramountcy was described as being "necessarily implied in our constitutional act," one that had to be followed under the *Colonial Laws Validity Act, 1865*: *Huson v. Township of South Norwich* (1895), 1895 CanLII 1 (SCC), 24 S.C.R. 145 at page 149. These constitutional doctrines became part of the law that all Canadian courts, including the Exchequer Court, were bound to apply.
>
> [58] And so the Exchequer Court did. In one case, it found that provincial water rights legislation, the *Water Clauses Consolidation Act, 1897*, R.S.B.C., c. 190, could not apply to lands owned by the federal Crown that fell under exclusive federal jurisdiction under subsection 91(1A) of the *Constitution Act, 1867*: *The Burrard Power Company Limited v. The King* (1909), 12 Ex. C.R. 295, aff'd 1910 CanLII 48 (SCC), [1910] 43 S.C.R. 27, aff'd [1911] A.C. 87 (P.C.). In another case, it found that federal legislation, the *Soldier Settlement*

> *Act, 1917*, 9-10 Geo. V, c. 71, was *intra vires* the federal Parliament and if it conflicted with provincial legislation, it would prevail: *R. v. Powers*, [1923] Ex. C.R. 131 at page 133.

48 In this case, the nexus between the Federal Court and the constitutional issue here arising is obviously the judicial review proceeding under section 18 of the *Federal Courts Act* against the decision by the Board, which in turn arises from the valid LTSO suspension proceedings clearly commenced by the Service pursuant to the CCRA. Devoid of any artifice, this is what enables this Court to intervene in the resolution of the very real dispute between the parties today. And, at the risk of repeating myself, the Federal Court's jurisdiction to grant declaratory relief against the Crown in an action (subsection 17(1) and definition of "relief" in section 2 of the *Federal Courts Act*), or against any federal board, commission or other tribunal in an application for judicial review (section 18 of the *Federal Courts Act*), seems indisputable, unless that jurisdiction is otherwise assigned to the Federal Court of Appeal (subsections 28(1) and (3) of the *Federal Courts Act*).

49 With regard to the judicial review of a Board decision on administrative law grounds, the Federal Court has exclusive original jurisdiction (*Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] SCJ No. 37at paragraphs 63-64 [*Strickland*], citing *Canada (Attorney General) v. McArthur*, 2010 SCC 63, [2010] 3 S.C.R. 626at paragraphs 2 and 17, and *Canada v Paul L'Anglais*, [1983] 1 SCR 147 at pages 153-154 and 162 [*Paul L'Anglais*]). Therefore, there is nothing in the law preventing the Federal Court from deciding any constitutional question that could incidentally be raised in this case. Indeed, the case has already been heard: it is not a question today of granting the Federal Court *exclusive* jurisdiction to administer the "laws of Canada" when the validity or applicability of an Act of the Parliament of Canada is disputed by an interested party. Instead, it is a matter of *concurrent* jurisdiction.

50 The Supreme Court also specified the following in *Northern Telecom v. Communication Workers*, [1983] 1 S.C.R. 733at page 741 [*Northern Telecom*]:

> It is inherent in a federal system such as that established under the *Constitution Act*, that the courts will be the authority in the community to control the limits of the respective sovereignties of the two plenary governments, as well as to police agencies within each of these spheres to ensure their operations remain within their statutory boundaries. Both duties of course fall upon the courts when acting within their own proper jurisdiction. ...
>
> [My emphasis.]

51 A final determination has already been made: In spite of section 18 of the *Federal Courts Act*, the provincial superior courts have concurrent jurisdiction with the Federal Court when a plaintiff claiming damages against the Crown needs to attack a law or order by a federal board, commission or other tribunal to establish their cause of action, and adjudication of that allegation is a necessary step in disposing of the claim for relief against the Crown (*Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] SCJ No. 62at paragraphs 6, 67, 75 and 80). Furthermore, section 18 of

the *Federal Courts Act* does not remove the power of provincial superior courts to grant traditional administrative law remedies for reasons directly related to the division of powers (*Paul L'Anglais* at pages 152-153).

52 It could have ended there. However, questions of jurisdiction are compelling. To avoid a ping-pong effect, it is in the interests of justice that the Federal Court's jurisdiction and powers be clear to all parties, the final adjudicator being the Supreme Court.

B. The Supreme Court's obiter dictum in Windsor

53 Although "[t]he notion that each phrase in a judgment of [the Supreme] Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience" (*R v. Henry*, 2005 SCC 76), this Court nevertheless raised, on its own initiative, the question of the Federal Court's jurisdiction to render a declaratory judgment on a constitutional issue. This Court also considered the respective positions of the parties in the case on the legal significance, if any, of the Supreme Court of Canada's general comments in *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617[*Windsor SCC*], in response to what the Federal Court of Appeal wrote on this subject in its judgment and which was already discussed above.

54 The issue in *Windsor* was related to the application of a municipal by-law to a company operating a federal undertaking. Specifically, the issue was to determine whether the three branches of the test established by the Supreme Court of Canada in *ITO-Int'l Terminal Operators v. Miida Electronics*, [1986] 1 S.C.R. 752[*ITO*] had been met: (1) a statute grants jurisdiction to the Federal Court, (2) federal law nourishes the grant of jurisdiction and is essential to the disposition of the case, and (3) that federal law is constitutionally valid. The Canadian Transit Company [Canadian Transit], incorporated by a special Act of Parliament, was seeking declaratory relief under paragraph 23(c) of the *Federal Courts Act* against the City of Windsor [Windsor]. Windsor had issued over 100 repair orders against 114 properties purchased between 2004 and 2013 as part of a project to expand the Ambassador Bridge. Canadian Transit refused to comply, arguing that the bridge facilities are federal undertakings to which municipal by-laws do not apply. Canadian Transit wanted to obtain a Court declaration that the bridge was to be considered a "federal undertaking" and therefore could not be subject to municipal by-laws. Windsor responded by bringing a motion to strike the application for declaratory relief on the ground that the Property Standards Committee was already dealing with the repair orders, while the Ontario Superior Court of Justice was hearing several appeals by the two parties regarding the demolition orders. The Attorney General of Canada was not the respondent, nor did the case involve the interests of the Crown or the decision of a federal board, commission or other tribunal.

55 The majority of the Supreme Court decided that the Federal Court clearly lacked jurisdiction to hear the application for declaratory relief. Therefore, the trial judge did not err in striking the

114 notice of application, and the Federal Court of Appeal ought not to have intervened (*Windsor SCC* at paragraph 72). Justices Moldaver and Brown, who were dissenting, were satisfied that paragraph 23(c) of the *Federal Courts Act* provided the required statutory grant of jurisdiction, and that federal law was essential to the disposition of the case. However, the two dissenting judges would have remitted the matter to the Federal Court to determine whether it should stay the proceedings pursuant to section 50 of the *Federal Courts Act* to allow the matter to be litigated in the Ontario Superior Court of Justice (*Windsor SCC* at paragraphs 73 and 119, citing *Strickland* at paragraphs 37-38). Justice Abella, who was also dissenting, found that even though the Federal Court has concurrent jurisdiction with the Ontario Superior Court of Justice, it should not exercise it (*Windsor SCC* at paragraphs 122-131).

56 While it is already established that the Federal Court can make findings of constitutionality at first instance in a case where it has jurisdiction under an Act of Parliament (section 26 of the *Federal Courts Act*), and the Federal Court of Appeal can do the same in an appeal from a judgment by the Federal Court (section 27 of the *Federal Courts Act*), the Supreme Court nevertheless seems to question the existence of the Federal Courts' plenary power to issue a formal declaration of invalidity as sought today by the applicant in his application for judicial review and his notice of constitutional question.

57 Paragraphs 70 and 71 of Justice Karakatsanis' reasons in *Windsor SCC* read as follows:

> [70] Since the *ITO* test is not met, it is also unnecessary to consider the Federal Court of Appeal's holding that the Federal Court has the remedial power to declare legislation to be constitutionally invalid, inapplicable or inoperative. I decline to comment on this issue, except to say this. There is an important distinction between the power to make a constitutional finding which binds only the parties to the proceeding and the power to make a formal constitutional declaration which applies generally and which effectively removes a law from the statute books (see, e.g., *R. v. Lloyd*, 2016 SCC 13 (CanLII), [2016] 1 S.C.R. 130, at para. 15; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, 1990 CanLII 63 (SCC), [1990] 3 S.C.R. 570, at p. 592; *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at p. 316).
>
> [71] The Federal Court clearly has the power, when the *ITO* test is met, to make findings of constitutionality and to give no force or effect in a particular proceeding to a law it finds to be unconstitutional. The Federal Court of Appeal in this case appears to have held that the Federal Court also has the power to make formal, generally binding constitutional declarations. My silence on this point should not be taken as tacit approval of the Federal Court of Appeal's analysis or conclusion.
>
> [My emphasis.]

58 These general comments are found at the very end of Justice Karakatsanis' reasons, suggesting they are of high importance. However, here, the Supreme Court's "silence" "should not be taken as tacit approval of the Federal Court of Appeal's analysis or conclusion." The Supreme Court is therefore sending a message to the Federal Courts and all readers of *Windsor SCC*, without formally setting aside or allowing the comments in paragraphs 47 to 70 regarding the opinion of Justice Stratas in *Windsor FCA*. It is an obligatory silence, an aside that encourages reflection and opens the debate on the Federal Court's remedial power to declare legislation to be constitutionally invalid, inapplicable or inoperative. Clearly, this is a significant challenge.

59 Because the doxa — whose precedential value seems to be disputed today — is the Federal Court of Appeal's affirmation in *Windsor FCA* at paragraph 64: "...the ability of the [Federal Courts] to use section 52 of the *Constitution Act, 1982* where the *ITO-Int'l Terminal Operators test* is met is undoubted..." [my emphasis]. However, the Federal Court of Appeal is not alone in saying this. Generally speaking, parties and litigants have not really disputed the ability of the Federal Court (the Federal Courts since 2003) to issue a formal declaration of invalidity since the *Constitution Act, 1982* came into force.

60 To use a metaphor, this Court is now facing a truly Shakespearean dilemma. To be or not to be a superior court: that is the question. From an existential standpoint, this problem ultimately affects the social self and the jurisdiction of this federal court, unique in Canada. It is also a compelling question. Failing to recognize today the ability to use section 52 of the *Constitution Act, 1982* — when the *ITO* test is met — is likely to cause major inconveniences for litigants who come before the Federal Court seeking relief, and serious problems with judicial control above and below, considering that, in the case of a material error, a court of appeal can not only render the judgment that should have been rendered by the trial judge but also refer the case back to them for redetermination if the evidence in the record is insufficient or needs to be supplemented. However, we must not forget that in all *Charter* cases, the issue of justification of the infringement of the protected right, according to the section 1 test, very often requires a factual demonstration from the attorneys general.

61 The problem, as the Attorney General of Canada explains in his additional submissions, is that Supreme Court is itself a court created under section 101 of the *Constitution Act, 1867*. Recall that in 1875, the Supreme Court was constituted and established "in and for the Dominion of Canada [as] a Court of Common Law and Equity..." and which "shall have, hold, and exercise an appellate civil and criminal jurisdiction within and throughout the Dominion of Canada" (sections 1 and 15 of the *Supreme and Exchequer Court Act*). It was maintained as a "court of law and equity...as a general court of appeal for Canada, and as an additional court for the better administration of the laws of Canada" (section 3 of the *Supreme Court Act*, RSC 1985, c. S-26). In addition, the appellate powers of the Supreme Court are limited by federal law in that it must "give the judgment and award the process or other proceedings that the court whose decision is appealed against should

116 have given or awarded" (section 45 of the *Supreme Court Act*). In other words, its own jurisdiction depends on that of the court appealed against.

62 However, as the Attorney General of Canada points out, a number of constitutional challenges to federal legislation, initiated in Federal Court with no application other than declaratory, have been appealed all the way to the Supreme Court of Canada. It is revealing to note that the Supreme Court then ruled on the constitutionality of the provisions on the basis that it had the required jurisdiction. Specifically, in *Labatt v Canada*, [1980] 1 SCR 914, the Supreme Court rendered a judgment declaring unconstitutional provisions of the *Food and Drugs Act*, RSC 1970, c. F-27, with respect to the division of powers. In *Corbiere v. Canada*, [1999] 2 S.C.R. 203, the Supreme Court rendered a judgment declaring a provision of the *Indian Act*, RSC 1985, c. I-5 unconstitutional under the *Charter*. The declaration of unconstitutionality was suspended for a certain period, though the Supreme Court left no doubt that the declaration would apply to all after the period of suspension expired (see pages 226-227 for the majority; page 284-285 for the minority). In *Egan v. Canada*, [1995] 2 S.C.R. 513, the majority of the Supreme Court rendered a judgment declaring a provision of the *Old Age Security Act*, RSC 1985, c. O-9 constitutional under the *Charter*. The minority — albeit consisting of four judges — would have declared the provision invalid while suspending the unconstitutionality for a certain period after which the declaration would have taken effect against all (page 625).

63 In *Windsor SCC*, since the *ITO* test was not met, the Supreme Court found that section 23 of the *Federal Courts Act* did not allow the Federal Court to grant relief. Moreover, pragmatically, the parties argue that, in this case, the three branches of the *ITO* test are met and that the Federal Court therefore has plenary power to make a declaration of invalidity under section 52 of the *Constitution Act, 1982*:

> a) Firstly, sections 18 and 18.1 of the *Federal Courts Act* provide for judicial review and provide that a declaratory judgment may be granted as relief against any federal board, commission or other tribunal and/or the Attorney General of Canada. This Court's superintending and reforming power with regard to judicial review therefore extends to the Board, which is responsible for reviewing any request to suspend an LTSO for long-term offenders.
>
> b) Secondly, the CCRA is a valid federal statute that sets out all of the Board's powers with regard to long-term offenders (sections 99.1 to 135.1 of the CCRA) as well as its obligations of procedural fairness (section 100 and paragraph 101(a) of the CCRA). In this regard, federal law plays an essential role in this case, one that involves the Federal Court's jurisdiction to review the legality of Board decisions.
>
> c) Thirdly, although the Constitution is not one of the "laws of Canada" referred to in section 101 of the *Constitution Act, 1867*, the fact remains that the constitutional question raised in this case is directly related to the application of a federal law for which the Federal Court

has jurisdiction. Consequently, the Federal Court has jurisdiction under sections 18 and 18.1 of the *Federal Courts Act* to rule on the constitutionality of subsections 140(1) and (2) of the CCRA in this application for judicial review and to issue a declaration of invalidity, if applicable.

64 I agree with the general reasoning of the parties, which I find difficult to dispute from a statutory and constitutional standpoint.

65 In fact, I am satisfied that all branches of the *ITO* test are met. I would add that the constitutionality of section 18 of the *Federal Courts Act*, which grants the Federal Court original and general supervisory jurisdiction over federal boards, commissions or other tribunals, is not in dispute in this case. Nor does the applicant raise any constitutional questions relating to the division of legislative powers or the application of the constitutional doctrines of interjurisdictional immunity and federal paramountcy, which posed a problem in *Windsor*. Furthermore, the Federal Court's jurisdiction to make constitutional declarations is, of course *concurrent* with that of other provincial superior courts (*Jabour*).

66 It is therefore appropriate to ascribe limited weight to the *obiter* in paragraphs 70 and 71 of *Windsor SCC*. That being said, in the event that there is still doubt as to the Federal Court's statutory or constitutional ability to declare, as a remedy, that legislation is constitutionally invalid, inapplicable or inoperative, I believe it is necessary to demonstrate in this judgment why the Federal Court can indeed make a formal declaration of invalidity even though it is not a "superior court" within the meaning of section 96 of the *Constitution Act, 1867*. It is not a matter of placing particular emphasis on historical happenstance or philosophical or political speculation, but of giving credit to Parliament's legal reason and intent, which only an informed and prospective reading of the Constitution and its guiding principles can magnify.

C. The Federal Court is a "superior court" for the purposes of the exercise of the jurisdiction under section 18 of the Federal Courts Act

67 For present purposes and to avoid burdening the text, the term "Federal Court" may also, depending on the context, refer to the Federal Court of Appeal. There was an obvious practical reason behind the creation of the Exchequer Court in 1875 and the creation, in 1970, of the Federal Court, which has a broader jurisdiction: the better administration of the "laws of Canada." Federal law has no boundaries and can be applied indiscriminately throughout Canada. In this regard, not only is the Federal Court the only court of first instance with national jurisdiction in Canada, but its judgments can be executed throughout the country. This is reflected in the Federal Court's mission, which is to deliver justice and assist parties to resolve their legal disputes throughout Canada, in either official language, in a manner that upholds the rule of law and that is independent, impartial, equitable, accessible, responsive and efficient.

68 Access to justice, an essential pillar of the rule of law, has become the single biggest challenge facing courts across Canada. This reality is well explained by dissenting judges Moldaver and Brown in *Windsor SCC*, in paragraphs 77 to 79:

> [77] The history of the Federal Court reveals that it was intended by Parliament to have broad jurisdiction. The Exchequer Court, created in 1875, initially had limited jurisdiction: it could hear certain claims against the Crown, and eventually, claims relating to patents, copyrights, public lands, and railway debts (*The Supreme and Exchequer Court Act*, S.C. 1875, c. 11; *Exchequer Court Act*, R.S.C. 1970, c. E-11, ss. 17 to 30). During the 20th century, however, it became apparent that the Exchequer Court could not deal with many matters that transcended provincial boundaries, and that confusion, inconsistency, and expense tended to accompany litigation of these national matters in the provincial superior courts.
>
> [78] These problems prompted Parliament in 1970 to replace the Exchequer Court with the Federal Court, and to expand the Federal Court's jurisdiction (*Federal Court Act*, S.C. 1970-71-72, c. 1). According to the Minister of Justice, the Federal Court was designed to achieve two objectives: first, ensuring that members of the public would "have resort to a national court exercising a national jurisdiction when enforcing a claim involving matters which frequently involve national elements"; and second, making it possible for "litigants who may often live in widely different parts of the country to [have] a common and convenient forum in which to enforce their legal rights" (*House of Commons Debates*, vol. V, 2nd Sess., 28th Parl., March 25, 1970, p. 5473).
>
> [79] These purposes are better served by a broad construction of the Federal Court's jurisdiction. We acknowledge that the Federal Court is not without jurisdictional constraints. A broad construction of the Federal Court's statutory grant of jurisdiction cannot exceed Parliament's constitutional limits and intrude on provincial spheres of competence. ...
>
> [My emphasis.]

69 In short, justice is not in competition with itself: access to justice must prevail in every case, which favours a broad construction of the jurisdiction conferred on this Court by the *Federal Courts Act*. In this sense, the Federal Court is part of the solution, and it would be wrong to want to associate it with the problem of the increasing number of jurisdictions. When it created a national court of first instance, Parliament could very well have left it to the courts mentioned in section 129 of the *Constitution Act, 1867*, and to the other provincial courts created under subsection 92(14) of the *Constitution Act, 1867*, to exercise their traditional jurisdiction in civil and criminal matters, while making adjustments over time, if necessary, for the purposes of the "laws of Canada." But what characterizes the Federal Court is not only its nature as a national court (trial and appeal). Its composition also ensures national continuity (section 5.3 of the *Federal Courts Act*) and the maintenance of Canadian bijuralism (common law and civil law). However, like section 6 of the

Supreme Court Act, section 5.4 of the *Federal Courts Act* provides for effective representation of Quebec, with a minimum and large number of judges (at least five judges of the Federal Court of Appeal and at least 10 judges of the Federal Court) who must have been judges of the Court of Appeal or of the Superior Court of Quebec or members of the Bar of Quebec. It is an eloquent legislative demonstration of Parliament's wish to create a pan-Canadian court that is particularly well adapted to Canada's reality and bijuralism.

70 In *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433[*Reference re Supreme Court*], the Supreme Court pointed out that section 6 of the *Supreme Court Act* "reflects the historical compromise that led to the creation of the Supreme Court" (paragraph 48), whereas its purpose "is to ensure not only civil law training and experience on the Court, but also to ensure that Quebec's distinct legal traditions and social values are represented on the Court, thereby enhancing the confidence of the people of Quebec in the Supreme Court as the final arbiter of their rights" (paragraph 49). Incidentally, the Supreme Court noted in this regard that section 5.4 of the *Federal Courts Act*, "*in many ways reflects s. 6 of the Supreme Court Act* by requiring that a minimum number of judges on each court be drawn from Quebec institutions. The role of Quebec judges on the federal courts is a vital one" (paragraph 60) [my emphasis].

71 When we consider the role, mission and "implied powers [the Federal Court] and its predecessors have had for almost a century-and-a-half to determine the constitutional validity, operability and applicability of laws before it" (*Windsor FCA* at paragraph 73), we have a better understanding of the Federal Court of Appeal's conclusion in *Windsor FCA*. As Mr. Justice Stratas clearly stated in paragraph 47, "as long as the test in *ITO-Int'l Terminal Operators* is met, the Federal Court has jurisdiction to make declarations in constitutional matters, such as declarations of invalidity." Regarding sections 18 and 28 of the *Federal Courts Act*, in order to truly exercise their superintending and reforming function regarding the legality of decisions by any federal board, commission or other tribunal, the Federal Courts must perforce be able to declare inoperative and/or unconstitutional any provision inconsistent with the Constitution, the supreme law of Canada.

72 The grant of jurisdiction under the *Federal Courts Act* should not be interpreted in a narrow fashion under the pretext that this Court is a statutory court rather than an inherent jurisdiction court (*Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626at paragraphs 24 *et seq*. [*Canadian Liberty Net*]). The historical primacy of the "superior courts" fuels the synecdoche associated with the vague, immanent concept in the judicial sphere of "inherent jurisdiction." But that is not all, because there are many other (federal and provincial) ordinary courts that exercise, at trial or on appeal, concurrent jurisdiction in civil and criminal matters. Moreover, I do not believe that the Federal Courts (Federal Court of Appeal and Federal Court) can be legally equated with provincial inferior courts or specialized federal or provincial administrative tribunals, whose sole remedial power is limited to refusing to apply a law inconsistent with the

120 Constitution based on the principle of the rule of law (*R v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130at paragraphs 15-16 [*Lloyd*]).

73 On the one hand, there is the "narrow view" articulated by Madam Justice Wilson in *Roberts* — as previously expressed by Bora Laskin (who later became Chief Justice of Canada) — to the effect that "[the] omnicompetence of provincial superior courts was fed by a decision of the Privy Council [*Board v. Board*, [1919] A.C. 956 (P.C.) [*Board*]], suggestive of inherent superior court jurisdiction, that (to use its words) "if the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the [Queen's] Courts of justice"" (cited in *Canadian Liberty Net* at paragraph 29).

74 On the other hand, and this is the one that I retain today, there is the more modern view — which is consistent with the evolving nature of the Constitution — that the "purpose of the doctrine of inherent jurisdiction ... is simply *to ensure that a right will not be without* a superior court forum in which it can be recognized" [my emphasis]. In this case, the Supreme Court in *Canadian Liberty Net*, after distinguishing *Board*, clearly opted for a dynamic and pragmatic interpretation of the Federal Court's legislative jurisdiction. Sections 96 to 101 of the *Constitution Act, 1867* relating to judicature must be read as a coherent whole. It is worthwhile noting that the tenure of "superior court" judges set out in section 99 of the *Constitution Act, 1867* is not limited to judges of the provincial superior courts appointed by the Governor General under section 96 of the *Constitution Act, 1867*. It also includes judges of the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court and the Tax Court of Canada (*Valente v. The Queen*, [1985] 2 S.C.R. 673at paragraph 29). Also, according to subsection 35(1) of the *Interpretation Act*, R.S.C., 1985, c. I-21, the term "superior court" means these four courts mentioned above created under section 101 of the *Constitution Act, 1867*.

75 Canada was still a colony before Confederation. There was an element of unpredictability in 1867 when the Parliament of the United Kingdom adopted the *British North America Act*, 30-31 Vict., c. 3 (U.K.) (which in 1982 became the *Constitution Act, 1867*). Although the provinces of Canada (Ontario and Quebec), Nova Scotia and New Brunswick wanted to establish a Federal Union to form one Dominion (*Puissance*) under the crown of the United Kingdom of Great Britain and Ireland, with a constitution based on the same principles as that of the United Kingdom, the constitution was only repatriated in 1982. In fact, the sovereignty of Canada and the other Dominions was only legally enshrined by the *Statute of Westminster, 1931*, R.S.C 1970, App. II, No. 26. Canada has changed a great deal in 150 years. In other words, if realities change, so do the courts. This is a reflection of Canada, the provinces and the territories. The Supreme Court and the Exchequer Court were both created in 1875 under the same Act, and both courts were able to share the same judges for a few years (see section 60 of *The Supreme and Exchequer Court Act*).

76 Although section 129 of the *Constitution Act, 1867* explicitly provides for the continued existence of the courts in the provinces of Ontario, Quebec, Nova Scotia and New Brunswick at

the time of the union, they may subsequently be repealed, abolished or altered by the competent authorities. The Constitution is "... a living tree capable of growth and expansion within its natural limits", and it should be interpreted as such (*Edwards v Canada (Attorney General)*, [1930] AC 124 at p. 136). This is why the Judicial Committee of the Privy Council (for the United Kingdom) adopted a broad interpretation in 1947 when it confirmed the Parliament of Canada's power to terminate appeals in London (including any direct appeals permitted by provincial legislation). After the provisions of the *Statute of Westminster* came into force, there was no legal impediment, given Parliament's jurisdiction under section 101 of the *Constitution Act, 1867*, that the Supreme Court should exercise exclusive ultimate appellate civil and criminal jurisdiction (*Attorney General for Ontario v Attorney General for Canada*, [1947] AC 127 [*Abolition of Privy Council Appeals Reference*]).

77 Also, it is not disputed in this case that a superior court is one which has supervisory jurisdiction over lower courts and other inferior tribunals. A superior court also has plenary jurisdiction to determine any matter arising out of its original jurisdiction and is subject only to appellate review. In other words, it is not subject to the writs of other superior courts (*Felipa FC* at paragraphs 59-62. This point was not overruled by the Court of Appeal). Not surprisingly, and well before the Constitution was repatriated in 1982, the Supreme Court had already recognized that Parliament had full authority to transfer to a court established under section 101 of the *Constitution Act, 1867* superintending power over federal agencies, which until then had been exercised by the Court of King's Bench, and the Superior Court in Quebec as courts of law (*Three Rivers Boatman Limited c. Conseil Canadien des Relations Ouvrières et al*, [1969] R.C.S. 607at p. 616). The *inherent jurisdiction* of provincial superior courts is meaningful today only because it overlaps with other jurisdictions of federal or provincial legislative origin, and because it is exercised in a *residual manner* if a jurisdiction is not otherwise exercised by another tribunal of the Canadian federation. In short, all of today's Canadian courts came into existence as a result of statutory changes. These changes are exactly what enables them to provide better justice.

78 As a result, as the Supreme Court noted in *Canadian Liberty Net*, "[i]n a federal system, the doctrine of inherent jurisdiction does not provide a rationale for narrowly reading federal legislation which confers jurisdiction on the Federal Court" (at paragraph 35). Thus, because this involves the Federal Court's general administrative jurisdiction over federal administrative tribunals, "[t]his means that where an issue is clearly related to the control and exercise of powers of an administrative agency, which includes the interim measures to regulate disputes whose final disposition is left to an administrative decision-maker, the Federal Court can be considered to have a *plenary jurisdiction*" (*Canadian Liberty Net* at paragraph 36) [my emphasis]. If section 44 of the *Federal Courts Act* gives the Federal Court jurisdiction to grant an injunction in enforcing the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, this is all the more reason to argue that in the context of an action against the Crown or an application for judicial review, the inherent or residual jurisdiction of the provincial superior courts in matters involving the constitution or

122 *habeas corpus* in no way affects the "plenary jurisdiction" exercised by the Federal Court under sections 17 and 18 of the *Federal Courts Act*.

79 In this case, the federal Courts exercise a vital front-line role in the Canadian federation. Federalism and constitutionalism are two fundamental constitutional principles (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217at paragraph 32). They go hand in hand and are complementary, as are the other unwritten constitutional principles of the Constitution (democracy, rule of law and respect for minorities). Either the inherent jurisdiction theory of the provincial superior courts has the effect of depriving the Federal Court of jurisdiction "over an area where it is otherwise explicitly given extensive powers of supervision" (*Canadian Liberty Net* at paragraph 25); or "the language of the Act is completely determinative of the scope of the Court's jurisdiction" (*Canadian Liberty Net* at paragraph 26 citing *Roberts v Canada*, [1989] 1 SCR at p. 331 [*Roberts*]). In the area of judicial review, the Federal Court plays an essentially interventionist role in all forms of federal government activity, as it must maintain the rule of law, which of course authorizes it to make formal declarations of invalidity.

80 As the Supreme Court pointed out in *Reference re Supreme Court Act* at paragraph 89: "The existence of an impartial and authoritative judicial arbiter is a necessary corollary [of subsection 52(1) of the *Constitution Act, 1982*]. The judiciary has become the "guardian of the Constitution (*Hunter*, at p. 155, *per* Dickson J.)." In Canada, the courts — whose independence is constitutionally protected — exercise supervisory jurisdiction, which is essential to maintaining the democratic character of our institutions and respect for the rule of law. The lower courts must submit to their authority — which of course includes the federal boards. As the Supreme Court pointed out in *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54[*Martin*], the Constitution is the supreme law of Canada and, by virtue of subsection 52(1)the *Constitution Act, 1982*,the question of constitutional validity *inheres* in every legislative enactment. From this principle flows, as a practical corollary, the idea that Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts. Consequently, the power to rule on a legal issue is the power to rule on it by applying only valid laws. Thus, in principle, a legislative provision inconsistent with the *Charter* is invalid from the moment it is enacted, and a judicial declaration to this effect is but one remedy amongst others to protect those whom it adversely affects (see *Martin* at paragraphs 28 and 35). Like the other superior courts in Canada, within its jurisdiction, the Federal Court plays an essential and vital role of plenary supervision in the Canadian federation.

81 But it is still true today that a judge of a lower inferior provincial court (*Séminaire de Chicoutimi v. La Cité de Chicoutimi*, [1973] S.C.R. 681, 1972 CanLII 153 (SCC)); *R c Big M Drug Mart Ltd*, 1985 SCC 69, [1985] 1 SCR 295) or an arbitration board exercising powers under provincial legislation (*Douglas/Kwantlen Faculty Assn v. Douglas College*, [1990] 3 S.C.R. 570, 1990 CanLII 63 (SCC)), is not entitled to make a formal declaration of invalidity. This is normal,

because this type of court does not exercise a general supervisory function over government activities. However, this is not the case when a judicial declaration is made by "superior court judges of inherent jurisdiction and courts with statutory authority" (*Lloyd* at paragraph 15).

82 Because this involves the particular jurisdiction granted under the *Federal Courts Act*, professor Lemieux clearly noted that [TRANSLATION]: "The Federal Court can be characterized as a superior court. However, unlike provincial superior courts, this superior court is of legislative origin" (Denis Lemieux, "La nature et la portée du contrôle judiciaire," in Collection de droit 2016-2017, École du Barreau du Québec, vol. 7, *Droit public et administratif*, Cowansville, Éditions Yvon Blais, 2016, at p. 208). I also share the Attorney General of Canada's view that section 96 of the *Constitution Act, 1867* does not constitute a constitutional impediment, because section 101 of the same Act contains the terms: "notwithstanding anything in this Act" (*Abolition of Privy Council Appeals Reference* at paragraph 19). To reason otherwise would mean that a federal institution that plays a leading role in the Canadian federation would be annihilated from the Canadian landscape. Notwithstanding belated constitutional revisionism, as the Supreme Court itself stated in 1984: "[t]o conclude otherwise would, in paraphrase of the *Jabour* decision, *supra*, leave a federal court established 'for the better administration of the laws of Canada' in the position of having to participate in the execution and administration of such laws without the authority, let alone the duty, of first assuring itself that the statute before the Court is a valid part of the 'laws of Canada'" (*Northern Telecom* at p. 744).

83 In conclusion, although it is not a "superior court" within the meaning of section 96 of the *Constitution Act, 1867*, the Federal Court is nevertheless comparable to a superior court when it exercises general supervisory power over federal boards under section 18 of the *Federal Courts Act* (*Commonwealth of Puerto Rico v. Hernandez*, [1975] 1 R.C.S. 228at pp. 232-233, 1973 CanLII 184 (SCC)). The same applies when it deals with a matter under section 17 of the *Federal Courts Act*. The Federal Court therefore has jurisdiction to make a formal declaration of invalidity in a matter where the constitutional question is validly raised, which is the case here.

D. The intention of Parliament expressed in section 57 of the Federal Courts Act is to allow the Federal Courts to grant binding declaratory relief in constitutional matters

84 Canada does not have a single or specialized (provincial or federal) judicial authority that would be responsible for reviewing the legality of laws and regulations to the exclusion of any court with jurisdiction in civil or criminal matters. In enacting section 57 of the *Federal Courts Act*, Parliament established the statutory framework under which, for the better administration of federal laws and regulations, a constitutional question may be validly argued before the Federal Court of Appeal or the Federal Court or a federal board, and consequently — before the Supreme Court itself, when an appeal has been authorized. We can also imagine that the explicit reference in subsection 57(1) of the *Federal Courts Act* to provincial statutes or regulations targets those

particular cases where their application is likely to conflict with a federal law or one of the regulations (*Windsor FCA* at paragraphs 53-54).

85 Service of a notice of constitutional question to the Attorney General of Canada and the attorney general of each province is mandatory (subsection 57(1) of the *Federal Courts Act*). Not only is the attorney general entitled to adduce evidence and make submissions in respect of the constitutional question, once that attorney general has made submissions, *he or she is deemed to be a party to the proceedings* for the purpose of any appeal in respect of the constitutional question (ss. 57(4) and (5) of the *Federal Courts Act*). Section 19.2 of the *Tax Court of Canada Act*, R.S.C., 1985, c. T-2, establishes similar requirements. The requirement for a notice of constitutional question is also set out in several provincial laws, although the requirement to serve a notice, where a federal provision is at issue, is limited to the Attorney General of Canada and the Attorney General of the province in question (for example, in Quebec, see the new sections 76 and 77 of the *Québec Code of Civil Procedure*, CQLR c C-25.01 [CCP], formerly section 95).

86 The statutory notice of constitutional question allows courts of law — whose judges enjoy a guarantee of independence (unlike those of administrative tribunals) — to declare invalid a law or a regulation that contravenes the Constitution. As the Supreme Court of Canada noted in *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241at paragraph 48:

> In our constitutional democracy, it is the elected representatives of the people who enact legislation. While the courts have been given the power to declare invalid laws that contravene the Charter and are not saved under s. 1, this is a power not to be exercised except after the fullest opportunity has been accorded to the government to support its validity. To strike down by default a law passed by and pursuant to the act of Parliament or the legislature would work a serious injustice not only to the elected representatives who enacted it but to the people. Moreover, in this Court, which has the ultimate responsibility of determining whether an impugned law is constitutionally infirm, it is important that in making that decision, we have the benefit of a record that is the result of thorough examination of the constitutional issues in the courts or tribunal from which the appeals arise.
>
> [My emphasis.]

87 Furthermore, the Supreme Court of Canada has a well-established discretion, albeit one that is narrow and should be exercised sparingly, to address the merits of a constitutional issue when proper notice of constitutional question has been given at the appeal stage, even though the issue was not properly raised in the courts below (*Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3[*Guindon*]). Since January 1, 2017, the new rule 33 of the *Rules of the Supreme Court of Canada*, SOR/2002-156, provides that in the case of an appeal that raises an issue in respect of the constitutional validity or applicability of a statute, regulation or common law rule, or the inoperability of a statute or regulation, a notice of constitutional question shall be filed.

88 Accordingly, the Parliament of Canada clearly intended to allow the Federal Courts to grant binding declaratory relief in constitutional matters. Otherwise, section 57 of the *Federal Courts Act* would no longer have any practical utility, and the notice of constitutional question required by Parliament to allow the Attorney General to support the validity of the impugned provision and adduce evidence would be supererogatory.

V. Federal Court's discretion to grant declaratory relief with respect to a constitutional and administrative issue

89 Secondly, I am satisfied in this case that this Court should exercise its discretion to grant declaratory relief with respect to the constitutional validity, applicability or operability of subsections 140(1) and (2) of the CCRA, an with respect to the extent of the Board's obligations under the principles of fundamental justice and/or administrative law.

A. General principles

90 Whether this Court should exercise its discretion to grant reparation — including declaratory relief — will depend in particular on its assessment of the respective roles of the courts and administrative bodies, the circumstances of each case and whether there is an adequate alternative (*Strickland* at paragraphs 37-45; *Khosa* at paragraphs 36-40; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561at p. 575 and *Solosky* at pp. 830-831; *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49at pp. 90, 92- 93 and 96; and *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3at pp. 77-80).

91 It is inherent in a federal system such as that established under the *Constitution Act*, that the courts will be the authority in the community to control the limits of the respective sovereignties of the two plenary governments, as well as to police agencies within each of these spheres to ensure their operations remain within their statutory boundaries. Both duties of course fall upon the courts when acting within their own proper jurisdiction. (*Northern Telecom* at paragraph 12). Furthermore, no one questions that s. 18 of the *Federal Courts Act* does not withdraw the authority of the provincial superior courts to grant the traditional administrative law remedies against federal boards, commissions and tribunals on division of powers grounds (*Strickland* at paragraph 64; *Paul L'Anglais* at pp. 152-163), nor the residual power they possess in matters of *habeas corpus*.

92 It is worthwhile noting that in 1875, the Supreme Court itself had "concurrent jurisdiction with the Courts or Judges of several Provinces, to issue the writ of *Habeas Corpus ad subjiciendum*, for the purpose of an enquiry into the cause of commitment, in any criminal case under any Act of the Parliament of Canada, or in any case of demand for extradition" (section 51 of the *Act to establish a Supreme Court, and a Court of Exchequer, for the Dominion of Canada*). But because Parliament in 1970 omitted to mention *habeas corpus* in subsection 18(1) of the *Federal Courts Act* — even if it explicitly stipulated in subsection 18(2), that a writ of *habeas corpus* can be issued

in relation to any member of the Canadian Forces serving outside Canada - we can nevertheless ask ourselves whether this Court should today refuse to rule on the constitutional question given the particular expertise that provincial superior courts may possess in matters of *habeas corpus* (*Strickland* at paragraph 40; *Reza v. Canada*, [1994] 2 S.C.R. 394[*Reza*]).

93 The Supreme Court of Canada already noted in *R v. Miller*, [1985] 2 S.C.R. 613at p. 624 [*Miller*], that Parliament had intended to leave "the jurisdiction by way of *habeas corpus* to review the validity of a detention imposed by federal authority with the provincial superior courts." Considering Parliament's intention and the importance of *certiorari* in aid to the effectiveness of *habeas corpus*, it concluded that provincial superior courts had jurisdiction to issue *certiorari* in aid of *habeas corpus* to determine the validity of an incarceration. In *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809[*May*], the Court reaffirmed this principle, which it did again just recently in *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502[*Khela*].

94 Since the reasonableness of the decision to detain a person should be regarded as an element of its lawfulness, the provincial superior court may consider the reasonableness of a detention in an application for *habeas corpus* — even if in fact, but not in form, it examines the legality of the conduct and the orders of the federal board from the standpoint of administrative law (*Khela* at para. 65). Also, where the offender has chosen to apply for a writ of *habeas corpus*, he may *also* apply to a provincial superior court for a ruling on the constitutionality of the legislative provisions at issue (*Cunningham v. Canada*, [1993] 2 S.C.R. 143[*Cunningham*]). Following the same logic, the Federal Court will be able to do the same when the offender chooses to apply for judicial review of an action of the Service or a final decision of the Board. A conclusion is once again necessary: no court can claim to be in a better position than the other to rule on the question of the constitutional validity of a provision of the CCRA.

B. The appropriate remedial option belongs to the offender

95 Given their vulnerability and the realities of confinement in prisons, offenders must, despite concerns about conflicting jurisdiction, have the ability to choose between the forums and remedies available to them (*May* at paragraphs 66-67; *Khela* at paragraph 44). As the Supreme Court of Canada very succinctly put it in *May*, "[t]he [remedial] option belongs to the applicant" (at paragraph 44).

96 Subject to the possible application of the doctrine of issue estoppel, there is, in principle, nothing that prevents an offender who is subject to an LTSO from concurrently addressing a provincial superior court and the Federal Court, first, to apply for a writ of *habeas corpus* to have the lawfulness of his detention reviewed as a result of a change in an LTSO (*Laferrière c Centre correctionnel communautaire Marcel-Caron*, 2010 QCCS 1677; *Laferrière c Commission des libérations conditionnelles du Canada*, 2013 QCCS 4228; *Laferrière c Commission des libérations conditionnelles du Canada*, 2013 QCCA 1081), and second, to file an application for judicial

review before the Federal Court to challenge the merits of a Board decision restricting his residual liberty as a result of a further review of the conditions of the LTSO (*Laferrière FC*). Of course, the same flexibility also applies to cases of suspension of an LTSO by the Service and post-suspension review by the Board under section 135.1 of the CCRA.

97 Preferring not to apply to the Superior Court of Québec for a writ of *habeas corpus* during the period when he was returned to a penitentiary following the suspension of the LTSO, the applicant addressed the Federal Court to have the Court quash the Board's final decision and make a declaration of invalidity.

98 In this case, the applicant is criticizing the time limits of the current LTSO post-suspension review procedure, which means that the offender cannot, in practice, have a decision to suspend an LTSO quashed when the case is referred to him by the Service. The Service has 30 days from the suspension of the LTSO to submit its assessment to the Board and forward the content to the offender through a Procedural Safeguard Declaration (subsection 135.1(5) of the CCRA). In accordance with the *Decision-Making Policy Manual for Board Members* [Manual], the Board's review will not be completed until at least 15 days from the date on which the Procedural Safeguard Declaration is signed in order to allow the offender or his assistant to make written submissions. The Manual also states that the Board's review of the case will occur as soon as practicable, and within 60 days of the return to custody. Although subsection 135.1(2) of the CCRA limits the reincarceration of an offender to 90 days, the offender's counsel submits that the statutory time limit is almost always reached through the applicable procedures, insofar as the case proceeds to the Board review stage. However, during this 90-day period, the applicant is subject to an order restricting his residual liberty without being guaranteed an in-person hearing, because in-person hearings are held at the Board's discretion.

99 The respondent does not really dispute the time limits at issue or the fact that it may be difficult in practice to obtain a final decision — within 90 days of the suspension of the LTSO. Because of these very short time limits, it is practically impossible for the applicant to apply to the Superior Court of Quebec for a writ of *habeas corpus*, especially since the Court will not have time and will not be in a better position than the Federal Court to make a declaration of unconstitutionality. In practice, a long-term offender who has been returned to custody will return to the community after 90 days, unless the offender has been charged, and a provincial judge has meanwhile ordered the offender's detention pending trial or refused to release the offender on bail. The fact that the offender is in preventive detention following the filing of a criminal charge for the offence set out in section 753.3 of the *Criminal Code*, is, however, extrinsic to the Board's decision under section 135.1 of the CCRA. The Attorney General is not bound by a Board recommendation.

C. The conditions for having a full debate and deciding on the questions of administrative and constitutional law have been met in this case

100 According to case law, this Court can properly issue a declaratory remedy so long as it has the jurisdiction over the issue at bar, the question before the court is real and not theoretical, and the person raising it has a real interest to raise it (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3at paragraph 46 [Khadr]). All of these criteria have been met in this case.

101 First, the lawfulness of the actions of the Service or of the Board's decisions can be reviewed by this Court at first instance under sections 18 and 18.1 of the *Federal Courts Act*. This of course includes the question of whether the enabling legislative or regulatory provisions pursuant to which they initiated an action or made a decision are consistent with the Constitution.

102 Second, the constitutional question raised by the applicant is unprecedented and is not currently being argued before another tribunal. This is not a theoretical question, whereas the constitutionality of the statutory provision — subsection 140(2) of the CCRA — continues to cause problems between the parties.

103 Third, because the offender is subject to an LTSO, the applicant has a genuine interest in having the Court determine the constitutionality of subsections 140(1) and (2) of the CCRA when the Board conducts a post suspension review pursuant to section 135.1 of the CCRA. Also, the declaratory relief sought in this case by the applicant will have immediate practical effect and will apply at once because the Board will have to comply with the ruling. In this case, the Board's position has been forcefully argued by the Attorney General of Canada who is a party to the proceeding.

D. Binding effect of a declaration of constitutional invalidity or inoperability

104 I say this as an aside, but upon closer examination, the *obiter dictum* in paragraph 70 and 71 of *Windsor SCC* also seemed to question the binding character, both at the horizontal and interjurisdictional level, of a constitutional declaration, whatever it may be. If this applies to parties involved in private law litigation, where interests are necessarily limited, the question may nonetheless arise in a public law dispute where the respondent is the Government itself represented by the Attorney General. There is the doctrine of *stare decisis*, but there is also the authority of *res judicata* between both parties. Given that this Court has jurisdiction in this matter and for the other reasons outlined above, I am of the view that it is not necessary to use my discretion and refer the matter to the Superior Court of Québec.

105 The questions asked in *Windsor SCC* reflected some comments in *Strickland*, which was decided a year earlier. In *Strickland*, the appellants brought an application for judicial review in the Federal Court seeking a declaration that the *Federal Child Support Guidelines*, SOR/97-175 were unlawful as they were not authorized by s. 26.1(2) of the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.). In exercising her discretion, the judge at first instance had refused to hear the issue on its merits: in matters of family law, the provincial superior courts were better placed than the Federal

Court to decide whether the Federal Guidelines contravened the *Divorce Act*. In the final analysis, the Supreme Court rejected the appellant's position that the *alternative remedy* of litigation in the provincial superior courts was inefficient and would give rise to multiple proceedings.

106 But beyond a number of practical considerations that are not relevant in this case, Cromwell J. noted in paragraph 53:

> [53] The appellants' position overlooks the fact that a ruling of the Federal Court on this issue would not be binding on any provincial superior court. Thus, regardless of what the Federal Court might decide, before the ruling could have any practical effect, the issue would have to be re-litigated in the superior courts, or, alternatively, litigated up to this Court. Even if there were a binding ruling that the *Guidelines* were unlawful, a proliferation of litigation would be inevitable. It would be for the provincial courts to decide the impact of the illegality of the *Guidelines* on particular support orders and that could only be done in the context of a multitude of individual cases. ...
>
> [My emphasis.]

107 A cogent argument would have to answer the following question, if the roles were reversed and the same constitutional issue were decided by a provincial superior court: to what extent would a declaration of invalidity by a superior court (or provincial court of appeal) *legally* bind other provincial and statutory courts, including the Federal Court and the Federal Court of Appeal? To ask the question is to answer it. The answer is "no" if we consider the question from the standpoint of the doctrine of *stare decisis*. But this does not necessarily mean that the *persuasive character* of a ruling rendered in another jurisdiction will be set aside pursuant to the rules of judicial comity (Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 4th Ed (Markham, Ontario: LexisNexis 2015) [Lange] at pp. 499-500, referring to *Fording Coal Limited v. Vancouver Port Authority*, [2006] BCJ No 900 (CA) at paragraphs 14-17, citing *Morguard Investment Ltd v. De Savoye*, [1990] 3 S.C.R. 1077; *Toronto Auer Light Co v. Colling* (1898), 31 OR 18).

108 If we now consider the verticality of the doctrine of stare decisis, in a unitary state, everyone knows his rank — as in a chain of command. Because, overall, while the doctrine of *stare decisis* provides some legal certainty while permitting the orderly development of the law in incremental steps (*Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] S.C.J. No. 5at paragraph 44, citing *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] S.C.J. No. 72at paragraph 42) — it is more difficult to apply in the Canadian federation because of the limits of the jurisdictional or territorial competence of the Canadian courts. This is why we need a supreme court. But from a horizontal standpoint, as the Supreme Court of Canada pointed out in *Wolf v. The Queen*, [1975] 2 S.C.R. 107at page 109: "A provincial appellate court *is not obliged, as a matter either of law or of practice*, to follow a decision of the appellate court of another province, *unless it is persuaded that it should do so on its merits or for other independent reasons*" [My emphasis]. These comments were echoed after the *Charter* came into force in 1982 by the Court of Appeal of British Columbia

130 in a criminal case where the accused based his appeal on a declaration of invalidity of a provision of the *Criminal Code* made by the Court of Appeal for Ontario (*R v. Pete*, [1998] BCJ No 65at paragraph 5). Similarly, it can be said that the Federal Court or the Federal Court of Appeal is not bound by the declaration of invalidity of provincial courts of appeal unless it is satisfied that it must follow that decision on the basis of its intrinsic value or other independent reasons.

109 Ultimately, the (provincial or statutory) superior courts and the (provincial or statutory) intermediate courts do not have the final word with respect to the evolution of Canadian law (common law or civil law). The Supreme Court of Canada does. Regarding this point, as the Supreme Court pointed out in *Reference re Supreme Court* at paragraph 85: "Drawing on the expertise of its judges from Canada's two legal traditions, the Court ensured that the common law and the civil law would evolve side by side, while each maintained its distinctive character. The Court thus became central to the functioning of legal systems within each province and, more broadly, to the development of a unified and coherent Canadian legal system." But as the Supreme Court itself explained, the role of the Court of Canada was further enhanced as the 20th century unfolded following the abolition in 1975 of appeals as of right to the Court in civil cases (paragraph 86).

110 But getting back to the present, we are not discussing the evolution of common law or civil law in this case. From a strictly practical point of view, what is essential in an administrative and constitutional matter such as the one before us is that the declaration of invalidity sought by a party can bind the Attorney General of Canada once the Federal Court decision has become final and all appeal mechanisms have been exhausted. In particular, this applicant is complaining about a breach of the *Charter*. As s. 32 of the *Charter* dictates, the *Charter* applies to governments and legislatures: "Its purpose is to provide a measure of protection from the coercive power of the state and a mechanism of review to persons who find themselves unjustly burdened or affected by the actions of government" (*Young v. Young*, 1993 SCC 34, [1993] 4 S.C.R. 3). Under subsection 24(1) of the *Charter*, in the event of a violation of section 7 of the *Charter*, the Federal Court also has jurisdiction to order appropriate remedies with regard to the review of the lawfulness of any decision made by the government or a federal board (*Singh* at paragraphs 75-78; *Operation Dismantle* at paragraphs 28 and 69; *RWDSU v. Dolphin Delivery Ltd.*, 1986 SCC 5, [1986] 2 S.C.R. 573at paragraph 34).

111 We should also revisit the concept of *lis inter partes*, which is essential to the application of *res judicata*, or even issue estoppel or abuse of process, since disputes must eventually come to an end. The Attorney General of Canada is party to this case. Pursuant to subsection 2(2) of the *Department of Justice Act*, R.S.C., 1985, c. J-2, the Minister is *ex officio* Her Majesty's Attorney General of Canada, in that the Minister holds office during pleasure and has the management and direction of the Department. Furthermore, section 4 stipulates that the Minister is the official legal adviser of the Governor General and the legal member of the Queen's Privy Council for Canada and shall see that the administration of public affairs is in accordance with law and advise on

the legislative Acts. Under subsection 4.1(1), the Minister shall examine whether the Bills and regulations are inconsistent with the purposes and provisions of the *Charter*. Finally, paragraph 5(1)(d) dictates that the Attorney General of Canada shall have the regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada. There is really nothing new in this legislative expression. The Attorney General of Canada and the Attorneys General of the provinces, collectively, are the descendants of the Attorney General of England (section 135 of the *Constitution Act, 1867*). An important aspect of the Attorney General of England's traditional constitutional role is to protect the public interest in the administration of justice. However, in Canada, the Attorney General is charged with duties that go beyond the management of prosecutions. Unlike England, the Attorney General is also the Minister of Justice and is generally responsible for drafting the legislation tabled by the government of the day (*Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372at paras. 24-27; *Canada (Attorney General) v. Cosgrove*, 2007 FCA 103, [2007] 4 FCR 714at paras. 34-36 — Supreme Court appeal denied 2007 SCC 66738). This is another notable aspect of the constitutional evolution of Canadian institutions.

112 It is safe to say that in constitutional cases, the effect of declarations of inoperability made by a court of law pursuant to section 52 of the *Constitution Act, 1982* is not trivial (Sarna at pp. 151-153). It goes without saying that the issue of whether such a declaration should be suspended — in order not to create a legislative vacuum — is a consideration in the public interest which may be studied by the trial judge after having heard the representations of the parties, including of course, those of the Attorney General. Eventually, depending on whether a judicial declaration has been made at first instance, a party may appeal to an intermediate court of appeal, and the constitutional question may ultimately be decided by the Supreme Court.

113 Similarly, if the court of law considers, in exercising the remedial power set out in subsection 24(1) of the *Charter* — that a declaration, rather than a particular concrete remedy, is appropriate and just under the circumstances, it should not be assumed that such a judicial declaration will not have any meaningful effect from a practical standpoint. In *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*, [2015] 2 S.C.R. 139, 2015 SCC 21, the Supreme Court pointed out that judicial declarations are often made under section 23 of the *Charter*, the minority language education provision that guarantees minority language rights holders the right to have their children receive primary and secondary school instruction in English or French.

114 At paragraph 65, Karakatsanis J. noted in this regard:

> That said, there is a tradition in Canada of state actors taking *Charter* declarations seriously: see, e.g., P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 40-37. As this Court noted in *Doucet-Boudreau*, "[t]he assumption underlying this choice of remedy is that governments will comply with the declaration promptly and fully" (para. 62). Indeed, this represents one reason why courts often choose to issue declarations in the context of s. 23

(M. Doucet, "L'article 23 de la *Charte canadienne des droits et libertés*" (2013), 62 S.C.L.R. (2d) 421, at pp. 462-63).

[My emphasis.]

115 At the risk of repeating myself, the Attorney General of Canada was *validly* constituted *as the respondent* in this application for judicial review and judicial declaration — which alleges that subsections 140(1) and (2) of the CCRA are inconsistent with the constitutional right guaranteed in section 7 of the *Charter*. In this case, the Government of Canada will be bound by this Court's ruling, once the decision has become final and all appeal mechanisms have been exhausted. I am therefore satisfied that any declaratory relief in this case may have a meaningful effect. If a party is dissatisfied, it can still appeal to the Federal Court of Appeal or even to the Supreme Court.

116 Consequently, it would not be in the best interests of justice to ask the applicant to have the Superior Court of Québec address this point in order to resolve the constitutional question now before the Federal Court. Considering the costs already incurred by the parties and that this Court is equally well placed to settle the question involving the CCRA, this is not a case where the Court should exercise its discretion to stay these proceedings pursuant to section 50 of the *Federal Courts Act*.

VI. Merits of the parties' arguments on the constitutional question

117 It is now a matter of determining whether subsections 140(1) and (2) of the CCRA violate section 7 the *Charter*, which states that everyone has the "right to life, liberty and security of the person" and the right not to be deprived thereof except "in accordance with the principles of fundamental justice."

A. Issue

118 To a large extent, the *Charter* argument and the administrative law argument meet without merging. On the one hand, if the statutory provisions at issue are inconsistent with section 7 and cannot be justified under section 1 of the *Charter*, the Court may provide declaratory relief under section 52 of the *Constitution Act, 1982*. On the other hand, if the legislative discretion to hold a hearing is not in itself inconsistent with section 7 of the *Charter*, and it is rather the Board's use of this discretion that is problematic, the Court may prescribe a remedy that it considers appropriate and just, under subsection 24(1) of the *Charter*, which may include granting declaratory relief under section 18 of the *Federal Courts Act*.

119 In general, the onus is on the applicant to prove two things: first, that he has suffered or may suffer prejudice to his right to life, liberty and security of person; and, second, that the breach violated or did not conform to the principles of fundamental justice. If the claimant succeeds, the government bears the burden of justifying the deprivation under s. 1, which provides that the rights

guaranteed by the *Charter* are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society (*Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350at paragraph 12 [*Charkaoui*]).

B. Positions of the parties

120 At the risk of repeating myself, here is a brief summary of the positions of the parties. The applicant argues that subsection 140 (2) of the CCRA, which gives the Board discretion to hold a hearing, must be declared invalid or inoperative in the case of long-term offenders subject to an LTSO. The respondent counters that the discretion granted under subsection 140(2) of the CCRA is not the problem. Rather, the problem lies with the Board's duty, derived from the principles of fundamental justice, to exercise that power in a manner consistent with section 7 of the *Charter*.

121 As indicated above, the outcome of the dispute depends on the discretion to hold a hearing under subsection 140(2) of the CCRA. The constitutional argument was formally raised by the applicant before the Board, but the Board preferred not to address it in the contested decision. We should keep in mind here that in addition to the judgments rendered by the Superior Court of Québec and the Appeal Court of Québec in *Canada (Procureur général) c Way*, 2015 QCCA 1576 [*Way CA*], confirming 2014 QCCS 4193 [*Way CS*], counsel for the applicant cited in her written submissions of June 5, 2016, in support of her requisition for hearing before the Board, various decisions of the Supreme Court of Canada and the provincial superior or appellate courts (*Gamble*; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817at paragraphs 21-28 [*Baker*]; *R v. Gatza*, 2016 ABPC 37[*Gatza*]; *R v. Bourdon*, 2012 ONCA 256[*Bourdon*]; *Regina v. Cadeddu* (1982), 4 CCC (3d) 97 (Ont. HC) [*Cadeddu*]; *Illes v. The Warden Kent Institution*, 2001 BCSC 1465; *Swan v. Attorney General of British Columbia* (1983), 35 CR (3d) 135) [*Swan*]), and a recent Federal Court decision (*Gallone*) which confirmed the right to an oral hearing in such a case. None of these decisions were considered by the Board in the decision under review.

122 Relying on the case law cited above and the reasoning of the Superior Court and the Court of Appeal of Québec in *Way*, the applicant argues that the same finding of invalidity or inoperability of subsections 140(1) and (2) of the CCRA is required in the case of long-term offenders whose LTSO has been suspended by the Service and whose case has been referred to the Board under section 135.1 of the CCRA. A hearing must be held, unless the offender waives this right in writing or fails to attend the hearing.

123 The respondent counters these arguments by stating that the declaration of invalidity made in *Way* does not apply in this case, because the reasoning of the Superior Court and the Court of Appeal of Québec does not support the applicant's arguments. The respondent notes that an in-person post-suspension hearing was never automatically granted by law to the offender whose LTSO was suspended under section 135.1 of the CCRA. Also, there are major differences between

134 the suspension of an LTSO and the suspension, cancellation, termination or revocation of parole or statutory release by the Board.

124 The applicant replies that the respondent's narrow interpretation of subsections 140(1) and (2) of the CCRA is inconsistent with the fundamental right to be heard, and submits that in all cases where an LTSO is suspended, the long-term offender's residual liberty is in fact restricted. Also, everything in the case law indicating that it is important that the prisoner be able to submit his own version of the facts to the Board suggests that any type of *ex parte* hearing is very suspect (*Swan*; *Cadeddu*; *Conroy and the Queen*, [1983] 5 CCC (3d) 501, 1983 CanLII 3066 (ONSC); *Re Lowe and the Queen*, [1983] 5 CCC (3d) 535 (BCSC), 1983 CanLII 328 (BCSC).

C. Legal framework governing long-term supervision orders

125 This has already been explained. Actions taken by the Service and decisions made by the Board with respect to supervision of long-term offenders fall within the authority of the Parliament of Canada. The applicable guidelines are found in the *Criminal Code* and the CCRA. An overview follows.

126 First, section 753.1 of the *Criminal Code* allows a judge, at the time of sentencing, to declare a person a "long-term offender" [offender]. At the expiration of the sentence, the offender is then subject to an LTSO for a period that does not exceed 10 years. It is important to note that the purpose of any such conditional release is to contribute to the maintenance of a just, peaceful and safe society by making appropriate decisions as to the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens (section 100 of the CCRA).

127 On the other hand, it is up to the Board to establish the specific conditions of the LTSO. These conditions remain valid for the period that the Board specifies (subsection 134.1(3) of the CCRA). This notwithstanding, the general conditions set out in subsection 161(1) of the *Corrections and Conditional Release Regulations*, SOR/92-620 [Regulations], are applicable, with necessary modifications, to the offender supervised by an LTSO (subsection 134.1(1) of the CCRA).

128 The Board may, at any time during the supervision period, vary or remove any such conditions (subsection 134.1(4) of the CCRA). Additionally, an offender who is required to be supervised, a member of the Board or, on approval of the Board, the offender's parole supervisor, may apply to a superior court of criminal jurisdiction for an order reducing the period of long-term supervision or terminating it on the ground that the offender no longer presents a substantial risk of reoffending and thereby being a danger to the community. The onus of proving that ground is on the applicant (subsection 753.2(3) of the *Criminal Code*).

129 Administrative and penal mechanisms are in place to limit or otherwise control the residual liberty of the offender supervised by an LTSO with a view to ensuring the offender complies with the conditions of the LTSO.

130 First, subsection 134.2(1) of the CCRA provides that an offender supervised by an LTSO shall comply with any instructions given by a member of the Board or a person designated, by name or by position, by the Chairperson of the Board or by the Commissioner, or given by the offender's parole supervisor, respecting any conditions of long-term supervision in order to prevent a breach of any condition or to protect society. Meanwhile, subsection 753.3(1) of the *Criminal Code* provides that an offender who, without reasonable excuse, fails or refuses to comply with long-term supervision is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years.

131 Second, when an offender fails to comply with a condition of an LTSO, the Service may suspend the community supervision and authorize the recommitment of the offender to custody for a period not exceeding 90 days (subsections 135.1(1) to (4) of the CCRA). In this circumstance, the Correctional Service Canada *Commissioner's Directive no. 715-2* concerning the post-release decision process [Directive] provides that the Service shall review the case. The LTSO is suspended only when an offender's risk is assessed as unmanageable in the community. If applicable, a warrant of suspension of conditional release is issued. A post-suspension interview is then conducted to advise the offender of the details of the suspension and provide him/her an opportunity to explain his/her conduct.

132 Third, if the Service does not cancel the suspension, the offender's case may be referred to the Board for review (subsection 135.1(5) of the CCRA). Where an officer of the Service finds that the suspension should be continued, the officer forwards to the Board an "Assessment for Decision" and shares any nonconfidential information from the assessment with the offender. The offender may make written representations and request a meeting in person with the Board. However, as explained below, the decision to hold a hearing is discretionary in this case (subsections 140(1) and (2) of the CCRA).

133 The Board shall, on the referral to it of the case, review the case and, before the end of the maximum period of 90 days, may: 1) cancel the suspension, if the Board is satisfied that, in view of the offender's behaviour while being supervised, resumption would not constitute a substantial risk by reason of the offender reoffending before the expiration of the period; 2) where the Board is satisfied that no appropriate program of supervision can be established that would adequately protect society from the risk of the offender reoffending, and that it appears that a breach has occurred, recommend that an information be laid charging the offender with an offence under section 753.3 of the *Criminal Code* (subsection 135.1(6) of the CCRA).

134 If the Board recommends that an information be laid, the Service shall make the recommendation to the Attorney General who has jurisdiction in the place in which the breach of the condition occurred — in other words, the provincial Crown (subsection 135.1(7) of the CCRA). The presumption of innocence applies to this step (subsection 11(d) of the *Charter*), while the person charged has a right not to be denied reasonable bail without just cause (subsection 11(e) of the *Charter*). An offender that does not pose a risk may consequently request conditional release pending the hearing of his/her case.

135 If the offender is found guilty of an offence referred to in section 753.3 of the *Criminal Code*, then the judge is responsible for determining, among the entire range of sentencing options, the sentence proportional to both the gravity of the offence and the degree of responsibility of the offender. The breach of an LTSO is not governed by a separate sentencing code or system. Time spent in preventive detention following indictment of the offender is taken into account although not necessarily time elapsed during the LTSO suspension period (maximum 90 days).

D. Hearing before the Board: Mandatory or discretionary?

136 Section 140 of the CCRA describes the cases in which a hearing before the Board is mandatory or discretionary. The text of section 140 is cited above (paragraph 4).

137 Subsection 140(1) of the CCRA stipulates that a hearing is mandatory in the cases listed in paragraphs (a) to (e) of subsection (1). However, according to subsection 140(2) of the CCRA, a hearing is at the Board's discretion in other cases, which includes a post-suspension hearing following the suspension of an LTSO (section 135.1 of the CCRA).

138 The specific cases in which a hearing is mandatory are set out by the Quebec Court of Appeal in *Way CA* in paragraphs 41 to 48. I am taking the liberty of reproducing this list from *Way CA* while disregarding the footnotes.

139 Under paragraph (a), the Board shall hold a hearing for the first review for day parole of the parties in question. In cases where the offender served a sentence of less than two years, the Board is not required to hold a hearing.

140 Under paragraph (b), the Board shall hold a hearing when reviewing the case of every offender who is serving a sentence of two years or more and who is not within the jurisdiction of a provincial parole board for the purpose of deciding whether to grant full parole. It shall also hold a hearing in relation to further review subsequent to a decision not to grant full parole or day parole or where a review was not conducted because the offender advised the Board that they do not wish to be considered for full parole. This further review is conducted within two years of the decision. The Board also holds a hearing when conducting another review concerning the

cancellation or termination of parole. This further review is also conducted within two years of the cancellation or termination.

141 Under paragraph (c), the Board shall hold a hearing when reviewing the case of an offender "who is serving a sentence of two years or more that includes a sentence imposed for an offence set out in Schedule I or II or an offence set out in Schedule I or II that is punishable under section 130 of the *National Defence Act*." Sections 129, 130 and 131 of the CCRA appear under the "Detention during Period of Statutory Release" heading.

142 Under paragraph (d), the Board shall hold a hearing for "a review following a cancellation of parole." It is to be noted that in 2012, paragraph 140(1)(d) of the CCRA was amended by section 527 of the *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c. 19 [2012 amendments]. These legislative changes came into force on December 1, 2012 (see SI/2012-88). Previously, paragraph 140(1)(d) of the CCRA provided that the Board was to hold a hearing for a review following "suspension, cancellation, termination or revocation of parole or following a suspension, termination or revocation of statutory release."

143 Under paragraph (e) and under the Regulations, the Board shall hold a hearing where an offender applies for an unescorted temporary absence if the Board has not yet granted a first unescorted temporary absence or a first day parole and where the offender is serving, in a penitentiary, a sentence of life imprisonment imposed as a minimum punishment or commuted from a sentence of death, or a sentence of detention for an indeterminate period (subsection 164(1) of the Regulations). The Board shall also hold a hearing in cases where an offender applies for an escorted temporary absence on certain specific grounds if the Board has not yet granted a first unescorted temporary absence and the offender is serving a sentence of life imprisonment as a minimum punishment or commuted from a sentence of death (subsection 164(2) of the Regulations).

144 Lastly, neither the Act nor the Regulations define the terms "cancellation," "termination" or "revocation." Cancellation may be said to take place where authorization for release is withdrawn before it takes effect (for example, subsection 124(3) of the CCRA). Termination and revocation occur following release. Termination occurs when "the undue risk to society is due to circumstances beyond the offender's control" (subsection 135(7) of the CCRA), while revocation occurs in all other cases.

E. Declaration of invalidity in Way

145 On August 26, 2014, the Superior Court of Québec granted an application for *habeas corpus* and *mandamus* in aid and declaratory relief submitted by two offenders whose day parole or full parole had been revoked by the Board without calling the offenders to an oral hearing (*Way SC*).

146 In the opinion of the Superior Court, the 2012 amendments represent a significant departure from a longstanding tradition of recognizing and protecting the right of offenders to be heard before major decisions are made concerning their potential re-release. In fact, the Superior Court concludes that the legislative changes of 2012 resulted in deprivation of the two offenders' residual liberty, contrary to principles of fundamental justice. Under these circumstances, detention of the two offenders was illegal. Section 527 of the *Jobs, Growth and Long-term Prosperity Act* and new paragraph 140(1)(d) of the CCRA were consequently declared inoperative on the grounds that these provisions violate section 7 of the *Charter* and cannot be saved pursuant to section 1.

147 On October 1, 2015, the judgment in *Way SC* was affirmed by the Court of Appeal of Québec (*Way CA*). The Court of Appeal noted that [TRANSLATION] "in the implementation of the parole system, every decision has significant impact on an offender's life," while [TRANSLATION] "revocation can have a number of serious consequences, notably a longer period of imprisonment and the loss of employment": *Way* at para 64, citing a comment from Laskin J., dissenting, in *Mitchell v. R.*, [1976] 2 S.C.R. 570on page 584 [*Mitchell*] affirmed by the Supreme Court in *Singh* on pages 209-210.

148 Now, although flexibility must be shown when it comes to analyzing procedural fairness with respect to the parole process (*Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75at paras 25-26 (SCC) [*Mooring*]), the Court of Appeal of Quebec also notes, at paragraph 72:

> [72] [...] [TRANSLATION] it is difficult not to observe that the amendment set out in section 527 of the [*Jobs, Growth and Long-term Prosperity Act*] creates an arbitrary situation. Apart from the financial savings sought by Parliament, there is no rational basis for making a different procedure applicable to decisions having similar impact on different offenders. Moreover, it is unfair to allow a hearing for an offender whose parole is cancelled before it has begun and to let the [Board] decide without limitation as to this benefit, while an offender's parole is suspended or revoked after the offender has earned this benefit.

149 Ultimately, the Court of Appeal of Québec concludes that there was no analytical error in the Superior Court's reasoning, whether in relation to the violation of section 7 of the *Charter* or its justification pursuant to section 1.

150 On April 21, 2016, the Supreme Court granted leave to appeal the decision in *Way CA*. On June 16, 2016, it formulated two constitutional questions concerning the violation of section 7 of the *Charter* and justification of any such violation pursuant to section 1. On September 7, 2016, however, the Attorney General of Canada withdrew its appeal and the case was closed.

151 On March 27, 2017, at the hearing for the present application for judicial review and declaratory relief, counsel for the respondent indicated that the Board is complying henceforth, across Canada, with the declaration of invalidity in *Way SC* despite the fact that the provisions

declared inoperative by the Superior Court of Québec (section 527 of the *Jobs, Growth and Long-term Prosperity Act* and paragraph 140(1)(d) of the CCRA) had not been officially repealed by Parliament. As a consequence, in practice, the Board automatically holds a hearing in all cases involving the suspension, cancellation, termination or revocation of an offender's parole or statutory release. However, it does not do so in cases referred to it by the Service following the suspension of an LTSO, when the decision as to a post-suspension hearing is made on a case-by-case basis.

152 This Court is not bound by provincial judgments. Notwithstanding this, it examined the persuasive character of the judgments rendered in Quebec in *Way* to determine whether similar reasoning could be applied to the suspension of an LTSO. Although the 2012 amendments to section 140 of the CCRA were declared unconstitutional, in my humble opinion, there are significant reasons for distinguishing the *Way* case from the case at hand.

153 First, in the case of long-term offenders, community supervision is based on the sentence handed down by a court of criminal jurisdiction, not a decision of the Board. The Board can in no way vary of its own motion the sentence passed.

154 Second, whereas parole is, among other factors, granted to an offender for good behaviour during detention, the LTSO is a consequence of the offender's behaviour based on the seriousness of his or her crimes or on the offender's repetitive behaviour (section 753.1 of the *Criminal Code*). Additionally, the procedure applicable to the violation of a condition of an LTSO illustrates the primary objective, this being to protect society from the danger posed by putting the offender back into the community. The LTSO is initially suspended by the Service, which obtains a warrant of recommitment. After meeting in person with the offender, the Service makes a decision as to the continuation or cancellation of the suspension. If the Service opts to continue the suspension, the case is referred to the Board. The Board must render a decision within the statutory time limit of 90 days, after which suspension of the LTSO cannot be continued and the offender must be released (unless, of course, the offender is charged in the meantime and the Attorney General opposes the offender's release).

155 Third, the material evidence in the file of this Court — which appears to be either absent or not considered in *Way* — does not lead me to conclude that any major issues of credibility *remain or are determining factors* in the decision of the Board under section 135.1 of the CCRA. As such, pursuant to section 9.1 of the Manual, when making a determination on whether to cancel the suspension or recommend that an information be laid pursuant to subsection 135.1(6) of the CCRA, Board members assess all relevant information, including:

> a. the offender's progress towards meeting the objectives of the correctional plan, including addressing the risk factors and needs areas;

b. information that the offender has demonstrated behaviour that may present a substantial risk to the community by failing to comply with one or more conditions (including time unlawfully at large and since re-incarceration);

c. reliable and persuasive information that a breach of condition has occurred;

d. whether the offender understood the full implications of the condition, or whether an explanation for failing to comply with the condition could be argued;

e. any documented occurrences of drug use, positive urinalysis results or failures or refusals to provide a sample; and

f. history and circumstances of breaches, suspensions or revocations during this or previous periods of conditional release or long-term supervision and any alternative interventions attempted to manage the risk.

156 Fourth, a recommendation to lay a charge pursuant to section 753.3 of the *Criminal Code* does not bind the Attorney General. More importantly, the offender is entitled to the presumption of innocence. They will have an oral hearing with a judge and may argue all means of defence to have the accusation dropped.

157 Fifth, the 2012 amendments in no way altered the situation of long-term offenders. The illogical nature of these changes was a determining factor in *Way* in terms of questioning the different treatment of offenders already on parole. In this case, the post-suspension hearings were always at the discretion of the Board when a case was referred to it following the suspension of an LTSO.

158 In addition, although this Court considered the conclusions and reasoning of the Superior Court of Québec and the Court of Appeal in *Way*, it must draw its own conclusions concerning the constitutionality of the discretion provided by subsection 140(2) of the CCRA with respect to a post-suspension review concerning a long-term offender whose LTSO has been suspended by the Service.

F. Deprivation of offender's residual liberty

159 To summarize from the start: first, the applicant claims that the suspension of an LTSO by the Service and ensuing recommitment to custody both represent significant restrictions on the residual liberty of the offender under community supervision (*Gallone* at para 17, *R. v. Gamble*, [1988] 2 S.C.R. 585; *Illes v The Warden Kent Institution*, 2001 BCSC 1465). According to the applicant, the right to residual liberty is more important in the context of an LTSO than the right of an offender on day parole or on full parole. This is because an offender under community supervision has finished

serving their sentence, unlike an offender on parole. The applicant cites further the importance of the principle of reintegration into society supporting the long-term supervision system.

160 I generally agree with the applicant. When an LTSO is suspended, the offender's residual liberty is indeed restricted for a period of up to 90 days. The respondent submits that recommitment of a long-term offender to custody is expressly permitted under section 135.1 of the CCRA. Now, the Board's exercise of discretion as to holding a hearing, as provided in subsection 140(2) of the CCRA, does not restrict the offender's residual liberty in any way. In any case, the deprivation of an individual's liberty must be sufficiently serious to justify protection under the *Charter* (*Cunningham v. Canada*, [1993] 2 S.C.R. 143at p. 151). In the present case, any deprivation of the offender's liberty beyond the statutory period of 90 days is not attributable to the Board's recommendation, at least, not significantly enough to claim violation of section 7 of the *Charter* (*Huynh v. Canada*, [1996] 2 FCR 976).

161 The respondent's argument is not convincing. It is not my role to decide whether the restriction of a long-term offender's residual liberty is greater or lesser than that resulting from the suspension of parole. As noted by the Supreme Court of Canada in *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433[*Ipeelee*], the LTSO represents a form of conditional release governed by the CCRA, and its purpose is consequently to contribute to the maintenance of a just, peaceful and safe society, facilitating the rehabilitation and reintegration of offenders (at para 47). In this regard, the Court notes at paragraph 48:

> [48] Reading the *Criminal Code*, the *CCRA* and the applicable jurisprudence together, we can therefore identify two specific objectives of long-term supervision as a form of conditional release: (1) protecting the public from the risk of reoffence, and (2) rehabilitating the offender and reintegrating him or her into the community. The latter objective may properly be described as the ultimate purpose of an LTSO, as indicated by s. 100 of the *CCRA*, though it is inextricably entwined with the former. [...]
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> [My emphasis.]

162 The mechanisms of the CCRA in relation to community supervision of a long-term offender constitute a whole. The various steps leading to deprivation of an offender's residual liberty cannot be artificially isolated. Suspension of an LTSO, recommitment to custody and even the subsequent indictment of the offender must be considered overall from the viewpoint of their practical effects on the offender. With respect to the first phase of the review required under section 7 of the *Charter*, the issue is not whether the existence of discretion as to holding a hearing goes against the principles of fundamental justice but instead whether the individual's right to liberty is engaged. Such is the case in this instance when considering the adverse application of the legislative mechanisms in question. One day the offender is released under community supervision; the next, following allegations of violation of the LTSO, the Service issues a warrant and the offender is recommitted to custody for a period of up to 90 days.

163 In the present case, even if the Board can ultimately only make a recommendation to prosecute to the Attorney General under paragraph 135.1(6)(c) of the CCRA, it remains responsible for deciding whether suspension of the LTSO by the Service is justified to begin with. The applicant is not stating here that his recommitment to custody is in itself illegal but that the offender has a right to an oral hearing to explain his conduct. If the Board does decide within the 90-day time limit not to suspend the LTSO, then the offender will be released again. Now, paragraph 135.1(6)(a) of the CCRA provides that a suspension may be cancelled if the Board finds, in view of the offender's conduct during the supervision period, that there is not a high risk of reoffending before expiration of this period. The Board may also vary the conditions of an LTSO. Further, I am not convinced that the maximum recommitment to custody of 90 days specified in section 135.1 of the Act should be separated from the application of subsection 140(2) of the Act concerning the holding of a hearing.

164 Having determined that the offender's right to liberty is engaged by application of the mechanisms provided in section 135.1 of the CCRA, it is now appropriate to determine whether the discretionary nature of the power granted under subsection 140(2) of the CCRA as to holding a hearing goes against principles of fundamental justice; first, however, we must identify which principles of fundamental justice are potentially applicable to the case under consideration.

G. Variable content of obligation to act fairly

165 The two parties agree that the Board is required to comply with principles of fundamental justice. However, they have adopted diverging positions on the question as to whether an oral hearing before the Board is necessary *in all cases involving suspension of an LTSO* referred to the Board by the Service.

166 The analysis grid proposed by the Supreme Court in *Baker* for establishing the scope of the obligation to act fairly is well known and not subject to challenge. The first factor is the nature of the decision being made, or the closeness of the administrative process to the judicial process in the process provided for, the function of the decision-making body and the determinations that must be made to reach a decision (*Baker* at para 23). The second factor is the nature of the statutory scheme, or the role of the particular decision within the statutory scheme including, for example, the appeal procedure or whether further requests can be submitted (*Baker* at para 24). The third factor is the importance of the decision to the individuals affected, or its impact on those persons and the scope of the repercussions of the decision (*Baker* at para 25). The fourth factor is the legitimate expectations concerning the procedure required or its outcome (*Baker* at para 26). The fifth factor is the choices of procedure made by the agency itself, considering the agency's expertise and the extent to which the statute leaves to the decision-maker the ability to choose its own procedures (*Baker* at para 27).

167 In two recent instances, *Gallone* and *Laferrière FC*, the Federal Court contributed significantly toward developing the administrative law and the content of the rules of procedural fairness. When an offender under an LTSO exhibits cognitive (psychiatric) problems, or when the reliable and convincing nature of the information examined by the Board cannot be evaluated by simple review of the case, an oral hearing should generally be held.

168 We will begin with the *Gallone* case. Meticulously reviewing each of the five factors mentioned in the *Baker* judgment in light of the plan at issue and the impact of the Board's decision on the residual liberty of the offender whose LTSO had been suspended, Judge Tremblay-Lamer notes in paragraphs 16, 17 and 19:

> [16] In this case, it is true that the PBC acts in neither a judicial nor a quasi-judicial manner (*Mooring v. Canada (Parole Board of Canada)*, [1996] 1 S.C.R. 75at paras 25-26) and that subsection 140(2) of the *Act* provides the PBC with the discretion decide whether to hold a hearing. However, greater procedural protections are required as there is no appeals process for persons subject to a long-term supervision order and the decision is final (sections 99.1 and 147 of the *Act*).
>
> [17] The most significant criterion in this case is the importance of the decision to the person affected. The Supreme Court in *Baker*, wrote "[t]he more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated" (at para 25). In this case, not only was the applicant incarcerated following the suspension of an LTSO, the PBC also recommended that a charge be filed under section 753.3 of the *Criminal Code*. The suspension of the long-term supervision and the ensuing incarceration amount to a curtailment of the applicant's residual liberty. That decision constitutes a significant factor affecting the content of the duty of procedural fairness owed the applicant by the PBC. It is an important factor the the PDC must take into account in deciding whether to hear viva voce testimony.
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> [...]
>
> [19] In addition, where the assessment of physical or mental capacities may have an impact on the type of conditions to be imposed, a hearing would be appropriate. Here, the Correctional Service's community mental health team, as well as the staff member supervising her, raised concerns about the applicant's cognitive abilities and intellectual limitations. Meeting with the applicant would have certainly allowed for an assessment of the grounds of the staff's concerns, in addition to hearing the applicant's explanations regarding the events leading up to the suspension, a decision which significantly restricted her residual liberty.

169 By applying the analytical framework to the specific facts of the case, Judge Tremblay-Lamer determined that an oral hearing would be necessary. We can thus read in paragraphs 20 to 22:

> [20] To be sure, the nature of the duty of procedural fairness is flexible and depends on the circumstances. A hearing will not be required in every case. However, the factors set out in *Baker* should not remain in the abstract. They must be examined in each case in order to ensure that administrative decisions made are adapted to the type of decision and institutional context.
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> [21] In this case, the duty of procedural fairness was particularly onerous given that, as the applicant pointed out, she was subject to highly restrictive constraints during her re-admissions (in a maximum security penitentiary, in solitary confinement 23 hours a day, with nothing in her cell but the clothes on her back).
>
> [22] In short, I am of the view that in the circumstances of this case, in particular the questions surrounding the applicant's capacities, the recommendations of the case management team and parole supervisor that the suspension be cancelled, and the significant impact to the applicant of the decision, not only not to cancel the suspension, but to recommend a criminal charge, the PBC should have held an in-person hearing. The submissions made by the applicant's counsel and by her case management team showed that the applicant may have been suffering from a psychiatric or psychological problem, which could obviously have an effect on the decision of the PBC and on the conditions to be imposed. In such circumstances, the PBC lacked sufficient, reliable and convincing information to base its decision on the record.

170 This Court also learned of a second decision that Judge Tremblay-Lamer rendered on the same subject: *Laferrière FC*. In the latter case, the offender contested the legality of a Board decision that modified the conditions to which the applicant had been subjected within the framework of an LTSO. This decision had been made on the record despite the request for a hearing. After evaluating the file, the Board accepted the parole supervisor's recommendation that two of the conditions be lifted: the obligation to be treated by a psychiatrist and the prohibition to enter within a perimeter of 500 metres of his spouse's home or any other location where she might be. However, the Board kept the other conditions in force.

171 Distinguishing this latter situation from *Gallone*, Judge Tremblay-Lamer decided that the written representations were an adequate substitute for an oral hearing. Moreover, the Board has no obligation to hold a hearing at regular intervals. Thus, paragraphs 10 and 11 of *Laferrière FC* state:

> [10] [...] In accordance with the factors set out in *Baker*, this is not a situation where the PBC had to hold a hearing to respect procedural fairness. This was a review of the applicant's

> parole conditions the outcome of which does not have as great an impact as a detention order or the suspension of parole (see *Arlène Gallone c Le procureur général du Canada*, 2015 CF 608). As noted by the Supreme Court in *Baker*, "[t]he more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated" (at para 25). In the matter at bar, the written representations were an adequate substitute for a hearing since no particular reason or no serious issue of credibility was raised by the applicant, either of which could have shed a different light on the PBC's decision.
>
> [11] Moreover, the applicant had no legitimate expectation that the PBC hold a hearing, and because the holding of a hearing is discretionary, the PBC was not obliged to hold a hearing at regular intervals. Also, the absence of reasons for the refusal to hold a hearing is not fatal to the decision in the particular circumstances of this case since the applicant did not raise any specific reason why a hearing should have been held and the PBC had all the required information before it. In accordance with *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 and *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, the Court may consider that the PBC could have given the fact that there was nothing to justify the holding of a hearing as a reason for its refusal. Consequently, the PBC did not breach procedural fairness by not holding a hearing.

172 As we can see, the scope of the obligation to act fairly has variable content. In terms of section 135.1 of CCRA, although the Board made only a recommendation that is in no way binding on the Attorney General, it remains true that offenders cannot appeal Board decisions to the Court of Appeal. The lack of a right to appeal favours a decisional process carried out with greater respect for principles of procedural fairness. Consequently, a hearing may or may not be necessary, everything depending on the specific circumstances of the file. Considering the legal clarifications made by the Court in 2015 in the *Gallone* and *Laferrière FC* judgments, I am satisfied that before refusing to meet with the offender in person at a post-suspension hearing, the Board must first make sure that the reliable and convincing nature of the file's information allows an informed decision to be made. The question is whether an oral hearing should be convened *in all cases*, or whether, depending on the file's specific facts, written representations would suffice.

H. The discretion specified in subsection 140(2) of CCRA is not in itself incompatible with procedural fairness.

173 In *Mooring*, the Supreme Court confirmed that in evaluating the risk to society, the Board must nevertheless review all the reliable and available information. The Supreme Court concluded that the Board does not play a quasi-judicial role. Far from settling a specific debate between two opposing parties, the Board performs more investigative functions. It is not required to apply the classical rules of evidence or to hear any *viva voce* "testimony" nor does it have the power

146 to summon witnesses. The Board also acts on the information provided by the offenders and by the Service. In addition, the presumption of innocence does not apply before the Board (*Mooring* at paragraphs 25-26). The Board's recommendation, without being binding upon the Attorney General, may indirectly lead to the extension of confinement, given that the Attorney General may file criminal charges and prevent the offender from being released. As well, the sentence imposed for a charge under subsection 753.3(1) of the *Criminal Code* does not take into consideration the three months spent in detention under the LTSO suspension (*Gatza* at paragraph 46; *Bourdon* at paragraph 17).

174 That being said, section 140 of CCRA does not automatically grant the right to an oral hearing in cases of an LTSO suspension and has never previously granted one. Be that as it may, administratively speaking, the Board's discretion is not absolute. Indeed, its practise is regulated by the Manual. The Manual provides instructions that the Board members cannot ignore when an offender requests an oral hearing. Thus in cases where a hearing is not required by CCRA or policy, Board members may, in any case, choose to conduct a review by way of a hearing, pursuant to subsection 140(2) of CCRA, where they believe, under the specific circumstances of the case, that a hearing is required to clarify relevant aspects of the case. The reasons for holding a discretionary hearing are recorded in the reasons for the Board's decision. In cases where the offender or a person acting in his name has requested a review by way of a hearing, the reasons for which holding a hearing was accepted or refused are also recorded (Manual, chapter 11.1, section 6). Incidentally, it can be said that providing reasons is the proper way to ensure the transparency and intelligibility of the Board's decision.

175 Moreover, the Manual provides a number of concrete examples in which an in-person hearing might be necessary. This may include, in particular, situations in which the reliability and persuasiveness of the information being considered cannot be assessed on a file review, when there is incomplete or discordant information on file, of relevance to the review, that could be clarified at a hearing or when the information on file indicates that the offender has difficulties (cognitive, mental health, physical or other) that prevent him from communicating effectively in writing (Manual, chapter 11.1, section 6). Although the Manual is not mandatory in nature, the examples found in the Manual lead the offender to legitimately expect that he will meet with the Board in person in this type of case — which of course includes cases in which the offender's credibility is questioned.

176 The principles of fundamental justice do not require that an individual benefit from the most favourable procedure; instead they require that the procedure be fair (*Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3at paragraph 46 referring to *R v. Lyons*, [1987] 2 S.C.R. 309on p. 362). Contrary to the applicant's claim, section 7 of the *Charter* does not *automatically* and *systemically* require an oral hearing, even if the rights guaranteed by this provision are at issue (*Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1at paragraphs 121-122,

[2002] 1 SCR 3). In addition, I am satisfied that the current administrative mechanisms include genuine guarantees with respect to principles of procedural fairness.

177 Insofar as subsection 140(2) of CCRA does not legally prohibit a hearing, when this can prove necessary in the specific circumstances of the case being reviewed, the existence of such a discretionary power is neutral and does not conflict with the principles of fundamental justice guaranteed by section 7 of the *Charter*.

VII. Conclusion

178 In conclusion, although the residual liberty of a long term offender is limited after an LTSO suspension, section 7 of the *Charter* does not oblige the Board to hold a post-suspension hearing *in all cases* where the Service has referred the file to it. Subsections 140(1) and (2) of CCRA do not prevent the Board from holding a post-suspension hearing in cases where it is asked to exercise the powers set out in section 135.1 of CCRA. The discretion conferred by subsection 140(2) may be applied in a manner that respects the rights guaranteed by the *Charter*, particularly when a question of credibility is a determining factor in the file. Insofar as the source of the problem reported by the applicant is not to be found in the legislation itself, but in the Board's refusal to use its discretion in a manner compatible with the principles of fundamental justice, there is no reason to declare the legislation's provisions invalid (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120at paragraphs 77, 130-139). It is enough to state that the Board must, in all respects, comply with the principles of fundamental justice and hold an in-person hearing in cases that have been discussed earlier.

179 For these reasons, the applicant has a right to a declaratory judgment, which is mentioned in the next paragraph.

180 In terms of exercising the jurisdiction set out in section 135.1 of CCRA, the long term offender's residual liberty is limited through the suspension of an LTSO. The Board must act fairly before upholding the LTSO suspension and recommending that a charge referring to section 753.3 of the *Criminal Code* be laid by the Attorney General. The principles of fundamental justice oblige the Board, before it refuses to hold an in-person, post-suspension meeting with the offender, to ensure that the reliable and convincing nature of information in the file enables it to make an informed decision. When the file contains incomplete or contradictory information that is relevant to the case review or that could be clarified by the offender, a post-suspension hearing must be held. This is also the case when the offender has difficulties (cognitive, mental health, physical or other) that prevent him from communicating effectively in writing or when a question of credibility is a determining factor in the file. Any refusal to hold an oral hearing must be given in writing. Consequently, the legislative discretion to hold a post-suspension hearing does not violate section 7 of the *Charter* Subsections 140(1) and (2) of CCRA are not constitutionally invalid or inoperative

in the case of long term offenders whose file is referred to the Board following the suspension of an LTSO.

181 The Court otherwise refuses the other compensation or statements sought by the applicant. Without costs.

JUDGMENT in file T-1159-16

RULING on the merit of this application for judicial review and declaratory judgment;

THE COURT ADJUDGES AND DECLARES:

> In terms of exercising the jurisdiction set out in section 135.1 of the *Corrections and Conditional Release Act*, SC 1992, c. 20 [CCRA], the long term offender's residual liberty is limited by the suspension of a long-term supervision order [LTSO]. The Parole Board of Canada must act fairly before upholding the LTSO suspension and recommending that a charge referring to section 753.3 of the *Criminal Code*, RSC 1985, c. C-46, be laid by the Attorney General. The principles of fundamental justice oblige the Board, before it refuses to hold an in-person, post-suspension meeting with the offender, to ensure that the reliable and convincing nature of information in the file enables it to make an informed decision. When the file contains incomplete or contradictory information that is relevant to the case review or that could be clarified by the offender, a post-suspension hearing must be held. This is also the case when the offender has difficulties (cognitive, mental health, physical or other) that prevent him from communicating effectively in writing or when a question of credibility is a determining factor in the file. Any refusal to hold an oral hearing must be given in writing. The legislative discretion to hold a post-suspension hearing does not violate section 7 of the *Canadian Charter of Rights and Freedoms*. Consequently, subsections 140(1) and (2) of CCRA are not constitutionally invalid or inoperative in the case of long term offenders whose file is referred to the Board following the suspension of an LTSO.

THE COURT REFUSES otherwise the other compensation or statements sought by the applicant;

WITHOUT costs.

Application dismissed.

1967 CarswellAlta 58
Alberta Supreme Court, Appellate Division

Breckenridge Speedway Ltd. v. R.,

1967 CarswellAlta 58, 61 W.W.R. 257, 64 D.L.R. (2d) 488

Breckenridge Speedway Ltd., Green et al (Plaintiffs) Appellants v. Reginam (Defendant) Respondent

Smith, C.J.A., Porter, Johnson, Kane and Allen, JJ.A.

Judgment: September 18, 1967

Counsel: *A. G. Macdonald, Q.C.*, for plaintiffs, appellants.
C. W. Clement, Q.C., for defendant, respondent.

Subject: Corporate and Commercial

***Smith, C.J.A.*:**

1 The plaintiffs have appealed from the judgment of Primrose, J. who dismissed the plaintiffs' action and gave the defendant judgment in accordance with the prayer of her counterclaim.

2 The facts are set out in detail in the reasons of the learned trial judge and in the reasons of my brother Johnson, J.A.

3 Having reviewed the evidence and the reasons of the learned trial judge, I can find no ground for questioning his conclusion that the evidence does not support a claim for rescission of the agreement referred to in par. 7 of the statement of claim, the date of which appears to have been established as Decem ber 8, 1958. Later, however, I shall add my views as to the relief to which the defendant is entitled under her counterclaim.

4 The plaintiffs had had advanced to them, over a period of years, substantial sums of money by one of the treasury branches operated by Her Majesty in the right of the province of Alberta. In November, 1958, the plaintiffs transferred to the defendant several pieces of real property and a lease of a filling station from North Star Oil Co.; the latter is conceded to be a mortgage but issues have arisen as to whether three of the remaining transfers were outright sales which had the effect of reducing the amount of advances owing to the defendant or were simply transfers by way of security and therefore mortgages.

5 The defendant contended that all but one of the transfers were outright sales, and counterclaimed against the plaintiffs for various balances of advances allegedly owing, for possession of several of the properties transferred, for some rentals in respect of the last-mentioned properties and for foreclosure of the mortgage of the North Star Oil Co. lease.

6 In answer to the counterclaim the plaintiffs alleged that the advances and the agreement of December, 1958, were made by the defendant and the transfers and mortgage were accepted by the defendant in the course of carrying on the business of banking; that all of these activities were *ultra vires* the defendant and they contended that consequently the plaintiffs were not liable to repay to the defendant the balances owing of the advances made by the defendant and that some of the properties transferred and the lease mortgaged to the defendant should be returned to the plaintiffs as their property free of any claims of the defendant.

7 The defendant in reply to the defence to counterclaim pleaded that the relevant legislation and the defendant's activities mentioned were within the constitutional powers of the province and that the plaintiffs were estopped from raising or relying on the assertion that the activities and operations of the defendant in question were *ultra vires* the defendant and that it was just and equitable that the plaintiffs should repay the moneys owing with interest and not be unjustly enriched thereby.

8 In my view the first question which calls for consideration in relation to the constitutional aspects of the case is whether it lies in the plaintiffs' mouths to allege that *The Treasury Branches Act*, RSA, 1955, ch. 344, and the activities and operations of the defendant said to consist of carrying on a banking business in the province of Alberta, were *ultra vires* the Queen in the right of this province and that for this reason the plaintiffs are not liable to repay the moneys advanced to them and are entitled to the recovery of their real property free of any securities or claims of the defendant. In other words can a person in the position of the plaintiffs complain "of an act which is ultra vires if he himself has in his pocket at the time he brings the action some of the proceeds of that very ultra vires act:" Vaughan Williams, L.J. in *Towers v. African Tug Co.*, [1904] 1 Ch. 558, at 567, 73 LJ Ch 395.

9 In *Bell Houses Ltd. v. City Wall Properties Ltd.*, [1966] 1 Q.B. 207, [1965] 3 W.L.R. 1065, [1965] 3 All ER 427, Mocatta, J. held that a defendant, when sued on a contract by a company, was entitled to maintain by way of defence that the contract was *ultra vires* the company and void. He found the contract was *ultra vires*. When the case came before the court of appeal [1966] 2 Q.B. 656, [1966] 2 W.L.R. 1323, [1966] 2 All ER 674, the trial judge's decision was reversed and the contract found to be *intra vires* the plaintiff. Salmon, L.J. said at p. 690 of [1966] 2 All ER:

> Having regard to the view which I have formed on this part of the case, it is unnecessary to consider the interesting, important and difficult question which would arise were the contract ultra vires, namely whether, the plaintiff company having fully performed its part under the

177 In *Tennant v. Union Bank of Canada*, [1894] A.C. 31, at 46, 63 LJPC 25, affirming 19 O.A.R. 1, Lord Watson, speaking in relation to the legislative authority of parliament under sec. 91 (15) said:

> It also comprehends 'banking,' an expression which is wide enough to embrace every transaction coming within the legitimate business of a banker.

178 It would seem from the above that the argument that because the government of Canada has not seen fit to expressly prohibit the carrying on of a banking business by anything other than a chartered bank under the *Bank Act* the province may carry on or authorize the carrying on of such a business otherwise than through the medium of a chartered bank, is ineffective. The field of legislation in relation to banking is exclusively vested in the parliament of Canada whether or not it has passed legislation of that nature.

179 It has been argued that although the legislative authority of the province of Alberta may not extend to banking, Her Majesty the Queen in the right of the province of Alberta in exercising the royal prerogative may carry on such a business, as there is no statutory prohibition against her doing so. However, it seems clear enough from *Bonanza Creek Gold Mining Co. v. Attys.-Gen. for Ont., Que., N.S., N.B. and B.C.* (1916) 10 W.W.R. 391, [1916] 1 AC 566, 85 LJPC 114, 34 W.L.R. 177, 25 Que KB 170, reversing 50 S.C.R. 534, 31 W.L.R. 43, in which the judgment of the Privy Council was delivered by Viscount Haldane, that the executive authority or royal prerogative of the crown in the right of the province is co-extensive with its legislative authority. Lord Haldane said at pp. 397-8 (WWR), at pp. 579-80 (AC):

> It is to be observed that *The British North America Act* has made a distribution between the Dominion and the provinces which extends not only to legislative but to executive authority. The Executive Government and authority over Canada are primarily vested in the Sovereign. But the statute proceeds to enact, by s. 12, that all powers, authorities, and functions which by any Imperial statute or by any statute of the provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick are at the Union vested in or exercisable by the respective Governors or Lieutenant-Governors of these provinces shall, 'as far as the same continue in existence and capable of being exercised after the Union in relation to the government of Canada,' be vested in and exercisable by the Governor-General. S. 65, on the other hand, provides that all such powers, authorities, and functions shall, 'as far as the same are capable of being exercised after the Union in relation to the government of Ontario and Quebec respectively, be vested in and exercisable by the Lieutenant-Governors of Ontario and Quebec respectively.'
>
> . . . . .
>
> The effect of these sections of *The British North America Act* is that, subject to certain express provisions in that Act and to the supreme authority of the Sovereign, who delegates to the

> Governor-General and through his instrumentality to the Lieutenant-Governors the exercise of the prerogative on terms defined in their commissions, the distribution under the new grant of executive authority in substance follows the distribution under the new grant of legislative powers. In relation, for example, to the incorporation of companies in Ontario with provincial objects the powers of incorporation which the Governor-General or Lieutenant-Governor possessed before the Union must be taken to have passed to the Lieutenant-Governor of Ontario so far as concerns companies with this class of objects. Under both s. 12 and s. 65 the continuance of the powers thus delegated is made by implication to depend on the appropriate Legislature not interfering.

180 In *Deputy Sheriff of Calgary v. Walter's Trucking Service Ltd., Atty.-Gen. of Alta. and Atty.-Gen. of Canada* (1965) 51 W.W.R. 407, affirming (1964) 47 W.W.R. 180, Porter, J.A. put it this way at p. 409:

> Every day we see the crown acting in two capacities which we commonly describe as the crown in the right of Canada and the crown in the right of the province. It seems to me that the crown in the right of Canada and the crown in the right of the province have well-defined functions under the respective legislative authorities of parliament and the provincial legislature as those authorities are created and divided by the *B.N.A. Act, 1867*. The crown's authority in the right of Canada and the crown's authority in the right of the province must be co-extensive with the division of the sovereign legislative powers made between Canada and the province by the *B.N.A. Act*, else the crown would be taking advice from the wrong ministers.

181 I think that on this point reference should also be made to *Atty.-Gen. v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508, 89 LJ Ch 417. That case would seem to be authority for the proposition that once the crown has submitted its prerogative to legislation then it is bound by such legislation. Lord Atkinson, at p. 538, quotes with approval the following passage from an earlier judgment of the master of the rolls:

> 'Those powers which the executive exercises without Parliamentary authority are comprised under the comprehensive term of the prerogative. Where, however, Parliament has intervened and has provided by statute for powers, previously within the prerogative, being exercised in a particular manner and subject to the limitations and provisions contained in the statute, they can only be so exercised. Otherwise, what use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back on prerogative.'

182 It would appear quite clear that the "royal prerogative" is what is known as the "executive authority" in the modern English state: See *Holdsworth's A History of English Law*, vol. 9, p. 6.

183 Therefore, if the province's legislative authority does not extend to a certain matter and that matter is, by competent legislation, assigned to the parliament of Canada, the province cannot undertake that matter through the exercise of the royal prerogative or executive authority.

184 Before leaving the constitutional aspects of this case, I think reference should be made to the judgment of Duff, C.J. in *Reference re Alberta Statutes*, [1938] S.C.R. 100, at 129, affirmed *(*sub nom. *Reference re Alberta Bills; Atty.-Gen. for Alta. v. Atty.-Gen. for Can.)* [1938] 3 W.W.R. 337, [1939] AC 117, 108 LJPC 1, where he said:

> The chartered banks in Alberta exercise their powers under the authority of a Dominion statute, the *Bank Act*. By that statute, a system of banking is set up by the Parliament of Canada and provision is made for the incorporation of individual banks which, on compliance with the statutory conditions, are entitled to carry on business subject to the provisions of the statute. This system of banking has been created by the Parliament of Canada in exercises of its plenary and exclusive authority in relation to that subject, and any legislation by a province which, to quote again the phrase of Lord Haldane, is 'so directed by the provincial Legislatures' as either directly or indirectly to frustrate the intention of the *Bank Act* by preventing banks carrying on their business or controlling them in the exercise of their powers, must be invalid.

185 I have, earlier in this judgment, made reference to the preamble to the *Bank of Canada Act*. Such preamble indicates that it was considered desirable to establish a central Bank of Canada to regulate credit and currency in the best interests of the economic life of the nation, and to control and protect the external value of the national monetary unit. One of the measures adopted to accomplish this objective is the requirement for reserves to be maintained by chartered banks with the Bank of Canada provided for in both the *Bank Act* and the *Bank of Canada Act* and referred to above. The right to prescribe increases and reductions in the amount of the reserves which the chartered banks are obliged to maintain from time to time with the Bank of Canada constitutes one of the effective measures of controlling credit and it is utilized for that purpose. There are no such provisions in *The Treasury Branches Act* and the treasury branches are not controlled by the provisions of the *Bank of Canada Act*. If every province in Canada were to legislate as the province of Alberta has done with regard to the operation of treasury branches with no effective control on the amount of credit which can be extended by these branches, the purposes of important provisions of the *Bank Act* and the *Bank of Canada Act* designed to exercise control of credit, could be frustrated.

186 To put it another way, in enacting *The Treasury Branches Act* and operating the treasury branches thereunder, it may well be urged that the legislature of the province of Alberta is interfering with some of the operations and purposes of the *Bank Act and the Bank of Canada Act*, both being legislation validly enacted by the parliament of Canada in the exercise of its exclusive

2018 BCSC 2084
British Columbia Supreme Court

Cambie Surgeries Corporation v. British Columbia (Attorney General)

2018 CarswellBC 3123, 2018 BCSC 2084, [2019] 2 W.W.R. 688, 17 B.C.L.R. (6th) 133, 300 A.C.W.S. (3d) 384

Cambie Surgeries Corporation, Chris Chiavatti, Mandy Martens, Krystiana Corrado, Walid Khalfallah by his litigation guardian Debbie Waitkus, and Specialist Referral Clinic (Vancouver) Inc. (Plaintiffs) and Attorney General of British Columbia (Defendant) and Dr. Duncan Etches, Dr. Robert Woollard, Glyn Townson, Thomas McGregor, British Columbia Friends of Medicare Society, Canadian Doctors for Medicare, Mariël Schooff, Daphne Lang, Joyce Hamer, Myrna Allison, and the British Columbia Anesthesiologists' Society (Intervenors) and The Attorney General of Canada (Pursuant to the Constitutional Question Act)

Winteringham J.

Heard: September 24-26, 2018
Judgment: November 23, 2018
Docket: Vancouver S090663

Counsel: P.A. Gall, Q.C., S. Gyawali, J. Sebastiampillai, for Plaintiffs
J. Penner, J. Hughes, for Defendants

Subject: Civil Practice and Procedure; Constitutional; Evidence; Public; Human Rights

APPLICATION by plaintiffs for interim and interlocutory injunction restraining British Columbia government from enforcing legislation that prohibited private-pay medically necessary health services.

***Winteringham J.*:**

I. OVERVIEW

1 Canada's health care system is founded on the belief that there should be universal coverage for medically necessary health care services on the basis of need and not the ability to pay. Those responsible for administering the health care system in B.C. aim to achieve this foundational

156 belief. It is not the role of the Court to determine the complexities and the many issues that arise in administering health care policy. That role belongs to elected officials and delegates. However, when laws are implemented in the name of health care policy, the courts do have a role to play, namely in deciding whether such laws are constitutionally compliant. In this case, the B.C. government implemented laws that operate to prohibit private-pay medically necessary health services. The issue before the trial judge is whether those prohibitions are compliant with *Charter*-protected rights.

2 This is an application for an interim and/or interlocutory injunction restraining the B.C. government from enforcing legislation that prohibits private-pay medically necessary health services. The Plaintiffs have brought this application in the middle of a trial that has been underway since September 2016 — the lawsuit having been commenced almost ten years ago. In the trial, the Plaintiffs challenge the constitutionality of ss. 14, 17, 18 and 45 (collectively, the "impugned provisions") of the *Medicare Protection Act*, R.S.B.C. 1996, c. 286 ("*MPA*"). The constitutional challenge raises issues of whether wait times for medically necessary health care, said to be connected to the impugned provisions, violate ss. 7 and 15 of the *Charter of Rights and Freedoms* (the "*Charter*"). For the purposes of this application, the parties focus their submissions on s. 7 of the *Charter* as will I.

3 Put simply, the Plaintiffs submit that the impugned provisions limit access to private health care by prohibiting the extra-billing of certain private-pay health services. This prohibition is said to impact the wait times for health care in the province. The Plaintiffs plead the s. 7 infringement in this way: In circumstances where the public health care system cannot provide reasonable health care within a reasonable time, and patients are precluded from choosing to obtain health care privately, ss. 14, 17, 18 and 45 of the *MPA*, on their own and taken together, constitute a deprivation of the rights to life and security of the person guaranteed by s. 7 of the *Charter*. This deprivation of life and security of the person is not in accordance with the principles of fundamental justice because, the Plaintiffs contend, the impugned provisions are arbitrary, overly broad and grossly disproportionate. In short, the constitutional issue is whether it is a violation of s. 7 (and/or s. 15) of the *Charter* to prohibit private-pay medically necessary health services when the result is to subject British Columbians to long delays with the risk of physical and psychological harm.

4 In April 2018, the B.C. government proclaimed into force significant financial penalties for those who violate the impugned provisions. It is this proclamation into force that gives rise to the application for injunctive relief. The Plaintiffs seek to stay or suspend enforcement of the impugned provisions pending the trial judge's ruling on the constitutionality of the prohibitions.

5 The parties are deeply immersed in a lengthy and complicated constitutional trial. Many of the positions taken during this application reflect this. In these reasons, I have attempted to address the multiplicity of issues relevant solely to the determination of the issue before me. In so doing, I have tried not to wade into the nuances of the evidentiary record built before the trial judge. In the

reasons that follow, I have addressed the following: (1) the background relating to the impugned provisions, this litigation and the impact of the legislative amendments; (2) the evidentiary record and objections to it; (3) the principles enunciated in *Chaoulli c. Québec (Procureur général)*, 2005 SCC 35 (S.C.C.) ("*Chaoulli*"); (4) the legal test for interim and/or interlocutory injunctive relief in constitutional cases; and (5) an analysis of the legal issues on the application before me.

II. NOTICE OF APPLICATION

6 On April 4, 2018, the province proclaimed into force, effective October 1, 2018, provisions of the *MPA* including new financial penalties for contraventions of the *MPA* ("*MPA* Amendments") [1] . On July 6, 2018, the Plaintiffs filed their Notice of Application for interim and/or interlocutory injunctive relief ("Injunction Application") pending a determination of the constitutionality of the impugned provisions of the *MPA*. On the Injunction Application, the Plaintiffs seek the following orders:

> a) A stay or suspension of the operation of Order-in-Council No. 468 of 2018 (September 7, 2018), and/or B.C. Reg. 178/2018, to the extent that it brings into force the following provisions of the *Medicare Protection Amendment Act*, 2003, SBC 2003, c. 95: s. 1, s. 2, s. 4 as it relates to section 17(1.2) of the *Medicare Protection Act*, s. 8, and s. 12, pending a final determination of the constitutional issues raised in the action;
>
> b) In the alternative, a stay or suspension of the coming into force of sections 1, 2, 4 (as it relates to section 17(1.2) of the *Medicare Protection Act*), 8 and 12 of the *Medicare Protection Amendment Act*, 2003, SBC 2003, c. 95, pending a final determination of the constitutional issues raised in the action; and,
>
> c) In the further alternative, an order enjoining the enforcement of sections 17, 18 and 45 of the *Medicare Protection Act* pending a final determination of the constitutional issues raised in the action.

7 In support of the Injunction Application, the Plaintiffs filed numerous affidavits, extensive trial transcript excerpts, and trial exhibits (including affidavits, expert reports, agreed statements of fact, documents from the common book of documents and substantial wait time data). Needless to say, the record is vast. The Attorney General of British Columbia (the "AGBC") objects to almost all of it.

8 I will deal with the AGBC's objections below.

III. POSITION OF THE PARTIES

9 The parties agree that the Court is to determine the Injunction Application on the basis of the test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311

158 (S.C.C.) ("*RJR-MacDonald*"), at 348-49, which requires the applicants to prove: (1) there is a serious question to be tried; (2) the applicants will suffer irreparable harm should the injunction be denied; and (3) the balance of convenience weighs in their favour, taking into account an appropriate consideration of the public interest.

10 The Plaintiffs take the position that the only real issue to be determined on the Injunction Application is the third branch of *RJR-MacDonald*. The Plaintiffs submit that the jurisprudence does not require an exhaustive analysis on the first two branches of the test. The Plaintiffs further submit that the first two branches, serious question to be tried and irreparable harm, are easily met in this case.

11 The AGBC fundamentally disagrees with the Plaintiffs' position that this Injunction Application can be determined solely on the final inquiry into the balance of convenience. Rather, the AGBC submits that the Plaintiffs have failed to satisfy any of the three branches. In addition to the evidentiary challenges, the AGBC raises a multiplicity of substantive issues under the *RJR-MacDonald* test. As best as I am able in the time available to me, I attempt to address the issues raised by the AGBC which I summarize here:

a) With respect to the first branch of *RJR-MacDonald*, the AGBC submits that the Plaintiffs cannot meet the low burden because there is no serious question to be tried on the pleadings to entitle them to relief in respect of the *MPA* Amendments. The AGBC says that the Plaintiffs have not challenged any of the enforcement provisions of the *MPA* and that they failed in their attempt to amend the pleadings to include such a challenge. In the result, the AGBC submits "there is no relief sought on the pleadings in the underlying action that would entitle the plaintiffs to the relief sought on this injunction application" and there is no legal authority permitting injunctive relief to be granted suspending or staying the coming into force of validly enacted legislation in such circumstances. The AGBC has characterized this application as a collateral attack on the trial judge's reasons dismissing the Plaintiffs' application to amend the pleadings.

b) With respect to the second branch of *RJR-MacDonald*, the AGBC submits that the Plaintiffs have not adduced clear evidence to show how "the irreparable harm will occur to them and [establish] a high probability that, without the injunctive relief sought, the alleged harm to one or more of the Plaintiffs will occur imminently or in the near future." The AGBC advances three points with this submission:

i. The AGBC says the "underlying claim is not pleaded as a systemic claim that puts in issue the s. 7 rights of anyone other than the patient plaintiffs."

ii. The AGBC says that the Plaintiffs have not been granted public interest standing and, as such, cannot "rely on allegations of irreparable harm to unidentified non-parties in order to meet the test for injunctive relief."

iii. The AGBC says that the Plaintiffs have failed to prove any harm is imminent (required for a *quia timet* injunction) because (1) the increased penalties will only be imposed after a lengthy process culminating in conviction and imposition of a penalty; (2) the Plaintiffs could cease extra-billing and comply with the *MPA* thereby avoiding any harm to physicians or clinics; and (3) if the Plaintiffs are permitted to rely on generalized assertions of harm, they have failed to prove, by way of expert evidence, that waiting for medical procedures causes harm.

c) With respect to the third branch of *RJR-MacDonald*, the AGBC submits that this is not one of those clear cases where the Court should enjoin the enforcement of duly enacted legislation. The AGBC submits that the *MPA* Amendments are enacted for the public good and the Court should not summarily decide that those provisions violate constitutionally protected rights. Under this branch, the AGBC responds to factors raised by the Plaintiffs and which the Plaintiffs say tilt the balance in their favour. The AGBC disputes the Plaintiffs' position on the following eight factors:

i. the Plaintiffs seek suspension (not an exemption) of validly enacted legislation; however, this is not one of those exceptional or rare cases where suspension should be granted;

ii. in consideration of what remains of the presumption of constitutionality, the Plaintiffs bear the onus of establishing that the *MPA* Amendments are unconstitutional and the Court should be reluctant to decide that issue on an interlocutory application;

iii. this is not a clear case of unconstitutionality because the *Charter* claim, if it applies to the operation of the health care system at all, requires many "hurdles for [the Plaintiffs] to clear" to prove a violation of s. 7 (and/or s. 15);

iv. the status quo argument advanced by the Plaintiffs (that violations of extra-billing prohibitions in the *MPA* is the "status quo" and has been "accepted" by the government) is flawed;

v. the Plaintiffs rely on case authority that does not assist their position;

vi. the Plaintiffs seek an equitable remedy in circumstances where they are asking the Court to countenance ongoing unlawful activity;

vii. although not required to do so, the AGBC has adduced evidence of actual harm (loss of $15.9 million of health care funding) should the injunction be granted; and

viii. related to the status quo factor, the AGBC says that any delay in implementing the *MPA* Amendments by the B.C. government should not weigh in the Plaintiffs' favour.

IV. BACKGROUND CIRCUMSTANCES RELEVANT TO INTERLOCUTORY INJUNCTIVE RELIEF

A. The parties

12 The Plaintiffs consist of two corporations, Cambie Surgeries Corporation ("Cambie") and Specialist Referral Clinic ("SRC"), and four individuals. The defendant is the AGBC. There are three interveners. Canada is a party to the underlying action pursuant to s. 3 of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68. Neither Canada nor the interveners participated in the Injunction Application.

13 The Plaintiffs assert public interest standing by virtue of *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2016 BCSC 1292 (B.C. S.C.), where Justice Steeves wrote, at para. 59:

> It is not necessary to decide whether the Corporate Plaintiffs have public interest standing. However, based on the three part test developed by the Supreme Court of Canada *(Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45at para. 37) I would conclude that the Corporate Plaintiffs have raised a serious justiciable issue by challenging certain provisions of the *MPA*, they have a real stake in this litigation by virtue of the counterclaim by the defendants (among other reasons), and the participation of the Corporate Plaintiffs is a reasonable and effective way to bring the issues before the court. I note that a purposive and flexible approach is required and the three factors should be seen as interrelated considerations rather than a checklist or technical requirements (at para. 36).

14 See also *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2018 BCSC 1141 (B.C. S.C.) *[Ruling re Amendment of Claim]* where Steeves J. again addressed public interest standing and stated, at para. 60:

> However, in my view, there remains a need for some party to have an interest in the subject matter of the litigation, in this case diagnostic services. As above, the current corporate plaintiffs operate surgical clinics and they use other facilities for diagnostic services (even public facilities). It is true that the corporate plaintiffs were previously granted public interest standing after being granted private interest standing (2016 BCSC 1292). However, the focus of the litigation at that time was surgical procedures . . . .

15 I will address the public interest standing issue below.

B. The proceedings

16 The history of this litigation is long. I attempt to summarize it here. I start with the history of the action set out by Associate Chief Justice Cullen (as he then was) in *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2015 BCSC 2169 (B.C. S.C.) *[Ruling re Stay of Enforcement Provisions]* at paras. 14 — 27:

> 14. This action has a lengthy history, some of which is relevant to the present applications. Cambie has been in operation since 1996 and SRC since 2002. By their own admission, they have been in contravention of s. 17(1)(b) and s. 18(e) of the *MPA* since their inception by charging a facility fee for surgical treatments which are a benefit under the *MPA*.
>
> 15. The plaintiffs assert that the defendants have been aware of the clinic's ongoing violations of the provisions of the *MPA* for quite some time
>
> 16. In May 2007, the Commission Chair wrote to the clinics to identify concerns regarding extra billing. In September 2008, the Commission informed the clinics that it intended to conduct an audit of their records. On December 4, 2008, a group of citizens filed a petition to compel the Commission to enforce the provisions of the *MPA*. On January 29, 2009, the clinics filed a statement of claim to commence this action, which challenges the constitutionality of the impugned provisions ("the Constitutional Action"). On February 20, 2009, the Commission filed a response to the statement of claim and a counterclaim seeking, among other things, a warrant authorizing an inspection of Cambie and SRC's records and interim and permanent injunctions restraining the clinics from contravening the *MPA*.
>
> 17. On November 20, 2009, Madam Justice Smith ruled that the constitutional issues raised by the plaintiffs' statement of claim should be determined before the petition filed by the citizens proceeded; see *Schooff v. Medical Services Commission*, 2009 BCSC 1596[*Schooff*]. She stayed the petition and declined to grant the requested warrant but issued an injunction permitting the Commission to enter the clinics' premises to inspect its documents and conduct an audit. In granting that remedy, Madam Justice Smith relied on the court's inherent jurisdiction.
>
> 18. On October 20, 2010, the British Columbia Court of Appeal set aside the injunction issued by Justice Smith; see *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2010 BCCA 396[*Cambie Surgeries* BCCA].
>
> 19. By June of 2012, without the need to apply for a warrant and with the cooperation of the clinics, the Commission concluded its audit of the clinics. Issues with extra billing and overlapping billing were identified. In July of 2012, the Commission notified the clinics of its intention to conduct an audit of selected physicians who provided services through the clinics ("the Selected Physicians") with a focus on overlapping billing. These audits are referred to as "the Targeted Audits."

20. On September 6, 2012, the defendants brought an injunction application to enjoin the clinics from providing services in breach of the *MPA* while the Constitutional Action was being heard. In January 2013, during a case management conference, the defendants agreed to adjourn the injunction application with the encouragement of the case management judge, Chief Justice Bauman.

21. By June 2013, some of the Selected Physicians had responded to the Commission's requests for information in the Targeted Audits and had advised the Commission that any further information or documents concerning payments to them would have to be obtained from the clinics.

22. On June 17, 2013, Dr. Brian Day, the President of the clinics, attended an examination for discovery. Stephen Abercrombie, who is an Audit Manager with the Audit and Investigations Branch of the Ministry of Health and one of the authors of the June 2012 "Specialist Referral Clinic (Vancouver) Inc. and Cambie Surgeries Corporation Audit Report" produced as part of the enforcement process against the clinics, was in attendance.

23. In November 2013, the clinics requested that the Commission suspend the Targeted Audits. In December 2013, the majority of the Selected Physicians indicated to the Commission that it would need to contact the clinics for further documentation to complete its audit of them.

24. In the context of the litigation, as opposed to the enforcement process, in April 2015 the Commission prepared an application to compel the clinics to produce a variety of documents regarding the clinics alleged double billing. That application was set down for June 29 and 30, 2015, but did not proceed. In June 2015, the clinics made admissions in the Constitutional Action in relation to double billing, admitting that they were in contravention of the *MPA*.

25. It does not appear that anything further was done with respect to the Targeted Audits between December 2013 and March 2015 . . .

26. What ensued thereafter was that the Commission provided to Cambie a notice of its intention to search the clinic. On August 21, 2015, the clinics requested that the audit be deferred until after the Constitutional Action. On September 8, 2015, the Commission repeated its demand for access. On September 10, the clinics indicated they would apply to the case management judge for directions. On September 16, the Commission repeated its intention to seek a warrant. On September 18, the Commission filed a warrant application and on September 21, the warrant was granted by the Provincial Court.

27. A further salient fact which underlies these applications relates to the adjournment of the trial of this matter and the reasons thereof. The trial was set to commence on March 2, 2015. It was adjourned at the defendants' request (with the agreement of the plaintiffs) because shortly before the trial was set to commence, the defendants discovered thousands of

> relevant documents in the possession of the Ministry of Health which had not been produced to defendants' counsel and not disclosed to the plaintiffs. The review and disclosure of those documents is now ongoing. Approximately 750 documents are being disclosed each week, and all the newly discovered documents will be disclosed to the plaintiffs by mid-January of 2016.

17 In the application brought before Cullen A.C.J., the Plaintiffs sought a stay of the execution of the warrant and of the enforcement of ss. 14, 17, 18 and 45 as those provisions applied to the Plaintiffs pending determination of the constitutional issues (para. 68). The Plaintiffs also sought an interlocutory order suspending the application of s. 36 of the *MPA* as those provisions applied to the Plaintiffs.

18 In response, Cullen A.C.J. granted a narrow and limited order which would remain in place until the commencement of the trial. It is clear from his reasons that he was concerned about the intermingling of information and issues between the enforcement process under s. 36 and the discovery process in the Constitutional Action. At paras. 138, 140-142, he stated:

> 138. In my view, while acquiring and executing the warrant to enable the Commission to complete its audit of the Selected Physicians would not offend that precept, it is necessary to put in place an order that will inhibit the Commission from taking further future enforcement action against the plaintiff clinics on the narrow ground that its role in the litigation should not be permitted to influence, guide, or focus its enforcement role.
>
> . . .
>
> 140. It is important to note, however, that this conclusion is situational. It does not reflect a determination that bringing enforcement action against the clinics would bring the administration of justice into disrepute or justify a stay of proceedings absent the adjournment, the reasons for it, and the additional burden it has placed on the plaintiffs to prepare for trial.
>
> 141. The stay is intended to address the unique circumstances of this case at this juncture, not to establish that the potential for using information gained through the discovery process necessarily equates to an abuse of process or otherwise justifies a stay of proceedings. Moreover this decision should not be taken as authority that it operates as a future bar to enforcement action.
>
> 142. The Court is concerned with avoiding unnecessary impediments to this litigation, not with regulating the Commission's ability to pursue its mandate to enforce the *MPA*.

19 The stay granted by Cullen A.C.J. was extended by Steeves J. but lapsed once the trial commenced.

C. The legislative scheme

20 The Plaintiffs seek injunctive relief within a legislative context that was altered by the bringing into force of the *MPA* Amendments. In its Response to the Notice of Application, the AGBC provided this overview of the legislative scheme:

> 3. The *MPA* governs the provisions of payment by the MSC to physicians who are enrolled in the Medical Services Plan (MSP), in return for their provision of medically necessary services (known as "benefits") to British Columbia residents who are enrolled in the MSP (known as "beneficiaries"). In brief, when an enrolled physician provides a medically necessary service to a beneficiary, the physician is entitled to submit a claim to the MSP for an amount set out in a fee schedule that is negotiated among the MSC, the Ministry of Health, and the Doctors of BC (formerly the BC Medical Association).
>
> 4. The provisions of the *MPA* that the plaintiffs challenge in the underlying action are sections 14, 17, 18 and 45.
>
> 5. In summary, section 14 permits a physician who is enrolled with the MSC to "opt out" of the billing process and bill beneficiaries directly. The beneficiaries must then claim reimbursement from the MSC directly for the amount billed.
>
> 6. Section 17 prohibits the charging of beneficiaries for benefits, or for matters relating to the rendering of benefits, unless otherwise provided for in the *MPA*, in the regulations, or by the MSC (the prohibition does not apply to physicians who have not enrolled with the MSC).
>
> 7. Section 18 prohibits non-enrolled physicians from charging beneficiaries more than the amount permitted by the MSC fee schedule, for services provided in hospitals or community care facilities. It also places the same limits on physicians who have opted out under s. 14, regardless of the location where they have provided their services.
>
> 8. Section 45 prohibits contracts of insurance that would cover the cost of services that are benefits when provided to beneficiaries.
>
> 9. The prohibitions on charging beneficiaries for benefits can be traced back to the *Medical Services Plan Act*, enacted in 1981. The current prohibitions originated in the *Medical and Health Care Services Act* of 1992, although there have been numerous amendments over the years.
>
> 10. The prohibition on private insurance likewise has its direct origin in the 1992 legislation, although such private insurance has effectively been non-existent since at least 1975.

21 The relationship between the *Canada Health Act* ("*CHA*") and the *MPA* is important to an understanding of the legislative scheme. In its written submission, the AGBC provided an overview of the *CHA* and its interplay with the *MPA* as follows:

11. The *Canada Health Act* ("*CHA*") is federal legislation that establishes conditions which provinces and territories must fulfill in order to be entitled to full federal funding for the operation of their public health care systems (the Canada Health Transfer or "CHT").

12. In order to be entitled to full federal funding, provinces and territories are required to ensure that "extra-billing" and "user charges" are not levied by physicians or private clinics. The Regulations under the *CHA* stipulate that provinces and territories must report to Health Canada each December any instances of extra billing or user charges of which they are aware for a preceding fiscal period. The *CHA* itself then requires the federal Minister of Health to deduct an equivalent amount from that province's CHT in March of the following year.

13. In the 2015 fiscal year, the amount of the CHT to British Columbia was $4.446 billion, approximately one quarter of the $17.0 billion allocated to the Ministry of Health ("MoH") by the Legislature.

14. Between 2004 and 2012, the federal Minister of Health deducted amounts varying between $29,019 and $126,775 from British Columbia's CHT.

15. Beginning in 2013, the deductions from British Columbia's CHT were higher because they included deductions of approximately $175,000 on account of extra billing identified through an audit by the Medical Services Commission ("MSC") of the corporate plaintiffs, Cambie and SRC.

16. By agreement dated 18 March 2017, the Province agreed with Health Canada that it would conduct further audits of private clinics over a three-year period in order to identify more accurately the extent to which extra-billing was occurring in British Columbia.

17. In March of 2018, based on the results of audits of private clinics that were carried out by the Ministry of Health pursuant to the March 2017 agreement between the Province and Health Canada, the federal Minister of Health deducted $15.9 million from the CHT.

22 In short, the provincial and federal governments fund health care in B.C. Federal funding comes through the Canada Health Transfer (the "CHT") which calls for the AGBC to comply with certain requirements, including provisions prohibiting the extra billing of beneficiaries for medically necessary health services. To comply with the requirements of the *CHA*, the MSP was established to pay benefits for beneficiaries. Associate Chief Justice Cullen further described the billing prohibitions and enforcement provisions available under the *MPA* (prior to the amendments) in the *Ruling re Stay of Enforcement Provisions*:

8. Practitioners who are not enrolled cannot be paid by MSP. They may charge any fee for a service provided to a beneficiary but not if it is provided in a hospital defined under the

Hospital Act, R.S.B.C. 1996. c. 200, or in a community care centre as defined in s. 1 of the *Community Care and Assisted Living Act*, S.B.C. 2002, c. 75.

9. To enforce the provisions of the *MPA*, the Commission has been granted a number of powers. Prior to December 2, 2006, its enforcement powers were confined to medical or healthcare practitioners. It could not take enforcement steps against clinics such as Cambie or SRC. The *MPA* was amended in December 2006 to enable the Commission to audit "anyone's billing or business practices if they are involved in the provision of benefits to beneficiaries." Section 45.1 was added to permit the Commission to obtain an injunction restraining any person from violating the extra billing prohibitions under the *MPA*.

10. The Commission also has the power under s. 36(2) of the *MPA* to appoint inspectors to audit:

1. claims for payment by practitioners;

2. the billing or business practices of persons who are involved in any way in the provision of benefits to beneficiaries; and

3. the billing or business practices of persons whom the Commission reasonably believes are either involved in any way in the provision of benefits to beneficiaries or have contravened one of sections 17, 18, 18.1 or 19 of the *MPA*.

11. Inspectors may enter premises and inspect records of any person whom the inspectors have authority to audit so long as they do so at a reasonable time and for reasonable purposes of the audit.

12. Under s. 36(7), a justice of the peace may issue a warrant authorizing an inspector to enter a place described in s. 36(5) to exercise the powers therein if satisfied there are records for which there are reasonable grounds to believe are relevant to the matters referred to in s. 36(5).

13. The Commission's Audit and Inspection Committee uses the Billing and Integrity Program ("BIP") for audit services to the MSP and the Commission. The BIP monitors, audits, and investigates billing patterns and practices of medical and healthcare practitioners to detect and deter incorrect billing. It also seeks recovery of inappropriately paid monies.

23 In December of 2003, the B.C. legislature unanimously enacted the *Medicare Protection Amendment Act, 2003* which amended a number of the provisions in the *MPA*. Some of the amendments were brought into force in December 2006. It was not until April 4, 2018 that the financial penalties were brought into force, effective October 1, 2018, when the Governor in Council deposited Order-in-Council 160 of 2018. Specifically, s. 46 of the *MPA* was amended to include the following new provisions:

46 Offences

> (5.1) A person who contravenes section 17(1), 18(1) or (3), 18.1(1) or (2) or 19(1) commits an offence;
>
> (5.2) A person who is convicted of an offence under subsection (5.1) is liable to a fine of not more than $10,000, and for a second or subsequent offence to a fine of not more than $20,000.

24 In summary, the *MPA* maintains the enforcement powers as described by Cullen A.C.J. (audits and injunctions) but now includes the financial penalties for those found to have contravened the enumerated provisions, including ss. 17(1), 18(1) or 18(3).

D. Application to amend pleadings

25 The Plaintiffs sought to amend the Fourth Amended Notice of Civil Claim to account for the *MPA* Amendments. The AGBC agreed to some of the proposed amendments. However, the AGBC successfully opposed the Plaintiffs' application to amend its pleadings to add a constitutional challenge to s. 18.1. Relevant to the Injunction Application, the AGBC successfully opposed the Plaintiffs' application to plead facts regarding the new enforcement provisions of s. 46. On July 9, 2018, Steeves J. dismissed this aspect of the Plaintiffs' application to amend, stating at para. 45:

> 45. The result is that the proposed amendments to the plaintiffs' claim that purport to challenge the enforcement of the *MPA* under s. 46 must be struck. They are bound to fail for the simple reason that there is no legal challenge by the plaintiffs to s. 46.

26 The AGBC says the Injunction Application seeks to circumvent the *Ruling re Amendment of Claim*. That is, the Plaintiffs seek to challenge provisions of the *MPA* that are not properly before the Court. I deal with this below.

V. EVIDENCE RELEVANT TO INJUNCTION APPLICATION

A. AGBC's objections to the record

27 I turn to the evidentiary record and the objections to it.

28 In response to the Injunction Application, the AGBC filed an Amended Notice of Application objecting to all of the evidence, either in whole or in part, filed by the Plaintiffs. The AGBC relied on forty-one case authorities and raised six legal bases said to support their objections, including grounds of relevance, hearsay, opinion, argument, collateral attack and evidence that is unfairly prejudicial to their defence at the ongoing trial.

29 I am mindful of the recent comment from the Court of Appeal in *Premium Weatherstripping Inc. v. Ghassemi*, 2016 BCCA 20 (B.C. C.A.) holding that the procedural requirements intended to guard the remedy of interlocutory injunctions must be assiduously met:

> 7. An interlocutory injunction is well understood to be a special sort of non-final order in that, by its very nature, it restricts the freedom of the party against whom it is made, without the applicant having had to prove any allegation beyond the standard of an arguable case. An interlocutory injunction often becomes the entire remedy in an action, and can endure for a very long time unless temporal limits are placed upon it. For that reason, assiduous care in preparation of the application is the standard, including strict compliance with the requirements for all hearsay evidence that would not be permitted to be stated at trial to be on information and belief, with the source identified. There is no room in interlocutory injunction practice for relaxation of that requirement, in my view.

30 I have spent considerable time working through the objections raised by the AGBC.

31 I pause to note that the trial commenced in September 2016 and the parties are still in the Plaintiffs' case. As I understand it, approximately half of the time spent in court has been dedicated to resolving the same sort of evidentiary objections raised during the Injunction Application. The trial judge has delivered at least forty-five sets of reasons. Many of those decisions relate to the evidentiary issues raised here and some are cited in support of the AGBC's objections.

32 On an application such as this and in circumstances where I am told there is considerable urgency and the evidentiary record vast, it is simply not possible to address every objection raised. There is no doubt that there are aspects of the record to which objection can properly be made. I have reviewed the material filed and I have assessed it in a way that takes into account any defects.

33 That being said, I wish to address specifically two objections raised by the AGBC. The first objection relates to what was characterized as medical "opinion" evidence. The second objection was a broader procedural complaint regarding unfair prejudice.

1. Objection to Plaintiffs' medical "opinion" evidence

34 Many of the AGBC's objections relate to affidavits filed by physicians in support of the Injunction Application. It is evident that the parties have spent considerable time litigating similar issues before the trial judge. In assessing the medical evidence presented here, I have considered the history of that litigation which I set out briefly.

35 I agree with the AGBC that expert opinion evidence is admissible on an interlocutory application but the witness providing the evidence must be properly qualified: *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation & Festival Property Ltd.*, 2009 BCSC 322

(B.C. S.C.) at paras. 117-128, 138-151; aff'd 2010 BCCA 539 (B.C. C.A.) at paras. 40-42. Further, I agree that evidence regarding the medical effects of waiting for health care could constitute expert opinion evidence and should be treated accordingly.

36 In assessing the admissibility of the medical evidence tendered on the Injunction Application, I have relied on Justice Steeves' précis on the admissibility of medical opinion evidence in *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2018 BCSC 514 (B.C. S.C.) *[Ruling re Evidence of Dr. Brian Day]* where he states:

> 35. It is well established that a witness is to testify about what he or she directly observed and not about what he or she thinks their observations mean (2016 BCSC 1390, at para. 22). To do otherwise is to give an opinion about what a particular observation might mean. The inference to be drawn from a particular observation is the trier of fact's responsibility, not the witness'. In some cases it can be the subject of expert evidence but not lay evidence.
>
> 36. The common law has recognized, in narrow circumstances, exceptions to this general rule. A witness may say in evidence that he or she thought a car was speeding or that a person appeared to be intoxicated, for example. These are exceptions because they are not considered matters where scientific, technical, or specialized evidence is necessary (sometimes described as "lay opinion evidence"): 2016 BCSC 1390, at para. 22; *Graat v. The Queen*, [1982] 2 S.C.R. 819.
>
> 37. In 2016 BCSC 1896, I found that a doctor is permitted to testify about his or her experiences with waitlists (i.e. how long they have been, how a patient gets on a waitlist, etc.) so long as these observations form a part of the everyday experience of the doctor (at para. 14). Similarly, a doctor is permitted to testify about his or her observations as to a patient's situation while waiting for a medical procedure (i.e. whether the patient is in pain or not), as this observation would be similar regardless of whether a doctor or non-doctor observed it (at para. 15).
>
> 38. However, a doctor who is not qualified by the Court as an expert, is not permitted to give opinion evidence about, for example, whether wait times are medically justified or not justified. That is an opinion and lay witnesses (such as doctors not tendered by a party as an expert) generally cannot provide opinions in their evidence.
>
> 39. Moreover, personal opinions about the state of the Canadian health care system is inadmissible opinion evidence. Personal opinions that go beyond lay observations or that go beyond a duly qualified expert's area of expertise are inadmissible (2016 BCSC 2161 at para. 46).
>
> 40. Opinion evidence is admissible in court where it is tendered through an expert (not a lay person). Rule 11 of the *Supreme Court Civil Rules*, BC Reg 168/2009 sets out the procedure for presenting expert evidence. Among other things, a person certified under this Rule as an

170 expert must certify that he or she is aware of the "duty to assist the court and is not to be an advocate for any party" (Rule 11-2(1)).

37 I have also relied on the ruling of Steeves J. regarding evidence of a doctors' observations of their patients as they await medical procedures. Justice Steeves said this in *Cambie Surgeries Corp. v. British Columbia (Attorney General)*, 2016 BCSC 1896 (B.C. S.C.) *[Ruling re non-expert medical witnesses]*:

> 15. Another related category of evidence is also from a doctor, again not certified as an expert, who testifies about his or her observations as to a patient's situation while waiting for a medical procedure. These observations can be about a patient being in pain, having restricted movements, not being at work, being anxious and/or depressed and other matters. I conclude that these observations are also admissible. In my view the character of these observations are the same as observations that could be made by a non-doctor. The fact that the witness is a doctor is relevant inasmuch as he or she may use medical language to describe his or her observations. But I see no difference for the purposes of admissibility with a non-doctor testifying about an accident where the victim was bleeding from the leg and a doctor saying the same victim was bleeding from the carotid artery.
>
> 16. I acknowledge there is an element of opinion in this type of evidence. However, it has been the case for some time that distinctions between fact and opinion can be tenuous and even false (*Graat v. The Queen*, [1982] 2 S.C.R. 819, at p. 15 (QL)). This development in the law of evidence has been applied in cases involving, for example, non-expert telecommunication workers describing how to determine the location of a cellphone (*R. v. Hamilton*, 2014 ONCA 339, at paras. 272-9) and a police officer testifying about his observations from years of experience about the operation of street level drug trafficking (*R. v. Ballony-Reeder*, 2001 BCCA 293, at para. 12).
>
> 17. In some cases this is called the "compendium statement of fact exception" to the usual requirement for expert opinions (*Ganges Kangro Properties Ltd. v. Shepard*, 2015 BCCA 522) and in other cases it is called "lay opinion evidence", *American Creek Resources Ltd. v. Teuton Resources Corp.*, 2013 BCSC 1042, at para. 142).
>
> 18. In any case I conclude that a doctor's observations about his patient while waiting for a medical procedure or prior to being put on a waitlist, however that list is defined, are analogous to the accepted forms of this type of evidence in other cases. This includes identification of handwriting, identification of persons, identification of things; apparent age; the bodily plight or condition of a person, including illness; the emotional state of a person, whether distressed, angry and depressed; and other categories (*Graat*, at para. 46).
>
> 19. I also conclude that this type of evidence may be generalized to reflect the experience of a doctor over a period of time and experience with a number of patients in the same situation.

> Of course, at a certain point highly generalized evidence without sufficient particulars cannot be given significant weight. I have in mind here statements such as patients simply being "significantly disabled" or "in significant distress." A doctor giving this type of evidence is subject to cross-examination, including questions about specific patients, and this might include details of their treatment.
>
> . . .
>
> 22. Turning to a fourth and perhaps final category of evidence here, the evidence may include evidence from a doctor, again not certified as an expert, who says a patient is experiencing a specific medical condition caused by waiting for a medical procedure.
>
> 23. In my view that is an issue that is at the heart of this litigation and ultimately for me to decide. There can be evidence on that issue that would certainly assist the court, but in my view it must be evidence in the form of an expert. To be clear, evidence on that issue or similar issues from a doctor testifying without being certified as an expert is not admissible. I take examples of this from the will-say statements that include a statement that wait times have a significant impact on the health outcomes and quality of life of patients or delayed treatment has a negative impact on the overall well-being of patients. Again, these conclusions are for the court to make based on admissible evidence including observations by physicians, expert reports and evidence from patients.

38 I reiterate that I have been guided by the evidentiary rulings of Steeves J. as I assess the affidavit evidence of several doctors including the weight, if any, to be attributed to that evidence as I work through the legal issues engaged in the Injunction Application.

2. Unfairly prejudicial to the AGBC to tender responding evidence on Injunction Application

39 The second objection I wish to address is what the AGBC has called "unfair prejudice." The submission was put this way:

> Many of the central issues in the [trial] are put into issue by the plaintiffs for determination on the Injunction Application. Compelling the defendant to respond to the plaintiffs' trial evidence where the effect of doing so is to compel it to adduce its defence of the plaintiffs' case in the underlying trial compounds the abuse of process and procedural unfairness created by the manner in which the plaintiffs have attempted to proceed with these applications.

40 In support of the "unfair prejudice" submission, the AGBC raises two concerns. First, they raise a concern about inconsistent findings of harm should I embark on a comprehensive review of all of the evidence on this application. Second, the AGBC says it is simply unfair that the Plaintiffs demand a substantive response on the Injunction Application because it forces the AGBC to respond to the merits of the Plaintiffs' case in the trial before the Plaintiffs' case is closed.

41 I address each of the AGBC's concerns.

42 First, I am not satisfied that the Plaintiffs' approach will lead to inconsistent findings of harm. It will be very clear to anyone reading these reasons that this is an interlocutory application for injunctive relief pending a determination of the constitutional issues on the merits. Nothing in these reasons for interlocutory relief should be construed as deciding the merits of the claim or the issues to be determined by the trial judge. That I, as a motion judge, have a limited role was made clear by Justice Beetz in *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.) ("*Metropolitan Stores*"):

> 40. The limited role of a court at the interlocutory stage was well described by Lord Diplock in the *American Cyanamid* case, *supra*, at p. 510:
>
> > It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.
>
> 41. The *American Cyanamid* case was a complicated civil case but Lord Diplock's *dictum*, just quoted, should *a fortiori* be followed for several reasons in a *Charter* case and in other constitutional cases when the validity of a law is challenged.
>
> 42. First, the extent and exact meaning of the rights guaranteed by the *Charter* are often far from clear and the interlocutory procedure rarely enables a motion judge to ascertain these crucial questions . . .
>
> 43. Still, in *Charter* cases such as those which may arise under s. 23 relating to Minority Language Educational rights, the factual situation as well as the law may be so uncertain at the interlocutory stage as to prevent the court from forming even a tentative opinion on the case of the plaintiff: *Marchand v. Simcoe County Board of Education* (1984), 10 C.R.R. 169 at p. 174 . . .

43 Justice Beetz went on to express his view about determining the merits of a constitutional case at an interlocutory stage at para. 50:

> Most of the difficulties encountered by a trial judge at the interlocutory stage, which are raised above, apply not only in *Charter* cases but also in other constitutional challenges of a law. I therefore fully agree with what Professor R.J. Sharpe wrote in *Injunctions and Specific Performance*, at p. 177, in particular with respect to constitutional cases that "the courts have sensibly paid heed to the fact that at the interlocutory stage they cannot fully explore the merits of the plaintiff's case." At this stage, even in cases where the plaintiff has a serious

> question to be tried or even a *prima facie* case, the court is generally much too uncertain as to the facts and the law to be in a position to decide the merits . . . .

44 There is no doubt that the issues to be determined by me in the Injunction Application are not the same as the issues for the trial judge in the underlying action. These issues remain in dispute between the parties and it is important that I refrain from expressing any preliminary thoughts on the strengths or weaknesses of their respective positions except insofar as is required. This is so even though the Plaintiffs rely on much of the same evidence here as they do at trial.

45 That said, to account for the AGBC's objections, the fact that the AGBC has yet to commence the calling of evidence and the deficiencies of some of the evidence tendered, I have relied on only a limited aspect of the evidence filed on the Injunction Application. To be clear, any findings of fact I have made are relevant only to the issues before me in determining whether the interlocutory relief should be granted and not on the merits of the constitutional claims to be determined by the trial judge. In other words, I touch on the merits only insofar as is necessary to determine whether the Plaintiffs have met their burden in obtaining injunctive relief and for no other purpose.

46 I turn to the second point raised by the AGBC. That is, requiring the AGBC to respond fully and substantively to the evidence presented on the Injunction Application allows the Plaintiffs to split their case. As I understand this submission, the AGBC claims that any substantive response on this Injunction Application will enable the Plaintiffs to shore up their evidence. In support of its position, the AGBC relies on *R. v. Krause*, [1986] 2 S.C.R. 466 (S.C.C.) at 473 where Justice McIntyre stated:

> . . . The general rule is that the Crown, or in civil matters the plaintiff, will not be allowed to split its case. The Crown or the plaintiff must produce and enter in its own case all the clearly relevant evidence it has, or that it intends to rely upon, to establish its case with respect to all the issues raised in the pleadings; in a criminal case the indictment and any particulars: see *R. v. Bruno* (1975), 27 C.C.C. (2d) 318 (Ont. C.A.), per Mackinnon J.A., at p. 320, and for a civil case see*: Allcock Laight & Westwood Ltd. v. Patten, Bernard and Dynamic Displays Ltd*., [1967] 1 O.R. 18 (Ont. C.A.), per Schroeder J.A., at pp. 21-22. This rule prevents unfair surprise, prejudice and confusion which could result if the Crown or the plaintiff were allowed to split its case, that is, to put in part of its evidence -- as much as it deemed necessary at the outset -- then to close the case and after the defence is complete to add further evidence to bolster the position originally advanced. The underlying reason for this rule is that the defendant or the accused is entitled at the close of the Crown's case to have before it [page474] the full case for the Crown so that it is known from the outset what must be met in response.

47 Relevant to the rule against case-splitting is the concept of fairness. In a civil trial, the litigants are bound by rules of court that dictate trial process and which aim to prevent unfair surprise. However, the situation presented here is plainly distinguishable from that which exists

at trial where prejudice may well occur if a party does not put its entire case forward in chief: see Sharpe J.'s statement in *Mead Johnson Canada v. Ontario (Ministry of Health)* (1999), 85 A.C.W.S. (3d) 265 (Ont. Gen. Div.) [1999 CarswellOnt 104 (Ont. Gen. Div.)].

48 I do not agree with the AGBC's objection that the Injunction Application constitutes improper case-splitting. The rule against case-splitting is intended to prevent unfair surprise, prejudice and confusion if the plaintiff is permitted to hold back during the course of a trial. That is not this case. The Injunction Application was brought in the context of a civil dispute where both sides have engaged in extensive discovery. The Plaintiffs pursue the injunction because of a legislative change brought during the middle of the trial. Policy reasons for restricting case-splitting do not apply in the circumstances presented here.

49 In summary, I dismiss the objection framed as unfair prejudice. As set out above, I have taken into account the fact that the AGBC has not opened its case and the material on the Injunction Application must be assessed accordingly. I also agree that some of the affidavit evidence tendered contravenes rules against hearsay, opinion and argument. I have cautioned myself accordingly.

B. Evidence filed in support of Injunction Application

50 The AGBC filed limited responding material on the Injunction Application. The AGBC submitted that "the fact that [the AGBC] has not responded on the evidence to any particular assertion of fact is not indicative of any form of concession that that fact is not in dispute, or is true." The AGBC takes the position that the Court must proceed with caution in accepting the Plaintiffs' assertions that facts are not in dispute. Specifically, the AGBC disputes the Plaintiffs' evidence regarding: (1) the distinction between benchmark wait times and the point at which waiting causes clinical harm; (2) measurement of wait lists; and (3) the medical effects of waiting.

51 Bearing in mind the AGBC's caution about disputed facts and the frailties of some of the material filed, I set out, in the paragraphs that follow, the evidence relevant to my determination of the issues raised on the Injunction Application.

52 Dr. Day swore an affidavit on January 26, 2018 which was to constitute, for the most part, his examination-in-chief at the trial. Before he was called to testify, the AGBC objected to about half of the content of Dr. Day's affidavit. The AGBC's objections (similar to many of those raised on this application) were argued over six days before Steeves J. and resulted in the *Ruling re Evidence of Dr. Brian Day*. Dr. Day's affidavit as amended pursuant to the trial judge's ruling is filed in support of the Injunction Application.

53 I appreciate that the AGBC, at least on this application, disputes what remains of Dr. Day's affidavit. However, in my view, Dr. Day's affidavit #9, as amended, can be considered on the Injunction Application because the AGBC has had its objections, at least in part, addressed by the trial judge.

54 To that end, in the paragraphs that follow, I briefly set out the evidence of Dr. Day that is relevant to the Injunction Application.

55 Dr. Day, an orthopaedic surgeon, has been the president, CEO and medical director of Cambie Surgeries since it began providing surgical services in 1996. Dr. Day has been the president and CEO of SRC since it began providing specialist assessments in 2002. He says this about Cambie and its operations:

> 53 Cambie provides a broad range of surgical procedures, including orthopedic surgery, general surgery, neurosurgery, plastic surgery, urology, gynaecology, eye surgery and children's dentistry, as well as colonoscopies and other diagnostic procedures.
>
> 54 Based on data we have filed with the BC College, I estimate that Cambie has treated approximately 3,800 patients per year on average over the past 10 years, and approximately 70,000 patients in total since it opened in 1996.

56 Dr. Day provides some history about the health care system in B.C. and described some factors that he believes have impacted wait times for health services. Those factors include restrictions on global billing, restrictions on elective and emergency surgeries and increased specialization of surgeons. As a physician, he has observed patients waiting for surgeries and says:

> 229 I have witnessed first-hand the significant problems — medical, financial and personal — that patients suffer when their surgeries are cancelled or otherwise delayed as a result of the restrictions I have reviewed above.
>
> 230 I have personally observed my patients suffering mentally and physically while they waited for medically necessary surgeries at public hospitals.
>
> 231 Many of my patients were in pain or had reduced mobility, but were required to wait long periods without the surgeries they needed.
>
> 232 My patients have often been on strong addictive narcotic pain killers and often needed surgery to reduce pain and give them the best chance of regaining functioning without suffering harm or permanent damage.
>
> 233 In addition, some of my patients were unable to work without the necessary surgeries and therefore the longer they waited for surgery, the longer they were out of work and the greater their financial and other hardships. I observed that this caused a great deal of stress and anguish for my patients.

57 This affidavit evidence relates to Dr. Day's observations, at an earlier time, of the impact of wait times and serves to explain the basis for establishing Cambie (and SRC). This evidence

also demonstrates, to a certain extent, how it is that waiting times for medically necessary health services may engage s. 7 *Charter* rights.

C. Evidence of Wait Times in B.C.

58 The Plaintiffs described the measurement of wait times for specified medical procedures as including three different waiting periods: (1) "wait one" constitutes the referral time from when a general practitioner refers a patient to a specialist; (2) "wait two" constitutes the time between the specialists' requisition for treatment/surgery and the time when the procedure is completed; and (3) "wait three" constitutes the time required for diagnostic testing, if any.

59 Wait time data for surgeries and some treatments for both wait one and two are compiled in the surgical patient registry ("SPR").

60 The Plaintiffs rely on a description of the SPR as given by the AGBC:

> 324. The SPR is a province-wide system that tracks patients (adults and pediatric) waiting for scheduled surgery in BC. Patient information and data gathered from health Authorities operating room booking systems are entered into the registry by way of a nightly batch upload and used to evaluate and monitor surgical wait times across health authorities and specific physicians.
>
> 325. The purpose of the SPR is to provide clinically relevant, accurate and comprehensive information on patients waiting for surgery identified by surgeon, by diagnosis/clinical condition, by procedure, by priority level, by hospital, and by Health Authority. Wait time data is also collected for performed surgical cases.
>
> 326. The SPR captures adult and pediatric surgical procedures that are typically completed in an operating room or another room that requires similar equipment and human resources and are scheduled in the hospital's operating room booking system.

61 In their written submissions and in Affidavit #13 of Dr. Day, the Plaintiffs describe the maximally acceptable wait one times and BC's performance in relation to such wait one times as follows:

> 43. The Wait One information in the SPR is provided by the specialist to the Health Authority, along with the information relating to when a decision is made by the patient and the surgeon that the patient is ready for surgery. This Wait One information has been entered into the SPR since 2014. The SPR only contains Wait One information for patients who are booked for surgery — there is no tracking of Wait One for patients who are found to require treatment other than surgery.

44. There are no national or provincial benchmarks established for adult Wait One times. However, there are maximally acceptable Wait One targets for paediatric patients which were established by the Canadian Paediatric Surgical Wait Times (CPSWT) Project, which are known as the Pediatric Canadian Access Targets for Surgery ("PCATS").

45. The Government's Wait One data from the SPR shows that adult patients are waiting a very long time for surgical consultations, with some specialties, such as orthopedics, neurosurgery, plastic surgery and vascular surgery experiencing 90 th percentile wait times for consultations of 28 to 37 weeks.

46. The Paediatric Wait One data in the SPR shows that most paediatric surgical specialties do no meet their Wait One targets and most patients wait far longer for surgical consults than the maximum acceptable consultation wait times.

62 The Plaintiffs describe the maximally acceptable wait two times and BC's performance in relation to such wait two times as follows:

48. The Wait Two data in the SPR is measured against evidence-based wait time benchmarks that have been established by groups of national or provincial experts, and which have been accepted by the BC government as indicating the maximally acceptable wait times for various conditions and surgical procedures.

49. With respect to Wait Two times, the BC Government has developed maximum acceptable wait times for adult surgical procedures, through the use of "patient priority codes", which are used by physicians to categorize patients based on their diagnoses and conditions, and the comparative urgency with which they require treatment.

50. These patient priority codes were first adopted by the Province in 2010, following consultation with surgical specialists, and were revised in 2014-2015 following an extensive review involving specialist surgeons, and Ministry of Health and Health Authority representatives.

51. According to the BC Government, the target wait times set out in the adult priority codes indicate "the time beyond which patients presenting with the particular diagnosis/condition could suffer negative consequences".

52. The current list of adult conditions and diagnoses, with their corresponding priority levels and maximum acceptable Wait Two times (in weeks), published by the Ministry of Health and the Health Authorities in late 2015.

53. The Adult Priority Codes List indicates the maximum acceptable wait times for surgery for patients experiencing particular conditions. The different priority levels and their maximum

178 acceptable wait times are: level 1 (2 weeks maximum), level 2 (4 weeks maximum), level 3 (6 weeks maximum), level 4 (12 weeks maximum), and level 5 (26 weeks maximum).

54. The Wait Two maximum acceptable wait times do not take into account the time it took a patient to see a specialist (Wait One) or the time it took for a specialist to make a decision that a surgery is required, which includes the time it takes to obtain the necessary diagnostic testing (Wait Three).

55. The current PCATS list of paediatric conditions and diagnoses, with their corresponding maximum acceptable Wait One and Wait Two times, which were issued by the Ministry of Health in March 2016.

56. The PCATS were adopted by BC Children's Hospital in 2009, and by the BC Government in 2010, when the adult prioritization codes were first established. The PCATS were revised following further cross-Canada expert review and consultation in 2015.

57. The PCATS have priority levels I through VI, for both Wait One and Wait Two, with priority I being highest urgency (surgery within 24 hours) and priority VI being lowest urgency (surgery within 52 weeks).

58. The patient prioritization codes and the collection of wait time data through the SPR is further discussed in a BC Government publication, entitled the "BC Surgical Patient Registry (SPR) Communications Backgrounder", updated September 2015. ("2015 SPR Communications Backgrounder").

59. As noted above, the priority levels and maximum acceptable wait times contained in the Adult and Paediatric Priority Code Lists reflect the period beyond which a patient could suffer negative consequences, such as treatment not being successful or as successful as it would otherwise have been.

60. However, even if there are no permanent consequences from waiting for medical treatment, patients suffer ongoing pain, may need narcotics (with the risk of addiction), and may suffer other significant limitations on their daily lives, while they wait for treatment. This suffering is compounded by the length of the delay.

63 The Plaintiffs contend that the data shows many patients are waiting in excess of the maximally acceptable wait times, as established by the Patient Prioritization Codes for adults and the PCATS for children, and that, in many cases, these wait times are worsening rather than improving.

64 The Plaintiffs provided an overview of adult wait times for surgery. Relying on provincial figures from 2017-2018, the Plaintiffs allege that:

a) 22% of patients in need of immediate treatment for cancer of the ovary, fallopian tube, or peritoneum, are treated within the maximum acceptable wait time of two weeks, which is down from a high of 49.6% in 2013;

b) 33% of patients with confirmed or suspected lung cancer receive surgery within the maximum acceptable wait time of two weeks;

c) 16% of patients in need of immediate treatment for "Bladder Cancer With Risk of Cancer Progression" are treated within the maximum acceptable wait time, which is down from a high of 31.1 % in 2015; and

d) 37.6% of patients in need of treatment for "Prostate Cancer with High Risk of Cancer Progression" are treated within the maximum acceptable wait time, which is down from a high of 55% in 2014.

65 A similar overview was provided for pediatric wait times. The Plaintiffs allege "for BC children, there are long and harmful waits well beyond the maximum acceptable wait times for their condition as set out in PCATS, particularly in the specialties of orthopaedics, dental surgery, otolaryngology and ophthalmology" and provided the following statistics from 2017:

a) 26% of children with advanced dental caries (moderate/severe carious lesions and/or pain with high or moderate medical status risk) received their surgery within their maximum acceptable wait times of one week or six weeks respectively;

b) 36% of children with strabismus received surgery within the maximum acceptable wait time of six weeks;

c) 46.5% of children with otitis media with effusion — documented moderate hearing loss and speech delay received surgery within the maximum acceptable wait time of six weeks;

d) Less than 20% of children with acute meniscal injuries received surgery within their maximum acceptable wait time of one week; and

e) Nearly 20% of children with acute ACL injuries waited longer than their maximum acceptable wait time of 12 weeks.

66 Many of the procedures for which B.C. children are waiting for surgery are performed in private surgical clinics such as Cambie. At Cambie, over 1000 children each year receive dental surgery under anesthesia, which program will have to stop when enforcement commences. These children will then be added to the B.C. Children's Hospital wait lists.

67 The Plaintiffs also provided examples of medical conditions that exceed the maximum acceptable wait times for various related procedures. Here, I consider the submission as it relates to

180 colonoscopies. The Plaintiffs allege that the government data shows many patients waiting beyond the maximum acceptable wait times for a colonoscopy and state "for instance, the maximum wait time for patients following a positive fecal blood test is 8 weeks, as set out in the patient priority codes. This is consistent with the evidence-based maximum wait times established by the Canadian Gastroenterologists Association, and accepted by the BC Cancer Agency." The Plaintiffs state that the SPR data for patients receiving a colonoscopy following a positive fecal occult blood test outside of the BC Cancer Agency screening program shows that:

> a) 27.7% of BC patients received their colonoscopy following a positive FIT test received their colonoscopy within the 8 week maximum acceptable wait time in 2017, down to 21.1% of patients so far in 2018;
>
> b) About 60% of patients with bright red rectal bleeding or chronic unexplained abdominal pain received a colonoscopy within the maximum acceptable wait time of eight weeks;
>
> c) 50% of BC patients with a positive FIT test waited more than 15.4 weeks in 2017 (said to be about twice as long as the maximum acceptable wait time), and more than 27 weeks so far in 2018 (said to be over three times as long as the maximum acceptable wait); and
>
> d) 10% of BC patients with a positive FIT test waited over 28 weeks in 2017 and over 44 weeks so far in 2018 (said to be over five times longer than the maximum acceptable wait).

68 The Plaintiffs emphasize the importance of early detection for colorectal cancer. In that regard, such delays could be life-threatening.

69 Some private clinics provide private-pay colonoscopies for symptomatic patients. Cambie provides between 50 and 75 colonoscopies a year. Cambie will not perform colonoscopies should enforcement commence.

70 In addition to the above, I have considered the following:

> a) Evidence about Kristiana Corrado's experience accessing private surgical services. In particular, I have relied on the excerpted portions of her trial testimony and her description about the physical and psychological impact on her of waiting for knee surgery. I have considered Ms. Corrado's evidence that access to private medically necessary surgical services reduced her wait time by approximately six months;
>
> b) Ms. Corrado's experience occurred some six years ago. However, her experience as a teenage athlete is said to be representative of other young athletes awaiting knee surgery and the physical and psychological effects of waiting;
>
> c) Dr. Day's specific observations regarding Ms. Corrado. In particular, his observations that "she had a knee that was not functioning well; it was unstable and painful when it shifted out

of position and she was distraught about not being able to participate in physical activities . . . because of the delay in getting the knee fixed." In addition to his physical observations, he noted in her report that she was depressed, had trouble sleeping and concentrating on her school work because of her knee injury; and

d) The general observations to which Dr. Day deposed of "patients suffering from terrible pain that greatly affects their daily lives, the negative effects on their psychological state, their inability to return to work after being off work for a lengthy period, the serious financial consequences for these and their families and the long-term effects on their physical well-being and lives generally".

71 I have considered some of the expert testimony tendered at the trial and filed in support of the Injunction Application, including:

a) Excerpted trial testimony of Professor Alistair McGuire (Professor of Health Economics at the London School of Economics and qualified as an expert in international comparisons of health care systems in countries that provide universal access to health care) explaining his opinion that "the empirical evidence supports a conclusion that waiting time for surgery can have harmful consequences and that the wait, in and of itself, causes harm." In his explanation, he testified:

> And on the basis of my experience and knowledge of econometrics, statistics and health policy that's how I came to my opinion, and the opinion relates largely in these documents to elective surgery, and it relates to whether or not there was a deterioration in quality of life, which is a measure which is used, as I've said, by regulatory bodies across the world to try to succinctly define health benefit.

b) Excerpted trial testimony of Nadeem Esmail (qualified as an expert in health care systems, policies and economics of Canada and other developed countries that maintain universal access to health care, including assessing the success of these systems in providing timely, high quality health care to patients) about delayed access to health care. Mr. Esmail testified, in part, on the impact of delay:

> There's a number of different measures that are used to measure the function, pain and disability of the patients. And based on these various different measures — and they don't always align between studies, but each of the studies that I've cited there did show that there was a relationship between delay and potential deteriorations in status, and in some cases to the extent that initial status at the time of surgery is related to the outcome these deteriorations can then affect the outcome from the surgery. So a delay might not only affect your pain and your function while you're waiting and it might get worse; the outcome post-surgery might now be worse because you weren't treated early enough in the degenerative process.

72 The above overview serves as a basis for demonstrating evidence of wait times, the impact on patients waiting for health care services and the harm that may follow.

D. Evidence regarding impact of the MPA Amendments

1. Dr. Kevin Wade

73 I turn to the evidence regarding the impact, if any, of the *MPA* Amendments on access to health care. I start with the affidavit of Dr. Wade sworn June 29, 2018. Dr. Wade is an ophthalmologist working in public hospitals in B.C. and at Cambie. He has a medical office and ophthalmological examination clinic in Vancouver. He performs approximately 900 cataract surgeries per year. Dr. Wade describes his patient list in this way:

> 4. . . . I have a lengthy wait list in the public health care system for cataract surgery. Currently, I have over 525 patients waiting for cataract surgery on one eye. I estimate it will take about 1.5 years to complete these surgeries based on my current operating room time allocation.
>
> 5. Over the past three years, an increasing number of my patients have elected to have their cataract surgery performed at Cambie Surgery Centre on a private pay basis. In 2016 and 2017, I performed 123 and 165 cataract surgeries each year respectively, at Cambie. In 2018, up to June 30th, I have performed 115 cataract surgeries at Cambie.
>
> 6. These surgeries are in addition to the approximately 700 to 800 surgeries I perform annually in the public health care system at Vancouver General Hospital. In 2017, for example, I performed 783 cataract surgeries at VGH. In addition, in 2017, for example, I did 1822 consultations either at my Kerrisdale medical office or at VGH, which were covered by MSP.
>
> 7. I perform the additional surgeries at Cambie because the wait list in the public health care system for cataract surgery is very long (about 1.5 years currently) from the date of consultation to surgery.

74 A portion of Dr. Wade's affidavit addresses issues relating to billing and his use of the femtosecond laser in his procedures. I have not relied on any of his evidence regarding the femtosecond laser. Rather, I have considered his evidence that the amendments "will make it impossible for [him] to continue to provide any cataract surgeries at Cambie, using the femtosecond laser or otherwise." He deposes that this decision is based on the financial penalties and new set-off provisions, the consequences of which he cannot afford to risk. He estimates that approximately 150 patients per year for whom he currently provides cataract surgery at Cambie will have to go back into the public health care system and back onto public system wait lists.

75 At para. 32 of his Affidavit, Dr. Wade estimates that his surgical wait list will increase from approximately 18 months (as it is now) to approximately 24 months if he is unable to perform

cataract surgeries at Cambie. The AGBC objects to para. 32 on the basis that it is inadmissible opinion evidence. I have considered this evidence for what it is — an estimate only. That is, Dr. Wade is providing his estimate, based on his surgical practice, about the impact of the loss of Cambie on his surgical wait list.

76 At para. 34 of his Affidavit, Dr. Wade provides his opinion about the impact of the amendments based on his experience and knowledge of the number of enrolled B.C. surgeons and private medical clinics currently providing cataract surgeries on a private-pay basis. I have relied on para. 34(a) only insofar as it relates to Dr. Wade's personal observations regarding his own patients.

2. Dr. Amin Javer (Affidavit #2)

77 Dr. Javer is a sinus surgeon and describes his own lengthy wait list in the public health care system for endoscopic sinus surgery. He performs about three endoscopic sinus surgeries per week on a private-pay basis at False Creek Surgical Centre amounting to over 150 private-pay endoscopic sinus surgeries each year. He estimates that the wait list for endoscopic surgery in the public health care system to be approximately 2.5 years.

78 With respect to the amendments, Dr. Javer deposes that he will not continue to provide surgeries on a private-pay basis due to the high financial penalties and new set-off provisions. He estimates that this will increase his surgical wait list from about 2.5 years to about 4 years. Again, I rely on this evidence for what it is — an estimate. I rely on para. 12(a) only insofar as it relates to Dr. Javer's personal observations regarding his own patients.

3. Dr. Navraj Heran

79 Dr. Heran is a neurosurgeon, with a specialization in endovascular neurosurgery, who works within the public health care system and at False Creek Surgical Centre. He deposes that he has a very long wait list for neurosurgical consultations and scheduled medically necessary neurosurgeries in the public system. He estimates that his patients routinely wait six months to one year for neurosurgical consultations and an additional six months to one year for neurosurgery. Dr. Heran says he observed the impact of waiting on his patients noting that they suffered greatly from pain and loss of function.

80 In response to the *MPA* Amendments, Dr. Heran states that he will not perform private consultations or surgeries for non-exempt patients. He describes the impact on his patients in this way:

> This will mean my non-exampt patients will not have access to the less invasive spinal stabilization surgery that I currently provide at False Creek. This is a serious loss to patients.

E. Correspondence of September 10, 2018

81 The Medical Services Commission sent a letter, dated September 10, 2018, to physicians registered in B.C. to provide notice of the *MPA* Amendments. In part, the Medical Services Commission stated:

> The Government of British Columbia has announced that the *Act* is changing effective October 1, 2018. Please ensure that you are aware of these new provisions, as they may affect your practice. Please note these changes include that:
>
> • a beneficiary (or the person who pays for the service) will be entitled to a refund for an amount that is paid contrary to the extra billing provisions contained in the *Act*; (s. 20)
>
> • the general limits on extra billing by enrolled practitioners are being clarified; (s. 17)
>
> • there will be an increase in the scope of the limits on extra billing by non-enrolled medical practitioners; (s. 18)
>
> • there will be new offence provisions related to contravention of the extra billing provisions in the *Act*, including fines of up to $10,000 for a first offence and up to $20,000 for a second or subsequent offence; (s. 46(5.1) and (5.2)) and
>
> • the Commission will have "cause" to cancel the enrolment of a practitioner who: (a) contravenes; (b) attempts to contravene; or (c) authorizes, assists or allows someone else to contravene, the extra billing provisions in the *Act.* (s. 15)
>
> . . .
>
> You are required to comply with the *Act*, including the upcoming changes once they come into force. The changes to the *Act* do not prohibit practitioners from levying legitimate charges for completion of doctor's notes for employers or other non-benefits, including services that are not medically required (e.g. elective cosmetic procedures).

F. Previous enforcement measures

82 I touch briefly on the Plaintiffs' submissions regarding earlier efforts to enforce compliance with the *MPA*. In their written submissions, the Plaintiffs contend:

> Clearly, there was not a need to enforce the prohibition on enrolled doctors providing medically necessary services in private clinics to non-exempt British Columbians over the course of the past 25 years. And up until now, the Courts, starting with Justice Smith and continuing with CJ Bauman and ACJ Cullen, recognized that this status quo should be

> maintained pending a ruling in the trial on the constitutionality of the prohibitions in the *MPA* on access to private health care.
>
> . . .
>
> All three judges who dealt with the previous enforcement attempts recognized the public interest in allowing non-exempt British Columbians to continue to obtain medically necessary services on a private pay basis from enrolled doctors at Cambie and SRC during the course of the trial [into] the constitutionality of the prohibitions on access to private health care.

83 I have reviewed the reasons of Bauman C.J., Cullen A.C.J. and Smith J. I do not agree with the Plaintiffs that these decisions can be so broadly construed. Rather, I find that these rulings have little bearing on the Injunction Application. I say that because those earlier rulings were rendered at a time when some of the provisions of the *MPA* were different, or when the litigation was in its early stages and the issues to be resolved were different. For example, Cullen A.C.J.'s order seemed to be principally based on a concern about whether those responsible for enforcement had used material (subject to the implied undertaking rule) from the constitutional action in the enforcement proceedings. His order was crafted accordingly.

84 Furthermore, Groberman J.A., in *Schooff v. British Columbia (Medical Services Commission)*, 2010 BCCA 396 (B.C. C.A.), disagreed with Smith J. on her decision to grant an injunction requiring the medical clinics to allow inspectors from the MSC access to their premises and records in order to perform audits under s. 36 of the *MPA*. However, his disagreement was based on the irregular manner in which the application for an injunction came before the Supreme Court. He stated at para. 3:

> . . . The [*MPA*] makes adequate provision for orders facilitating audits where such orders are needed. The extraordinary powers of the Supreme Court to grant an injunction need not have been engaged in this case. Further, the procedure that was followed in this case obscured the legal issues surrounding the making of the order, and created unnecessary difficulties.

85 Justice Groberman concluded that the Commission was entitled to proceed with its audit and stated at para. 46:

> If the appellants consider that an audit should not take place pending determination of their constitutional challenge, they are entitled to apply to a judge of the Supreme Court for an order exempting them from the relevant provisions of the [*MPA*] pending the determination of their challenge. Such an application could properly be brought as an interlocutory application in the extant proceedings. Such an application would clearly be an application for an interlocutory stay, and the *RJR-MacDonald* test would apply.

86 I do not agree with the Plaintiffs that the enforcement decisions reflect a view that the three judges were attempting to recognize "the public interest in allowing non-exempt British Columbians to continue to obtain medically necessary services on a private pay basis from enrolled doctors at Cambie and SRC during the course of the trial". I simply consider these rulings to be part of the long narrative of this litigation.

G. AGBC's affidavits regarding MPA Amendments and enforcement

87 In an affidavit sworn by Manjit Sidhu, Assistant Deputy Minister of Finance and Corporate Services Division of the Ministry of Health, the AGBC provided information about events that occurred in early 2018 regarding the CHT. In its written submission, the AGBC explained the evidence in this way:

> By agreement dated 18 March 2017, the Province agreed with Health Canada that it would conduct further audits of private clinics over a three-year period in order to identify more accurately the extent to which extra-billing was occurring in British Columbia.
>
> In March of 2018, based on the results of audits of private clinics that were carried out by the provincial Ministry of Health pursuant to the March 2017 agreement, the federal Minister of Health deducted $15.9 million from the CHT.
>
> On 8 August 2018, the federal Minister of Health wrote to the British Columbia Minister of Health to advise that beginning 1 April 2020, the federal government will require provinces and territories to prohibit any charges to patients for medically necessary diagnostic services. The federal Minister also advised that the federal government had implemented a new Reimbursement Policy that will permit the reimbursement to the provinces of amounts deducted from the CHT if the affected province demonstrates that they have taken action to prevent extra billing from recurring.
>
> Amounts deducted from March of 2018 onwards will be eligible to be reimbursed, which would include the $15.9 million deducted from British Columbia's CHT. However, contrary to the plaintiffs' submission, there is urgency in establishing compliance as the Reimbursement Policy provides that the Minister of Health has the discretion to provide a reimbursement if the province comes into compliance by the end of the calendar year. This suggests that if the Province is to be eligible for reimbursement of the $15.9 million deduced from the 2017/2018 CHT, it must come into compliance by January 2019.
>
> [Footnotes removed.]

88 The AGBC says I should not question the timing of bringing legislation into force because that is a legislative decision and the Court should not inquire into the wisdom of the policy decisions made by government in its legislative role. I agree. As such, I do not accept the Plaintiffs'

submission that there was no good reason to disrupt the status quo pending the completion of the trial. I am satisfied that the decision to bring the amendments into force is a decision that should not be questioned on this application.

89 The AGBC also tendered affidavit evidence from Stephanie Power, Executive Director of the Beneficiary Services and Strategic Priorities Branch employed with the Ministry of Health, to support their position that the Plaintiffs' have failed to prove imminent harm. Ms. Power deposed that she was part of a team responsible for planning the Ministry of Health's strategy and process for implementation of the new enforcement provisions of the *MPA*, including ss. 46(5.1) and (5.2). Ms. Power deposed that the operational details relating to the enforcement provisions are currently under discussion although the Ministry of Health does not intend to apply them retroactively.

90 The AGBC submits that there are many decisions required to be made before a fine can be imposed against a doctor accused of violating ss. 17 or 18 of the *MPA*.

91 In my view, despite Ms. Power's evidence about the many steps required before the imposition of a fine, it is reasonable for physicians to cease offering private-pay medically necessary health services due to the new enforcement provisions. I accept the evidence of the physicians who have deposed that they will not risk a prosecution by providing non-exempt services on a private-pay basis.

H. Summary of evidence

92 As I have stated, the AGBC disputes much of the evidence on which the Plaintiffs rely. In particular, what constitutes acceptable wait times, whether B.C. is meeting wait time targets (whatever they should be), and the health impact, if any, of wait times on patients remain very much in dispute.

93 For the purpose of the Injunction Application only, I am satisfied that there is sufficient evidence, as referenced above and taking into account the AGBC's objections, to make the following findings:

a) There exists waiting lists for medically necessary health services;

b) Some of those waiting lists exceed maximally acceptable targets;

c) Some medically necessary health services can be accessed through private-pay clinics, such as Cambie;

d) Some patients experience serious physical and/or psychological harm when medically necessary health services are delayed;

e) Some physicians will not offer private-pay medically necessary health services once the financial penalties are implemented;

f) Some patients will be unable to access previously available private-pay medically necessary health services when enforcement commences; and

g) For some patients, inability to access private-pay medically necessary health services will prolong pain and discomfort causing them physical and/or psychological harm.

VI. CHAOULLI V. QUEBEC (AG)

94 In support of their claim that the impugned provisions violate the *Charter*, the Plaintiffs rely heavily on *Chaoulli*. I set out the circumstances of *Chaoulli* in some detail because many of the same legal arguments are advanced here.

95 In *Chaoulli*, the plaintiffs contested the validity of the prohibition on private health insurance found in two of Quebec's health care statutes. They argued that the legislative provisions violated s. 7 of the *Charter*. The Superior Court concluded that the plaintiffs demonstrated a deprivation of the rights to life, liberty and security of the person guaranteed by s. 7 of the *Charter* but that the deprivation was in accordance with the principles of fundamental justice. The Court of Appeal affirmed that decision.

96 The majority of the Supreme Court of Canada, in a 4-3 decision, ruled that the legislative provisions violated the Quebec *Charter of Human Rights and Freedoms*. With respect to the *Charter*, however, the Supreme Court of Canada was evenly split (3-3 and one justice declined to determine the *Charter* issue) on whether s. 7 had been unjustifiably infringed.

97 On the one side, McLachlin C.J.C. (as she then was) and Major J. (Bastarache J. agreeing) found the prohibitions on private health insurance violated s. 7 of the *Charter*. They framed the issue this way:

> 103. The appellants do not seek an order that the government spend more money on health care, nor do they seek an order that waiting times for treatment under the public health care scheme be reduced. They only seek a ruling that because delays in the public system place their health and security at risk, they should be allowed to take out insurance to permit them to access private services.
>
> 104. The *Charter* does not confer a freestanding constitutional right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*. We are of the view that the prohibition on medical insurance in s. 15 of the *Health Insurance Act*, R.S.Q., c. A-29, and s. 11 of the *Hospital Insurance Act*, R.S.Q., c. A-28 (see Appendix), violates s. 7 of the *Charter* because it impinges on the right to life, liberty and security of the person in an arbitrary fashion that fails to conform to the principles of fundamental justice.

> 105. The primary objective of the *Canada Health Act*, R.S.C. 1985, c. C-6, is "to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers" (s. 3). By imposing exclusivity and then failing to provide public health care of a reasonable standard within a reasonable time, the government creates circumstances that trigger the application of s. 7 of the *Charter*.
>
> 106. The *Canada Health Act*, the *Health Insurance Act*, and the *Hospital Insurance Act* do not expressly prohibit private health services. However, they limit access to private health services by removing the ability to contract for private health care insurance to cover the same services covered by public insurance. The result is a virtual monopoly for the public health scheme. The state has effectively limited access to private health care except for the very rich, who can afford private care without need of insurance. This virtual monopoly, on the evidence, results in delays in treatment that adversely affect the citizen's security of the person. Where a law adversely affects life, liberty or security of the person, it must conform to the principles of fundamental justice. This law, in our view, fails to do so.

98 Chief Justice McLachlin and Major J. were satisfied that the appellants had established that many Quebec residents face delays in treatment that adversely affect their s. 7 *Charter* rights that they would not sustain but for the prohibition on private medical insurance. They also determined that waiting for critical care may have "serious psychological effects [that] may engage s. 7 protection for security of the person". They stated at paras. 118-19:

> 118. The jurisprudence of this Court holds that delays in obtaining medical treatment which affect patients physically and psychologically trigger the protection of s. 7 of the *Charter*. In *R. v. Morgentaler*, [1988] 1 S.C.R. 30, Dickson C.J. concluded that the delay in obtaining therapeutic abortions, which increased the risk of complications and mortality due to mandatory procedures imposed by the state, was sufficient to trigger the physical aspect of the woman's right to security of the person: *Morgentaler*, at p. 59. He found that the psychological impact on women awaiting abortions constituted an infringement of security of the person. Beetz J. agreed with Dickson C.J. that "[t]he delays mean therefore that the state has intervened in such a manner as to create an additional risk to health, and consequently this intervention constitutes a violation of the woman's security of the person": see *Morgentaler*, at pp. 105-6.
>
> 119. In this appeal, delays in treatment giving rise to psychological and physical suffering engage the s. 7 protection of security of the person just as they did in *Morgentaler*. In *Morgentaler*, as in this case, the problem arises from a legislative scheme that offers health services. In *Morgentaler*, as in this case, the legislative scheme denies people the right to access alternative health care. (That the sanction in *Morgentaler* was criminal prosecution while the sanction here is administrative prohibition and penalties is irrelevant. The important

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> point is that in both cases, care outside the legislatively provided system is effectively prohibited.) In *Morgentaler* the result of the monopolistic scheme was delay in treatment with attendant physical risk and psychological suffering. In *Morgentaler*, as here, people in urgent need of care face the same prospect: unless they fall within the wealthy few who can pay for private care, typically outside the country, they have no choice but to accept the delays imposed by the legislative scheme and the adverse physical and psychological consequences this entails. As in *Morgentaler*, the result is interference with security of the person under s. 7 of the *Charter*.

99 Having concluded that the ban on private medical insurance constituted an interference with security of the person, McLachlin C.J.C. and Major J. turned to whether that deprivation was in accordance with the principles of fundamental justice. They concluded that the impugned provisions were arbitrary and, therefore, the deprivation of life and security of the person could not be said to accord with the principles of fundamental justice.

100 It was particularly here where the six justices differed (although Binnie and Lebel JJ. described differently the security of the person deprivation). Binnie and Lebel JJ. (with Fish J. agreeing) wrote:

> 207. As stated, the principal legal hurdle to the appellants' *Canadian Charter* challenge is not the preliminary step of identifying a s. 7 interest potentially affected in the case of some Quebeckers in some circumstances. The hurdle lies in their failure to find a fundamental principle of justice that is violated by the Quebec health plan so as to justify the Court in striking down the prohibition against private insurance for what the government has identified as "insured services".

101 With respect to the principles of fundamental justice, they wrote:

> 209. Thus, the formal requirements for a principle of fundamental justice are threefold. First, it must be a legal principle. Second, the reasonable person must regard it as vital to our societal notion of justice, which implies a significant societal consensus. Third, it must be capable of being identified with precision and applied in a manner that yields predictable results. These requirements present insurmountable hurdles to the appellants. The aim of "health care of a reasonable standard within a reasonable time" is not a legal principle. There is no "societal consensus" about what it means or how to achieve it. It cannot be "identified with precision". As the testimony in this case showed, a level of care that is considered perfectly reasonable by some doctors is denounced by others. Finally, we think it will be very difficult for those designing and implementing a health plan to predict when its provisions cross the line from what is "reasonable" into the forbidden territory of what is "unreasonable", and how the one is to be distinguished from the other.
>
> [Emphasis in original.]

102 The above paragraphs, from both sets of reasons in *Chaoulli* reflect the tension between the courts and law-makers when entering the health care debate.

103 I would add here as well that since *Chaoulli*, there have been significant developments in the s. 7 *Charter* jurisprudence. Notably, in considering the constitutionality of the *Criminal Code*'s prostitution-related offences in *Bedford v. Canada (Attorney General)*, 2013 SCC 72 (S.C.C.) ("*Bedford*"), the Court consolidated and refined its jurisprudence concerning some of the principles of fundamental justice including arbitrariness, overbreadth and gross disproportionality. Writing for a unanimous Court, McLachlin C.J.C. recognized that there is "significant overlap" between these principles and that the case law tended to "conflate" some of them. Nonetheless, McLachlin C.J.C. emphasized that they were distinct principles. In *Chaoulli*, McLachlin C.J.C. and Major J. had concluded that the provisions violated s. 7 because they were arbitrary. In the underlying trial of this matter, the trial judge may very well find another principle of fundamental justice, as refined since *Chaoulli*, better suited to the analysis.

VII. INTERLOCUTORY INJUNCTIVE RELIEF — CONSTITUTIONAL CASE

104 I commence this discussion with two preliminary observations that underscore the positions taken by the parties on the Injunction Application. The first relates to the separation of powers between the courts and law makers. The second relates to more generally to interlocutory motions for injunctive relief in *Charter* cases.

105 The issues presented in this constitutional litigation very much engage a consideration of the role and interaction between legislatures and courts. In this regard, I turn back to early statements from the Supreme Court of Canada describing a judge's approach to *Charter* litigation in *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 (S.C.C.) starting at 496:

> 11. The novel feature of the *Constitution Act*, 1982, however, is not that it has suddenly empowered courts to consider the content of legislation. This the courts have done for a good many years when adjudicating upon the vires of legislation. The initial process in such adjudication has been characterized as "a distillation of the constitutional value represented by the challenged legislation" (Laskin, Canadian Constitutional Law (3rd ed. rev. 1969), p. 85), and as identifying "the true meaning of the challenged law" (Lederman (ed.), The Courts and the Canadian Constitution (1964), p. 186), and "an abstract of the statute's content" (Professor A.S. Abel, "The Neglected Logic of 91 and 92" (1969), 19 U. of T. L.J. 487, p. 490). This process has of necessity involved a measurement of the content of legislation against the requirements of the Constitution, albeit within the more limited sphere of values related to the distribution of powers.
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> 12. The truly novel features of the *Constitution Act*, 1982 are that it has sanctioned the process of constitutional adjudication and has extended its scope so as to encompass a broader range

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> of values. Content of legislation has always been considered in constitutional adjudication. Content is now to be equally considered as regards new constitutional issues. Indeed, the values subject to constitutional adjudication now pertain to the rights of individuals as well as the distribution of governmental powers. In short, it is the scope of constitutional adjudication which has been altered rather than its nature, at least, as regards the right to consider the content of legislation.
>
> 13. In neither case, be it before or after the *Charter*, have the courts been enabled to decide upon the appropriateness of policies underlying legislative enactments. In both instances, however, the courts are empowered, indeed required, to measure the content of legislation against the guarantees of the Constitution. The words of Dickson J. (as he then was) in *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576, at p. 590, continue to govern:
>
> > The Courts will not question the wisdom of enactments . . . but it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power.

106 This sentiment remains. That is, there is an important line between making policies at the legislative level and testing public policy against constitutional standards. Chief Justice McLachlin, in *PHS Community Services Society v. Canada (Attorney General)*, 2011 SCC 44 (S.C.C.) more recently articulated this point at para. 105:

> The issue of illegal drug use and addiction is a complex one which attracts a variety of social, political, scientific and moral reactions. There is room for disagreement between reasonable people concerning how addiction should be treated. It is for the relevant governments, not the Court, to make criminal and health policy. However, when a policy is translated into law or state action, those laws and actions are subject to scrutiny under the *Charter*: *Chaoulli*, para. 89 *per* Deschamps J., at para 197, *per* McLachlin C.J. and Major J., and at para. 183, *per* Binnie and LeBel JJ.; *Rodriguez*, at pp. 589-90, *per* Sopinka J. The issue before the Court at this point is not whether harm reduction or abstinence-based programmes are the best approach to resolving illegal drug use. It is simply whether Canada has limited the rights of the claimants in a manner that does not comply with the *Charter*.

107 My second observation relates to the guiding principles underlying the *RJR-MacDonald* test in *Charter* litigation and, in particular, the limits of determining complex constitutional issues on an interlocutory application. Here, I borrow Justice Stinson's words in *Council of Canadians v. Canada (Attorney General)*, 2015 ONSC 4601 (Ont. S.C.J.) where he was faced with a motion for an interlocutory injunction to suspend the operation of a provision of the *Fair Elections Act*. The interlocutory injunction was sought pending a full hearing on the constitutionality of the challenged legislation and the parties agreed that the full hearing could not be accomplished before the upcoming election. Starting at para. 39, Stinson J. said this about his role as the motion judge:

> 39. It is important to acknowledge that, as a judge hearing and deciding a preliminary motion such as this, I am constrained in several ways. First, I must recognize that I do not have at hand all the information and arguments that will be available when the case is fully argued. Secondly, and in part due to the factor I have just mentioned, my comments on the evidence and the merits of the case must be viewed as preliminary only and not determinative of the merits of the underlying arguments or my view of the merits. As stated by the Supreme Court of Canada in *RJR-MacDonald v. Canada*, "a prolonged examination of the merits is generally neither necessary nor desirable" at the interlocutory injunction stage.
>
> 40. Because the judge is being asked at an early stage in the proceedings to issue an order that will temporarily — and, potentially, significantly — affect the parties' legal rights, at a time before the parties have the opportunity to gather and present all their evidence and arguments and without the benefit of a full hearing, the courts have developed a well-recognized test to be applied when this type of judicial relief is sought . . .

108 Justice Stinson's comments are apt. To reiterate, my remarks on the evidence and the merits of the constitutional issues must be considered as not only preliminary but also within the context in which they are made — as a judge presiding over an interlocutory application for injunctive relief where the issues to be determined are different and are based on an incomplete and to a certain extent, untested, evidentiary record.

109 I turn then to the analytical framework established in *RJR-MacDonald*, requiring an applicant to establish that (1) there is a serious question to be tried; (2) the applicant will suffer irreparable harm should the injunctive relief be denied; and (3) the balance of convenience favours the applicant, having due regard for the public interest.

110 In applying the *RJR-MacDonald* test, the Court is not to become the "prisoner of a formula." Rather, the fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case: see *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (B.C. C.A.) at para. 52.

A. Serious Question to be Tried

111 In *RJR-MacDonald*, Sopinka and Cory JJ. explained the underlying rationale for using the "serious question to be tried" test in *Charter* cases. In so doing, the Court referred at length to Beetz J.'s reasons in *Metropolitan Stores* and his analysis about why it was that "serious question to be tried" was better suited in *Charter* cases than a more stringent test. They stated it this way at 335:

> 45. 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.

112 After reviewing several authorities suggesting a higher standard, Sopinka and Cory JJ. disagreed that something more than a serious question to be tried was required in *Charter* cases. They stated at 337:

> 48. 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."
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> 49. 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.
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> 50. 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 to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

113 The Court identified two exceptions to the general rule that a judge should not engage in a review of the merits. In my view, neither exception applies in this case.

114 The first exception arises when the result of the interlocutory motion will, in effect, amount to a final determination of the action. The Court specifically recognized that the circumstances where this exception applies are rare, and provided two examples at 338-339:

52. 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:

> 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.]

53. 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.

115 The second exception arises when the question of constitutionality presents itself as a simple question of law alone. In *Metropolitan Stores*, Beetz J. described the second exception in this way, at 133:

> 49. . . . 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.

116 Again, in my view, neither exception applies here.

B. Irreparable Harm

117 *RJR-MacDonald* provides, at 348, that:

> 79. 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.

118 The Court in *RJR-MacDonald* described this branch of the test starting at 340 as follows:

> 57. 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, 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.
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> 58. 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.
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> 59. "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.)).

119 Sopinka and Cory JJ. recognized, at 341, that 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".

120 At the time the decision in *RJR-MacDonald* was rendered, the Court noted that there existed an uncertain state of the law regarding the award of damages for a *Charter* breach and, as such, 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". The Court concluded that it was appropriate to assume financial damage would be suffered by an applicant following a refusal of relief until the law in this area developed further (at 342).

121 Since *RJR-MacDonald*, the availability of *Charter* damages has garnered some judicial attention albeit not necessarily in the context of interlocutory injunctions. For example, the

Supreme Court of Canada divided in its analysis of *Charter* damages in *Ernst v. Alberta Energy Regulator*, 2017 SCC 1 (S.C.C.). Writing for the majority (4-4-1), Justice Cromwell stated:

> 25. Underlying the question of whether *Charter* damages could be an appropriate remedy is a broader issue. It concerns how to strike an appropriate balance so as to best protect two important pillars of our democracy: constitutional rights and effective government; see, e.g., *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, at para. 79. Granting *Charter* damages may vindicate *Charter* rights, provide compensation and deter future violations. But awarding damages may also inhibit effective government, and remedies other than damages may provide substantial redress for the claimant without having that sort of broader adverse impact. Thus there is a need for balance with respect to the choice of remedies. This concern for balance was emphasized recently in *Henry v. British Columbia (Attorney General)* in words that are especially apt in this case: "Courts should endeavour, as much as possible, to rectify *Charter* breaches with appropriate and just remedies. Nevertheless, when it comes to awarding *Charter* damages, courts must be careful not to extend their availability too far" (2015 SCC 24, [2015] 2 S.C.R. 214, at para. 91).
>
> 26. The leading case about when *Charter* damages are an appropriate and just remedy is *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28. Applying the principles set out in that case, damages are not an appropriate and just remedy for *Charter* violations by this Board. Not every bare allegation claiming *Charter* damages must proceed to an individualized, case-by-case consideration on its particular merits. *Ward* held that *Charter* damages will not be an appropriate and just remedy where there is an effective alternative remedy or where damages would be contrary to the demands of good governance. These considerations, taken together, support the conclusion that the proper balance would be struck by holding that damages are not an appropriate remedy.
>
> 27. Section 24(1) of the *Charter* confers on the courts a broad remedial authority. As has been said, "[i]t is difficult to imagine . . . a wider and less fettered discretion": *Mills v. The Queen*, [1986] 1 S.C.R. 863, at p. 965. This broad discretion should not be narrowed by "casting it in a straight-jacket of judicially prescribed conditions": *Ward*, at para. 18. But this does not mean that *Charter* breaches should always, or even routinely, be remedied by awards of *Charter* damages. The remedy of damages is limited to situations in which it is "appropriate and just" because it serves one or more of the compensatory, vindicatory and deterrent purposes which support that choice of remedy: *Ward*, at para. 32. Countervailing factors may establish that damages are not an appropriate and just remedy even though they would serve these ends: *Ward*, at para. 33.

122 The Supreme Court of Canada's recent decisions in *Ward v. Vancouver (City)* [2010 CarswellBC 1947 (S.C.C.)], *Henry v. British Columbia (Attorney General)* [2015 CarswellBC 1121 (S.C.C.)] and *Ernst* demonstrate that *Charter* damages jurisprudence has developed since

RJR-MacDonald. However, the legal principles remain difficult to apply in the context of an interlocutory application.

123 Earlier this year, in *Manitoba Federation of Labour et al. v. The Government of Manitoba*, 2018 MBQB 125 (Man. Q.B.) ("*Manitoba Federation*"), Justice Edmond stated why it remained preferable to resolve the application for injunctive relief, in the circumstances before him, under the balance of convenience and not irreparable harm. He put it this way in para. 118:

> 118. To conclude on irreparable harm, I am mindful of the statement made by the Supreme Court of Canada in *RJR-MacDonald*, that until the law on *Charter* damages has developed further, 'it is inappropriate 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.' Although the law on *Charter* damages has developed further since 1994, the law has not changed significantly and accordingly, I must be cautious in relying too heavily on this test in deciding whether to grant or dismiss the relief sought. At this stage of the proceeding, in the absence of other evidence sufficiently persuasive so as to justify a finding of irreparable harm, this motion ought not and cannot be determined based on the alleged irreparable harm suffered by the moving plaintiffs. In my view, like most *Charter* cases, granting an interlocutory injunction or a stay pending the trial will be determined primarily on the balance of convenience, public interest test.

124 I agree with this analysis. That is, despite developments in *Charter* damages jurisprudence, this motion "ought not and cannot be determined based on the alleged irreparable harm suffered by the moving plaintiffs."

125 In light of the AGBC's position, I have also considered the legal authorities regarding public interest standing in the context of the irreparable harm analysis.

126 The AGBC says that the named Plaintiffs have failed to demonstrate that *they* will suffer irreparable harm. Relevant to this submission are the authorities addressing public interest standing. Here, I refer to Cromwell J.'s remarks in *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45 (S.C.C.) ("*Downtown Eastside*"), where he wrote:

> 1. This appeal is concerned with the law of public interest standing in constitutional cases. The law of standing answers the question of who is entitled to bring a case to court for a decision. Of course it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter. Limitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere "busybody" litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government: *Finlay v. Canada*

> *(Minister of Finance)*, [1986] 2 S.C.R. 607, at p. 631. The traditional approach was to limit standing to persons whose private rights were at stake or who were specially affected by the issue. In public law cases, however, Canadian courts have relaxed these limitations on standing and have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations.
>
> 2. In exercising their discretion with respect to standing, the courts weigh three factors in light of these underlying purposes and of the particular circumstances. The courts consider whether the case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court: *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, at p. 253. The courts exercise this discretion to grant or refuse standing in a "liberal and generous manner" (p. 253).

127 Justice Cromwell noted that, in exercising their discretion with respect to standing, the courts weigh three factors in light of the underlying purposes and the particular circumstances. Having reviewed the three factors in the *Downtown Eastside* decision, and after focusing on the third factor (whether the proposed suit is a reasonable and effective means to bring the issue before the court), Cromwell J. stated as follows:

> 73. I turn now to other considerations that should be taken into account in considering the reasonable and effective means factor. This case constitutes public interest litigation: the respondents have raised issues of public importance that transcend their immediate interests. Their challenge is comprehensive, relating as it does to nearly the entire legislative scheme. It provides an opportunity to assess through the constitutional lens the overall effect of this scheme on those most directly affected by it. A challenge of this nature may prevent a multiplicity of individual challenges in the context of criminal prosecutions. There is no risk of the rights of others with a more personal or direct stake in the issue being adversely affected by a diffuse or badly advanced claim. It is obvious that the claim is being pursued with thoroughness and skill. There is no suggestion that others who are more directly or personally affected have deliberately chosen not to challenge these provisions. The presence of the individual respondent, as well as the Society, will ensure that there is both an individual and collective dimension to the litigation.

128 The Plaintiffs advance a similar position here.

C. Balance of Convenience

129 The third branch of *RJR-MacDonald* requires an assessment of the balance of convenience to the parties. It is here where the interests of the public must be considered and it is here where a case such as this one is typically decided.

130 I begin with the description provided by Sopinka and Cory JJ. in *RJR-MacDonald* at 342:

> 62. 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.
>
> 63. 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.
>
> 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."
>
> 64. 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.

131 As stated above, it is here where the public interest analysis predominates. The Supreme Court of Canada discussed public interest in *Metropolitan Stores* and *RJR-MacDonald*. I turn to both.

132 Justice Beetz wrote considerably about the balance of convenience and the public interest in *Metropolitan Stores*. He started with a discussion about the difficulty (or impossibility) of deciding the merits of a case at the interlocutory stage. He then discussed the consequences of granting a stay in constitutional cases. He described it this way starting at 134:

> 54. In both sorts of cases, the granting of a stay requested by the private litigants or by one of them is usually aimed at the public authority, law enforcement agency, administrative board, public official or minister responsible for the implementation or administration of the impugned legislation and generally works in one of two ways. Either the law enforcement agency is enjoined from enforcing the impugned provisions in all respects until the question of their validity has been finally determined, or the law enforcement agency is enjoined from enforcing the impugned provisions with respect to the specific litigant or litigants who request the granting of a stay. In the first branch of the alternative, the operation of the impugned provisions is temporarily suspended for all practical purposes. Instances of this type can perhaps be referred to as suspension cases. In the second branch of the alternative, the litigant who is granted a stay is in fact exempted from the impugned legislation which, in the meanwhile, continues to operate with respect to others. Instances of this other type, I will call exemption cases.
>
> 55. 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 democratically-elected legislatures and are generally passed for the common good, for instance: the providing and financing of public services such as educational services, or of public utilities such as electricity, the protection of public health, natural resources and the environment, the repression of what is considered to be criminal activity, the controlling of economic activity such as the containing of inflation, the regulation of labour relations, etc. 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.
>
> 56. While respect for the Constitution must remain paramount, the question then arises whether it is equitable and just to deprive the public, or important sectors thereof, from the protection and advantages of impugned legislation, the invalidity of which is merely uncertain, unless the public interest is taken into consideration in the balance of convenience and is given the weight it deserves. As could be expected, the courts have generally answered this question in the negative. In looking at the balance of convenience, they have found it necessary to rise above the interests of private litigants up to the level of the public interest, and, in cases involving interlocutory injunctions directed at statutory authorities, they have correctly held it is erroneous to deal with these authorities as if they have any interest distinct from that of the public to which they owe the duties imposed upon them by statute.

133 Justice Beetz then provided examples of the concern expressed by the courts for the protection of the common good in suspension and exemption cases. Following his review, he concluded at 146:

> 79. It has been seen from what precedes that suspension cases and exemption cases are governed by the same basic rule according to which, in constitutional litigation, an interlocutory stay of proceedings ought not to be granted unless the public interest is taken into consideration in the balance of convenience and weighted together with the interest of private litigants.
>
> 80. The reason why exemption cases are assimilated to suspension cases is the precedential value and exemplary effect of exemption cases. Depending on the nature of the cases, to grant an exemption in the form of a stay to one litigant is often to make it difficult to refuse the same remedy to other litigants who find themselves in essentially the same situation, and to risk provoking a cascade of stays and exemptions, the sum of which make them tantamount to a suspension case.
>
> . . .
>
> 83. This being said, I respectfully take the view that Linden J. has set the test too high in writing in Morgentaler, *supra*, that it is only in "exceptional" or "rare" circumstances that the courts will grant interlocutory injunctive relief. It seems to me that the test is too high at least in exemption cases when the impugned provisions are in the nature of regulations applicable to a relatively limited number of individuals and where no significant harm would be suffered by the public: it does not seem to me, for instance, that the cases of Law Society of Alberta v. Black, *supra*, and Vancouver General Hospital v. Stoffman, *supra*, can be considered as exceptional or rare. Even the Rio Hotel case, *supra*, where the impugned provisions were broader, cannot, in my view, be labeled as an exceptional or rare case.
>
> 84. On the other hand, the public interest normally carries greater weight in favour of compliance with existing legislation in suspension cases when the impugned provisions are broad and general and such as to affect a great many persons. And it may well be that the above mentioned test set by Linden J. in Morgentaler, *supra*, is closer to the mark with respect to this type of case. In fact, I am aware of only two instances where interlocutory relief was granted to suspend the operation of legislation and, in my view, these two instances present little precedent value.

134 In cases where the authority of a law enforcement agency is constitutionally challenged, Beetz J. stated that "no interlocutory injunction or stay should issue to restrain the public authority from performing its duties to the public unless, in the balance of convenience, the public interest is taken into consideration and given the weight it should carry" (149).

135 In assessing the balance of convenience, Sopinka and Cory JJ. added to Beetz J.'s discussion regarding public interest stating at 343 of *RJR-MacDonald*:

65. . . . 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 represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

66. 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.

67. 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.

> 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.]

68. 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 court of the public interest benefits which will flow from the granting of the relief sought.

136 Sopinka and Cory JJ. described the balancing of public interest considerations in *Charter* cases at 346:

> 71. 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.
>
> 72. 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.
>
> 73. 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 than when the application of the law is suspended entirely.
>
> [citations omitted].

137 In other words, on an interlocutory application for injunctive relief in a *Charter* case, a court is required to assume irreparable harm to the public interest if the government action is restrained (so long as there is 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). In large part, that is because the *Charter* does not authorize the court to conduct an inquiry into whether the government is "governing well."

138 In *Harper v. Canada (Attorney General)*, 2000 SCC 57 (S.C.C.), the Supreme Court of Canada stayed an interim injunction granted by the chambers judge in circumstances where Mr. Harper was seeking a declaration that provisions in the *Canada Elections Act*, limiting third-party spending on advertising, violated s. 2(b) freedom of expression rights. The Court decided Mr. Harper's application for interim injunction on the balance of convenience analysis. The Court stated it succinctly as follows at para. 5:

> Applications for interlocutory injunctions against enforcement of still-valid legislation under constitutional attack raise special considerations when it comes to determining the balance of convenience. On the one hand stands the benefit flowing from the law. On the other stand the rights that the law is alleged to infringe. An interlocutory injunction may have the effect of depriving the public of the benefit of a statute which has been duly enacted and which may in the end be held valid, and of granting effective victory to the applicant before the case has been judicially decided. Conversely, denying or staying the injunction may deprive plaintiffs of constitutional rights simply because the courts cannot move quickly enough: R.J. Sharpe, Injunctions and Specific Performance (loose-leaf ed.), at para. 3.1220.

139 The Court determined that the chambers judge had not properly applied the balance of convenience analysis as articulated in *RJR-MacDonald*. The Court, in *Harper*, followed the majority decision in *RJR-MacDonald* and provided this further statement at para. 9:

> . . . Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed.

140 Applying those principles in *Harper*, the Court concluded that "the public interest in maintaining in place the duly enacted legislation on spending limits pending complete constitutional review outweighs the detriment to freedom of expression caused by those limits" (para. 11).

141 I turn to *Manitoba Federation*. This appears to be the most recent example of an application for an interim injunction in a *Charter* case. The circumstances are briefly these. The Manitoba Federation of Labour and numerous unions representing public service bargaining units issued a statement of claim against the government of Manitoba seeking an interlocutory injunction restraining, enjoining and prohibiting the government from proclaiming into force (or, alternatively, staying/suspending) ss. 9 — 15 of the *Public Services Sustainability Act* alleging violations of ss. 2(d) and 7 of the *Charter*. The *PSSA* had not yet been proclaimed into force.

142 Applying the *RJR-MacDonald* framework, Edmond J. concluded that there was a serious question to be tried and, if the interlocutory relief was not granted, there was a prospect that the applicants would suffer irreparable harm. He found, however, that the applicants had not demonstrated that the balance of convenience favoured the injunctive relief sought. The court's analysis of balance of convenience included a review of five Supreme Court of Canada cases (all failed attempts to obtain interim injunctions staying/suspending legislation pending constitutional determination). Edmond J. commenced this case review as follows:

146. Both parties acknowledge that at this stage of the proceeding, the assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will rarely order that laws that parliament or the legislature have duly enacted for the public good will not operate or be enforceable in advance of a full constitutional review.

147. It follows therefore that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality or a violation of the *Charter* succeed. (see *Harper* at para. 9)

148. Counsel for the Government referred the court to five examples from the Supreme Court of Canada in the post-*Charter* era where injunctions have been sought to stay legislation pending constitutional determination. In all five, the court denied the motion seeking an injunction on the basis of public interest. (see *Gould*; *Metropolitan Stores*; *RJR-MacDonald*; *Harper* and *Thomson Newspapers*)

149. *RJR-MacDonald* dealt with declaring inoperable sections of the *Tobacco Products Control Act*, S.C. 1988, c. 20, which dealt with tobacco packaging. The public interest in health was found to be of such compelling importance that the applications for a stay were dismissed.

150. In *Metropolitan Stores*, the court had to consider whether to grant a stay with respect to the Manitoba Labour Board imposing a first collective agreement pursuant to the provisions of the *LRA*.

151. In *Harper*, the Supreme Court of Canada upheld sections of the *Canada Elections Act*, S.C. 2000, c. 9, regarding third party spending limits on the basis of s. 1 of the *Charter*.

152. In *Thomson Newspapers*, the Supreme Court of Canada declared inoperable sections of the *Canada Elections Act* regarding the publication of survey results.

153. In *Gould* (see on the merits *Sauvé v. Canada (Attorney General)*; *Belczowski v. Canada*, [1993] 2 S.C.R. 438), the Supreme Court of Canada declared inoperable sections of the *Canada Elections Act* regarding prisoner voting.

154. Although the facts of these cases are different, they make it clear that interlocutory injunctions or stays are rarely granted in constitutional cases because it is assumed that laws enacted by democratically elected legislatures are directed to the common good and serve a valid public purpose.

155. That does not mean that injunctions are never granted. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the moving plaintiffs who rely on the public interest must demonstrate that the suspension or

exemption of the legislation would provide a public benefit. (see *Harper* at para. 9, quoting from *RJR-MacDonald* at pp. 348-49)

143 Justice Edmond dismissed the application for interlocutory relief (raising a concern about sufficiency of the evidentiary record before the Court) on the basis that he was not satisfied that this was one of those clear cases of a *Charter* violation that an interlocutory injunction or stay should be granted pending a trial on the constitutionality of the *PSSA*.

144 The above authorities set the stage for what the Plaintiffs must establish to succeed in the Injunction Application. Assuming, as I must, that the *MPA* Amendments and impugned provisions were implemented to advance the public good, the Plaintiffs must establish that the granting of an injunction will serve a valuable public purpose.

VIII. ANALYSIS

145 I turn to an application of the *RJR-MacDonald* framework to the circumstances of this case and the nature of the relief sought. That is, the Plaintiffs seek to enjoin the government from enforcing the impugned provisions — the Plaintiffs do not seek an exemption from enforcement.

A. Is There a Serious Question to be Tried?

146 The Plaintiffs submit that this branch is easily met and that the evidence overwhelmingly demonstrates that there is a serious question to be tried. The Plaintiffs say that answering this question requires the court to address whether the prohibition on private-pay medically necessary health services deprives individuals of their security of the person rights as protected by s. 7 of the *Charter* and, if so, whether that deprivation is in accordance with the principles of fundamental justice.

147 The AGBC submits that the Plaintiffs have failed to meet even this low hurdle because the Plaintiffs do not challenge the enforcement provisions of the *MPA*.

148 The AGBC says the trial judge denied the Plaintiffs' application to amend the claim to plead facts relating to enforcement. As such, says the AGBC, "the plaintiffs' continued attempts to assert that they are entitled to injunctive relief suspending the implementation of the new enforcement provisions despite there being no material facts pleaded to support that relief cannot be characterized as anything other than an attempt to re-litigate the Amendment Reasons."

149 I do not agree with this submission. In my view, the Plaintiffs' constitutional challenge is to the private-pay billing prohibitions captured in ss. 17, 18 and 45 of the *MPA*. The Plaintiffs have not challenged the constitutionality of the enforcement provisions of the *MPA*. Rather, the Plaintiffs challenge the provisions prohibiting private-pay medically necessary health services because it is

208 the prohibition, not the enforcement of the prohibition, that limits access to timely health care in the province.

150 In *Charter* litigation, it is often the case that the penalty attracts a *Charter* challenge because the risk of the deprivation of liberty engages s. 7. In *Bedford*, McLachlin C.J.C., writing for the Court, specifically recognized that s. 7 was engaged not because of the risk of deprivation of liberty due to enforcement of prostitution-related offences. Rather, she wrote, it was "compliance with the laws [that] infringes the applicants' security of the person". In the context of explaining why it was that security of the person rights were engaged, she wrote at paras. 59-60:

> Here, the applicants argue that the prohibitions on bawdy-houses, living on the avails of prostitution, and communicating in public for the purposes of prostitution, heighten the risks they face in prostitution — itself a legal activity. The application judge found that the evidence supported this proposition and the Court of Appeal agreed.
>
> For reasons set out below, I am of the same view. The prohibitions at issue do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing dangerous conditions on prostitution; they prevent people engaged in a risky — but legal — activity from taking steps to protect themselves from the risks.

151 I am not satisfied, based on the circumstances presented, that a direct challenge to the enforcement provisions is required. The Plaintiffs' challenge is as it was before the *MPA* Amendments — the prohibitions on private-pay medically necessary health services increase wait times in a way that is harmful and thus engages patients' life and security of the person rights.

152 The Plaintiffs contend, correctly in my view, that it is not the risk of a fine but the prohibition that engages s. 7 of the *Charter*. The *MPA* Amendments do not change or alter the nature of the constitutional challenge.

153 I turn, then, to whether the Plaintiffs have established that there is a serious question to be tried. I am to determine whether the test has been satisfied on the basis of common sense and by conducting an extremely limited review of the case on the merits (*RJR-MacDonald* at 348).

154 The Plaintiffs must show that the impugned provisions are sufficiently connected to the harm suffered before s. 7 is engaged. In addition, the Plaintiffs must show that the deprivation of life and/or security of the person is not in accordance with the principles of fundamental justice. Should a violation be found, the AGBC may seek to justify the infringement under s. 1 of the *Charter*.

155 I have considered the evidence only insofar as to determine whether the Plaintiffs have demonstrated that there is a serious question to be tried. For the purpose of the Injunction

Application, I am satisfied that this hurdle has been met. In finding that there is a serious question to be tried, I am satisfied that the Plaintiffs have established the following:

> a) Some patients will suffer serious physical and/or psychological harm while waiting for health services;
>
> b) Some physicians will not provide private-pay medically necessary health services after the *MPA* Amendments take effect;
>
> c) Some private-pay medically necessary health services would have been available to some patients but for the impugned provisions;
>
> d) Some patients will have to wait longer for those medically necessary health services that could have been available but for the new enforcement provisions; and
>
> e) If those patients lose access to private-pay medically necessary health services, awaiting those health services in the public system can be significant and some of those patients are in pain, discomfort and have limited mobility.

156 I am satisfied, based on the evidentiary record before me, that there are some patients who would have accessed private-pay medically necessary health services but now cannot due to the new enforcement provisions. I am satisfied, with respect to those patients, that their s. 7 security of the person rights are engaged.

157 I am also satisfied that there is evidence on the Injunction Application that establishes (in a way that is not frivolous or vexatious) that the prohibitions are sufficiently connected to the harm suffered by some patients. I have concluded that there is sufficient evidence showing that some patients will experience delayed access to health treatment because they are denied access to private-pay medically necessary health services. This delay prolongs the physical and psychological harms to this group of patients. In this regard, I rely on McLachlin C.J.C. and Major J.'s statement in *Chaoulli* at para. 118, relying on *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (S.C.C.) where they write:

> The jurisprudence of this Court holds that delays in obtaining medical treatment which affect patients physically and psychologically trigger the protection of s. 7 of the Charter.

158 In *Chaoulli*, McLachlin C.J.C. and Major J. write at para. 119:

> . . . In *Morgentaler*, as here, people in urgent need of care face the same prospect: unless they fall within the wealthy few who can pay for private care, typically outside the country, they have no choice but to accept the delays imposed by the legislative scheme and the adverse physical and psychological consequences this entails. As in *Morgentaler*, the result is interference with security of the person under s. 7 of the *Charter*.

159 I agree with the Plaintiffs that delays in treatment giving rise to psychological and physical suffering engage the security of the person *Charter* protections just as they did in *Morgentaler*.

160 Finally, I note (although analyzed differently by the justices writing in *Chaoulli*) that the Supreme Court of Canada makes it clear that access to health care, and government decision-making relating to such access, are matters engaging s. 7 of the *Charter*.

161 I agree with the AGBC that *Chaoulli* demonstrates a Court very much divided on this issue and it is certainly not a definitive answer on the constitutionality of private health insurance prohibitions. However, *Chaoulli* does more than crystalize the debate. Six justices confirmed that s. 7 was engaged when addressing serious infringements of access to health care (albeit viewed differently by each). Chief Justice McLachlin and Major J. put it this way at paras. 122-24:

> 122. In *Rodriquez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, Sopinka J., writing for the majority, held that security of the person encompasses "a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress." The prohibition against private insurance in this case results in psychological and emotional stress and a loss of control by an individual over her own health.
>
> 123. Not every difficulty rises to the level of adverse impact on security of the person under s. 7. The impact, whether psychological or physical, must be serious. However, because patients may be denied timely health care for a condition that is clinically significant to their current and future health, s. 7 protection of security of the person is engaged. Access to a waiting list is not access to health care. As we noted above, there is unchallenged evidence that in some serious cases, patients die as a result of waiting lists for public health care. Where lack of timely health care can result in death, s. 7 protection of life itself is engaged. The evidence here demonstrates that the prohibition on health insurance results in physical and psychological suffering that meets this threshold requirement of seriousness.
>
> 124. We conclude, based on the evidence, that prohibiting health insurance that would permit ordinary Canadians to access health care, in circumstances where the government is failing to deliver health care in a reasonable manner, thereby increasing the risk of complications and death, interferes with life and security of the person as protected by s. 7 of the *Charter*.

162 I have considered the circumstances surrounding this constitutional litigation. After a preliminary assessment of the evidence demonstrating, for the purpose of the Injunction Application, that waiting for certain health care services may cause some patients serious physical or psychological harm and that, but for the prohibitions, those patients could have accessed private-pay medical services, I am satisfied that the Plaintiffs have established that there is a serious question to be tried.

B. Have the Plaintiffs Demonstrated Irreparable Harm?

163 The Plaintiffs submit that irreparable harm will be suffered by British Columbians if the *MPA* prohibitions are enforced on enrolled doctors providing private-pay surgeries to non-exempt British Columbians. That is because non-exempt British Columbians who require medically necessary health services will not be able to access private services. Physicians will not deliver private surgeries to non-exempt British Columbians because they will not expose themselves to the risk of substantial financial penalties.

164 The Plaintiffs describe irreparable harm in two ways. First, enforcing the prohibitions will directly impact those patients seeking (and needing) private surgical services. Second, it will burden the public system (even further) because those who would have used private surgical services must now be integrated into the public health care system.

165 The AGBC submits the Plaintiffs have failed to prove irreparable harm. The AGBC takes the position that the Plaintiffs must establish irreparable harm to the named Plaintiffs and not unidentified third parties because the claim is not pleaded as a systemic one nor do the Plaintiffs have public interest standing.

166 Considering the nature of the harm alleged (and not its magnitude), I am wary of wading into the evidentiary record to determine whether adequate compensation could ever be obtained at trial. Conducting such an inquiry, at this preliminary stage of the analysis, would ignore the Supreme Court of Canada's caution in *RJR-MacDonald* and *Metropolitan Stores*. The irreparable harm analysis is further complicated by the public interest nature of the litigation and it may be ill-suited to a comparable assessment of harm in the private law context.

167 I have concluded, for the purposes of the Injunction Application, that the Plaintiffs have established irreparable harm. This conclusion is based on the following:

> a) Evidence from Dr. Day (and other physicians) deposing that Cambie (physicians) will not perform private-pay medically necessary surgical services once the *MPA* Amendments are brought into force;
>
> b) Evidence about Kristiana Corrado's experience accessing private surgical services. In particular, I have relied on the excerpted portions of her trial testimony and her description about the physical and psychological impact on her of waiting for knee surgery. I have considered Ms. Corrado's evidence that access to private medically necessary surgical services reduced her wait time by approximately six months;
>
> c) Ms. Corrado's experience occurred some six years ago. However, her experience as a teenage athlete is said to be representative of other young athletes awaiting knee surgery and the physical and psychological effects of waiting;

d) Dr. Day's specific observations regarding Ms. Corrado. In particular, his observations that "she had a knee that was not functioning well; it was unstable and painful when it shifted out of position and she was distraught about not being able to participate in physical activities . . . because of the delay in getting the knee fixed." In addition to his physical observations, he noted in her report that she was depressed, had trouble sleeping and concentrating on her school work because of her knee injury;

e) The general observations to which Dr. Day deposed of "patients suffering from terrible pain that greatly affects their daily lives, the negative effects on their psychological state, their inability to return to work after being off work for a lengthy period, the serious financial consequences for these and their families and the long-term effects on their physical well-being and lives generally";

f) Excerpted trial testimony of Professor Alistair McGuire explaining his opinion that "the empirical evidence supports a conclusion that waiting time for surgery can have harmful consequences and that the wait, in and of itself, causes harm". In his explanation, he testified:

> And on the basis of my experience and knowledge of econometrics, statistics and health policy that's how I came to my opinion, and the opinion relates largely in these documents to elective surgery, and it relates to whether or not there was a deterioration in quality of life, which is a measure which is used, as I've said, by regulatory bodies across the world to try to succinctly define health benefit.

g) Excerpted trial testimony of Nadeem Esmail (qualified as an expert in health care systems, policies and economics of Canada and other developed countries that maintain universal access to health care, including assessing the success of these systems in providing timely, high quality health care to patients) about delayed access to healthcare. Mr. Esmail testified, in part, on the impact of delay:

> There's a number of different measures that are used to measure the function, pain and disability of the patients. And based on these various different measures — and they don't always align between studies, but each of the studies that I've cited there did show that there was a relationship between delay and potential deteriorations in status, and in some cases to the extent that initial status at the time of surgery is related to the outcome these deteriorations can then affect the outcome from the surgery. So a delay might not only affect your pain and your function while you're waiting and it might get worse; the outcome post-surgery might now be worse because you weren't treated early enough in the degenerative process.

168 Based on my review of the pleadings, Steeves J.'s ruling on private and public interest standing, and the case authorities regarding *Charter* litigation and public interest standing, I am

satisfied that, for the purpose of the Injunction Application, I can consider the impact of the prohibitions more generally.

169 I do not suggest that the evidence before me proves that the province has failed to meet optimal waiting times for any particular health care service. I wish to make clear that the trial judge will determine, on the full evidentiary record before him, whether the evidence of waiting times (for any particular health service) infringes s. 7 *Charter* rights. For the purpose of the Injunction Application, I am satisfied that the evidence establishes a number of physicians will not perform private-pay medically necessary health services should the *MPA* Amendments be brought into force. As such, prospective private health care patients will be precluded from accessing health services in a manner that may alleviate their wait time. Furthermore, there is a sufficient causal connection between denying access to private-pay medically necessary health services and ongoing or greater physical and/or psychological harm that the delay may cause.

170 I am satisfied that the Plaintiffs have established that some patients will suffer irreparable harm in this sense. But for the prohibitions, patients could obtain health care services much sooner at a private clinic (such as Cambie). The prohibitions infringe the s. 7 *Charter* rights of the patients by forcing them onto public health care waiting lists and the subsequent delay in receiving treatment causes some patients to endure physical and psychological suffering.

C. Balance of Convenience

171 At this stage of the analysis, the Court must consider the damage each party alleges it will suffer and consider the public interest. Where, as here, the nature and declared purpose of the legislation is to promote the public interest, a motion judge should not be concerned with whether the legislation actually has such an effect. The motion judge must assume it does so. The Plaintiffs must demonstrate that the suspension of the legislation will itself provide a public benefit in order to overcome the assumed benefit to the public interest arising from the continued application of the legislation or that no harm is done to the public interest if the injunctive relief is granted. Put another way, it is the Plaintiffs who must prove a more compelling public interest.

172 The AGBC submits that the public interest in ensuring the enforceability of validly enacted law weighs heavily in assessing the balance of convenience. The AGBC relies on *Harper* at para. 9 and *RJR-MacDonald* at 348-49 in support of its submission that this court should not order laws passed by a democratically-elected body to be inoperable in advance of complete constitutional review at trial. Moreover, the AGBC says that it is charged with promoting and protecting the public interest, including public health, and the *MPA* Amendments and impugned provisions were enacted pursuant to this duty. In addition and even though such evidence is not required, the AGBC says that it has provided evidence of actual harm.

173 In the language of *Harper*, it follows that in assessing the balance of convenience, I must proceed on the assumption that the law — the impugned provisions of the *MPA* — is directed to the public good and serves a valid public purpose.

174 As well, in *RJR-MacDonald*, at 333-34, Sopinka and Cory JJ. considered the factors that must govern the balancing process:

> 38. On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.
>
> 39. 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 Charter and might encourage a government to prolong unduly final resolution of the dispute.

175 The AGBC says that the "plaintiffs cannot discharge the heavy burden of establishing that the *MPA* Amendments are unconstitutional and that this is not one of the clear cases where the Court ought to order duly enacted laws to be inoperable in advance of complete constitutional review." In addition, the AGBC submits that although not necessary to dismiss the application, there is evidence of real and immediate harm should the injunction be granted. The AGBC says that it can seek to recover $15.9 million that the federal Minister of Health deducted from its transfer payments in March 2018. This money can be reclaimed if the province establishes that it is taking steps to end the practice of extra-billing in B.C.

176 During the hearing of the Injunction Application, considerable time was spent on the CHT deduction. The Plaintiffs invite the Court to speculate about whether the federal government will reimburse the province for the $15.9 million deduction in light of the enforcement steps the province has taken. The AGBC also invites the Court to speculate about whether, by the time a decision is rendered in the constitutional case, the "federal government would presumably have made further, and larger, deductions, thereby depriving B.C.'s public health care system of millions more dollars that could be used to provide publicly-funded services to all British Columbians . . . "

177 I am not permitted on this application to second-guess legislative decision-making or, in particular, the basis for the timing of the *MPA* Amendments. I agree with the AGBC that the decision to bring into force the *MPA* Amendments is to be presumed to be for the public good and I accept that it is. Further, there is evidence suggesting that the province can take steps to reclaim $15.9 million because it has taken steps to enforce the prohibitions. The potential transfer of these funds is generally beneficial.

178 In *RJR-MacDonald* at 346, the Supreme Court of Canada made clear that the Court should, in most cases, assume that irreparable harm to the public interest would result from the restraint of that action.

179 It is clear from the authorities that the applicants usually fail in their efforts to obtain interim and/or interlocutory injunctive relief where they challenge the constitutionality of legislation. There is good reason for this and the AGBC has cited all of them.

180 I accept that it is only in exceptional cases where the effect of democratically enacted legislation should be suspended before a finding of unconstitutionality or invalidity. In my view, this is an exceptional case. This case falls in the narrow category of exceptions. I have considered the circumstances surrounding this constitutional litigation and the submissions made during the Injunction Application. In addition to the findings as set out above, two factors tip the balance of convenience in favour of the Plaintiffs.

181 The first is the nature of the constitutional challenge at issue. If nothing else, *Chaoulli* opened the door to *Charter* scrutiny of health care decision-making. Binnie and Lebel JJ. declined to engage in the public debate stating: "This issue has been the subject of protracted debate across Canada through several provincial and federal elections. We are unable to agree with our four colleagues who would allow the appeal that such a debate can or should be resolved as a matter of law by judges" (para. 161). McLachlin C.J.C. and Major J. agreed that decisions about the type of health care systems Quebec should adopt falls to the legislature of that province. However, they also stated that the resulting legislation is subject to constitutional limits and the Court cannot avoid reviewing legislation for *Charter* compliance when citizens challenge it.

182 It is an understatement to say that this is a complex constitutional case brought in the context of public health care legislation. The proceedings constitute a direct affront to the public health care system and, importantly, Canada's pledge to a universal public health care system. In *Chaoulli*, the much divided court revealed the tension between the laudable goal of providing universal (equal) access to health care and interfering with citizens' autonomy and dignity by prohibiting access to private health care options for medically necessary health services. The tension is all the more evident when access to health care is redefined as access to a wait list for health care. However, the determination of these complicated issues is for the trial judge, on a full record, with the benefit of legal submissions from the parties.

183 The Plaintiffs must establish that limiting access to private medically necessary health services engages their life and/or security of the person rights. In the Injunction Application, the Plaintiffs provided sufficient evidence that waiting for certain medically necessary health services causes physical and psychological harm to some patients. There is a dispute about wait time targets, whether the province has met those targets and whether the Plaintiffs have proven a sufficient causal connection between harm and wait times. Those are all issues for the trial judge. For the

216 purpose of the Injunction Application only, I am satisfied that the Plaintiffs have demonstrated, to the extent necessary, that the s. 7 *Charter* rights of some patients are engaged. I make that finding based on the evidence of the doctors who depose that they will refrain from providing private-pay medically necessary health services that are subject to significant financial penalties. Further, those doctors deposed that their own waiting lists for the same health services in the public system will increase. Any delay is thus twofold. First, for a patient such as Ms. Corrado, the *MPA* Amendments will remove access to private-pay medically necessary health services. Second, patients such as Ms. Corrado will be added to a waiting list that may be longer than what is in place today because the public health care system will need to accommodate those who (but for the *MPA* Amendments) would have otherwise utilized private health care services.

184 The s. 7 analysis requires a consideration of the principles of fundamental justice as articulated in the recent jurisprudence and whether the AGBC can justify any infringement should one be found. Again, those are issues for the trial judge with the benefit of a full evidentiary record and submissions from the parties.

185 I am satisfied that the Plaintiffs have demonstrated, for the purpose of the Injunction Application, a sufficient nexus between the prohibitions to private health care and being required to wait for treatment with no autonomous right to access private health care services. I am satisfied that there is evidence before me that at least some patients are at an increased risk of suffering physical and psychological harm by having to wait for public health care service. It is this waiting with no option to pursue an alternative that engages security of the person rights and tips the balance of convenience in favour of the Plaintiffs.

186 The second reason I am satisfied that this is one of those exceptional cases warranting injunctive relief is based on the fact that the parties are in the middle of a trial that has, to date, been underway for over two years. This is not a case where a new law was brought into force and a trial on the merits is years away. Here, the Plaintiffs' case is almost concluded and the AGBC will open its case shortly. I am told there has been some 150 days of trial and 48,000 pages of evidence presented to date.

187 Although not brought into force until this year, the *MPA* Amendments were pronounced fifteen years ago.

188 In my view, the assumption that the *MPA* Amendments and impugned provisions service the public good and a valid public purpose must be measured against the evidence presented on the Injunction Application that private health services, as described here, will be unavailable once the financial penalties come into play and the s. 7 life and security of the person rights of some patients will be infringed because those patients will not have access to timely and necessary private medical health services. Both sides argued the status quo argument operated against the other. However, I am satisfied that the Plaintiffs will be impacted in a far greater manner than

the AGBC should the injunctive relief not be granted. I say that because I am satisfied that there are doctors who will not provide private-pay medically necessary health services with the new enforcement provisions, thereby potentially impacting the s. 7 rights of some patients. I also wish to address the AGBC's submission regarding the availability of equitable relief in the circumstances presented here. I am not satisfied based on the evidence before me that it has been established that the Plaintiffs are disentitled to equitable relief because they do not have "clean hands." The parties have a complicated history and one that has evolved since the litigation began. I therefore decline to make such a finding on the Injunction Application.

189 I am satisfied in the circumstances presented on the Injunction Application that the special considerations raised on the Injunction Application can be addressed by granting an order that is limited in time. During the Injunction Application, I was advised that the case should be concluded by April 1, 2019. In that regard, I am prepared to grant the Plaintiffs' alternative form of relief as set out in the Injunction Application. The order will enjoin the province from enforcing ss. 17, 18 and 45 of the *MPA* until June 1, 2019 or further order of the Court. I grant the injunctive relief to June 1, 2019 (or further order of the court) to take into account the contingencies of this litigation. Neither party made any submission regarding Rule 10-4(5) of the *B.C. Supreme Court Civil Rules*. As such, I have not included it as a term of the order.

IX. CONCLUSION AND ORDERS

190 In summary, for the purposes of the Injunction Application, I have determined the following:

a) Taking into account the circumstances of this constitutional litigation and a preliminary assessment of the evidence, the Plaintiffs have established that injunctive relief is appropriate in this case. I make that determination based on a preliminary assessment of the evidence and finding that the Plaintiffs have established that there is a serious question to be tried in that:

i. Some patients will suffer serious physical and/or psychological harm while waiting for health services;

ii. Some physicians will not provide private-pay medically necessary health services after the *MPA* Amendments take effect;

iii. Some patients would have accessed private-pay medically necessary health services but for the *MPA* Amendments;

iv. Some patients will have to wait longer for those medically necessary health services that could have been available but for the *MPA* Amendments and impugned provisions;

v. A sufficient causal connection between increased waiting times for private-pay medically necessary health services and physical and/or psychological harm caused to some patients.

b) The Plaintiffs have established irreparable harm in the context of a constitutional case that has proceeded in a manner that is consistent with public interest litigation in that some patients, but for the prohibitions, could have obtained private-pay medically necessary health services much sooner at a private clinic (such as Cambie) and the subsequent delay in receiving treatment causes some patients to endure serious physical and psychological suffering. The nature of this constitutional case complicates the assessment of damages at the interlocutory stage.

c) The Plaintiffs have established that the balance of convenience tips in their favour. This is so despite the Court's conclusion that the *MPA* Amendments are directed to the public good and serve a valid public purpose. The Plaintiffs have tilted the balance by establishing that restraint of the enforcement provisions will also serve the public interest in that private-pay medically necessary health services will be accessible in circumstances where the parties are in the midst of a lengthy trial to determine the complicated constitutional issues at play. Enjoining the province from enforcing the prohibitions for a relatively short period of time serves that important public purpose.

191 In the result, I make the following order:

a) The application for a stay or suspension of the operation of Order-in-Council No. 468 of 2018 (September 7, 2018), and/or B.C. Reg. 178/2018, to the extent that it brings into force the following provisions of the *Medicare Protection Amendment Act*, 2003, SBC 2003, c. 95: s. 1, s. 2, s. 4 as it relates to section 17(1.2) of the *Medicare Protection Act*, s. 8, and s. 12, pending a final determination of the constitutional issues raised in the action is dismissed;

b) The application for a stay or suspension of the coming into force of sections 1, 2, 4 (as it relates to section 17(1.2) of the *Medicare Protection Act*), 8 and 12 of the *Medicare Protection Amendment Act*, 2003, SBC 2003, c. 95, pending a final determination of the constitutional issues raised in the action is dismissed; and

c) The application for an order enjoining the enforcement of sections 17, 18 and 45 of the *Medicare Protection Act* is granted and such order will be effective until June 1, 2019 or further order of the Court.

Application granted.

Footnotes

1 In these reasons, "MPA Amendments" refers to the new financial penalties as set out in s. 46 of the *MPA*.

2019 BCCA 29
British Columbia Court of Appeal

Cambie Surgeries Corporation v. British Columbia (Attorney General)

2019 CarswellBC 96, 2019 BCCA 29, 19 B.C.L.R. (6th) 130, 28 C.P.C. (8th) 213, 302 A.C.W.S. (3d) 276

Cambie Surgeries Corporation, Chris Chiavatti, Mandy Martens, Krystiana Corrado, Walid Khalfallah by his litigation guardian Debbie Waitkus, and Specialist Referral Clinic (Vancouver) Inc. (Respondents / Plaintiffs) And Attorney General of British Columbia (Appellant / Defendant) And Dr. Duncan Etches, Dr. Robert Woollard, Glyn Townson, Thomas McGregor, British Columbia Friends of Medicare Society, Canadian Doctors for Medicare, Mariël Schooff, Daphne Lang, Joyce Hamer, Myrna Allison, and the British Columbia Anesthesiologists' Society (Intervenors) And Attorney General of Canada

Newbury J.A., In Chambers

Heard: December 21, 2018
Judgment: January 24, 2019
Docket: Vancouver CA45748

Proceedings: refusing leave to appeal *Cambie Surgeries Corporation v. British Columbia (Attorney General)* (2018), 17 B.C.L.R. (6th) 133, 2018 CarswellBC 3123, 2018 BCSC 2084, Winteringham J. (B.C. S.C.)

Counsel: J.G. Penner, J.D. Hughes, for Appellant
P.A. Gall, Q.C., for Respondents

***Newbury J.A., In Chambers*:**

1 The defendant Attorney General of British Columbia seeks leave to appeal the order made in chambers by Madam Justice Winteringham in this matter on November 23, 2018. Her reasons for judgment are indexed as 2018 BCSC 2084 (B.C. S.C.). The order, which I am advised was entered on January 10, 2019, enjoined the enforcement of ss. 17, 18 and 45 of the *Medicare Protection Act*, R.S.B.C. 1996, c. 286 ("*MPA*") until June 1, 2019 or further order of the court. The order also dismissed applications for narrower orders staying or suspending the coming into force of

certain provisions of the *MPA* and of the *Medicare Protection Amendment Act*, S.B.C. 2003, c. 95, pending final determination of the constitutional issues raised in this action.

2 The injunction was sought and granted mid-trial, near the closing of the plaintiffs' case. The trial began in September 2016 (after an adjournment necessitated by the Province's disclosure of many thousands of pages of documents to the plaintiffs on the eve of trial) and has occupied about 150 days of court time thus far. It is clear that the case is being hard-fought: there have already been at least five other appeals to this court, and according to the chambers judge, the trial judge has delivered at least 45 formal rulings. Half of the trial court's time has been spent on evidentiary objections. (See para. 31.) Similar objections were raised in the hearing of the injunction application.

The Legislation

3 Sections 17, 18 and 45 of the *MPA* are reproduced on Schedule A attached to these reasons. These sections are the target of the constitutional challenge brought by the plaintiffs on the basis of s. 7 of the *Canadian Charter of Rights and Freedoms*, which provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The plaintiffs also rely on the decision of the Supreme Court of Canada in *Chaoulli c. Québec (Procureur général)*, 2005 SCC 35 (S.C.C.).

Canada Health Act

4 The impugned provisions of the *MPA* are meant to dovetail with the scheme established by the *Canada Health Act*, R.S.C., 1985, c. C-6, which establishes conditions a province must meet in order to obtain federal funding for the operation of a public health-care system. Under ss. 18-19 of the *Canada Health Act*, a province is required to ensure that extra billing and user charges are not levied by physicians or private clinics under the provincial health insurance plan. Sections 18 and 19(1) of the federal statute provide as follows:

> **Extra-billing**
>
> 18 In order that a province may qualify for a full cash contribution referred to in section 5 for a fiscal year, no payments may be permitted by the province for that fiscal year under the health care insurance plan of the province in respect of insured health services that have been subject to extra-billing by medical practitioners or dentists.
>
> **User charges**

> 19 (1) In order that a province may qualify for a full cash contribution referred to in section 5 for a fiscal year, user charges must not be permitted by the province for that fiscal year under the health care insurance plan of the province.

Section 2 of the *Canada Health Act* defines "user charge" to mean any charge for an insured health service that is authorized or permitted by a provincial health-care insurance plan that is not payable, directly or indirectly, by a provincial plan, other than extra-billing. The latter phrase means billing for an insured health service rendered to an insured person by a medical practitioner in an amount in addition to any amount paid or to be paid for that service by a provincial plan.

5 The *Canada Health Act* contemplates that where, because of the existence of extra-billing, the federal government has withheld or made deductions from the amount (the "CHT") payable to a province for the reimbursement of health-care costs, such deductions may nevertheless be reimbursed if the province makes efforts to come into compliance. The Attorney filed evidence at the injunction hearing that such compliance had to be shown by the end of the calendar year in respect of which the deduction was made: see the passage quoted by the chambers judge from the Province's argument at para. 87 of her reasons.

6 However, in a hearing before the chambers judge on October 22, 2018 (i.e., one month before her main reasons were issued) the parties brought to her attention certain provisions of the *Budget Implementation Act*, *2018, No.1*, S.C. 2018, c. 12 which amended s. 25.01 of the *Federal-Provincial Fiscal Arrangements Act*, R.S.C. 1985, c. F-8 to read:

> A cash contribution provided to a province under section 24.21 may be increased by reimbursing, in whole or in part, a deduction referred to in paragraph 25(b).
>
> **Certificate for reimbursement of deduction**
>
> (2) If the Minister of Health is of the opinion that the circumstances giving rise to a deduction made under section 20 of the *Canada Health Act* no longer exist, he or she may issue a reimbursement certificate that sets out
>
> (a) the details of the deduction, including the amount of extra-billing or user charges, the province to which it applies and the fiscal year in which the deduction was made; and
>
> (b) the amount to be reimbursed.
>
> **Time period**
>
> (3) The Minister of Health may issue a reimbursement certificate under subsection (2) in the fiscal year in which the deduction was made or in the following two fiscal years and he or she must provide it to the Minister of Finance no later than March 6 of the final fiscal year in which the reimbursement may be made.

Reimbursement

(4) A reimbursement under this section must be made by the Minister of Finance upon receipt of a reimbursement certificate within the time period set out in subsection (3).

Application

(5) This section only applies to deductions made after March 31, 2017. [Emphasis added.]

It appears that ss. (3) allows a longer period than the one-year period which the Attorney had previously asserted. The parties were given the opportunity to make submissions on the reimbursement policy in addition to those they had already made in the three-day hearing in chambers in September 2018.

The Challenged MPA Provisions

7 British Columbia's health-care insurance plan, the Medical Services Plan ("MSP" or the "Plan"), is governed by the *MPA*, under which physicians enrolled in the Plan are paid by the Medical Services Commission in return for providing medically necessary services ("benefits") to residents of the Province who are enrolled in the Plan.

8 Sections 17 and 18 of the *MPA* (which were enacted in 1995) and s. 45 (enacted in 1992) have been amended in minor ways over the years. In general terms, however, s. 17 prohibits a medical practitioner from charging for a benefit or related service (including the use of a clinic or other place) other than as provided for in the *MPA* or regulations thereto, or permitted by the Commission; and s. 17(1.2) makes unenforceable any contract to pay such a charge. Section 17(2) provides that s. 17(1) does not apply if the person receiving the medical service is not enrolled as a beneficiary under the MSP; if the Commission does not consider the medical services to be a "benefit", if the practitioner elects or is deemed to have elected to be paid for the service directly by the beneficiary under the *MPA*; or if the practitioner is not enrolled in the Plan.

9 Section 18 of the *MPA* prohibits extra billing for benefits rendered by medical practitioners who are not enrolled in the Plan. Subs. (2) clarifies that subs. (1) applies only to benefits rendered in certain provincially-regulated medical care facilities. Subs. (3) prohibits extra billing by practitioners who elect, or are deemed to have elected, to be paid for benefits directly by a beneficiary. Subs. (4) makes contracts to pay extra billing charges to practitioners who are not enrolled in the Plan, unenforceable.

10 A new s. 18.1 is due to come into force on April 1, 2019, prohibiting direct and extra billing for benefits rendered by enrolled medical practitioners in diagnostic facilities that are not approved by the Commission. Section 18.1 is not the subject of the plaintiffs' constitutional challenge in this proceeding.

11 Section 45 prohibits and renders void all private contracts of insurance covering the costs of benefits under the *MPA*. It does not apply to those classes of costs or insurance described in s. 45(2).

12 Section 45.1 came into force on December 1, 2006. It enabled the Commission to apply to the Supreme Court of British Columbia for orders restraining contraventions of ss. 17, 18, 18.1 or 19 of the *MPA*. Under s. 45.1(3), the Court may grant an interim injunction "until the outcome of an action commenced under subsection (1)".

13 Section 46 of the *MPA* first came into force in 1992. Subsections (1) to (6) thereof created offences as follows:

> (1) A beneficiary or practitioner who misrepresents the nature or extent of the benefit in a claim for payment commits an offence.
>
> (2) A person who knowingly obtains or attempts to obtain payment for a benefit to which he or she is not entitled commits an offence.
>
> (3) A person who fails to pay or to collect and remit premiums in accordance with an agreement referred to in section 32 (1) commits an offence.
>
> (4) A person who obstructs an inspector in the lawful performance of his or her duties under this Act commits an offence.
>
> (5) A person who contravenes section 12 or 49 commits an offence.
>
> (6) A person who knowingly assists another person to commit an offence under this section commits an offence.

14 By virtue of amendments made to the *MPA* in 2003, the following subsections (5.1) and (5.2) were added to s. 46, *but were not proclaimed into force*:

> . . .
>
> (5.1) A person who contravenes section 17 (1), 18 (1) or 3 [words not in force] or 19(1) commits an offence.
>
> (5.2) A person who is convicted of an offence under subsection (5.1) is liable to a fine of not more than $10,000, and for a second or subsequent offence to a fine of not more than $20,000.

It is worth re-emphasizing that the plaintiffs' *Charter* challenge in this proceeding targets only ss. 14, 17, 18 and 45 of the *MPA* and does not extend to s. 46 before or after amendment. At the same time, since s. 46(5.1) refers to contraventions of ss. 17 and 18, it would lose much of its effect if s. 17 or 18 were ruled unconstitutional.

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15 Since at least 2009 when this action was commenced, the Province has taken various steps to enforce and restrain the corporate plaintiffs' operations in contravention of ss. 17 and 18 of the *MPA*. These steps were described by Associate Chief Justice Cullen (as he then was) in reasons indexed as 2015 BCSC 2169 (B.C. S.C.) at paras. 14-27, reproduced at para. 16 of the chambers judge's reasons. They included inspections, "targeted audits" and searches of the premises of the corporate plaintiffs. In November 2015, Cullen A.C.J. granted a limited order which was in effect until the commencement of the trial, precluding the Commission from "taking further future enforcement action against the plaintiff clinics on the narrow ground that its role in the litigation should not be permitted to influence, guide, or focus its enforcement role." (See para. 138.)

16 It was not until September 7, 2018 that the Province proclaimed in force (effective October 1) what became subsections 5.1 and 5.2 of s. 46. There was in evidence before the chambers judge an affidavit of the Hon. Gordon Campbell, who was Premier of British Columbia between June 2001 and March 2011. Mr. Campbell deposes that when he first took office, he was aware that the *MPA* effectively prohibited enrolled specialists from providing medical services to patients in private clinics, subject to some exceptions such as services related to workplace injuries. He was also aware that the previous government had permitted private surgical clinics in the Province to provide surgeries to non-exempt British Columbians in contravention of the *MPA*. His affidavit continues:

> 7. Because of the information we had about long wait times for surgeries in the public health care system and the increasing costs of the health care system, the Government decided to carry on the practice of allowing enrolled surgeons to provide some private surgical services to non-exempt British Columbians in private medical clinics in the Province to allow them to deal with their personal health care needs outside of the public system.
>
> 8. The Government had no credible evidence that permitting enrolled specialists to perform additional surgeries privately would harm the public system, or the delivery of medical service through the public system.
>
> 9. While the government considered formally eliminating the restrictions on access to private health care in the *MPA*, we did not take steps to do so because of the possible loss of health transfer payments from the Federal Government.
>
> . . .
>
> 13. Following the enactment of the amendments, the government decided that, given the wait times in the public system, the amendments would be harmful to the health of British Columbians.

14. Therefore, the Government did not to proclaim the amendments, and took no further steps to enforce the restrictions on dual practice in the *Act*.

. . .

16. The Government's conclusions about access to private health care can be summarized as follows:

> a) The large and consistent growth of provincial health care costs over the previous decade was unsustainable when taken in conjunction with other essential public services financial requirements since there was no equivalent growth in the provincial economy and therefore provincial revenues.
>
> b) To contain costs, it would be necessary to continue to ration surgeries and diagnostic services in the public system.
>
> c) Delays in receiving what had been considered medically necessary surgeries - and the inability for the province to meet the established wait time guidelines - caused suffering and the risk of permanent harm to many British Columbians. Many patients were already waiting too long for needed diagnostic services and surgeries.
>
> d) The delays in the public system could not be shortened given the constraints on funding, even if additional efficiencies could be found.
>
> e) Surgeons and other specialists had excess capacity due to the limited operating time and use of other facilities and equipment made available to them in the public system.
>
> f) Allowing these specialists to use their excess capacity to provide private diagnostic services and surgeries would cause no harm to the public system. It would also result in more medical treatments being provided to British Columbians, benefiting the overall health and wellbeing of British Columbians, while conserving capital and operational costs in the public system. It would also increase patient choice.
>
> g) Enforcing the prohibitions against private medical services would therefore only harm and not benefit British Columbia's patients.

. . .

18. After the *Chaoulli* decision, I stated publicly that the Government did not want a two-tier health care system in Canada - one in Quebec after *Chaoulli* and a second, lower tier in the rest of Canada, including British Columbia. British Columbians should have the same right as the residents of Quebec to access private health care to avoid lengthy waits in the public system, and patients, not the Government, should be free to make that choice for themselves.

. . .

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> 21. In 2006, in an effort to satisfy the concerns of the Federal Government, even though the concerns were not supported by credible evidence or arguments, the Government proclaimed certain of the amendments. In particular, it proclaimed amendments which empowered the [Medical Service Commission] to audit private clinics and to obtain an injunction. The amendments proclaimed in 2006 did not include the financial penalties or the new prohibition on private diagnostic testing, because the Government was of the view that those amendments would have prevented British Columbians from accessing these private medical services to protect their personal health care.

The Chambers Judge's Reasons

17 Winteringham J.'s reasons are lengthy and detailed, and reflect a careful weighing of the complex considerations of law, fact and policy raised by the parties below. I do not intend to attempt to rehearse those reasons here except to the extent necessary to address the parties' arguments on this leave application. The reasons, to which I refer the reader, described the parties' respective positions at paras. 9-11; and the "background circumstances" of the case relevant to interlocutory injunctive relief at paras. 12-26. At paras. 27-93, the judge reviewed the evidence before her, noting that she had been "guided by the evidentiary rulings of [the trial judge] as I assess the affidavit evidence of several doctors including the weight, if any, to be attributed to that evidence". She then briefly reviewed *Chaoulli* at paras. 94-103 and considered the law concerning the granting of interlocutory relief in constitutional cases at paras. 104-44.

18 The judge's analysis began at para. 145 and employed the well-known framework affirmed by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) for the granting of injunctive relief (including stays.) At p. 334 of *RJR*, the Court stated:

> *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interrogatory 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. [At 334.]

19 It is trite law that the three factors do not form a checklist of items each of which must be satisfied before injunctive relief may be granted. As stated by McLachlin J.A. (as she then was) for this court in *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (B.C. C.A.), *aff'd*. [1991] 1 S.C.R. 62 (S.C.C.), the three parts of the test are not intended to be separate watertight compartments, but factors that "relate to each other", such that "strength on one part

of the test ought to be permitted to compensate for weakness on another." (At 346-7.) Further, she observed:

> The checklist of factors which the courts have developed - relative strength of the case, irreparable harm, and balance of convenience - should not be employed as a series of independent hurdles. They should be seen in the nature of evidence relative to the central issue of assessing the relative risks of harm to the parties from granting or withholding interlocutory relief. [At 347.]

Serious Question to be Tried

20 With respect to whether there was a serious question to be tried, the chambers judge began with the Attorney General's argument that this "low hurdle" had not been met because the *enforcement provisions* of the *MPA* were not being challenged in the underlying case. Indeed, the trial judge had dismissed an application by the plaintiffs to amend their notice of claim to plead facts relating to enforcement. (At para. 148.) However, the chambers judge did not agree with the Province's position. In her analysis:

> In *Charter* litigation, it is often the case that the penalty attracts a *Charter* challenge because the risk of the deprivation of liberty engages s. 7. In *Bedford*, McLachlin C.J.C., writing for the Court, specifically recognized that s. 7 was engaged not because of the risk of deprivation of liberty due to enforcement of prostitution-related offences. Rather, she wrote, it was "compliance with the laws [that] infringes the applicants' security of the person". In the context of explaining why it was that security of the person rights were engaged, she wrote at paras. 59-60:
>
> > Here, the applicants argue that the prohibitions on bawdy-houses, living on the avails of prostitution, and communicating in public for the purposes of prostitution, heighten the risks they face in prostitution - itself a legal activity. The application judge found that the evidence supported this proposition and the Court of Appeal agreed.
> >
> > For reasons set out below, I am of the same view. The prohibitions at issue do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing dangerous conditions on prostitution; they prevent people engaged in a risky - but legal - activity from taking steps to protect themselves from the risks.
>
> I am not satisfied, based on the circumstances presented, that a direct challenge to the enforcement provisions is required. The Plaintiffs' challenge is as it was before the *MPA* Amendments - the prohibitions on private-pay medically necessary health services increase wait times in a way that is harmful and thus engages patients' life and security of the person rights. [At paras. 150-151; emphasis added.]

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At para. 152, she adopted the plaintiffs' contention that it was not the risk of a fine *per se* that engaged s. 7 of the *Charter*, and that the enforcement provisions of the *MPA* did not change the nature of the plaintiffs' constitutional challenge to the prohibitions on "private-pay medically necessary health services".

21 Returning to the existence of a serious question to be tried, the chambers judge noted that this determination was to be made on the basis of "common sense" and on a very limited review of the case on the merits, citing *RJR* at 348. She continued:

> The Plaintiffs must show that the impugned provisions are sufficiently connected to the harm suffered before s. 7 is engaged. In addition, the Plaintiffs must show that the deprivation of life and/or security of the person is not in accordance with the principles of fundamental justice. Should a violation be found, the AGBC may seek to justify the infringement under s. 1 of the *Charter*. [At para. 154.]

She found that the plaintiffs had established the following on the evidence before her that:

> a) Some patients will suffer serious physical and/or psychological harm while waiting for health services;
>
> b) Some physicians will not provide private-pay medically necessary health services after the *MPA* Amendments take effect;
>
> c) Some private-pay medically necessary health services would have been available to some patients but for the impugned provisions;
>
> d) Some patients will have to wait longer for those medically necessary health services that could have been available but for the new enforcement provisions; and
>
> e) If those patients lose access to private-pay medically necessary health services, awaiting those health services in the public system can be significant and some of those patients are in pain, discomfort and have limited mobility.

> I am satisfied, based on the evidentiary record before me, that there are some patients who would have accessed private-pay medically necessary health services but now cannot due to the new enforcement provisions. I am satisfied, with respect to those patients, that their s. 7 security of the person rights are engaged.
>
> I am also satisfied that there is evidence on the Injunction Application that establishes (in a way that is not frivolous or vexatious) that the prohibitions are sufficiently connected to the harm suffered by some patients. I have concluded that there is sufficient evidence showing that some patients will experience delayed access to health treatment because they are denied access to private-pay medically necessary health services. This delay prolongs the physical

and psychological harms to this group of patients. In this regard, I rely on McLachlin C.J.C. and Major J.'s statement in *Chaoulli* at para. 118, relying on *R. v. Morgentaler*, [1988] 1 S.C.R. 30 where they write:

> The jurisprudence of this Court holds that delays in obtaining medical treatment which affect patients physically and psychologically trigger the protection of s. 7 of the Charter.

In *Chaoulli*, McLachlin C.J.C. and Major J. write at para. 119:

> ... In *Morgentaler*, as here, people in urgent need of care face the same prospect: unless they fall within the wealthy few who can pay for private care, typically outside the country, they have no choice but to accept the delays imposed by the legislative scheme and the adverse physical and psychological consequences this entails. As in *Morgentaler*, the result is interference with security of the person under s. 7 of the *Charter*.

I agree with the Plaintiffs that delays in treatment giving rise to psychological and physical suffering engage the security of the person *Charter* protections just as they did in *Morgentaler*. [At paras. 155-159; emphasis added.]

22 On the basis of her preliminary assessment of the evidence demonstrating that "waiting for certain health care services may cause some patients serious physical or psychological harm and that, but for the prohibitions, those patients could have accessed private-pay medical services", the chambers judge was satisfied there was a serious question to be tried. (At para. 162.)

Irreparable Harm

23 The judge then turned to the second factor - whether the plaintiffs had demonstrated irreparable harm. This subject was also contentious. The Province argued that the plaintiffs were required to establish irreparable harm *to themselves* and not to "unidentified third parties" because (again in the Attorney's submission) the claim was not pleaded as a systemic one and the plaintiffs did not have public interest standing. (At para. 165.)

24 The 'standing' issue was problematic. The trial judge had in 2016 received written submissions on the question of whether the plaintiffs Cambie Surgeries Corporation and Specialist Referral Clinic (Vancouver) Inc. had standing to bring the constitutional challenge in this case. For reasons indexed as 2016 BCSC 1292 (B.C. S.C.), he had ruled that the corporate plaintiffs had *private* interest standing. (See paras. 57-8.) At para. 59, he said he did not find it necessary to decide whether they had public interest standing for purposes of the application before him; but he noted that they nevertheless met the "purposive and flexible" test for *public i*nterest standing enunciated in *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45 (S.C.C.).

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25 Then, in later reasons indexed as 2018 BCSC 1141 (B.C. S.C.), in ruling on the plaintiffs' application to amend their pleading in light of the enactment of s. 18.1 of the *MPA*, the trial judge appears to have found that the plaintiffs did not meet the second part of the test for public interest standing and did not have a real stake or genuine interest in *s. 18.1* of the *MPA*. (As earlier noted, s. 18.1, which deals with diagnostic services, is not yet in effect and was not a subject of the plaintiffs' *Charter* argument.) Yet at the same time, he said at para. 60 of his ruling that the corporate plaintiffs had been "previously granted public interest standing after being granted private interest standing." (Quoted by the chambers judge at her para. 14.)

26 Winteringham J. stated at para. 168 that given the authorities and the trial judge's ruling on standing, she was in a position to analyse the impact of the impugned legislation on the s. 7 *Charter* rights of patients *generally*, as opposed to its impact on the rights of the named plaintiffs specifically, in assessing the issue of irreparable harm.

27 The chambers judge was understandably "wary" of trying to determine on the record whether adequate compensation could ever be obtained at trial should the plaintiffs succeed in their constitutional challenge. Conducting such an inquiry at this stage, she observed, would ignore cautions given by the Supreme Court of Canada in *RJR* and in *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.). Thus cautioned, she concluded that irreparable harm had been demonstrated, based on the following:

> . . .
>
> a) Evidence from Dr. Day (and other physicians) deposing that Cambie (physicians) will not perform private-pay medically necessary surgical services once the *MPA* Amendments are brought into force;
>
> b) Evidence about Kristiana Corrado's experience accessing private surgical services. In particular, I have relied on the excerpted portions of her trial testimony and her description about the physical and psychological impact on her of waiting for knee surgery. I have considered Ms. Corrado's evidence that access to private medically necessary surgical services reduced her wait time by approximately six months;
>
> c) Ms. Corrado's experience occurred some six years ago. However, her experience as a teenage athlete is said to be representative of other young athletes awaiting knee surgery and the physical and psychological effects of waiting;
>
> d) Dr. Day's specific observations regarding Ms. Corrado. In particular, his observations that "she had a knee that was not functioning well; it was unstable and painful when it shifted out of position and she was distraught about not being able to participate in physical activities... because of the delay in getting the knee fixed." In addition to his

physical observations, he noted in her report that she was depressed, had trouble sleeping and concentrating on her school work because of her knee injury;

e) The general observations to which Dr. Day deposed of "patients suffering from terrible pain that greatly affects their daily lives, the negative effects on their psychological state, their inability to return to work after being off work for a lengthy period, the serious financial consequences for these and their families and the long-term effects on their physical well-being and lives generally";

f) Excerpted trial testimony of Professor Alistair McGuire explaining his opinion that "the empirical evidence supports a conclusion that waiting time for surgery can have harmful consequences and that the wait, in and of itself, causes harm". In his explanation, he testified:

> And on the basis of my experience and knowledge of econometrics, statistics and health policy that's how I came to my opinion, and the opinion relates largely in these documents to elective surgery, and it relates to whether or not there was a deterioration in quality of life, which is a measure which is used, as I've said, by regulatory bodies across the world to try to succinctly define health benefit.

g) Excerpted trial testimony of Nadeem Esmail (qualified as an expert in health care systems, policies and economics of Canada and other developed countries that maintain universal access to health care, including assessing the success of these systems in providing timely, high quality health care to patients) about delayed access to healthcare. Mr. Esmail testified, in part, on the impact of delay:

> There's a number of different measures that are used to measure the function, pain and disability of the patients. And based on these various different measures - and they don't always align between studies, but each of the studies that I've cited there did show that there was a relationship between delay and potential deteriorations in status, and in some cases to the extent that initial status at the time of surgery is related to the outcome these deteriorations can then affect the outcome from the surgery. So a delay might not only affect your pain and your function while you're waiting and it might get worse; the outcome post-surgery might now be worse because you weren't treated early enough in the degenerative process.

[At para. 167.]

(I note that Ms. Corrado is a plaintiff in this case. Both she and Ms. Martens had been successfully treated by one or both corporate plaintiffs and their avoidance of the waiting lists they would otherwise have had to endure in the public system is alleged to have saved much pain and suffering and perhaps, in Ms. Martens' case, her life.)

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28 The chambers judge emphasized that she did not intend to suggest that the evidence before her 'proved' that the Province had failed to meet optimal waiting times for any particular health care service. That, she said, was to be determined by the trial judge on all the evidence. For purposes of the injunction application, however, she was satisfied that prospective private health-care patients would be precluded from accessing health services in a manner that might alleviate their wait times, and that there was a sufficient causal connection between denying access to private-pay health services and ongoing harm that might be caused by such delay. (At para. 169.) Thus she ruled:

> I am satisfied that the Plaintiffs have established that some patients will suffer irreparable harm in this sense. But for the prohibitions, patients could obtain health care services much sooner at a private clinic (such as Cambie). The prohibitions infringe the s. 7 *Charter* rights of the patients by forcing them onto public health care waiting lists and the subsequent delay in receiving treatment causes some patients to endure physical and psychological suffering. [At para. 170; emphasis added.]

Balance of Convenience

29 Turning finally to the balance of convenience, Winteringham J. noted that where, as in this case, the purpose of the challenged legislation was to promote the public interest, it was not for her to determine whether it actually had such effect. Rather, she was required to assume that the legislation promoted the public interest. The onus was then on the plaintiffs to demonstrate that its suspension would:

> ...itself provide a public benefit in order to overcome the assumed benefit to the public interest arising from the continued application of the legislation or that no harm is done to the public interest if the injunctive relief is granted. Put another way, it is the Plaintiffs who must prove a more compelling public interest. [At para. 171.]

The judge also acknowledged that applicants usually fail in efforts to obtain interim injunctive relief when they challenge the constitutionality of legislation, and for good reason. It was only in "exceptional" cases, she stated, that democratically-enacted legislation should be suspended before an actual finding of unconstitutionality or invalidity at trial.

30 The Attorney General argued below that this was not one of the "clear cases" in which a court should order duly enacted laws to be "inoperable in advance of complete constitutional review" and that the Province would suffer immediate harm should the injunction be granted. The federal health minister had already deducted the sum of $15.9 million from its transfer payments to B.C. in March 2018. This money could be reclaimed if the Province established that it was "taking steps to end the practice of extra-billing in B.C." (At para. 175.)

31 The chambers judge characterized this point as speculative:

> During the hearing of the Injunction Application, considerable time was spent on the CHT [Canada Health Transfer] deduction. The Plaintiffs invite the Court to speculate about whether the federal government will reimburse the province for the $15.9 million deduction in light of the enforcement steps the province has taken. The AGBC also invites the Court to speculate about whether, by the time a decision is rendered in the constitutional case, the "federal government would presumably have made further, and larger, deductions, thereby depriving B.C.'s public health care system of millions more dollars that could be used to provide publicly-funded services to all British Columbians..." [At para. 176.]

She noted at para. 177 that there was evidence that suggested the Province could seek to recover the $15.9 million because it had already taken steps to enforce the prohibitions in the *MPA*. The potential transfer of those funds would, she said, be "generally beneficial".

32 She found, however, that this *was* an exceptional case. She reached this conclusion on the basis of the findings set out above and additional factors that, in her analysis, tipped the balance of convenience in the plaintiffs' favour. First, *Chaoulli* had "opened the door to *Charter* scrutiny of health care decision-making." (At para. 181.) In particular, Chief Justice McLachlin and Major and Bastarache JJ., as well as Deschamps J. in her separate reasons, had agreed that health-care legislation similar to the *MPA* was subject to constitutional review and that a court could not avoid reviewing legislation for *Charter* compliance when citizens challenge it. The chambers judge commented:

> It is an understatement to say that this is a complex constitutional case brought in the context of public health care legislation. The proceedings constitute a direct affront to the public health care system and, importantly, Canada's pledge to a universal public health care system. In *Chaoulli*, the much divided court revealed the tension between the laudable goal of providing universal (equal) access to health care and interfering with citizens' autonomy and dignity by prohibiting access to private health care options for medically necessary health services. The tension is all the more evident when access to health care is redefined as access to a wait list for health care. However, the determination of these complicated issues is for the trial judge, on a full record, with the benefit of legal submissions from the parties. [At para. 182; emphasis added.]

and further:

> ... For the purpose of the Injunction Application only, I am satisfied that the Plaintiffs have demonstrated, to the extent necessary, that the s. 7 *Charter* rights of some patients are engaged. I make that finding based on the evidence of the doctors who depose that they will refrain from providing private-pay medically necessary health services that are subject to significant financial penalties. Further, those doctors deposed that their own waiting lists for the same health services in the public system will increase. Any delay is thus twofold. First,

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> for a patient such as Ms. Corrado, the *MPA* Amendments will remove access to private-pay medically necessary health services. Second, patients such as Ms. Corrado will be added to a waiting list that may be longer than what is in place today because the public health care system will need to accommodate those who (but for the *MPA* Amendments) would have otherwise utilized private health care services. [At para. 183.]

The chambers judge was satisfied on the evidence before her that at least some patients are at increased risk of suffering physical and psychological harm by reason of having to wait for public health-care services. It was such waiting, "with no option to pursue an alternative", that in her analysis engaged the rights of such persons under s. 7 of the *Charter* and tipped the balance of convenience in the plaintiffs' favour.

33 The judge's second reason for finding that the case was "exceptional" in the context of the balance of convenience was that the parties were in the middle of a trial that had been underway for over two years. This was not a case in which the law had been brought into force prior to a trial on the merits. In fact, the plaintiffs' case was almost concluded and the Attorney General was to open its case in the near future. There had already been some 150 days of trial and 48,000 pages of evidence had been presented at trial.

34 Perhaps more significantly, the new additions to s. 46 of the *MPA* had in fact been enacted in 2003 but had not been proclaimed into force until September 2018 — some 15 years later. Both parties attempted to rely on a "*status quo* argument", but the chambers judge found that the plaintiffs would be affected in a far greater manner than the Attorney General should injunctive relief not be granted. In her words:

> ... I say that because I am satisfied that there are doctors who will not provide private-pay medically necessary health services with the new enforcement provisions, thereby potentially impacting the s. 7 rights of some patients. I also wish to address the AGBC's submission regarding the availability of equitable relief in the circumstances presented here. I am not satisfied based on the evidence before me that it has been established that the Plaintiffs are disentitled to equitable relief because they do not have "clean hands." The parties have a complicated history and one that has evolved since the litigation began. I therefore decline to make such a finding on the Injunction Application. [At para. 188.]

35 In the result, Winteringham J. was satisfied that the "special considerations" raised by the application could be addressed by a time-limited order. Having been advised that the case at trial should be concluded by April 1, 2019, she was prepared to grant the *injunction* (the alternative to the *stays* sought by the plaintiffs) enjoining the Province from enforcing ss. 17, 18 and 45 of the *MPA* until June 1, 2019 or further order of the Court.

36 The judge ended by summarizing her conclusions at para. 190:

. . .

a) Taking into account the circumstances of this constitutional litigation and a preliminary assessment of the evidence, the Plaintiffs have established that injunctive relief is appropriate in this case. I make that determination based on a preliminary assessment of the evidence and finding that the Plaintiffs have established that there is a serious question to be tried in that:

> i. Some patients will suffer serious physical and/or psychological harm while waiting for health services;
>
> ii. Some physicians will not provide private-pay medically necessary health services after the *MPA* Amendments take effect;
>
> iii. Some patients would have accessed private-pay medically necessary health services but for the *MPA* Amendments;
>
> iv. Some patients will have to wait longer for those medically necessary health services that could have been available but for the *MPA* Amendments and impugned provisions;
>
> v. A sufficient causal connection between increased waiting times for private-pay medically necessary health services and physical and/or psychological harm caused to some patients.

b) The Plaintiffs have established irreparable harm in the context of a constitutional case that has proceeded in a manner that is consistent with public interest litigation in that some patients, but for the prohibitions, could have obtained private-pay medically necessary health services much sooner at a private clinic (such as Cambie) and the subsequent delay in receiving treatment causes some patients to endure serious physical and psychological suffering. The nature of this constitutional case complicates the assessment of damages at the interlocutory stage.

c) The Plaintiffs have established that the balance of convenience tips in their favour. This is so despite the Court's conclusion that the *MPA* Amendments are directed to the public good and serve a valid public purpose. The Plaintiffs have tilted the balance by establishing that restraint of the enforcement provisions will also serve the public interest in that private-pay medically necessary health services will be accessible in circumstances where the parties are in the midst of a lengthy trial to determine the complicated constitutional issues at play. Enjoining the province from enforcing the prohibitions for a relatively short period of time serves that important public purpose. [At para. 190.]

Application for Leave

37 In support of his application for leave to appeal, the Attorney General asserts that the chambers judge:

> a. exercised her discretion on a wrong principle by:
>
> > i. enjoining the enforcement of validly-enacted legislation despite failing to find that the Plaintiffs had established a clear case of the legislation's unconstitutionality; and
> >
> > ii. finding that the Plaintiffs had satisfied the irreparable harm branch of the test of an interlocutory injunction by establishing the possibility of harm to unnamed third parties, rather than harm to themselves;
>
> b. failed to exercise her discretion judicially by granting the broadest possible remedy, sought by the Plaintiffs only in the alternative, without any explanation of why that was necessary;
>
> c. erred in law by making critical findings of fact based on inadmissible expert opinion evidence; and
>
> d. erred in fact and law by finding that the Plaintiffs had established irreparable harm on the evidence before her.

I propose to address subpara. (a)(ii) and para. (d) together since the arguments advanced by the Province on those issues are essentially the same.

38 At paras.18 and 19 of his written argument, the Attorney General cited the well-known 'tests' for the granting of leave to appeal in this court, namely:

> a. whether the appeal is prima facie meritorious, or on the other hand, whether it is frivolous;
>
> b. whether the points on appeal are of significance to the practice;
>
> c. whether the points raised are of significance to the action itself; and
>
> d. whether the appeal will unduly hinder the progress of the action.

The Attorney acknowledges that the overarching consideration is whether it is in the interests of justice to grant leave.

39 The plaintiffs agree with the four factors as stated, but join issue on the application of each in the circumstances of this case. They submit that:

> In this case, the application for leave to appeal should be dismissed because the proposed grounds of appeal are not meritorious, the proposed appeal raises no legal questions of significance to the practice, it will unnecessarily delay the underlying trial, and there is no public interest in granting leave to appeal of this time-limited and discretionary decision.

As well, they emphasize the discretionary nature of the chambers judge's decision and the deferential standard of review that this court would be bound to apply in any appeal. Counsel appear to agree that the standard is whether the chambers judge erred in principle or made an order not supported by the evidence, or whether the order appealed from will result in an injustice: see the authorities cited by Mr. Justice Fitch in *Independent Contractors and Businesses Association v. British Columbia*, 2018 BCCA 429 (B.C. C.A.) at paras. 35-6.

Merits of the Appeal: A Wrong Principle?

40 Although the Attorney agrees that an "arguable case" must be shown in all cases by an applicant for injunctive relief, he also contends (or at least so I infer) that a higher or different standard must be met where the applicant is seeking a suspension of the operation of duly enacted legislation. The Attorney says that the chambers judge had to find that the impugned legislation was unconstitutional or, put in slightly different terms, that she had to find a "clear case of unconstitutionality" before she could, in law, grant the injunction. It is said that such proof would have to extend beyond the 'engagement' of s. 7 rights, to include a *finding* that any violation of s. 7 rights is not in accordance with the principles of fundamental justice. In support, the Attorney cited *Metropolitan Stores* at 130-3; *RJR* at 343-7; and *Harper v. Canada (Attorney General)*, 2000 SCC 57 (S.C.C.) at paras. 5-9.

41 In *Metropolitan Stores*, Beetz J. for the Court addressed the 'arguable case' test as follows:

> In the case at bar, it is neither necessary nor advisable to choose, for all purposes, between the traditional formulation and the [*American Cyanamid Co. v. Ethicon Ltd*. [1975] A.C. 396 (H.L.)] description of the first test: the British case law illustrates that the formulation of a rigid test for all types of cases, without considering their nature, is not to be favoured (see Hanbury and Maudsley, *Modern Equity*. (12th ed., 1960) pp. 736-43). In my view, however, 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. [At 128; emphasis added.]

He also approved the *dictum* of Lord Diplock in *American Cyanamid Co. v. Ethicon Ltd.* [[1975] A.C. 396 (U.K. H.L.)] that:

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> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration. These are matters to be dealt with at the trial. [At 130; emphasis added.]

The Supreme Court acknowledged that interlocutory procedures rarely allow a chambers judge to decide questions of constitutionality prior to trial. In the words of Beetz J., "...the court is generally much too uncertain as to the facts and the law to be in a position to decide the merits." (At 133.)

42 The Court in *RJR* took a similar view. In its analysis:

> 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."
>
> 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.
>
> 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 to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable. [At 337-8; emphasis added.]

43 In *Harper*, the majority of the Supreme Court observed at para. 4 that the first factor is whether there is a serious issue to be tried. The majority found this had been shown "without prejudging the appeal."

44 Each of the foregoing decisions involved a *Charter* challenge to existing legislation, and there is no doubt that such a challenge imports special considerations where an injunction is sought pending trial. In *Metropolitan Stores*, Beetz J. considered how the usual tests for injunctive relief are applied in these circumstances. (See 129.) None of the parties in that case, he observed, had disputed the existence of a discretionary power to grant a stay in such cases, and he agreed with their assumption. (See 126.) He noted that "the courts consider" that they should not be restricted

to the application of the traditional criteria and that unless the public interest is also taken into consideration *in evaluating the balance of convenience*, courts often "express their disinclination" to grant injunctive relief before constitutional invalidity has been finally decided on the merits. (At 129; my emphasis.) Following a review of the relevant cases and various practical consequences of granting injunctive relief in the form of the suspension of legislation, Beetz J. stated:

> ... I respectfully take the view that Linden J. has set the test too high in writing in *Morgentaler* that it is only in "exceptional" or "rare" circumstances that the courts will grant interlocutory injunctive relief. It seems to me that the test is too high at least in exemption cases when the impugned provisions are in the nature of regulations applicable to a relatively limited number of individuals and where no significant harm would be suffered by the public: it does not seem to me, for instance, that the cases of [*Law Soc. of Alta. v. Black* and *Vancouver Gen. Hosps. v. Stoffman*,] ... can be considered as exceptional or rare. Even the *Rio Hotel* case, *supra*, where the impugned provisions were broader, cannot, in my view, be labelled as an exceptional or rare case.
>
> On the other hand, the public interest normally carries greater weight in favour of compliance with existing legislation in suspension cases when the impugned provisions are broad and general and such as to affect a great many persons. And it may well be that the above mentioned test set by Linden J. in *Morgentaler* ... is closer to the mark with respect to this type of case. In fact, I am aware of only two instances where interlocutory relief was granted to suspend the operation of legislation and, in my view, those two instances present little precedent value. [At 147-8; emphasis added.]

45 In *RJR*, the Supreme Court again emphasized that the public interest is a "special factor" to be considered in assessing the balance of convenience in constitutional cases and that it must be given "the weight it should carry". The Court suggested it should be open to both parties in an interlocutory *Charter* proceeding to rely on considerations of the public interest. In the words of Sopinka and Cory JJ. for the Court:

> 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. [At 344; emphasis added.]

46 Sopinka and Cory JJ. stated that a motions court should in most instances assume that irreparable harm to the public interest would result from the restraint of the action sought to be enjoined. They recognized at pp. 346-7 that public interest considerations will "weigh more heavily" in a 'suspension' case than in an 'exemption' case, in which a discrete and limited number of applicants are exempted from the application of the legislation; and that even in suspension cases some relief might be provided if the court is able to limit the scope of the applicant's request for

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relief. All things being equal, the court said, it is, in Lord Diplock's words, a "counsel of prudence to... preserve the *status quo*."

47 In *Harper*, the Court re-affirmed that in injunction applications based on constitutional challenges, the motions judge must presume that the impugned law will "produce a public good." In the words of the majority:

> The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed. [At para. 9; emphasis added.]

48 This is presumably the source of the "clear case" requirement asserted by the Attorney General in the case at bar. The same phrase was employed in a lengthy passage quoted by Winteringham J. from a more recent case involving interlocutory relief, *Manitoba Federation of Labour et al. v. The Government of Manitoba*, 2018 MBQB 125 (Man. Q.B.). The quoted passage includes the conclusion of Edmond J. that "... only in clear cases will interlocutory injunctions against the enforcement of the law on grounds of alleged unconstitutionality or a violation of the *Charter* succeed." In his analysis:

> Although the facts of these cases are different, they make it clear that interlocutory injunctions or stays are rarely granted in constitutional cases because it is assumed that laws enacted by democratically enacted legislatures are directed to the common good and serve a valid public purpose.
>
> That does not mean that injunctions are never granted. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the moving plaintiffs who rely on the public interest must demonstrate that the suspension or exemption of the legislation would provide a public benefit. [At paras. 154-5; emphasis added.]

49 As I have already suggested, the "clear case" requirement in cases where the constitutionality of legislation is challenged does not in my view affect the first *RJR* factor by imposing a higher standard in *the sense of a strong or highly meritorious argument*. Instead, it informs the court's task in assessing the *second* factor of the analysis, *irreparable harm*. Given that a court is required to assume the existence of a public good underlying challenged legislation, it could hardly be otherwise: the applicant for an injunction must, as the chambers judge said, "prove a more compelling public interest" if it is to offset the presumption of public good. (See paras. 171, 177.) The chambers judge clearly accepted these propositions of law, but found that the balance in this case had been tipped in the plaintiffs' favour.

50 As far as the Attorney's first ground of appeal — that the chambers judge proceeded on a wrong principle in granting an injunction in the absence of finding that a "clear case" of unconstitutionality had been established — is concerned, none of the authorities supports the assertion that a motions judge should find facts or reach conclusions on the outcome of the issues that stand to be decided at trial. I see no merit in the Attorney's first proposed ground of appeal, which rests on a misconception of the nature of an interlocutory injunction. Indeed it would have been erroneous for the chambers judge to have attempted to reach any final conclusion on the constitutionality of the impugned provisions of the *MPA*.

Harm to "Unnamed Third Parties"

51 I turn next to the Province's argument that the chambers judge exercised her discretion on a wrong principle in finding that the test of irreparable harm had been met by the demonstration of harm to "*unnamed third parties*". It will be recalled that Winteringham J. concluded (based on her review of the pleadings, the trial judge's ruling on private and public interest standing, and the case authorities regarding *Charter* litigation and public interest standing) that it was open to her to consider the impact of the *MPA* prohibitions "more generally" - presumably as a systemic challenge. In the Attorney's submission, this was erroneous: the judge had to find harm to *the plaintiffs themselves* before she could be satisfied on the second *RJR* factor.

52 Although I would describe the Attorney General's argument on this point as a weak one, I cannot say it is frivolous or vexatious. Part of the difficulty stems from the fact that the trial judge declined to reach a conclusion in his 2016 reasons on the question of the public interest standing of the corporate defendants - despite also finding the plaintiffs had met the applicable criteria for that status. Regardless of the public/private interest standing of the corporate plaintiffs, however, the plaintiffs' claims here, like those advanced in *Chaoulli*, are systemic in nature. In the words of Binnie, LeBel and Fish JJ. in *Chaoulli* at para. 189, their argument is not limited to a case-by-case consideration and they do not limit themselves to the circumstances of any particular patient. (Binnie, LeBel and Fish JJ. were not in dissent on this point; Deschamps J. agreed on this point at para. 35; and Chief Justice McLachlin and Major and Bastarache JJ. agreed with her conclusions: see para. 102.) In addition in the case at bar, one or more of the individual plaintiffs has or had at some point (and I see no meaningful difference on that point) a direct interest in the outcome of the litigation. The corporate plaintiffs have been found to have (at the least) a direct interest as well. In these circumstances, the question of law advanced by the Attorney seems to be of theoretical interest at best.

Inadmissible Evidence?

53 Setting aside subparagraph (b) of the Attorney's grounds of appeal for the moment, we come to his third ground - that the chambers judge erred in law by making critical findings of fact and law based on inadmissible expert opinion evidence. As noted earlier, Winteringham J. stated

she was guided in her analysis by the evidentiary rulings of the trial judge in assessing affidavit evidence of several doctors that was filed in chambers by the plaintiffs. Yet the Attorney contends that she relied on evidence the *trial judge* had ruled inadmissible. (When questioned at the hearing in this court, counsel for the Province said that in using the word "inadmissible" he meant the trial judge had given the evidence "no weight". On this point, see para. 6 of the trial judge's reasons at 2017 BCSC 156 (B.C. S.C.).) The evidence objected to by the Province included parts of the "lay" evidence (as opposed to expert opinion evidence) of Dr. Brian Day, the president and medical director of the plaintiff Cambie Surgeries Corporation (see 2018 BCSC 514 (B.C. S.C.)); opinion evidence of Professor Alistair McGuire on the issue of medical harm to individuals waiting for medical care; and opinion evidence of Mr. Nadeem Esmail, an economist. The Attorney says that because Mr. Esmail had no *medical* training or expertise, he was not qualified to opine on the medical effects of waiting or harm caused by waiting.

54 The plaintiffs respond that, just as it was not for the chambers judge to rule on the constitutionality of the impugned legislation, it was not for her to resolve the many evidentiary disputes that have confronted and will continue to confront the trial judge. They contend that only *portions* of the disputed evidence were ruled inadmissible by the trial judge and that the chambers judge was entitled to consider the rest. (Neither party before me cited any case-law as to whether the chambers judge was bound by the trial judge's evidentiary rulings; as Mr. Penner observed, the trial judge is usually the judge who rules on injunctive relief.) As well the plaintiffs say that even if the expert evidence relied on expressly by the chambers judge was "inadmissible" (which they deny), the conclusions reached by Professor McGuire and Mr. Esmail were also supported by various other experts whose reports *were* admitted, including those of Drs. Masri, Matheson, Chambers and Younger. Last, they emphasize that evidence that may have been excluded as unhelpful on issues at trial may well have been found to be relevant to issues on the injunction application; and that the expert opinions given at trial were similar to those admitted in *Chaoulli*.

55 Even if one assumes the Attorney is correct in his assertion that the chambers judge relied on evidence the trial judge had found to be truly inadmissible, it is in my view very unlikely a division of this court would, prior to the conclusion of the trial and issuance of the trial judge's reasons, express views on his evidentiary rulings. As this court (with a division of five judges) observed recently in another appeal in this litigation indexed as 2017 BCCA 287 (B.C. C.A.):

> This Court has repeatedly held it does not have jurisdiction to hear free-standing appeals from evidentiary and other rulings made during the course of a trial. The modern genesis of that line of authority is *Rahmatian v. HFH Video Biz, Inc*. (1991), 55 B.C.L.R. (2d) 270 (C.A., Chambers), wherein Chief Justice McEachern declined to entertain an application by a defendant in an on-going trial for leave to appeal the dismissal of a no-evidence motion. In his view, the dismissal was not an order but rather, "a ruling, or a ruling on evidence which is part of the trial process, and is not appealable until after the trial has been completed": at 272. This reasoning is in accord with older authorities to which I will refer later in these reasons.

> To hold that an evidentiary ruling made during a trial juridically constitutes an appealable order would be inconsistent with the long-accepted principle that it is always open to a trial judge to revisit such rulings: see *R. v. Adams*, [1995] 4 S.C.R. 707 at paras. 29-30; *R. v. Cole*, 2012 SCC 53 at para. 100, [2012] 3 S.C.R. 34. If such rulings gave rise to orders and those orders were formally entered, then the doctrine of *functus officio* would preclude reconsideration even in the face of a material change in circumstances. [At paras. 40, 63.]

Overly Broad Terms?

56 The Attorney's final ground of appeal is that Winteringham J. failed to exercise her discretion judicially by granting a "broad" injunctive order, rather than a stay restricted to the enforcement provisions of ss. 46(5.1) and (5.2) of the *MPA*, "without any explanation of why that was necessary." This assertion tests the limits of the court's discretion in such cases, and more particularly the extent to which a decision reached by a judge in chambers must be explained in reasons for judgment. Again, given the nature of the motions judge's task on an application such as the one before Winteringham J., the broad similarity of injunctions and stays, and the deferential standard of review that would have to be applied by this court, I conclude that this ground is a weak one, but not one that could be said to be frivolous or vexatious.

Summary on Merits of the Appeal

57 To summarize my conclusions regarding the merits of the issues proposed to be advanced on appeal by the Province, I find that:

> (i) There is no merit to an appeal based on the proposition that the chambers judge exercised her discretion on a wrong principle in granting injunctive relief in the absence of a finding of a "clear case" of unconstitutionality. The law is clear that an "arguable" or "serious" case is sufficient at this point, and there is no doubt that "low hurdle" was met;
>
> (ii) The argument that the chambers judge proceeded on a wrong principle in finding harm to "unnamed third parties" rather than to the plaintiffs themselves is highly problematic and overlooks the evidence of the individual plaintiffs in this case, the trial judge's rulings on public interest standing and the fact that as in *Chaoulli*, the *Charter* challenge here is a 'systemic' one. Nevertheless, the point is not frivolous or vexatious;
>
> (iii) The argument that the chambers judge considered inadmissible opinion evidence is also problematic given that this court will not rule in an appeal at this stage on whether the trial judge's evidentiary rulings are correct or not. Nevertheless, the point cannot be said to be frivolous or vexatious; and
>
> (iv) The argument that the chambers judge was required to explain in her reasons why she granted an injunction on the terms she did rather than a stay in the narrower terms sought by

the plaintiffs (the injunction being their second alternative) is also arguable, although highly theoretical.

Significance to the Practice

58 For the reasons given above, I am of the view that those questions raised by the Attorney which I have found to be arguable, are not of significance to the practice generally.

Significance to the Action / Will Appeal Unduly Hinder the Action?

59 It is the final two branches of the test for granting leave to appeal (see para. 38 above) that in my view are decisive of this application. First, an appeal that answered the questions described above would be of very little significance to the action itself. As held in the previous appeal in 2017, this court would in all likelihood decline to rule on the evidentiary issue(s) raised by the Province. Nothing would change at trial if this court were to rule that the chambers judge should not have considered "harm" in a general way, given that direct harm to at least Ms. Corrado and the corporate plaintiffs was shown to the trial judge's satisfaction. If this court were to rule that the chambers judge should have explained at length why she chose to grant an injunction as opposed to a stay, the practical effect is unclear: the court might still grant an injunction or a stay of some kind. At bottom, the issues are at best theoretical distractions from the constitutional issues that are the subject of the underlying case. Given the amount of time and resources, including judicial resources, that have been devoted to this proceeding thus far, an appeal on these issues simply cannot, in my respectful view, be justified - even if it were the case that both parties have unlimited funds and time, which they do not.

60 This brings me to the fourth factor - the effect that an appeal would have on the trial. The Attorney submitted that two previous appeals in this proceeding were mounted and completed without apparent difficulty on the part of the plaintiffs, suggesting that the same could occur with respect to this appeal. Again with respect, I am doubtful that no real difficulties were encountered by the parties and their counsel by reason of the two appeals. Obviously, *judicial* time and resources are taken up by appeals, and have been taken up in this case by five of them. More to the point, I reiterate that the appeal of the issues described above would be virtually irrelevant to the resolution of the *Charter* challenge that has been underway in the Supreme Court of British Columbia since 2016. It is now 2019. The parties and their counsel should be encouraged to complete their cases in the court below, not to pursue distractions in the form of appeals to this court.

61 The ultimate question on this leave application is of course whether the proposed appeal would be in the interests of justice. It will be apparent that in my opinion, the proposed appeal is not in the interests of justice. The authorities are clear than a motions judge is not expected to rule on the issues of fact and law before the trial court, nor to carefully weigh and make rulings on admissibility or findings of harm. The injunction is merely an interim measure, and generally the preservation of the *status quo* pending the trial court's decision will be the appropriate course.

62 Here we have three highly theoretical questions that are irrelevant to the important *Charter* issues in the case; a discretionary decision reached after careful consideration and explained in lengthy reasons; and the granting of relief that effectively preserves the *status quo* that was in place from 2003 until mid-trial when the Province suddenly decided to attach penalties to contraventions of ss. 17 and 18 of the *MPA*. Granting leave would only add another layer of expense and complexity to a proceeding that has already occupied 150 days of court time over two years, and presumably many more months of counsel's time. It is time for counsel and the parties to focus on the completion of the trial process.

63 In all the circumstances, I would dismiss the application.

Schedule A

General limits on direct or extra billing

17 (1) Except as specified in this Act or the regulations or by the commission under this Act, a person must not charge another person

(a) for or in relation to a benefit, or

(b) for materials, consultations, procedures, use of an office, clinic or other place or for any other matters that relate to the rendering of a benefit.

(1.1) The commission may determine that a person charges in relation to a benefit for the purposes of subsection (1) (a) if the charge is for anything done, provided, offered, made available, used, consumed or rendered

(a) at any time in relation to the rendering or refusal to render the benefit, and

(b) in circumstances that a reasonable person would consider would result in

(i) a refusal to render the benefit if the thing were not done, provided, offered, made available, used, consumed or rendered, or

(ii) the beneficiary being rendered the benefit in priority over other persons or being given preferential treatment in the scheduling or rendering of the benefit if the thing were done, provided, offered, made available, used, consumed or rendered.

(1.2) If a person charges or attempts to charge another person contrary to subsection (1), another person is not liable to pay the amount charged.

(2) Subsection (1) does not apply:

(a) if, at the time a service was rendered, the person receiving the service was not enrolled as a beneficiary;

(b) if, at the time the service was rendered, the service was not considered by the commission to be a benefit;

(c) if the service was rendered by a practitioner who

(i) has made an election under section 14 (1), or

(ii) is subject to an order under section 15 (2) (b);

(d) if the service was rendered by a medical practitioner who is not enrolled.

Limits on direct or extra billing by a medical practitioner

18 (1) If a medical practitioner who is not enrolled renders a service to a beneficiary and the service would be a benefit under this Act or the *Hospital Insurance Act* if rendered by an enrolled medical practitioner, a person must not charge another person for, or in relation to, the service, or for materials, consultations, procedures, use of an office, clinic or other place or for any other matters that relate to the rendering of the service, an amount that, in total, is greater than

(a) the amount that would be payable under this Act, by the commission, for the service if rendered by an enrolled medical practitioner,

(b) if a payment schedule or regulation permits or requires an additional charge by an enrolled medical practitioner, the total of the amount referred to in paragraph (a) and the additional charge, or

(c) the amount that would be payable under the *Hospital Insurance Act*, for the service if rendered by an enrolled medical practitioner.

(2) Subsection (1) applies only to a service rendered in

(a) a hospital as defined in section 1 of the *Hospital Act*,

(b) a facility as defined in section 1 of the *Continuing Care Act*,

(c) a community care facility or assisted living residence as defined in section 1 of the *Community Care and Assisted Living Act* that receives funding for the service through a regional health board, the Nisga'a Nation or the Provincial Health Services Authority, or

(d) a medical facility or diagnostic facility if

(i) a regional health board as designated under section 4 of the *Health Authorities Act*, or

(ii) the Provincial Health Services Authority

has contracted to have the service rendered.

(3) If a medical practitioner described in section 17 (2) (c) renders a benefit to a beneficiary, a person must not charge another person for, or in relation to, the benefit, or for materials, consultations, procedures, use of an office, clinic or other place or for any other matters that relate to the rendering of the benefit, an amount that, in total, is greater than

(a) the amount that would be payable under this Act, by the commission, for the benefit, or

(b) if a payment schedule or regulation permits or requires an additional charge, the total of the amount referred to in paragraph (a) and the additional charge.

(4) If a medical practitioner who is not enrolled charges another person contrary to subsection (1) or (3), another person is not liable to pay the amount charged.

Private insurers

45 (1) A person must not provide, offer or enter into a contract of insurance with a resident for the payment, reimbursement or indemnification of all or part of the cost of services that would be benefits if performed by a practitioner.

(2) Subsection (1) does not apply to

(a) all or part of the cost of a service

(i) for which a beneficiary cannot be reimbursed under the plan, and

(ii) that is rendered by a health care practitioner who has made an election under section 14 (1),

(b) insurance obtained to cover health care costs outside of Canada, or

(c) insurance obtained by a person who is not eligible to be a beneficiary.

(3) A contract that is prohibited under subsection (1) is void.

Application dismissed.

2006 FC 1046, 2006 CF 1046
Federal Court

Canadian Council for Refugees v. R.

2006 CarswellNat 2658, 2006 CarswellNat 3064, 2006 FC 1046, 2006 CF 1046, 151 A.C.W.S. (3d) 108, 299 F.T.R. 114 (Eng.), 57 Imm. L.R. (3d) 48

Canadian Council for Refugees, Canadian Council of Churches, Amnesty International, and John Doe (Applicants) and Her Majesty the Queen (Respondent)

R.T. Hughes J.

Heard: August 29, 2006
Judgment: August 30, 2006 *
Docket: IMM-7818-05

Counsel: Barbara Jackman, Andrew Brower for Applicants, Canadian Council for Refugees, Canadian Council of Churches, John Doe
David Lucas, Greg G. George, Matina Karvellas for Respondent

Subject: Immigration; Civil Practice and Procedure; Family

MOTION by applicants for order restraining respondent Crown from denying J and his wife entry to Canada.

***R.T. Hughes J.*:**

1 This is a Motion brought on behalf of the Applicants for an Order pursuant to section 18.2 of the *Federal Court Act* restraining the Respondent from denying John Doe and his wife entry to Canada or, in the alternative, an Order directing the Respondent to allow John Doe and his wife to enter Canada from the United States pending determination on Judicial Review as to whether or not the Safe Third Country Agreement applies to them to bar them from eligibility to make a refugee claim. The motion is brought within the context of a larger Application in which the validity of the designation of the United States of America as a "Safe Third Country" and certain regulatory provisions respecting "Safe Third Country" legislation in Canada is being challenged by the Applicants.

2 At the core of the Application is a challenge to certain *Regulations* appearing in the *Immigration and Refugee Protection Regulations* S.O.R./2002-227 established with reference to section 101 and 102 of the *Immigration and Refugee Protection Act* S.C. 2001, c. 27 [*IRPA*]. These

250 *Regulations* came into force in December 2004, and provide that a refugee claim is ineligible to be considered if the claimant came directly or indirectly to Canada from a third country other than their original country of nationality, which third country has been designated as "safe" by the new *Regulations*. The United States of America is presently the only designated country.

3 These *Regulations* arise from the Safe Third Country Agreement signed by Canada in December 2002. The Regulatory Impact Statement published in Part II of the Canada Gazette on 12 October, 2002 [C. Gaz. 2002 II. Vol. 136] described these *Regulations* as a necessary step towards international cooperation in the orderly handling of refugee claims. Thus, a person who has originally come from a country where they have been persecuted and who has first gone to the United States of America, cannot thereafter seek to claim refuge in Canada. Prior to the establishment of these *Regulations*, a sojourn in the United States of America, did not preclude a person from coming to Canada and claiming refugee protection.

4 The Applicants, other than John Doe, were opposed to the passage of these *Regulations* and since their passage, have been seeking a means to challenge their validity in Court. These Applicants frankly acknowledge that they have spent considerable time and effort to locate an individual whose circumstances would better enable them to challenge the validity of the *Regulations*. Eventually the Applicant John Doe, whose anonymity was preserved by an earlier Order of the Court, was selected as a joint Applicant for purposes of challenging the *Regulations*.

5 The Affidavit of John Doe filed in the Application establishes that he and his wife are citizens of Columbia where they resided until June 2000 when they entered the United States of America apparently under a tourist visa. Doe unsuccessfully sought employment in the United States. In August 2001, the United States government commenced removal proceedings against him. In December 2001, Doe made an application for asylum in the United States and the withholding of the removal order. He claimed that when he was in Columbia, he was targeted by a rebel group (FARC) who made threats against his life apparently by reason of certain political views that he had openly expressed. He fears that if he is returned to Colombia he would be persecuted on the basis of his political beliefs. Asylum was denied by a United States Immigration Judge in February 2005. The withholding of the removal order was denied at the same time. Doe now claims that he would like to seek asylum in Canada.

6 There is no evidence that Doe has ever been to Canada or attempted to enter Canada. He has no relatives here. There is no evidence that Doe ever had any interest in making a refugee or asylum claim in Canada prior to the denial of his claim for asylum in the United States. There is no evidence as to whether Doe has attempted to enter or make a refugee or asylum claim in any country other than the United States. There is no evidence as to efforts if any, made by Doe to exhaust any other remedies, whether by appeal or otherwise, as may remain available to him in the United States.

7 The purpose of the mandatory injunction now sought by the Applicants has been set out in an affidavit, not of Doe, but of an "assistant" in the offices of the solicitor for the Applicants other than Amnesty International. The assistant claims to have spoken by telephone to Doe and obtained the information. Paragraphs 6 and 7 of that Affidavit states:

> 6. John Doe is unable to pay the legal fees required to appeal the decision of the BIA, and so is not eligible for an extension of time for voluntary departure. He is therefore required to depart the United States on or before September 11, 2006, it appears that his spouse will also be required to leave at this time, as her asylum claim was joined to that of John Doe, though she was not named in the appeal. If they fail to depart voluntarily, they will be deported to Colombia, where their lives are at risk and where they continue to face a serious risk of persecution, torture and ill treatment. Recent documentation of the human rights situation in Colombia is attached as Exhibit A to my affidavit.
>
> 7. John Doe and his spouse have no place to go where they can be safe. They have been ordered to depart from the USA and have no status in any country other than Colombia. They would have approached a Canadian port of entry to seek refugee protection in Canada, but have not done so because they are ineligible to seek Canada's protection under the Safe Third Country Agreement. Unless this court orders the Respondent to admit them to Canada for the purpose of pursuing the herein application for judicial review of the Safe Third Country Agreement, they will be forced to return to the very country they fled in fear for their lives, Colombia.

There is no evidence to show why Doe did not provide an affidavit personally.

Jurisdiction of the Federal Court to Grant the Mandatory Injunction Requested

8 The motion for a mandatory injunction is brought within the context of an Application challenging certain *Regulations* established under *IRPA*. Neither that Act nor those *Regulations* provide for such relief. However, section 44 of the *Federal Court Act*, R.S.C. 1985, c.F-7 provides that the Court may grant other relief including a *mandamus* or injunction, or an order for specific performance in all cases in which appears to be just and convenient to do so.

9 The Supreme Court of Canada in *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 (S.C.C.) [*Canadian Liberty*] at paragraphs 35 to 37 of the majority decision held that the Federal Court, having administrative jurisdiction over certain federal tribunals, has within the intent of section 44 of the *Federal Court Act*, the power to grant other relief of the kind contemplated here. In this case the general powers of supervision given by Parliament to the Federal Court under *IRPA* and the *Regulations*, taken together with section 44 of the *Federal Court Act*, give to the Court jurisdiction to grant the type of relief requested here.

Status of the Applicants to seek a Mandatory Injunction

10 The Applicants, other than John Doe, describe themselves as public interest litigants having a particular interest in the *Regulations* at issue. None of these Applicants are named in any way as persons affected by *IRPA* or *Regulations*.

11 There is no dispute that John Doe is a person that could be affected by the *Regulations*. As to the other Applicants, no remedy that could be provided by this Court by way of a mandatory injunction could affect them in any way. The status of persons such as the Applicants other than Doe has been the subject of several decisions of the Supreme Court of Canada. A principal decision is that of *Borowski v. Canada (Minister of Justice)*, [1981] 2 S.C.R. 575 (S.C.C.). The question of status of persons claiming to be public interest litigants is considered in light of the genuine interest of the litigant and whether or not there is no other reasonable and effective manner in which the issue may be brought before the Court. In *Canadian Council of Churches v. R.*, [1992] 1 S.C.R. 236 (S.C.C.) it was considered that where several persons directly affected had already filed Court challenges, a public interest litigant should not be given status to challenge.

12 I prefer to leave the matter open at this time. The issue of status can be argued more fully and properly at the time that the Application is heard.

Criteria to be met in the Granting of an Interlocutory Mandatory Injunction

13 An interlocutory injunction is typically sought so as to preserve matters as they are until the final determination of the issues in a proceeding at a full trial on the merits. In this way any relief granted following such a trial will not be meaningless. The injunction is granted usually to preserve the *status quo*.

14 A mandatory injunction sought before a full trial on the merits is somewhat different. It seeks to make one of the parties do something that it ordinarily would not do. It seeks to change the *status quo*. Again, the purpose is the same, to prevent any relief given following a trial from being meaningless. Here the Applicant argued that unless Doe were to be allowed to come to Canada to make a refugee claim before being removed from the United States to Colombia, his challenge to the validity of the *Regulations* would be meaningless.

15 At one time, the Courts were reluctant to grant mandatory injunctions but, over time, the Court have been somewhat more willing to do so. Still, some greater level of caution arises when, particularly at an interlocutory stage, the Court is asked to order somebody to take a positive action that will change the *status quo* [see Robert Sharpe, *Injunctions and Specific Performance*, Looseleaf ed., (Aurora, ON: Canada Law Book Inc., 2005), paras. 1500 to 1580].

16 The criteria for consideration by the Court as to whether to grant an interlocutory injunction, mandatory or not, are those as set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), at pp. 332-333. The criteria are:

> 1. A preliminary assessment of the merits of the case is to be made so as to ensure that there is a serious issue to be tried.
>
> 2. It must be determined whether the applicant(s) were to suffer irreparable harm if the application were refused.
>
> 3. An assessment must be made as to which of the parties would suffer harm from granting or refusals of the remedy providing a decision on the merits. Sometimes this is simply called the balance of convenience.

17 In the *Canadian Liberty* case, *supra* at paragraphs 46 and following, the Supreme Court of Canada cautioned that some modification of these criteria may be needed in non-commercial cases. In cases such as this the public interest requires particular consideration. I will be paying attention to the public interest in considering the balance of convenience.

18 Each of these criteria will be examined in the context of the present motion.

1. Serious Issues:

19 The validity of the "Safe Third Country" *Regulations* and the designation of the United States of America as one such country is the predominant issue for a hearing on the merits. I do not propose to examine in depth the arguments raised, nor to assess the likelihood of success as to the outcome. It must be noted that the validity of *Regulations* is to be reviewed on a correctness standard (*Sunshine Village Corp. v. Parks Canada*, [2004] 3 F.C.R. 600 (F.C.A.) at para 10). However, *Regulations* have rarely been found to be invalid by Courts, partly, no doubt, because of the broad grant of delegated power under which they are made (*de Guzman v. Canada (Minister of Citizenship & Immigration)*, 2005 FCA 436 (F.C.A.) at para 25).

20 Counsel for the Applicants argued that the earlier Order of this Court granting leave to commence a Judicial Review was determinative in that a serious issue was raised. This is not the case, the standard for granting an Order permitting judicial review is low. The matter at that point is to be dealt with in a summary way. The standard on a leave application is whether or not a fairly arguable case is disclosed (*Bains v. Canada (Minister of Employment & Immigration)* (1990), 47 Admin. L.R. 317 (Fed. C.A.)).

21 It is sufficient for the purposes of this motion to say that I am satisfied that the arguments to be raised at the ultimate hearing of the Application do not appear to be frivolous and possess sufficient merit to meet the very low threshold usually applied in considering this criteria.

2. Irreparable Harm:

22 The Applicants argue that John Doe and his wife will be returned to Colombia to face possible torture or death unless they are given the chance to enter Canada and make a refugee claim here. They argue that Doe and his wife will, as of early September, be removed from the United States to Colombia and will lose forever any opportunity to claim refugee status in Canada. I am not persuaded that this is the case.

23 First, it appears that Doe has not exhausted the remedies that still remain open to him in the United States. The Affidavit of Martin, an expert in United States immigration and refugee law, states that a number of avenues for relief remain open to Doe in the United States so that it is still an open question as to whether he and his wife will be returned to Colombia or if so, whether they will be returned in the near future.

24 The applicants argue that Doe has no funds so as to retain counsel to engage in the pursuit of these further avenues. I am not persuaded that this is the case. The evidence as to lack of funds is hearsay, only the assistant makes this statement, Doe does not. Doe only says that he has not worked for some time. The evidence shows that Doe had counsel in the United States proceedings to date. The evidence also shows that there is a functional *pro bono* system available in the United States to persons in Doe's circumstances. I would have expected clearer evidence from Doe if he could not avail himself of these further remedies whether for financial reasons or otherwise. The onus is upon Doe to prove the likelihood of irreparable harm. He had an opportunity to respond to these issues and did not. This important aspect of his case has simply not been addressed properly.

25 Second, the Affidavit of Manni indicates that there are a number of countries including Argentina, Brazil, Chile, Costa Rica, Ecuador, Panama, Mexico, Spain and Venezuela that do not require a visa from persons such as Doe to enter. The Applicants argue that simply because Doe could enter such countries without a visa does not mean that he could sojourn or remain there. The Respondent argues that the evidence shows that these countries are signatories to the *Convention Relating to the Status of Refugees*, 28 July 1951, U.N.T.S. 189 [the *Convention*], just as Canada is, thus they must afford a person an opportunity to make a refugee claim. The Applicants say that there is no evidence that, having signed the Convention, any of these countries have implemented its terms into their laws or if there are exceptions that would prevent or allow Doe and his wife from making a refugee claim. Again, the Respondent has raised the issue, albeit imperfectly, it would have been expected that the applicant's would have lead some evidence to address it.

26 Third, the evidence of Doe himself as to irreparable harm is not robust. In his affidavit filed in the main application he says, paragraph 25, "I would like to seek asylum in Canada", in paragraph 26, he says, "I am deeply concerned about what might happen to my parents etc. if my whereabouts became know to FARC....If the Court declines to issue an order protecting my identity....I will be compelled to withdraw from this case..." This statement in paragraph 26 suggests that Doe does not

fear irreparable harm if he is not permitted to enter Canada for purposes of making a claim. What is does indicate is that he is willing to drop his case entirely if his identity is revealed. Presumably anonymity is more important to Doe than the making of a refugee claim in Canada.

27 The Prothonotary's Order permitted anonymity states that the fear that Doe has as a consequence of any revelation of his true identity is uncontradicted on the evidence and is not speculative, but rather is substantial and continuing. That finding is directed to the issue of anonymity, not to the issue of irreparable harm if a mandatory injunction were not to be granted.

28 The only evidence of irreparable harm comes from an affidavit of an "assistant" in the office of the solicitor for Doe. The relevant part of that affidavit is paragraph 7 which has previously been set out in full in these Reasons. That paragraph says that Doe and his spouse "...have no place to go" and that "...they will be forced to return to the very country they fled in fear for their lives, Colombia".

29 This affidavit is very unsatisfactory by way of evidence. First, the "assistant" gives no basis for statements such as that Doe has nowhere to go and will be forced to return to Colombia. The assistant does not purport to be an expert in the relevant legal areas.

30 Second, while the Court can, particularly in interlocutory proceedings, accept hearsay evidence, there is no stated reason why Doe could not provide an affidavit as to irreparable harm. Why do we need his solicitor's assistant? Rule 82 of this Court says that a solicitor should not swear an affidavit filed on a motion and also appear to argue that motion. This has been pointed out in an immigration setting in *Ly v. Canada (Minister of Citizenship & Immigration)*, 2003 FC 1184 (F.C.). The same has been held to apply to assistants and others in the solicitor's office (*Cross-Canada Auto Body Supply (Windsor) Ltd. v. Hyundai Auto Canada*, 2005 FC 1254 (F.C.)). Solicitor affidavits directed to non-controversial matters are often accepted by this Court. However, an affidavit from an assistant in the office of the solicitor arguing the case, directed to critical or controversial matters, if not rejected outright, should be given much less weight than if it came directly from the person who is a litigant. No meaningful cross-examination could be conducted upon the "assistant". No reason was given as to why Doe could not furnish evidence directly.

31 I find that the Applicants, who bear the onus, have failed to establish that irreparable harm would be the result to Doe should the relief sought not be granted.

3. Balance of Convenience

32 Much has been said as to the balance of convenience in this matter. The Supreme Court of Canada in *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.) at paragraphs 38 and 39 cautions that where the constitutional validity of a legislative provision is challenged the Court must take the public interest into consideration. The court must consider the far-reaching, albeit temporal, practical consequences of its Order. At

paragraphs, 54 to 56 of that decision the Supreme Court directs that a Court, in considering the balance of convenience, rise above the interests of private litigants. Will the grant of the order requested frustrate the pursuit of the common good?

33 In *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764 (S.C.C.) the Supreme Court of Canada, at paragraph 9 said that the Court will not lightly order that laws that Parliament has duly enacted for the public good are inoperative in advance of a complete hearing as to their validity. In the present case, to order a mandatory injunction would be to render the *Regulations* essentially inoperative against Doe and quite possibly many others.

34 The Respondent argues that the "Third Safe Country" Agreement is part of the orderly scheme in the administration of refugee claims and protected claims. He further argued that to allow the relief claimed on the motion would be effectively to suspend the effect of the *Regulations* not only as far as Doe is concerned, but also in respect of a large number of other individuals whose situations would be essentially undistinguishable from that of Doe.

35 The Applicants argue that Doe's claim is highly fact specific and that only few persons would be sufficiently emboldened by Doe's success on this motion so as to risk exposure to authorities in the United States, or elsewhere, for the purpose of making a claim in Canada. I am not persuaded that this narrow view is correct.

36 I find that the balance of convenience favours the Respondent. The *Regulations* have been enacted in the public interest. Private interests of those such as Doe must yield to the public interest unless and until those *Regulations* have been held to be invalid.

In Conclusion

37 I have found that, on a low threshold criteria, the Applicants have established a *prima facie* case. However, the Applicants have failed to establish irreparable harm would result should the requested relief not be granted. The balance of convenience favours the Respondent. Accordingly, the application will be dismissed.

38 Since this motion was brought within the context of an application ostensibly made under *IRPA*, there is a procedural as well as a substantive question as to whether a question has to be certified before any appeal from this Order can be taken. The parties have asked that I provide an opportunity for them to make submissions on this issue. They will have five days to file written submissions in this regard.

39 The parties have agreed that costs shall be in the cause and it will be so ordered.

ORDER

THIS COURT ORDERS that

1. The motion is dismissed;

2. The parties shall, within five (5) business days from the date of this Order file written submissions as to whether certification of a question is required and if so, what that question might be; and

3. Costs shall be in the cause.

Motion dismissed.

Footnotes

* A corrigendum issued by the court on November 14, 2006 has been incorporated herein.

1998 CarswellNat 387
Supreme Court of Canada

Canada (Human Rights Commission) v. Canadian Liberty Net

1998 CarswellNat 387, 1998 CarswellNat 388, [1998] 1 S.C.R. 626, [1998] 2 F.C. i, [1998] S.C.J. No. 31, 147 F.T.R. 305 (note), 157 D.L.R. (4th) 385, 224 N.R. 241, 22 C.P.C. (4th) 1, 31 C.H.R.R. D/433, 50 C.R.R. (2d) 189, 6 Admin. L.R. (3d) 1, 78 A.C.W.S. (3d) 705, J.E. 98-935

Canadian Human Rights Commission, Appellant v. Canadian Liberty Net and Tony McAleer (alias Derek J. Peterson), Respondents

Canadian Liberty Net and Tony McAleer (alias Derek J. Peterson), Appellants v. Canadian Human Rights Commission, Respondent and The Attorney General of Canada and the League for Human Rights of B'Nai Brith Canada, Interveners

L'Heureux-Dubé, Gonthier, McLachlin, Major and Bastarache JJ.

Heard: December 10, 1997
Judgment: April 9, 1998
Docket: 25228

Proceedings: reversing (1996), 192 N.R. 298 (Fed. C.A.); affirming (1996), 192 N.R. 313 (Fed. C.A.); affirming (1992), 48 F.T.R. 285 (Fed. T.D.); affirming (1996), 192 N.R. 313 (Fed. C.A.); affirming (1992), 56 F.T.R. 42 (Fed. T.D.)

Counsel: *William F. Pentney* and *Eddie Taylor*, for the appellant/respondent the Canadian Human Rights Commission.
Douglas H. Christie, for the respondents/appellants Canadian Liberty Net and Tony McAleer.
David Sgayias, Q.C., and *Brian Saunders*, for the intervener the Attorney General of Canada.
David Matas, for the intervener the League for Human Rights of B'Nai Brith Canada.

Subject: Public; Civil Practice and Procedure; Constitutional

APPEAL from judgment reported 192 N.R. 298, 132 D.L.R. (4th) 95, 108 F.T.R. 79 (note), [1996] 1 F.C. 804, 38 Admin. L.R. (2d) 27, *(*sub nom. *Canada (Human Rights Commission) v. Canadian Liberty Net (No. 2))* 26 C.H.R.R. D/242 (Fed. C.A.), allowing appeal from judgment reported 48 F.T.R. 285, 9 C.R.R. (2d) 330, 90 D.L.R. (4th) 190, [1992] 3 F.C. 155, 14 Admin. L.R. (2d) 294, *(*sub nom. *Canada (Human Rights Commission) v. Candian Liberty Net (No. 1))* 26 C.H.R.R. D/194 (Fed. T.D.), granting application for interlocutory injunction.

APPEAL from judgment reported 192 N.R. 313, 108 F.T.R. 80 (note), [1996] 1 F.C. 787, *(sub nom. Canada (Human Rights Commission) v. Canadian Liberty Net (No. 3))* 26 C.H.R.R. D/260 (Fed. C.A.), dismissing appeal from judgment reported, *(sub nom. Canada (Human Rights Commission) v. Canadian Liberty Net (No. 2))* 56 F.T.R. 42, [1992] 3 F.C. 504, *(sub nom. Canada (Human Rights Commission) v. Canadian Liberty Net (No. 2))* 26 C.H.R.R. D/221 (Fed. T.D.), convicting respondents for contempt of court. POURVOI du jugement publié à 192 N.R. 298, 132 D.L.R. (4th) 95, 108 F.T.R. 79 (note), [1996] 1 F.C. 804, 38 Admin. L.R. (2d) 27, *(sub nom. Canada (Human Rights Commission) v. Canadian Liberty Net (No. 2))* 26 C.H.R.R. D/242 (Fed. C.A.), accueillant l'appel du jugement publié à 48 F.T.R. 285, 9 C.R.R. (2d) 330, 90 D.L.R. (4th) 190, [1992] 3 F.C. 155, 14 Admin. L.R. (2d) 294, *(sub nom. Canada (Human Rights Commission) v. Candian Liberty Net (No. 1))* 26 C.H.R.R. D/194 (Fed. T.D.), accordant la requête pour injonction interlocutoire. POURVOI du jugement publié à 192 N.R. 313, 108 F.T.R. 80 (note), [1996] 1 F.C. 787, *(sub nom. Canada (Human Rights Commission) v. Canadian Liberty Net (No. 3))* 26 C.H.R.R. D/260 (Fed. C.A.), rejetant l'appel du jugement publié à (sub nom. *Canada (Human Rights Commission) v. Canadian Liberty Net (No. 2)*), 56 F.T.R. 42, [1992] 3 F.C. 504, *(sub nom. Canada (Human Rights Commission) v. Canadian Liberty Net (No. 2))* 26 C.H.R.R. D/221 (Fed. T.D.), condamnant les défendeurs pour outrage au tribunal.

Statutes considered by/Législation citée par *McLachlin* and *Major JJ.* (dissenting in part):

— referred to

— considered

— considered

— considered

— considered

— considered

— referred to

— considered

— considered

***Bastarache J.* (*L'Heureux-Dubé* and *Gonthier JJ.* concurring):**

1 This case raises the issue of the existence and proper exercise of an injunctive power in the Federal Court of Canada in support of federal legislation, the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the "*Human Rights Act*"). As the injunction sought in this case would prohibit

speech, it also implicates important issues regarding the guarantee of freedom of expression in s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. Finally, there is the question of whether a person who violates an injunction can invoke lack of jurisdiction in the granting court, or wrongful exercise of that jurisdiction, as a defence to proceedings in contempt.

Facts

2 In December 1991, the Canadian Human Rights Commission (the "Commission") received five complaints regarding telephone messages made available by an organization advertising itself as "Canadian Liberty Net". Callers to the Liberty Net phone number were offered a menu of telephone messages to choose from, by subject area. These messages included denials of the existence or extent of the Holocaust; assertions that non-white "aliens" are importing crime and problems into Canada, and the implicit suggestion that violence could be helpful to "set matters straight"; criticism of an alleged "Kosher tax" on some foods to ensure that some percentage can be certified as Kosher; complaints about the alleged domination of the entertainment industry by Jews; and a number of messages decrying the alleged persecution of well-known leaders of the white supremacist movement. After having investigated the content of the messages, the Commission requested on January 20, 1992 that a Human Rights Tribunal (the "Tribunal") be empanelled to decide whether these messages were in violation of s. 13(1) of the *Human Rights Act*, which makes it a "a discriminatory practice ... to communicate telephonically ... any matter that is likely to expose a person or persons to hatred or contempt ... on the basis of a prohibited ground of discrimination". Section 3 of the Act includes race, national or ethnic origin, colour, and religion as prohibited grounds of discrimination.

3 On January 27, 1992, one week after the request to the Tribunal, the Commission filed an originating notice of motion before the Federal Court of Canada, Trial Division, seeking an injunction, enjoining Liberty Net, including Tony McAleer and any other associates in the Liberty Net organization, from making available any phone messages "that are likely to expose persons to hatred or contempt by reason of the fact that those persons are identifiable on the basis of race, national or ethnic origin, colour or religion", until a final order of the Tribunal is rendered. On February 5 and 6, the motion was argued, and on March 3, 1992, Muldoon J. granted the injunction sought: [1992] 3 F.C. 155 (Fed. T.D.). Upon further submissions of the parties, Muldoon J. varied the content of his order slightly, although those changes are not germane to any controversy in this appeal.

4 A Tribunal was empanelled in response to the Commission's request and held hearings for a total of five days in May and August 1992. The panel reserved its decision for more than a year, finally rendering a decision on September 9, 1993. Thus, the injunction order of Muldoon J. was in effect for almost eighteen months, from March 3, 1992 until September 9, 1993.

5 On June 5, 1992, a Commission investigator telephoned the Liberty Net phone number and heard a message referring callers to a new number of the Canadian Liberty Net "in exile" where they could "say exactly what we want without officious criticism and sanction". This new number was rented from a telephone company in the State of Washington, in the United States. Callers to that number then had access to a similar menu of messages as had been available prior to the issuance of Muldoon J.'s order of March 3. Indeed, Liberty Net admitted before the Court of Appeal that some of those messages were specifically covered by the injunction, but they contended that the messages were not in breach of the order because they emanated from a source outside Canada, and thus outside the jurisdiction of the Federal Court.

Issues

6 Two separate cases heard by the Federal Court have been combined in the appeal now before this Court. One is an appeal from the original order of Muldoon J. as to the issuance of the order (I will refer to this as the "injunction appeal"); the other is an appeal from a finding of contempt of court by Teitelbaum J. ([1992] 3 F.C. 504 (Fed. T.D.)) arising from the message on the Canadian Liberty Net phone line referring callers to the new number in the United States which contained messages whose content was proscribed by the order (the "contempt appeal"). The injunction appeal divides into two questions: first, did the Federal Court have jurisdiction to issue the injunction? Second, if it did have jurisdiction to issue the injunction, was the issuance of an injunctive order appropriate in this case? The contempt appeal has been inextricably tied to the substance of the injunction appeal by the defendants in this case. The third question before this Court, which arises from the contempt appeal, is: if the injunction was wrongly issued on either basis above, can the defendants be held in contempt of court for breach of the order?

7 Strictly speaking, since there has been a final determination by the Human Rights Tribunal on the substantive issue of the violation of s. 13(1), and an order made by the Tribunal which supplants the order of Muldoon J., the injunction appeal is now moot. However, given the manner in which the questions have been presented to this Court, it is impossible to address the contempt issue without addressing to some degree the injunction issue. Since it would be inconvenient and difficult at the outset to distinguish those principles pertaining to the injunction which are necessary to the contempt appeal from those which are not, I propose to articulate those principles as fully as possible given the facts of the case before us, and then turn to the contempt appeal. In my view, this is particularly important since there appears to have been considerable confusion in the courts below in distinguishing the tests for determining the *existence* of jurisdiction, from the *appropriateness* of exercising jurisdiction in a particular case. Having once set out and distinguished those principles, however, it is my view that there clearly is no need to apply the principles as to the *appropriateness* of the injunction in this case, as the contempt appeal in no way turns on that point. That point is undoubtedly moot and I propose to leave the application of those principles to specific facts for another day.

First Question: Does the Federal Court Have Jurisdiction?

8 Does the Federal Court have jurisdiction to issue an injunction in support of the prohibitions contained in the *Human Rights Act*? The classic statement as to the jurisdiction of the Federal Court in modem jurisprudence was given by McIntyre J. in *Miida Electronics Inc. v. Mitsui O.S.K. Lines Ltd.*, [1986] 1 S.C.R. 752 (S.C.C.), at p. 766, who posits three requirements:

> 1. There must be a statutory grant of jurisdiction by the federal Parliament.
>
> 2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
>
> 3. The law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the *Constitution Act, 1867*.

In my view, it is the first of these three conditions which presents the greatest obstacle for the Commission. It attempted to found a statutory grant of jurisdiction on three grounds arising from the interlocking structure of the *Federal Court Act*, R.S.C., 1985, c. F-7, and the *Human Rights Act*.

(i) Section 25 of the Federal Court Act

9

> **25.** The Trial Division has original jurisdiction, between subject and subject as well as otherwise, in any case in which a claim for relief is made or a remedy is sought under or by virtue of the laws of Canada if no other court constituted, established, or continued under any of the *Constitution Acts, 1867 to 1982* has jurisdiction in respect of that claim or remedy.

Muldoon J. found that no other court had jurisdiction over an interlocutory order giving effect to the *Human Rights Act* (at p. 168) and that this section therefore was a grant of jurisdiction to the Federal Court. The Tribunal was not competent to issue an interlocutory, only a final, order. By contrast, Strayer J.A. for the majority of the Court of Appeal ([1996] 1 F.C. 804 (Fed. C.A.)) engaged in an extensive analysis of the provisions of the *Human Rights Act* and found that Parliament had implicitly intended the scheme of remedies conferred on the Tribunal to be exhaustive. Thus, another court (the Tribunal) had, in fact, been vested with jurisdiction which ousted that of the Federal Court pursuant to s. 25. He also asserted, *obiter*, that a provincial superior court did not have jurisdiction to issue an injunction.

10 Before this Court, the appellant abandoned its argument under s. 25. It did so on the basis of this Court's decision in *B.M.W.E. v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495 (S.C.C.), in which this Court held that a provincial superior court constituted under s. 96 of the *Constitution Act, 1867*, does have authority to issue an injunction in aid of the *Canada Labour Code*, R.S.C.,

1985, c. L-2, notwithstanding the comprehensiveness of the provisions of that Act. McLachlin J. stated the law succinctly (at paras. 5 and 7):

> The governing principle on this issue is that notwithstanding the existence of a comprehensive code for settling labour disputes, where "no adequate alternative remedy exists" the courts retain a residual discretionary power to grant interlocutory relief such as injunctions, a power which flows from the inherent jurisdiction of the courts over interlocutory matters....
>
> ...deference to labour tribunals and exclusivity of jurisdiction to an arbitrator are not inconsistent with a residual jurisdiction in the courts to grant relief unavailable under the statutory labour scheme. There has never been any dispute in this case that the arbitrator and the arbitrator alone is entitled to resolve the dispute between the employer and the employees.

The "courts" to which she refers are the provincial superior courts, and, in that case, the British Columbia Supreme Court "in the exercise of its inherent jurisdiction" (at para. 6). The features of the *Canada Labour Code* in issue in the *B.M.W.E.* case are in all salient respects identical to the features of the *Human Rights Act*: an administrative tribunal vested with power of final determination of claims brought under an Act; absence of reference to injunctive relief in the Act; and a tailored scheme of other remedies which was held not to implicitly preclude the existence of an injunctive remedy. The appellant concluded that those facts were applicable to the case at bar, and that, therefore, there was an "other court" which had jurisdiction which precluded the operation of s. 25.

11 Section 25 was not before the Court in *B.M.W.E.*, and the relationship between that section and the inherent jurisdiction of a provincial superior court was not the object of that decision. The appellant's concession before us relates to this relationship. Given my findings below as to the proper interpretation of s. 44 of the *Federal Court Act*, and in the absence of argument by the parties on this point, I prefer to exercise caution and refrain from expressing any opinion on this issue.

(ii) Implied Grant in the Human Rights Act

12 The Commission urged *R. v. Rhine*, [1980] 2 S.C.R. 442 (S.C.C.), upon us for the proposition that there need not be an express grant of authority for jurisdiction to be found in the provisions of a federal Act. But in that case, there was a clear statutory grant of jurisdiction under the *Federal Court Act* and the issue being decided by this Court, to use the language adopted in *Miida, supra*, was whether the cause of action was nourished by existing federal law. The principles in that case are not applicable to the question of whether there is an implied statutory grant.

13 Although Muldoon J. did not consider the question of implied statutory grant in the *Human Rights Act*, Strayer J.A. devotes a significant part of his analysis to this question. He draws upon remarks by Dickson C.J. in *Canada (Canadian Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 (S.C.C.), at p. 924, as to the "conciliatory nature" of the procedures under the Act,

whose objective is "to encourage reform of the communicator of hate propaganda". Dickson C.J. is also quoted as observing that "s. 13(1) plays a minimal role in the imposition of moral, financial or incarcerating sanctions, the primary goal being to act directly for the benefit of those likely to be exposed to the harms caused by hate propaganda" (p. 940). Strayer J.A. asserts (at p. 822) that:

> The result in the Supreme Court, I believe, demonstrates the reason for the very cautious approach taken by Parliament in section 13 to remedy telephone hate messages within the context of the remedial provisions of the *Canadian Human Rights Act*. It also militates against there being an implied authority for the courts to issue interlocutory orders to stop communications prior to a full hearing by a tribunal.... The violation of an injunction based on such evidence involves criminal sanctions, something not contemplated by the Act until a full hearing by a tribunal, its determination of a violation of subsection 13(1), the issue of the prohibitory order, and the violation of that order.

14 With respect, this reasoning suffers from two flaws. First, the concerns expressed in the passage above could be dealt with in the context of the criteria for determining the appropriateness of issuing an injunction. A stringent test for the issuance of an injunction would satisfy Strayer J.A.'s concern that the constitutional constraints on the exercise of judicial power under s. 13(1) be respected. In my view, assuming that these concerns affect an implied jurisdiction is to mistake the question of appropriateness of exercising, for the existence, of the injunctive power.

15 Second, Strayer J.A. does not indicate the criteria which he considers necessary for a finding of implied jurisdiction. The intervener Attorney General for Canada advocated a relatively flexible and fluid approach to determining whether jurisdiction should be implied from the provisions of federal legislation, and suggested that the *Human Rights Act* contained such an implied jurisdiction. Indeed, although Strayer J.A. finds against Federal Court jurisdiction in this case, his methodology actually lends support to the idea of a relatively fluid approach to implied jurisdiction.

16 In my opinion, the standard for finding an implied power in the existing jurisprudence is actually much more stringent. An injunctive power has only been implied where that power is actually *necessary* for the administration of the terms of the legislation; coherence, logicality, or desirability are not sufficient. The Attorney General cited two cases: *New Brunswick Electric Power Commission v. Maritime Electric Co.*, [1985] 2 F.C. 13 (Fed. C.A.), and *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 (S.C.C.). In the latter case, the implied "jurisdiction" referred not to remedy, but rather to whether the Human Rights Commission had the power to make determinations as to the constitutionality of its own constitutive statute. In considering that question. La Forest J., at para. 59, stated that "[i]n such an endeavour practical considerations may be of assistance in determining the intention of Parliament, but they are not determinative". But the "endeavour" in that case was not the addition of remedies to those spelled out in an Act, but rather the standard of review exercisable by a court over an administrative

body. Reading a remedial power into a statute is of an entirely different nature than attempting to determine legislative intent as to the proper standard of review and relative competence to decide constitutionality as between an administrative body and a court. In the latter case, the function must be exercised by one or the other institution, whereas in the former, the issue is whether the power exists at all where the Act is silent. Attempting to use the rules of implicit legislative intent in one case should not be automatically inferred for the other case.

17 The leading Federal Court authority on "implied" remedial jurisdiction suggests that far more conservative interpretative principles apply. In *New Brunswick Electric Power, supra* (*per* Stone J.A., Mahoney and Ryan JJ.A. concurring), the Federal Court of Appeal found that there was an implied right to issue a stay of execution of an order of the National Energy Board pending the disposition of an appeal where there was a statutory right of appeal. Quoting from an *obiter* remark of Pratte J.A. in *National Bank of Canada v. Granda* (1984), 60 N.R. 201 (Fed. C.A.), at p. 202, the court observed (at p. 27):

> It is clear that those provisions do not expressly confer on the court a power to stay the execution of decisions which it is asked to review. However, it could be argued that Parliament has conferred this power on the court by implication, in so far as the existence and exercise of the power are necessary for the court to fully exercise the jurisdiction expressly conferred on it by s. 28. In my opinion, this is the only possible source of any power the Court of Appeal may have to order a stay in the execution of a decision which is the subject of an appeal under s. 28. It follows logically that, if the court can order a stay in the execution of such decisions, it can only do so in the rare cases in which the exercise of this power is necessary to allow it to exercise the jurisdiction conferred on it by s. 28. [Emphasis added.]

In that case, failure to order a stay would have rendered the provision for the appeal nugatory. To a similar effect, and in contrast to the position of a court of inherent jurisdiction, the following observations were made in *Natural Law Party of Canada v. Canadian Broadcasting Corp.* (1993), [1994] 1 F.C. 580 (Fed. T.D.) (*per* McKeown J.), at pp. 583-84:

> There is no provision in the *Broadcasting Act* for providing relief on an expedited basis, but this does not mean that the Federal Court of Canada can obtain jurisdiction. Section 23 of the *Federal Court Act* ... limits the jurisdiction of the Federal Court to the extent that jurisdiction has been otherwise specially assigned. Since the *Broadcasting Act* has assigned jurisdiction to the CRTC, I do not have jurisdiction.
>
> This Court is a statutory court. I am unable to rely on the inherent jurisdiction of other superior courts as was the case in *Green Party Political Assn. of British Columbia v. Canadian Broadcasting Corp. (CBC)* ... where Colver J. accepted jurisdiction. Colver J. was a judge of the Supreme Court of British Columbia, which is not a statutory court. There is no gap in the jurisdiction.

Because s. 23 of the *Federal Court Act* referred the question of jurisdiction to the *Broadcasting Act*, the Court looked primarily to that Act as the foundation for its jurisdiction. Distinguishing his position from that of a court of inherent jurisdiction, McKeown J. refused to read that Act liberally to imply a power, even though he recognized that an inherent jurisdiction court might do so. Subject to what I have to say below about the operation of s. 44, this decision also indicates that "gaps" within federal legislation may only be filled where such a power is a necessary incident to the discharge of the scheme of the Act as constituted.

18 The scheme of the *Human Rights Act* does not come close to that It is not a necessary incident to any of the Tribunal's functions or powers that there be an injunctive power to restrain violations of s. 13(1). The existence of a "gap" in the range of remedies available in the Act itself does not mean that Parliament intended the Federal Court to have the power to issue an injunction. The Act could just as easily be read to mean that Parliament intended the "gap" to exist. Under these circumstances, it is inappropriate to engage in an extensive analysis of what is desirable to carry out the aims of the Act. The threshold test was precisely stated by Stone J.A. in *New Brunswick Electric Power, supra*, at p. 27:

> These observations bring into focus the absurdity that could result if, pending an appeal, operation of the order appealed from rendered it nugatory. Our appellate mandate would then become futile and be reduced to mere words lacking in practical substance.... The appeal process would be stifled. It would not, as it should, hold out the possibility of redress to a party invoking it. This Court could not, as was intended, render an effective result.

It cannot be said that the other remedies contained in the *Human Rights Act* would be rendered "nugatory" in the absence of an injunctive power in the Federal Court. Failing that, no such power can be implied into the scheme of the Act.

(iii) Section 44 of the Federal Court Act

19 Section 44 states:

> **44.** In addition to any other relief that the Court may grant or award, a *mandamus*, injunction or order for specific performance may be granted or a receiver appointed by the Court in all cases in which it appears to the Court to be just or convenient to do so, and any such order may be made either unconditionally or on such terms and conditions as the Court deems just.

A number of other sections of the *Federal Court Act* and *Human Rights Act* are helpful in understanding the ambit of this section. First, there are those sections setting out the purposes of the Act relevant to this appeal:

> **Human Rights Act**

> **2.** The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which a pardon has been granted.
>
> **13.**(1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

Second, there are descriptions of the general status and purpose of the Federal Court:

> **Federal Court Act**
>
> **3.** The court of law, equity and admiralty in and for Canada now existing under the name of the Federal Court of Canada is hereby continued as an additional court for the better administration of the laws of Canada and shall continue to be a superior court of record having civil and criminal jurisdiction.
>
> **Constitution Act, 1867**
>
> **101.** The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

Third, there are a number of sections of both Acts which describe the powers and relationship between the Federal Court and the *Human Rights Act* adjudication scheme:

> **Human Rights Act**
>
> **57.** Any order of a Tribunal ... may, for the purposes of enforcement, be made an order of the Federal Court by following the usual practice and procedure or, in lieu thereof, by the Commission filing in the Registry of the Court a copy of the order certified to be a true copy, and thereupon that order becomes an order of the Court.

58.(1) Where any investigator or Tribunal requires the disclosure of any information and a minister of the Crown or any other person interested objects to its disclosure, the Commission may apply to the Federal Court for a determination of the matter.

Federal Court Act

17. ...

(6) Where an Act of Parliament confers jurisdiction in respect of a matter on a court constituted or established by or under a law of a province, the Trial Division has no jurisdiction to entertain any proceeding in respect of the same matter unless the Act expressly confers that jurisdiction on the Court.

18.(1) Subject to section 28 [having to do with the original jurisdiction of the Federal Court of Appeal], the Trial Division has exclusive original jurisdiction

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

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

(3) On an application for judicial review, the Trial Division may

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

(*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

20 The principal objection to s. 44 as a source of jurisdiction to issue an injunction is that there is no "other relief that the Court may grant or award" in this case. This objection has two versions. The first version is that the words used in s. 44 cannot support the exercise of a "free-standing" injunction — that is, an injunction granted where there is no action pending before the court as to the final resolution of the merits of the claim. This objection does not relate to the status of the Federal Court as distinguished from provincial superior courts; rather, it asserts that words akin to s. 44 as applied to *any court* could not support a free-standing injunction, but only an interlocutory injunction pending the determination before *that* court of the cause of action. The objection arises out of a controversy to this effect in English law which has now been resolved by the recent decision of the House of Lords in *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.*, [1993] A.C. 334 (U.K. H.L.). In that case, the issue was whether an English court had jurisdiction to

grant an injunction where it was likely (although not certain) that an arbitral body had jurisdiction over the final determination of the dispute. In commenting on a previous case, *"Siskina" (The) v. Distos Compania Naviera S.A.* (1977), [1979] A.C. 210 (U.K. H.L.), which appeared to suggest that there was no such jurisdiction. Lord Browne-Wilkinson stated (at pp. 342-43) that:

> I can see nothing in the language employed by Lord Diplock (or in later cases in this House commenting on *The Siskina*) which suggest that a court has to be satisfied, at the time it grants interlocutory relief, that the final order, if any, will be made by an English court....
>
> Even applying the test laid down by *The Siskina* the court has power to grant interlocutory relief based on a cause of action recognised by English law against a defendant duly served where such relief is ancillary to a final order whether to be granted by an English court or by some other court or arbitral body.

That approach has now been adopted by this Court in the *B.M.W.E.* case already mentioned, where McLachlin J. comments (at para. 16):

> Canadian courts since *Channel Tunnel* have applied it for the proposition that the courts have jurisdiction to grant an injunction where there is a justiciable right, wherever that right may fall to be determined.... This accords with the more general recognition throughout Canada that the court may grant interim relief where final relief will be granted in another forum....

The wording of the clause granting jurisdiction to the Supreme Court of British Columbia in *B.M.W.E.* was virtually identical to that in effect in England at the time of *"Siskina" (The), supra*. The *Law and Equity Act*, R.S.B.C. 1979, c. 224, states:

> **36.** A mandamus or an injunction may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made, and the order may be made either unconditionally or on terms and conditions the court thinks just....

By virtue of this decision, there is now no doubt that the power of a court of inherent jurisdiction to award injunctive relief extends to disputes even in the event that the substance of the dispute falls to be determined by another decision-maker. Based on the principles articulated in *B.M.W.E.*, it is clear that if this injunction had been sought before the Supreme Court of British Columbia, that court could have granted the order.

21 This brings us to the more difficult version of the objection mentioned above. Section 44 uses the words "[i]n addition to any other relief that the Court may grant or award". The plain words might be interpreted in two quite divergent ways. The Commission contends that "in addition to" means simply "separate and apart from" any other relief which the Federal Court may grant or award. Rather than a clause of limitation, it is said to be an introductory clause to a power-

conferring section which is, in all purposes and effects, identical to s. 36 of the *Law and Equity Act*. By contrast, the words "in addition to" might be read as a clause of limitation, which creates an injunctive power only "ancillary to" other remedies which the court could award. Since no other relief may be issued by the Federal Court at the interlocutory stage, it is argued, no injunction is authorized by this section. The idea that there is "other relief" conferred on the court under the interlocking scheme of the *Human Rights Act* and the *Federal Court Act* is rejected, largely on the basis of a strict reading of s. 44. I would add that even if we adopt the "ancillary to" interpretation favoured by the respondents, a liberal approach to those words could favour an interpretation of the various powers of supervision over the Human Rights Tribunal as orders "ancillary to" which an injunctive order could be issued under s. 44.

22 I should say at the outset that I find that both the interpretations which favour a grant of jurisdiction, and that which does not, are plausible on the face of the section. When confronting an interpretative challenge such as this, it is necessary to examine the entire Act in question in order to determine its intendment, and to determine whether the language of the Act can support distinguishing this case from *B.M.W.E.*. The respondents contend that a reading which denies jurisdiction to grant the injunctive remedy is justified by the Federal Court's status as a mere "statutory court", which requires grants of jurisdiction to be read narrowly. By contrast, the Supreme Court of British Columbia is a superior court of inherent jurisdiction, and only it has jurisdiction to issue the injunction in this case.

23 That outcome appears anomalous. The sections of the *Human Rights Act* and *Federal Court Act* indicate a high degree of supervision of the Human Rights Tribunal by the Federal Court. The Federal Court is responsible for judicial review over decisions of the Tribunal (*Federal Court Act*, s. 18.1); it may issue injunctions *against* the Tribunal (*Federal Court Act*, s. 18(1)); recourse to it is necessary to order disclosure of information required in the course of an investigation or Tribunal hearing (*Human Rights Act*, s. 58(1)); and, an order of the Tribunal may be filed with and transformed into an order of the Federal Court (*Human Rights Act*, s. 57). And yet, it is argued that none of these powers are to be accepted as "other relief" because the relief sought at the interlocutory, or pre-filing stage, is said to be conceptually distinct from the relief which may be ordered under these provisions. Meanwhile, the provincial superior court would be competent as a court of "inherent jurisdiction".

24 Of course, while policy factors may be helpful in gleaning Parliament's intention as to whether there has been a statutory grant, they cannot be determinative. But the general statement in s. 3 as to the status of the Federal Court as "a superior court of record having civil and criminal jurisdiction", combined with the many powers of supervision, control, and enforcement of this and many other Tribunals, leaves one wondering why statutory authorization could not be inferred from s. 44 when its language is similar to that used to describe the powers of a superior court in s. 36 of the *Law and Equity Act*.

25 At this point, it is necessary to explore more carefully the concept of "inherent jurisdiction" to determine how it operates to give the provincial superior court remedial jurisdiction, and why this would require that the Federal Court, described as a "statutory court", would be bound by a very strict and narrow reading of its authorizing statute which effectively would deprive it of jurisdiction over an area where it is otherwise explicitly given extensive powers of supervision. Indeed, the doctrine of inherent jurisdiction has been used in this case as a corollary for the proposition that a federal statute granting authority to the Federal Court should be read narrowly. Whether the doctrine of inherent jurisdiction supports that approach merits closer inspection,

26 In *Wewayakum Indian Band v. Canada*, [1989] 1 S.C.R. 322 (S.C.C.), at p. 331, Wilson J. articulated the narrow view:

> The statutory grant of jurisdiction by Parliament to the Federal Court is contained in the *Federal Court Act*. Because the Federal Court is without any inherent jurisdiction such as that existing in provincial superior courts, the language of the Act is completely determinative of the scope of the Court's jurisdiction.

What is this notion of inherent jurisdiction which is used to justify a strict approach to the interpretation of the *Federal Court Act*? The notion of inherent jurisdiction has developed from the role of provincial superior courts in Canada's legal system. The unique historical feature of provincial superior courts, as opposed to the Federal Court, is that they have traditionally exercised general jurisdiction over all matters of a civil or criminal nature. This general jurisdictional function in the Canadian justice system precedes Confederation, and was expressly continued by s. 129 of the *Constitution Act, 1867*, "as if the Union had not been made". Under s. 92(14), the provinces exercise authority over the "Administration of Justice in the Province", including the "Constitution. Maintenance, and Organization" of provincial superior courts. The unique institutional feature of these courts is that by s. 96 of the *Constitution Act, 1867*, judges of provincial superior courts are appointed by the Governor General, not by the provinces. Responsibility for s. 96 courts is thus shared between the two levels of government, unlike either inferior provincial courts, or courts created under s. 101. Estey J., in *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.), at pp. 326-27, explained the unique nature of provincial superior courts in the following way:

> The provincial superior courts have always occupied a position of prime importance in the constitutional pattern of this country. They are the descendants of the Royal Courts of Justice as courts of general jurisdiction. They cross the dividing line, as it were, in the federal-provincial scheme of division of jurisdiction, being organized by the provinces under s. 92(14) of the [*Constitution Act, 1867*] and are presided over by judges appointed and paid by the federal government (sections 96 and 100 of the [*Constitution Act, 1867*]).

27 In addition to s. 129 providing for the post-Confederation continuation of provincial superior courts, s. 96 also impliedly contemplates their continued existence. The constitutional fact of their continued existence endorses their general jurisdiction and, in effect, guarantees a traditional core of superior court jurisdiction (*Reference re Residential Tenancies Act (Ontario)*, [1981] 1 S.C.R. 714 (S.C.C.); *Court of Unified Criminal Jurisdiction, Re*, [1983] 1 S.C.R. 704 (S.C.C.); *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 (S.C.C.). See also *Valin v. Langlois* (1879), 3 S.C.R. 1 (S.C.C.), at pp. 19-20; *Ontario (Attorney General) v. Pembina Exploration Canada Ltd.*, [1989] 1 S.C.R. 206 (S.C.C.), at p. 217; Hogg, "Federalism and the Jurisdiction of Canadian Courts" (1981), 30 *U.N.B.L.J.* 9).

28 The historical origins and constitutional basis of the Federal Court of Canada demonstrate its more particular, as opposed to general, jurisdiction. Section 101 of the *Constitution Act, 1867* authorizes Parliament to create "any additional Courts for the better Administration of the Laws of Canada". This it did, in 1875, with the establishment of the Exchequer Court, which was granted a very limited jurisdiction, confined to "cases in which demand shall be made or relief sought in respect of any matter which might in England be the subject of a suit or action in the Court of Exchequer on its revenue side against the Crown, or any officer of the Crown" (*Supreme and Exchequer Courts Act*, S.C. 1875, c. 11, s. 58). In 1887, and again in 1890 and 1891, this jurisdiction was expanded modestly, to cover intellectual property, other actions brought by the government, admiralty, and expropriation of land by the government (*An Act to amend "The Supreme and Exchequer Courts Act", and to make better provision for the Trial of Claims against the Crown*, S.C. 1887, c. 16; the *Colonial Courts of Admiralty Act, 1890* (U.K.), 53 & 54 Vict., c. 27; *The Exchequer Court Amendment Act, 1891*, S.C. 1891, c. 26, s. 4). From an interpretation of the Federal Court's constitutional origins in s. 101, Professor Hogg draws the following conclusions (in *Constitutional Law of Canada* (loose-leafed.), vol. 1, at p. 7-15):

> Section 101 does not authorize the establishment of courts of general jurisdiction akin to the provincial courts. It only authorizes courts for the 'better administration of the laws of Canada'. This has two important consequences. First, it means that the Federal Court of Canada has no inherent jurisdiction; its jurisdiction is confined to those subject matters conferred upon it by the Federal Court Act or other statute. Secondly, it means that the Federal Court can be given jurisdiction over only subject matters governed by the 'laws of Canada'.

Thus, even when squarely within the realm of valid federal law, the Federal Court of Canada is not presumed to have jurisdiction in the absence of an express federal enactment. On the other hand, by virtue of their general jurisdiction over all civil and criminal, provincial, federal, and constitutional matters, provincial superior courts do enjoy such a presumption.

29 This presumption is not a necessary incident of the structure of our Constitution. Section 101 empowers Parliament to create a federal court with *general* jurisdiction over the administration

of all federal law. For whatever reasons, Parliament has not chosen to create such a court. Moreover, the presumption is the product of a long line of jurisprudence which has responded to the constitutional and historical indications described above, rather than an explicit constitutional requirement. Apposite are the comments of Bora Laskin, later Chief Justice of Canada, who described the situation in 1969 (in *The British Tradition in Canadian Law*, at pp. 113-14):

> There has been no great need in Canada to establish a separate system of federal courts for federal law, because, as a mere matter of course, provincial courts have from the beginning of the Canadian federation exercised jurisdiction in disputes arising out of or involving federal law. Unlike the case in Australia, where the Constitution empowers the Commonwealth Parliament to invest the State courts with jurisdiction in federal matters, the British North America Act is not express on the matter. Inferentially, the legislative authority of the Provinces in relation to the administration of justice therein, and including the constitution, organisation and maintenance of provincial courts both of civil and criminal jurisdiction — without limitation as to matters within federal competence — is an indication of the availability of provincial courts for litigating federal causes of action and for enforcing federal criminal law.... They may be considered, *pro tanto*, as federal courts in so far as they administer federal law.
>
> ...This view of the omnicompetence of provincial superior courts was fed by a decision of the Privy Council, suggestive of inherent superior court jurisdiction, that (to use its words) "if the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the [Queen's] Courts of Justice". [Emphasis added.]

30 The case quoted by Laskin, *Board v. Board*, [1919] A.C. 956 (Alberta P.C.), concerned the jurisdiction of the provincial superior court in Alberta to deal with matters arising under the *Matrimonial Causes Act, 1857* ((U.K.), 20 & 21 Vict., c. 85). Although marriage and divorce fall within s. 91 of the *Constitution Act, 1867*, and the applicable English law was received into federal law as a consequence, the provincial superior court was held to have jurisdiction in the absence of any express federal enactment which conferred jurisdiction. The reason for this was quite simple. As of 1919, Parliament had only granted a very limited jurisdiction to the federal court system, as noted above, which did not include jurisdiction over marriage and divorce matters. By contrast, the *Supreme Court Act* of Alberta, S.A. 1907, c. 3, passed in 1907, expansively based the jurisdiction of the superior courts of that province on

> the jurisdiction which on July 15, 1870, was vested in, or capable of being exercised in England by (1.) the High Court of Chancery, as a Common Law Court, as well as a Court of Equity, including the jurisdiction of the Master of the Rolls as a judge or Master of the Court of Chancery, and any jurisdiction exercised by him in relation to the Court of Chancery as a common law Court; (2.) The Court of Queen's Bench; (3.) The Court of Common Pleas

> at Westminster; (4.) The Court of Exchequer as a Court of Revenue as well as a Common Law Court; (5.) The Court of Probate; (6.) The Court created by Commissioners of Oyer and Terminer, and of Gaol Delivery, or of any such Commissions.

(*Per* Viscount Haldane, at p. 960, referring to s. 9 of the Act.)

31 Perhaps as a result of an oversight, the English court responsible for divorces was not among those courts listed above. Nevertheless, the Privy Council held, on the basis of the Supreme Court of Alberta' s general jurisdiction, that "that Court was bound to entertain and to give effect to proceedings for making [the right of divorce] operative" (p. 962). In referring to its interpretation of the jurisdiction-conferring clause of Alberta's *Supreme Court Act* of 1907, the Privy Council explained its reasons for recognizing the jurisdiction of the Supreme Court of Alberta in the following manner (at pp. 962-63):

> ...a well-known rule makes it plain that the language there used ought to be interpreted as not excluding the jurisdiction. If the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the King's Courts of Justice. In order to oust jurisdiction, it is necessary in the absence of a special law excluding it altogether, to plead that jurisdiction exists in some other Court. This is the effect of authorities ... [The Alberta] Act set up a Superior Court, and it is the rule as regards presumption of jurisdiction in such a Court that, as stated by Willes J. in *London Corporation v. Cox* ((1867) L.R., 2 H.L. 239, 259), nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so.

32 The notion of "inherent jurisdiction" arises from the presumption that if there is a justiciable right, then there must be a court competent to vindicate the right. The issue addressed in *Board v. Board* was whether a failure to grant jurisdiction should be read as implicitly excluding jurisdiction. In that context, the doctrine of inherent jurisdiction requires that only an explicit ouster of jurisdiction should be allowed to deny jurisdiction to the superior court. In my view, the case does not stand for the fundamentally different proposition that statutes which purport to grant jurisdiction to another court should be read narrowly so as to protect the jurisdiction of the superior court. That is not the purpose of the doctrine of inherent jurisdiction, which is simply to ensure that a right will not be without a superior court forum in which it can be recognized. Although certain language in *Board v. Board* could be taken to stand for the former proposition, a reading of the entire case indicates that a choice was not being made between the jurisdiction of the s. 96 court and the jurisdiction of the federal court (which was extremely narrow at the time). The Privy Council simply did not consider the possible jurisdiction of the Exchequer Court in *Board v. Board*. The case was not an attempt to answer the question "which court?", but rather "is there a court?" The former question can only be determined by considering the constitutional, statutory and historical factors which I have canvassed above, while the latter can be dealt with by means

of the simple presumption that only an express ouster will deny jurisdiction to the superior court to hear such a case.

33 The statutory position of the Federal Court has changed since *Board v. Board*, a case in which the possible jurisdiction of the Exchequer Court was not even considered, because its jurisdiction at that time was so marginal. The passage of the *Federal Court Act* in 1971 substantially expanded the jurisdiction of the Exchequer Court (and changed its name to the Federal Court of Canada), and by necessary implication, removed jurisdiction over many matters from the provincial superior courts. The new Federal Court of Canada was granted an expanded jurisdiction, not only by specific enumeration of new subject matters, as, for example, in s. 23(*c*) of the Act, but also in a more general fashion. In essence, by virtue of ss. 3, 18, and 18.1, it was made a court of review and of appeal which stands at the apex of all the administrative decision-makers on whom power has been granted by individual Acts of Parliament. Significant confusion had developed prior to the Act as superior courts in different provinces reached conflicting outcomes as to the disposition of applications for judicial review from these administrative decision-makers, as to the proper test for standing, and as to the geographical reach of their decisions (I. Bushnell, *The Federal Court of Canada: A History, 1875-1992* (1997), at p. 159). The growth of administrative decision-makers adjudicating a myriad of laws within federal competence, without a single court to supervise that structure below the Supreme Court of Canada, created difficulties which an expanded Federal Court was intended to address.

34 These are the historical and constitutional factors which led to the development of the notion of inherent jurisdiction in provincial superior courts, which to a certain extent has been compared and contrasted to the more limited statutory jurisdiction of the Federal Court of Canada. But in my view, there is nothing in this articulation of the essentially remedial concept of inherent jurisdiction which in any way can be used to justify a narrow, rather than a fair and liberal, interpretation of federal statutes granting jurisdiction to the Federal Court. The legitimate proposition that the institutional and constitutional position of provincial superior courts warrants the grant to them of a residual jurisdiction over all federal matters where there is a "gap" in statutory grants of jurisdiction, is entirely different from the proposition that federal statutes should be read to find "gaps" unless the words of the statute explicitly close them. The doctrine of inherent jurisdiction raises no valid reasons, constitutional or otherwise, for jealously protecting the jurisdiction of provincial superior courts as against the Federal Court of Canada.

35 In my view, the doctrine of inherent jurisdiction operates to ensure that, having once analysed the various statutory grants of jurisdiction, there will always be a court which has the power to vindicate a legal right independent of any statutory grant. The court which benefits from the inherent jurisdiction is the court of general jurisdiction, namely, the provincial superior court. The doctrine does not operate to narrowly confine a statutory grant of jurisdiction; indeed, it says nothing about the proper interpretation of such a grant. As noted by McLachlin J. in *B.M.W.E., supra*, at para. 7, it is a "residual jurisdiction". In a federal system, the doctrine of

inherent jurisdiction does not provide a rationale for narrowly reading federal legislation which confers jurisdiction on the Federal Court.

36 As is clear from the face of the *Federal Court Act*, and confirmed by the additional role conferred on it in other federal Acts, in this case the *Human Rights Act*, Parliament intended to grant a general administrative jurisdiction over federal tribunals to the Federal Court. Within the sphere of control and exercise of powers over administrative decision-makers, the powers conferred on the Federal Court by statute should not be interpreted in a narrow fashion. This means that where an issue is clearly related to the control and exercise of powers of an administrative agency, which includes the interim measures to regulate disputes whose final disposition is left to an administrative decision-maker, the Federal Court can be considered to have a plenary jurisdiction.

37 In this case, I believe it is within the obvious intendment of the *Federal Court Act* and the *Human Rights Act* that s. 44 grant jurisdiction to issue an injunction in support of the latter. I reach this conclusion on the basis that the Federal Court does have the power to grant "other relief" in matters before the Human Rights Tribunal, and that fact is not altered merely because Parliament has conferred determination of the merits to an expert administrative decision-maker. As I have noted above, the decisions and operation of the Tribunal are subject to the close scrutiny and control of the Federal Court, including the transformation of the order of the Tribunal into an order of the Federal Court. These powers amount to "other relief" for the purposes of s.44.

38 In my view, this statutory jurisdiction is concurrent with the inherent jurisdiction of a provincial superior court in accordance with the principles of *B.M.W.E.*. There is no repugnance in the concept of a concurrent jurisdiction; indeed, it is common in our judicial structure. As one author has observed (T. A. Cromwell, "Aspects of Constitutional Judicial Review in Canada" (1995), 46 *S.C. L. Rev.* 1027, at p. 1030):

> The provincial superior courts and the purely provincial courts share large areas of concurrent jurisdiction, particularly in criminal law. While considerably less significant, there also is a good deal of overlap in the civil jurisdiction of the provincial superior courts and the Federal Court.

The standard for a complete ouster of the s. 96 court's jurisdiction is significantly higher than that for determining whether jurisdiction has been granted at all. This is appropriate because, as a result of our federal division of powers, the exercise of jurisdiction over the same matter is based on heads of power which are not mutually exclusive. An example of this lack of mutual exclusivity is provided in this Court's decision in *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631 (S.C.C.), which involved a challenge to the Justice Minister's decision not to exercise his discretionary authority to refuse to extradite the appellant. Review of that decision was conferred on the Federal Court by virtue of s. 18 of the *Federal Court Act*, which granted jurisdiction based on the identity of the decision-maker as a Federal Minister. The appellant sought a writ of *habeas*

corpus and a writ of *certiorari* in aid to quash the warrant of surrender on the grounds of improper procedures followed by the Minister. Vindication of the liberty interest through the writ of *habeas corpus* is a traditional function of as. 96 court. I note that in the case at bar there is a similar asymmetry: on the one hand, the granting of an injunction generally is a traditional function of s. 96 courts; on the other hand, the issuance of *this* injunction is integrally connected to the functioning of an administrative tribunal under the supervisory jurisdiction of the Federal Court. In considering whether the latter jurisdiction had been displaced or ousted by virtue of the *Federal Court Act*, Cory J. for a unanimous Court on this point said, at p. 651:

> The *Federal Court Act* does not remove the historic and long standing jurisdiction of provincial superior courts to hear an application for a writ of *habeas corpus*. To remove that jurisdiction from the superior courts would require clear and direct statutory language such as that used in the section referring to members of the Canadian Forces stationed overseas. It follows that the respondents fail in their contention that the Federal Court has exclusive jurisdiction in this matter. Rather it is clear that there is concurrent jurisdiction in the provincial superior courts and the Federal Court to hear all *habeas corpus* applications other than those specified in s. 17(6) [pertaining to the Canadian Forces] of the *Federal Court Act*.

The same standard was articulated in *Pringle v. Fraser*, [1972] S.C.R. 821 (S.C.C.), at p. 826. That standard of "clear and direct statutory language" is not satisfied in this case and, therefore, the jurisdiction of the Federal Court is concurrent with that of the provincial superior court.

39 As is clear, I have taken a different approach here with respect to s. 44 from that which I took in the previous section regarding an implied grant of authority within the *Human Rights Act*, read on its own. The reason for this should be made explicit. Many federal Acts do not provide for the exercise of administrative decision-making authority. Where that is the case, the reasoning adopted here with respect to the broad supervisory jurisdiction of the Federal Court is inapplicable.

40 I do not believe that anything in this approach undermines the special position of s. 96 courts, or that there is any likelihood of s. 101 courts acting beyond their constitutional competence. The third requirement of the *Miida, supra*, test — that the law be a constitutionally valid law of Canada — guarantees that from a doctrinal perspective. From an institutional perspective, I believe the ultimate guarantee is provided by this Court, whose purpose is to serve as the court of appeal for the federal and each provincial superior court system, and to ensure that each remains within its jurisdictional limits. Nor should anything which I have said in the foregoing be taken to undermine the long-established principle that where there is no federal law in a matter of federal jurisdiction, provincial superior courts continue to have jurisdiction by virtue of the doctrine of inherent jurisdiction. Even where federal law has been enacted, but there is no administrative decision-maker subject to the operation of the *Federal Court Act* or any other grant of jurisdiction to the Federal Court in the Act in question, then s. 96 courts continue to exercise an inherent jurisdiction.

41 Before this Court and in the courts below, it has been suggested that the finely balanced and tailored scheme of remedies contained in the *Human Rights Act* amounts to an implied ouster of the jurisdiction of the Federal Court. I would agree with McLachlin J. in *B.M.W.E.* who, when confronted with similar arguments, found that "[t]hese arguments go not to jurisdiction, but to whether, assuming jurisdiction, it was appropriate to grant the interim injunction" (para. 12). I will turn to that question in due course. Moreover, I would also agree with her observation in that case that an injunctive remedy will not be available where there is an adequate, alternative remedy conferred by statute on some other decision maker. If there is, then no jurisdiction should be found in the Federal Court under s. 44.

(iv) Section 23(c) of the Federal Court Act

42 At the hearing, the appellant suggested that another ground of jurisdiction could be found in s. 23(c) of the *Federal Court Act*. Given my finding in the previous section, and the lack of argument or supporting evidence presented by the parties, I consider it prudent to express no opinion on this submission.

Does Federal Law "Nourish" the Grant?

43 The requirement that there be valid federal law which nourishes the statutory grant of jurisdiction serves primarily to ensure that federal courts are kept within their constitutionally mandated sphere. As Wilson J. noted in *Wewayakum Indian Band*, *supra*, the second and third requirements set out in *Miida, supra*, of a nourishing body of federal law, and its constitutional validity, go hand in hand:

> While there is clearly an overlap between the second and third elements of the test for Federal Court jurisdiction, the second element, as I understand it, requires a general body of federal law covering the area of the dispute, i.e., in this case the law relating to Indians and Indian interests in reserve lands ... [Emphasis added.]

The dispute over which jurisdiction is sought must rely principally and essentially on federal law. If the dispute is only tangentially related to any corpus of federal law, then there is a possibility that assuming jurisdiction would take the Federal Court out of its constitutionally mandated role.

44 This case presents no such difficulties. The only relevant law that could cover the facts of this case is the *Human Rights Act*, confined as it is to the federal jurisdiction over telephonic means of communication. The prescription on which the Commission seeks to base the claim for an injunction is solely and exclusively s. 13(1) of the *Human Rights Act*. That is the normative root of its claim, and it clearly nourishes the statutory grant which I have found is conferred on the Federal Court. Whether an interlocutory power of restraint is conferred by federal law is best dealt with exclusively by the more nuanced and direct jurisprudence relating to the existence of

a statutory grant. Once that issue is decided, the nourishment requirement should not be used to subvert the conclusion of that analysis, but rather to ensure that the statutory grant is being exercised in a constitutionally valid manner. That is clearly the case here, and I find that the substantive provisions of the *Human Rights Act* nourish the statutory grant.

45 The appeal of the decision of the Court of Appeal on jurisdiction is therefore allowed with costs.

Second Question: Was the Exercise of Jurisdiction Appropriate?

46 Rule 469(3) of the *Federal Court Rules*, C.R.C., c. 663, states:

> The plaintiff may not make an application under this Rule before commencement of the action except in case of urgency, and in that case the injunction may be granted on terms providing for the commencement of the action and on such other terms, if any, as seem just.

Considerable argument before this Court and in the courts below was devoted to extrapolating the meaning of this provision based upon the landmark decision in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (U.K. H.L.), whose methodology was generally approved by this Court in *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.), at pp. 128-29, and reaffirmed in *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), at pp. 332-333. The three-stage test was defined in the latter case as follows (*per* Sopinka and Cory JJ., at p. 334):

> First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

The appellants sought to fine-tune each of these elements in order to respond to the initial perception that they set the threshold fairly low in a case such as this one. In particular, they recommended that the initial criterion of "serious question to be tried" be raised to a "strong *prima fade* case". They also urged that in considering the balance of convenience criterion, the public interest ought to be weighed against the individual interests of the speaker at the balance of convenience stage.

47 In my view, the *Cyanamid* test, even with these slight modifications, is inappropriate to the circumstances presented here. The main reason for this is that *Cyanamid*, as well as the two other cases mentioned above, involved the commercial context in which the criteria of "balance of convenience" and "irreparable harm" had some measurable meaning and which varied from case to case. Moreover, where expression is unmixed with some other commercial purpose or activity,

it is virtually impossible to use the second and third criteria without grievously undermining the right to freedom of expression contained in 2(*b*) of the *Charter*. The reason for this is that the speaker usually has no tangible or measurable interest *other than the expression itself*, whereas the party seeking the injunction will almost always have such an interest. This test developed in the commercial context stacks the cards against the non-commercial speaker where there is no tangible, immediate utility arising from the expression other than the freedom of expression itself.

48 The inappropriateness of the *Cyanamid* test is confirmed by the jurisprudence relating to injunctions against allegedly defamatory statements, in both England and Canada. In both countries, the *Cyanamid* test has been rejected for injunctions against dissemination of defamatory statements. Although defamation does not possess precisely the same characteristics as discriminatory hate speech, it is a much closer analogy than restraining commercial activity, even where that commercial activity includes a speech element. Defamation typically involves damage to only one person's reputation and not an entire group. On the other hand, given the widespread circulation of many defamatory statements in the press and the crystallized damage which a defamatory statement may have, compared with the slow, insidious effect of a relatively isolated bigoted commentary, the two are not necessarily substantially different in terms of the "urgency" requirement. Certainly from the point of view of the rights of the speaker, bigotry and defamation cases both represent potentially low-or no-value speech and are in that sense, extremely similar. It is therefore helpful to look at the approach to injunctions in cases of defamatory speech to determine how "urgency" should be defined in the context of s. 13(1) of the *Human Rights Act*.

49 In his treatise *Injunctions and Specific Performance* (2nd ed. 1992 (loose-leaf)), Robert Sharpe says the following, at paras. 5.40-5.70 (pp. 5.2-5.4):

> There is a significant public interest in the free and uncensored circulation of information and the important principle of freedom of the press to be safeguarded....
>
> The well-established rule is that an interlocutory injunction will not be granted where the defendant indicates an intention to justify [ie. prove the truth of] the statements complained of, unless the plaintiff is able to satisfy the court at the interlocutory stage that the words are both clearly defamatory and impossible to justify.
>
> ...it seems clear that the rule is unaffected by the *American Cyanamid* case and that the balance of convenience is not a factor.

One of the leading English authorities has a close affinity to the *Human Rights Act* in that it was a statutory prohibition on certain expression. *Herbage v. Pressdram Ltd.*, [1984] 1 W.L.R. 1160 (Eng. C.A.), involved the application of the *Rehabilitation of Offenders Act 1974*, which had been enacted by Parliament to prevent indefinite reference to an individual's criminal history, after the individual had served his or her sentence. Based on that specific legislative intention, contended

the applicant, an injunction should be issued. Griffiths L.J. (on behalf of himself and Kerr L.J. on a two-judge panel) rejected that approach (at p. 1163):

> If the court were to accept this argument, the practical effect would I believe be that in very many cases the plaintiff would obtain an injunction, for on the *American Cyanamid* principles he would often show a serious issue to be tried, that damages would not be realistic compensation, and that the balance of convenience favoured restraining repetition of the alleged libel until trial of the action. It would thus be a very considerable incursion into the present rule which is based on freedom of speech.

In *Rapp v. McClelland & Stewart Ltd.* (1981), 34 O.R. (2d) 452 (Ont. H.C.), Griffiths J. attempted to define the precise threshold for the granting of an injunction in the following terms (at pp. 455-56):

> The guiding principle then is, that the injunction should only issue where the words complained of are so manifestly defamatory that any jury verdict to the contrary would be considered perverse by the Court of Appeal. To put it another way where it is impossible to say that a reasonable jury must inevitably find the words defamatory the injunction should not issue.
>
> ...*American Cyanamid* ... has not affected the well established principle in cases of libel that an interim injunction should not be granted unless the jury would inevitably come to the conclusion that the words were defamatory. [Emphasis added.]

This passage has recently been cited with approval in the Quebec Court of Appeal in *CEGEP de Jonquière c. Champagne*, [1997] R.J.Q. 2395 (Que. C.A.). Rothman J.A., on this point speaking on behalf of Delisle and Robert JJ.A., went on to comment on the constitutional dimension of these common law approaches to the use of the injunctive power (at pp. 2402-3):

> With the coming into force of the Canadian Charter and the Quebec Charter, these safeguards protecting freedom of expression and freedom of the press have become even more compelling.
>
> The common law authorities in Canada and the United Kingdom have suggested the guiding principle that interlocutory injunctions should only be granted to restrain in advance written or spoken words in the rarest and clearest of cases — where the words are so manifestly defamatory and impossible to justify that an action in defamation would almost certainly succeed. Given the value we place on freedom of expression, particularly in matters of public interest, that guiding principle has much to recommend it. [Emphasis added.]

These cases indicate quite clearly that the *Cyanamid* test is not applicable in cases of pure speech and, therefore, the appellants are misguided in presuming that this test does apply. As Griffiths L.J.

points out in *Herbage v. Pressdram, supra*, such a test would seldom, if ever, protect controversial speech. Nor do I believe that the modifications suggested by the appellants sufficiently relieve that problem. The same tests discussed here with respect to restraining potentially defamatory speech should be applied in cases of restraint of potential hate-speech, subject to modification which may prove necessary given the particular nature of bigotry as opposed to defamation. As the question now before us is moot, and as the parties did not address themselves to the appropriate tests, it would be inappropriate to speculate here as to how such distinctions might affect the analysis, if at all.

50 The second factor affecting the exercise of jurisdiction in this case is that the very constitutionality of s. 13(1) is predicated on the absence of remedies of this kind existing in the scheme of the Act. A major issue in *Taylor*, *supra*, which followed on the heels of *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), where the hate speech provision of the *Criminal Code* was narrowly upheld, was whether the absence of an intent requirement ins. 13(1) of the *Human Rights Act* rendered it impermissibly broad under the *Oakes* criteria. On that point, Dickson C.J. stated (at p. 932):

> In coming to this conclusion, I do not mean to say that the purpose of eradicating discrimination in all its forms can justify any degree of impairment upon the freedom of expression, but it is well to remember that the present appeal concerns an infringement of s. 2(*b*) in the context of a human rights statute. The chill placed upon open expression in such a context will ordinarily be less severe than that occasioned where criminal legislation is involved, for attached to a criminal conviction is a significant degree of stigma and punishment, whereas the extent of opprobrium connected with the finding of discrimination is much diminished and the aim of remedial measures is more upon compensation and protection of the victim. [Second emphasis added.]

The constitutional concerns expressed in the *Rapp* and *CEGEP de Jonquière* cases mirror those of Dickson C.J. In my view, those tests would confine the issuance of an injunction to cases where it would be constitutionally justifiable. Elaborations of that test in the context of enforcement of s. 13(1) must be mindful of the guarantee of freedom of expression in the *Charter*. Given the mootness of the disposition of the appeal on this point, I refrain from expressing an opinion on the application of these principles to this case.

Third Question: Was Liberty Net in Contempt of Court?

51 On this issue, the appellants argue that they were not in contempt on two separate grounds. Their first ground of attack has to do with the validity of the order. As I have found above that the Federal Court had jurisdiction to issue the order, at its highest, the appellants can only suggest that that jurisdiction was exercised wrongly. Such an order is neither void nor nugatory, and violation of

its terms constitutes contempt of court. The words of McLachlin J. in *Taylor*, *supra*, at pp. 974-75, are both definitive and eloquent on this point:

> In my opinion, the 1979 order of the Tribunal, entered in the judgment and order book of the Federal Court in this case, continues to stand unaffected by the *Charter* violation until set aside. This result is as it should be. If people are free to ignore court orders because they believe that their foundation is unconstitutional, anarchy cannot be far behind. The citizens' safeguard is in seeking to have illegal orders set aside through the legal process, not in disobeying them.
>
> ...For the purposes of the contempt proceedings, [the order] must be considered to be valid until set aside by legal process. Thus, the ultimate invalidity of the order is no defence to the contempt citation.

52 The appellants' second ground of attack is that the contempt order is inapplicable because it seeks to restrain conduct taking place outside of Canada, and, therefore, beyond the territorial jurisdiction of the Federal Court of Canada. This argument is misguided. The violation being impugned here is not the existence of the phone number in the United States without more, but rather the combined effect of that American phone number with the offending messages, and the referral message to that phone number on Liberty Net's old line. The gravamen of the violation of the order is the communication of the offending messages; that communication takes place by virtue of the advertisement on the Canadian phone line and the broadcast of the message on the American phone line. The former element took place "by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament", as provided for under s. 13 of the *Human Rights Act*. As long as at least part of an offence has taken place in Canada, Canadian courts are competent to exert jurisdiction. As La Forest J. articulates the principle in *R. v. Libman*, [1985] 2 S.C.R. 178 (S.C.C.), at pp. 212-13:

> As I see it, all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there be a "real and substantial link" between an offence and this country, a test well-known in public and private international law...

This case does not even test the outer limits of that principle. There was here an advertisement for a message which violated the terms of the order, and that advertisement was made in Canada, on the very phone line where the offending messages had formerly been available, and this advertisement was done with knowledge of the content of those messages and with knowledge that that content violated the terms of the order of Muldoon J.

53 The defendants knowingly violated the order of Muldoon J. and were properly found to be in contempt of court by Teitelbaum J.

54 The second appeal is dismissed with costs.

***McLachlin* and *Major JJ.* (dissenting in part):**

55 We have read the reasons of Justice Bastarache. We agree with him that there is no implied grant of jurisdiction to the Federal Court in the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. As well, we agree that the appeal on the contempt conviction should be dismissed. We disagree with his conclusion on s. 44 of the *Federal Court Act*, R.S.C. 1985, c. F-7.

I. Facts

56 The facts are set out in the decision of Bastarache J.

II. Issues

57 There are two issues in these appeals. The first issue arises out of the original order of Muldoon J. ([1992] 3 F.C. 155 (Fed. T.D.)) enjoining the Canadian Liberty Net from operating its telephone message service. The second issue concerns the contempt order issued by Teitelbaum J. ([1992] 3 F.C. 504 (Fed. T.D.)) in response to the relocation of the Canadian Liberty Net to the State of Washington in the United States of America.

A. Did The Federal Court Have Jurisdiction To Issue An Injunction?

58 The Federal Court of Canada is a statutory court that derives all its jurisdiction from the *Federal Court Act*. The traditional jurisdiction test for that court is set out by McIntyre J. in *Miida Electronics Inc. v. Mitsui O.S.K. Lines Ltd.*, [1986] 1 S.C.R. 752 (S.C.C.), at p. 766:

> 1. There must be a statutory grant of jurisdiction by the federal Parliament.
>
> 2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
>
> 3. The law on which the case is based must be a "law of Canada" as the phrase is used ins. 101 of the *Constitution Act, 1867*.

59 The first test requires a party seeking to bring a matter before the Federal Court to find an express or implied grant of jurisdiction. In this appeal that jurisdiction will be found if at all in the *Canadian Human Rights Act* or the *Federal Court Act*. Neither of these statutes provides jurisdiction to the Federal Court of Canada to issue an injunction in aid of the Canadian Human Rights Commission pending the determination of a complaint by a Human Rights Tribunal.

(1) Grant of Authority Under s. 25 of the Federal Court Act

60 The jurisdiction sections of the *Federal Court Act* exhaustively enumerate all cases over which the Federal Court, Trial Division has jurisdiction. Save for s. 25, it is evident that none of the provisions grant the Federal Court, Trial Division jurisdiction to issue the injunction sought in this appeal.

61 Section 25 reads:

> **25.** The Trial Division has original jurisdiction, between subject and subject as well as otherwise, in any case in which a claim for relief is made or a remedy is sought under or by virtue of the laws of Canada if no other court constituted, established or continued under any of the *Constitution Acts, 1867 to 1982* has jurisdiction in respect of that claim or remedy. [Emphasis added.]

62 Section 25 grants limited original jurisdiction when there is no other court that can hear the matter. Only in the absence of a forum to rule on ajusticiable right is the Federal Court able to rely upon s. 25. This appeal does not qualify as such a case. In *B.M.W.E. v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495 (S.C.C.), McLachlin J., writing for a unanimous nine-member Court, held that a s. 96 provincial superior court's inherent jurisdiction allowed it to issue an interim "free-standing" injunction in response to a gap in the *Canada Labour Code*.

63 Section 25 does not support the appellant's claim that the Federal Court has jurisdiction because another court, the Supreme Court of British Columbia, has jurisdiction to issue the precise injunction. While concurrent jurisdiction between the Federal Court and provincial superior courts exists in limited circumstances it is inconsistent with our primarily unitary court system. In *Reference re Residential Tenancies Act (Ontario)*, [1981] 1 S.C.R. 714 (S.C.C.), at p. 728, Dickson J. (as he then was) noted the importance of maintaining this system:

> Section 92(14) and ss. 96 to 100 represent one of the important compromises of the Fathers of Confederation.... What was conceived as a strong constitutional base for national unity, through a unitary judicial system, would be gravely undermined.

Interpretations that result in concurrent jurisdiction are undesirable as they not only detract from our unitary court system, but inevitably result in forum shopping.

(2) Implied Grant Of Authority From the Canadian Human Rights Act

64 The Human Rights Commission position was that a careful examination of the *Canadian Human Rights Act* reveals an implied grant of statutory authority to issue an injunction. We agree with Bastarache J. that the scheme of the *Canadian Human Rights Act* does not contemplate the Federal Court granting injunctive relief in support of alleged breaches of the Act. An implied grant of jurisdiction has previously been recognized by the Federal Court of Appeal only when

an injunctive remedy was a necessary incident to a Tribunal's function (*New Brunswick Electric Power Commission v. Maritime Electric Co.*, [1985] 2 F.C. 13 (Fed. C.A.)). That is not the situation in this appeal.

65 On the contrary, the *Canadian Human Rights Act* arguably negates the power of the Federal Court to grant injunctions restraining speech before a tribunal finds a contravention of s. 13(1) of the Act. Section 13 is the only provision in the Act dealing with communications. It is restricted to repeated communications by telephone likely to expose persons to hatred or contempt identification on the basis of a prohibited ground of discrimination. This Court upheld s. 13 on the basis that its ambit was narrow: *Canada (Canadian Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 (S.C.C.). Parliament has adopted a narrow and measured approach to the question of when human rights concerns can trump the constitutional right of free speech. While we agree with Bastarache J. that these concerns might appropriately be raised at the point of applying for an injunction, this does not negate the point that nothing in the *Canadian Human Rights Act* suggests that Parliament intended by that Act to confer on the Federal Court the right to restrain speech alleged to violate the *Canadian Human Rights Act* prior to a hearing by the Commission. On the contrary, the Act suggests that Parliament was willing to trench on free speech only in very particular circumstances.

(3) Section 44 of the Federal Court Act

66 Section 44 was raised by several of the parties as a possible source of jurisdiction for allowing the Federal Court to grant the injunction.

> **44.** In addition to any other relief that the Court may grant or award, a *mandamus*, injunction or order for specific performance may be granted or a receiver appointed by the Court in all cases in which it appears to the Court to be just or convenient to do so, and any such order may be made either unconditionally or on such terms and conditions as the Court deems just.

The jurisdictional inquiry is twofold: Does s. 44 grant jurisdiction to issue an injunction and does s. 44 provide jurisdiction to grant "free-standing" injunctions? The key words in s. 44 are "[i]n addition to any other relief that the Court may grant or award". Two interpretations are possible. The appellant argues that "in addition to" refers to the Federal Court's independent ability to grant any relief or remedy. In contrast, the respondents argue that "in addition to" should be read as a limiting clause, which only permits the exercise of injunctive power that is "ancillary to" other preexisting remedies that the Court can grant. We agree with Pratte J.A. and prefer the latter interpretation.

67 In our view, the words "[i]n addition to any other relief that the Court may grant or award" indicate that s. 44 is an ancillary provision, and does not itself grant jurisdiction to the Federal Court, Trial Division. In order to avail itself of s. 44 the Federal Court must possess pre-existing jurisdiction over the subject matter at hand. A similar view was expressed by Rouleau J. in *C.U.P.E.*

v. Canadian Broadcasting Corp., [1991] 2 F.C. 455 (Fed. T.D.), where he held that s. 44 could not independently authorize the Federal Court to grant injunctive relief when the Court was not vested with jurisdiction under the *Federal Court Act*.

68 Clearly, the Federal Court, Trial Division does not have jurisdiction to hear or determine a complaint based on the *Canadian Human Rights Act*. That task is exclusively assigned to the Canadian Human Rights Commission. It follows that s. 44 does not clothe the Federal Court with jurisdiction to grant an interlocutory injunction.

69 The structure of the *Federal Court Act* is indicative of Parliament's intent with respect to s. 44 and the jurisdiction of the Federal Court. The Act is divided into divisions with each division set off by a bold heading. Section 44 appears within the division of the *Federal Court Act* headed "Substantive Provisions", as opposed to the division titled "Jurisdiction Of Trial Division". We are here concerned with an issue of jurisdiction. If the power to grant injunctions in a case such as this is to be found in the *Federal Court Act*, we would expect to find it in ss. 17 to 26, not in s. 44, which finds its place among the residual housekeeping sections of the Act.

70 As the Federal Court, Trial Division is a statutory court, there is no persuasive reason to interpret s. 44 in a broad manner. Bastarache J. sets out a number of other statutory provisions in his judgment that he reasons aid in ascertaining the proper interpretation of s. 44. Unlike a provincial superior court, the Federal Court's jurisdiction is limited by the statute and does not include residual or inherent jurisdiction. Wilson J. in *Wewayakum Indian Band v. Canada*, [1989] 1 S.C.R. 322 (S.C.C.), at p. 331, stated:

> The statutory grant of jurisdiction by Parliament to the Federal Court is contained in the *Federal Court Act*. Because the Federal Court is without any inherent jurisdiction such as that existing in Provincial Superior Courts, the language of the Act is completely determinative of the scope of the Court's jurisdiction.

71 Clearly, it would be contrary to the explicit language of the *Federal Court Act* and well-established jurisprudence of this Court to recognize jurisdiction that was not conferred on the Federal Court by Parliament. While the provincial superior courts and the Federal Court are both created by statute, the inherent jurisdiction of the s. 96 superior courts is an important distinguishing feature. Their inherent or residual nature was recognized in *Valin v. Langlois* (1879), 3 S.C.R. 1 (S.C.C.), and by the Privy Council in *Board v. Board*, [1919] A.C. 956 (Alberta P.C.), and in 1982 Estey J. in *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.), at pp. 326-27, stated:

> The provincial superior courts have always occupied a position of prime importance in the constitutional pattern of this country. They are the descendants of the Royal Courts of Justice as courts of general jurisdiction. They cross the dividing line, as it were, in the federal-provincial scheme of division of jurisdiction, being organized by the provinces under s. 92(14)

of the *Constitution Act* and are presided over by judges appointed and paid for by the federal government (sections 96 and 100 of the *Constitution Act*.)

72 The appellant is not prevented from seeking an injunction. The only question is: where does it find jurisdiction? It is clear from the *B.M.W.E., supra*, decision that a provincial superior court has the jurisdiction to issue an injunction in the present circumstances.

73 Given the result we have reached it is not necessary to determine the ability of the Federal Court to grant "free-standing" interim injunctions. We would dismiss this appeal on the ground that the Federal Court does not have jurisdiction to grant an injunction under the circumstances of this case.

B. Was Liberty Net in Contempt of Court?

74 The appellants were held in contempt of court by Teitelbaum J. for violating the injunction issued by Muldoon J. McAleer and Canadian Liberty Net argued that if the injunction was issued without jurisdiction it was void, and therefore the conviction should be set aside. We disagree and concur in the result of Bastarache J. and would dismiss the appeal.

Commission's Appeal allowed.

Respondents' Appeal dismissed.

Appel de la Commission accueilli.

Appel des défendeurs rejeté.

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Federal Court of Appeal

Canadian Broadcasting Corp. v. SODRAC 2003 Inc.

2014 CarswellNat 808, 2014 CarswellNat 809, 2014 CAF 84, 2014 FCA 84, [2014] F.C.J. No. 321, 118 C.P.R. (4th) 79, 241 A.C.W.S. (3d) 434, 457 N.R. 156

Canadian Broadcasting Corporation/Société Radio-Canada, Applicant and SODRAC 2003 Inc. and Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) Inc., Respondents

Astral Media Inc., Applicant and Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) Inc., Respondent

Canadian Broadcasting Corporation/Société Radio-Canada, Applicant and SODRAC 2003 Inc. and Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) Inc., Respondents

Marc Noël, J.D. Denis Pelletier, Johanne Trudel JJ.A.

Heard: October 1, 2013
Judgment: March 31, 2014
Docket: A-516-12, A-527-12, A-63-13

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Subject: Civil Practice and Procedure; Intellectual Property; Property

APPLICATION by broadcasters for judicial review of determination regarding licence fees for copyrighted material.

***J.D. Denis Pelletier J.A.*:**

1 In a decision dated November 2, 2012 [2012 CarswellNat 4255 (Copyright Bd.)] (the Decision), the Copyright Board (the Board) exercised its mandate under section 70.2 of the Copyright Act, R.S.C. 1985 c. C-42 (the Act) to settle the terms of a licence to be granted to two broadcasters by a collective society which administers reproduction rights. The terms of the licence reflect the Board's view that royalties were payable with respect to ephemeral copies of works made by the broadcasters in the normal course of their production or broadcasting activities. Ephemeral copies, as will be seen, are copies or reproductions that exist only to facilitate a technological operation by which audiovisual work is created or broadcast.

2 This aspect of the Board's decision rests on the Supreme Court of Canada's decision in *Bishop v. Stevens*, [1990] 2 S.C.R. 467 (S.C.C.), in which the Court held that ephemeral recordings of a performance of a work, made solely for the purpose of facilitating the broadcast of that performance, were, if unauthorized, an infringement of the copyright holder's rights. In this application for judicial review of the Board's Decision, the broadcasters argue that *Bishop v. Stevens* must be read in the light of *Public Performance of Musical Works, Re*, 2012 SCC 34, [2012] 2 S.C.R. 231 (S.C.C.) (*ESA*), a decision in which the Supreme Court affirmed the principle of technological neutrality in copyright matters. The result, in the applicants' view, is that, today, ephemeral copies should no longer attract royalties.

3 The Board's decision raised other issues which will be discussed below but the question that dominated the hearing of this appeal was the treatment of ephemeral recordings in light of *ESA*.

4 For the reasons that follow, I am of the view that *Bishop v. Stevens* continues to be good law.

The Decision Under Review

5 These reasons apply to three applications for judicial review. In file no. A-516-12, the Canadian Broadcasting Corporation/Société Radio Canada (CBC) seeks to set aside several terms of the 2008-2012 licence issued to it pursuant to the Decision. In file no. A-527-12, Astral Media Inc. (Astral) also seeks to set aside a number of the terms of the 2008-2012 licence issued to it pursuant to the Decision. Lastly, file no. A-63-13 involves another application for judicial review by CBC, this time with respect to the Board's January 16, 2013 [2013 CarswellNat 43 (Copyright Bd.)] decision extending the 2008-2012 licence to the 2012-2016 period on an interim basis pending a final determination of SODRAC's section 70.2 with respect to that period. Both licences issued pursuant to the November 2, 2012 and the January 16, 2013 decisions are subject to a stay of execution pursuant to an order of this Court made February 28, 2013, pending the final determination of these applications for judicial review.

6 These reasons deal with all three applications; a copy of them will be placed on each file. Judgment will issue separately in each file, on the terms provided in these reasons.

7 The Society for Reproduction Rights of Authors, Composers and Publishers in Canada (Sodrac) Inc., and SODRAC 2003 Inc. (collectively SODRAC) are collective societies responsible for the administration of the reproduction rights on behalf of the holders of those rights.

8 CBC is Canada's public broadcaster. CBC's mandate with respect to Canada's French speaking population is discharged by the Société Radio-Canada (Radio-Canada) which, for many years, has produced and broadcast programs incorporating music by Québec artists. Since SODRAC represents the majority of Québec reproduction rights holders, Radio-Canada and SODRAC are well known to each other.

9 Astral is a broadcaster specializing in specialty channels but unlike the CBC, it does not produce any of its own programming. It purchases audiovisual works for broadcast from producers, apparently on the understanding that these producers have obtained the necessary rights to allow it to broadcast the works without the payment of additional royalties

10 This dispute arises out of a particular historical context. Following the decision in *Bishop v. Stevens* in 1990, SODRAC licensed broadcasters making use of its repertoire to make ephemeral copies for broadcasting purposes, and to incorporate works in its repertoire into their own productions. These licences also covered producers who were commissioned by these broadcasters to produce works containing SOCRAC material. Around 1998, SODRAC began requiring such producers o obtain their own licence, though these licences did not require the payment of royalties. Around 2006, SODRAC began requiring producers to pay for the right to incorporate works from its repertoire into their productions, even if the broadcaster commissioning the work was licensed by SODRAC.

11 In 1992, CBC and SODRAC concluded an agreement that set the terms upon which CBC was authorized to use works from SODRAC's repertoire on radio, on television and for certain ancillary purposes. This agreement was renewed from time to time but as SODRAC's licensing practices changed, they were unable to come to an agreement on renewal. SODRAC invoked section 70.2 of the Act so as to seize the Board with the question. More or less at the same time, SODRAC also invoked section 70.2 of the Act in relation to Astral. The Board consolidated the hearing of these two matters.

12 Section 70.2 of the Act provides for a form of arbitration in which parties who are unable to agree on the term of a licence can apply to the Board to fix those terms:

> 70.2 (1) Where a collective society and any person not otherwise authorized to do an act mentioned in section 3, 15, 18 or 21, as the case may be, in respect of the works, sound recordings or communication signals included in the collective society's repertoire are unable to agree on the royalties to be paid for the right to do the act or on their related terms and

conditions, either of them or a representative of either may, after giving notice to the other, apply to the Board to fix the royalties and their related terms and conditions.

(2) The Board may fix the royalties and their related terms and conditions in respect of a licence during such period of not less than one year as the Board may specify and, as soon as practicable after rendering its decision, the Board shall send a copy thereof, together with the reasons therefor, to the collective society and the person concerned or that person's representative.

70.2 (1) À défaut d'une entente sur les redevances, ou les modalités afférentes, relatives à une licence autorisant l'intéressé à accomplir tel des actes mentionnés aux articles 3, 15, 18 ou 21, selon le cas, la société de gestion ou l'intéressé, ou leurs représentants, peuvent, après en avoir avisé l'autre partie, demander à la Commission de fixer ces redevances ou modalités.

(2) La Commission peut, selon les modalités, mais pour une période minimale d'un an, qu'elle arrête, fixer les redevances et les modalités afférentes relatives à la licence. Dès que possible après la fixation, elle en communique un double, accompagné des motifs de sa décision, à la société de gestion et à l'intéressé, ou au représentant de celui-ci.

13 The heart of the dispute between CBC and Astral (collectively, the Broadcasters) on the one hand, and SODRAC, on the other, is SODRAC's business model which the Broadcasters say is inconsistent with the prevailing industry model. The Broadcasters say that the normal practice in the industry is for the producer of an audiovisual work (television program, movie or other cinematographic work) to obtain a through-to-the-viewer licence from the rights holder.

14 In its Decision, the Board described a through-to-the viewer licence as follows:

Producers sometimes secure a *through-to-the-viewer licence*. Such a licence authorizes all copies of a musical work made by the producer or others in the course of delivering the audiovisual work to the ultimate consumer in the intended market, be it television, cinema, DVD, Internet or other. A *buy-out licence* is a through-to-the-viewer licence in which royalties are set at a lump sum paid up front. Other through-to-the-viewer licences give the producer the option to extend the licence beyond a certain point in time, a certain territory or a certain market at pre-determined prices. When a producer exercises an option pursuant to a through-to-the-viewer licence, the related rights are cleared for downstream users as well as for the producer.

Decision at paragraph 15

15 The Broadcasters emphasize that this type of licence is consistent with the producer's intention in obtaining a licence, which is to create a product that can be marketed to broadcasters or exhibitors who can then exploit it commercially. The fact that the rights acquired under a through-to-the-viewer licence may be limited in time or place does not detract from the essential feature of

such a licence, which is that the producer obtains or "clears" all necessary rights for downstream users, within the temporal or geographical limits of the licence.

16 As against this model, SODRAC has adopted a layered approach to licensing in which each link in the distribution chain must acquire (and pay for) the right to make the copies required for its commercial purposes. It is reasonable to assume that SOCRAC'S position is designed to maximize revenue for the artists it represents.

17 SODRAC's change in strategy corresponds with the adoption of new technology that generally requires producers to make multiple copies of a musical work in order to incorporate it into an audiovisual work, a process known as synchronisation. At the same time, computerized digital content management systems and digital projection systems require broadcasters or exhibitors of an audiovisual work to make multiple copies of the work in order to broadcast or exhibit it. These copies, described earlier in these reasons as ephemeral copies, are known as incidental copies and were described as follows by the Board:

> ...*Synchronization* refers to the process of incorporating a musical work into an audiovisual work. Thus, a *synchronization copy* is any copy made in order to include the work into the final (*master*) copy of an audiovisual work. A post-synchronization copy of the music is made each time the audiovisual work itself is copied, for example to broadcast, deliver or distribute the audiovisual work.
>
> An *incidental copy* is necessary or helpful to achieve an intended outcome but is not part of the outcome itself. A *production-incidental copy* is made in the process of producing and distributing an audiovisual work, either before or after the master copy is made: it is a form of synchronization copy. A *broadcast-incidental copy* is made to facilitate the broadcast of an audiovisual work or to preserve the work in the broadcaster's archives, while a *distribution-incidental copy* is made for the purpose of readying or preserving the motion picture for distribution to the public: both are forms of post-synchronization copies.
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> Decision at paragraphs 11-12 (emphasis in the original)

18 To round out this discussion of incidental copies, it is of interest to note that the evidence before the Board was that a producer will reproduce a musical work between 12 and 20 times in the course of the synchronization process leading to a finished master copy. Television broadcasters, using digital content management systems (which are now the industry standard), make multiple copies of an audiovisual work in the course of editing (for example, adjusting sound and colour balance), broadcasting and archiving the work. While the making of incidental copies is not a new phenomenon (see *Bishop v. Stevens*), it appears that technological advances may have increased the number of incidental copies made in the course of commercial operations. The Board says it did; the Broadcasters dispute this.

19 With that background, I turn to the Board's decision. After having laid out the historical and technological background summarized above, the Decision then set out a few general legal principles, the most relevant of which is the following:

> Fourth, the Board cannot impose liability where the Act does not or remove liability where it exists. Consequently, the Board cannot decide who should pay, only what should be paid for which uses, and only to the extent that the envisaged use requires a licence.
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> Decision at *paragraph* 62

20 This principle is a partial answer to the Broadcaster's argument with respect to whether incidental copies should attract royalties. In the Board's view, liability to pay royalties is imposed by the Act and is based upon use of the protected material. As a result, the Board cannot relieve a user of protected material from the financial consequences of that use.

21 The Board then went on to consider what it called "contextual legal principles". Under this heading, the Board engaged in an examination of the history and current state of SODRAC's licensing practices. It acknowledged that the use of through-to-the viewer licenses in some markets by some rights holders was relevant but not determinative. The focus of the inquiry was on SODRAC's practices which, to the extent that they were both consistent and significant in the relevant market, could not be ignored.

22 The Board's review of the evidence, including SODRAC's licensing practices, led it to conclude that SODRAC had issued few, if any, through-to-the-viewer licences. To the extent that SODRAC had issued licences granting the licencee the right to authorize others to reproduce protected works, that right generally resided with the broadcaster not with the producer. So it was that CBC's licence from SODRAC covered synchronization in audiovisual works commissioned by CBC from independent producers. Under such licences, producers did not acquire the right to authorize anyone "downstream" in the distribution chain to reproduce a protected work.

23 As a result of its review of the evidence, the Board concluded that the record before it was unambiguous. "In the most relevant market, the province of Québec, through-to-the-viewer licensing exists but is not the norm": see Decision at paragraph 78. This finding is significant because, to the extent that the Board sets royalties and licence fees on the basis of the economic value of the rights involved, the definition of the market for those rights is a relevant consideration.

24 The Board next embarked on an analysis of the economic value of reproduction rights in the hands of broadcasters and producers, an analysis that proceeded on the basis of two fundamental propositions:

> a) The copy-dependent technologies adopted by producers and broadcasters add value to their businesses, by allowing them to remain competitive, even if they do not generate direct

profits. Since part of this value arises from the use of additional copies, some of the benefits flowing from those copies should be reflected in the remuneration paid for the additional copies.

b) The Board cannot, under the umbrella of a section 70.2 arbitration between two parties, dictate how either of the parties should conduct their business generally, or how they should deal with third parties such as producers. In other words, it is not for the Board to force SODRAC to issue through-to-the-viewer licenses or to establish through-to-the-viewer licences as a standard arrangement.

25 After establishing these principles, the Board's decision went on at some length in setting the financial terms of the licences to the CBC and to Astral. After making allowance for the fact that SODRAC did not represent all of the rights holders for music incorporated into the Broadcasters' offerings, the Board then addressed the quantification of the fees to be paid by the latter under various headings. The Board set the licence fees for broadcast-incidental copies in radio and television as well as the fees payable by CBC with respect to synchronization licences. Finally, the Board dealt with licence fees payable for internet TV, sales of programs to consumers for private use (DVDs and downloads), and fees for licensing of CBC programs to third parties.

26 The Broadcasters' principal argument before us was that the analysis adopted by the Board flew in the face of the principle of technological neutrality established by the Supreme Court in *ESA*. As a result, in order to simplify the analysis, I propose to deal with the issue of technological neutrality at this point, deferring the analysis of the other arguments made by the Broadcasters until later in these reasons.

Analysis

27 The Board is unusual among specialized administrative tribunals in that its decisions on question of law are reviewable on the standard of correctness: see *Public Performance of Musical Works, Re*, 2012 SCC 35, [2012] 2 S.C.R. 283 (S.C.C.) at paragraphs 10-15. Questions of fact are only reviewable if they are "made in a perverse or capricious manner or without regard for the material before it [the tribunal]": see section 18.1(4)(*d*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. In *Khosa v. Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.) (*Khosa*), the Supreme Court of Canada described this provision as providing "legislative precision to the reasonableness standard of review of factual issues falling under the *Federal Courts Act*": *Khosa*, at paragraph 46.

28 Earlier in these reasons, I set out two fundamental propositions that inform the Board's reasoning: see paragraph 25. The first is that, if technological advances require the making of more copies of a musical work in order to get an audiovisual work that incorporates it to market, those additional copies add value to the enterprise. As a result, they attract additional royalties, not

298 necessarily on a per-copy basis but on the basis of the additional value generated by those copies. Simply put, more copies mean more value and thus, more royalties.

29 The Broadcasters challenge this proposition on two interrelated but distinct grounds. First, they say that copy-dependent technology does not add value to an enterprise and as a result, there is no additional value to share with artists who, incidentally, bear none of the costs of acquiring and maintaining the new technology. This is essentially an economic argument, on which the Board heard extensive evidence and on which it came to a conclusion for which there is an evidentiary foundation. As a result, this Court is not in a position to interfere with the Board's conclusion on the economic justification for its conclusion.

30 The Broadcasters' second argument is a legal one: the Board's decision fails to give effect to the principle of technological neutrality articulated by the Supreme Court in *ESA*. The Broadcasters concede, as they must, that the incorporation of a musical work into an audiovisual work (synchronization) is a reproduction that attracts royalties. However, they go on to argue that copies of the work that are made purely to meet the requirements of the technological systems used by producers and broadcasters ought not to attract royalties. Changes in technology should not automatically result in changes in royalties. Otherwise, intellectual property rights become a drag on technological innovation and efficiency.

31 The Board's reasoning is grounded in the Supreme Court's decision in *Bishop v. Stevens*, a case in which the Supreme Court held that each of the rights enumerated in subsection 3(1) of the Act was a separate right reserved to the owner of the copyright, whose use by another attracted liability for the payment of royalties. Section 3(1) of the Act is reproduced below for ease of reference:

> 3. (1) For the purposes of this Act, "*copyright*", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right
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> (a) to produce, reproduce, perform or publish any translation of the work,
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> . . .
>
> (d) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,
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> (e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,
>
> (f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

. . .

and to authorize any such acts.

3. (1) Le droit d'auteur sur l'oeuvre comporte le droit exclusif de produire ou reproduire la totalité ou une partie importante de l'oeuvre, sous une forme matérielle quelconque, d'en exécuter ou d'en représenter la totalité ou une partie importante en public et, si l'oeuvre n'est pas publiée, d'en publier la totalité ou une partie importante; ce droit comporte, en outre, le droit exclusif:

a) de produire, reproduire, représenter ou publier une traduction de l'oeuvre;

. . .

d) s'il s'agit d'une oeuvre littéraire, dramatique ou musicale, d'en faire un enregistrement sonore, film cinématographique ou autre support, à l'aide desquels l'oeuvre peut être reproduite, représentée ou exécutée mécaniquement;

e) s'il s'agit d'une oeuvre littéraire, dramatique, musicale ou artistique, de reproduire, d'adapter et de présenter publiquement l'oeuvre en tant qu'oeuvre cinématographique;

f) de communiquer au public, par télécommunication, une oeuvre littéraire, dramatique, musicale ou artistique;

. . .

Est inclus dans la présente définition le droit exclusif d'autoriser ces actes.

32 More specifically, *Bishop v. Stevens* decided that ephemeral recordings made solely for the purpose of facilitating the broadcast of a work were caught by paragraph 3(1)(*d*) of the Act and were not implied in the right to broadcast a work: see *Bishop v. Stevens* at paragraphs 22-25. To that extent, *Bishop v. Stevens* is directly on point and, unless it has been overturned or disavowed by the Supreme Court, it determines the outcome of this branch of the applications for judicial review.

33 The Broadcasters say that *Bishop v. Stevens* has been overtaken by *ESA*.

34 The issue in *ESA* was whether a download of a game containing music is a communication of the musical work to the public by telecommunication, one of the rights reserved exclusively to the copyright holder by the Act: see paragraph 3(1)(*f*). If it is, then the publishers of the game, who had already paid for the right to *reproduce* the music incorporated in the game, were liable to pay royalties with respect to the download (*the communication to the public by telecommunication*). As a result, recourse to a technologically advanced method of delivery would create liability for additional royalties that were not paid or payable when the game was sold on a traditional physical medium, such as a CD-ROM.

35 In its decision, reported at (2007), 61 C.P.R. (4th) 353 (Copyright Bd.), the Board found that the download of a game containing music was a communication of the musical work to the public by telecommunication, a decision that was confirmed by this Court at 2010 FCA 221 (F.C.A.). The majority of the Supreme Court reversed this Court and, in the course of doing so, affirmed the principle of technological neutrality.

36 The Supreme Court began by articulating its view of the source and effect of technological neutrality:

> In our view, the Board's conclusion that a separate, "communication" tariff applied to downloads of musical works violates the principle of technological neutrality, *which requires that the Copyright Act apply equally between traditional and more technologically advanced forms of the same media: Robertson v. Thomson Corp.*, [2006] 2 S.C.R. 363, at paragraph 49. The principle of technological neutrality is reflected in s. 3(1) of the Act, which describes a right to produce or reproduce a work "in any material form whatever". In our view, there is no practical difference between buying a durable copy of the work in a store, receiving a copy in the mail, or downloading an identical copy using the Internet. The Internet is simply a technological taxi that delivers a durable copy of the same work to the end user.
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> *ESA* at paragraph 5 (my emphasis).

37 A slightly different view of technological neutrality emerges from paragraph 9 of the majority's reasons:

> SOCAN has never been able to charge royalties for copies of video games stored on cartridges or discs, and bought in a store or shipped by mail. Yet it argues that identical copies of the games sold and delivered over the Internet are subject to both a fee for reproducing the work and a fee for communicating the work. *The principle of technological neutrality requires that, absent evidence of Parliamentary intent to the contrary, we interpret the Copyright Act in a way that avoids imposing an additional layer of protections and fees based solely on the method of delivery of the work to the end user.* To do otherwise would effectively impose a gratuitous cost for the use of more efficient, Internet-based technologies.
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> (My emphasis.)

38 Finally, a third view of technological neutrality is found in paragraph 10 of the majority's reasons:

> The Board's misstep is clear from its definition of "download' as "a file containing data ... the user is meant to keep as his own" (*paragraph* 13). The Board recognized that downloading is a copying exercise that creates an exact, durable copy of the digital file on the user's computer, identical to copies purchased in stores or through the mail. *Nevertheless, it concluded that*

delivering a copy through the Internet was subject to two fees - one for reproduction and one for communication - while delivering a copy through stores or mail was subject only to reproduction fees. In coming to this conclusion, the Board ignored the principle of technological neutrality.

(My emphasis.)

39 A careful reading of these passages shows that the Supreme Court's majority reasons incorporate at least three views of technological neutrality:

a) Technological neutrality is media neutrality. Media neutrality is a statutory prescription arising from the opening words of section 3 of the Act, which protects the production or reproduction of works "in any material form whatever". Media neutrality was recognized by the Supreme Court in *Robertson v. Thomson Corp.*, 2006 SCC 43, [2006] 2 S.C.R. 363(*Robertson*), a case involving copyright in content originally published in a newspaper and then republished online.

b) Technological neutrality is a principle of statutory interpretation according to which, absent evidence of a contrary Parliamentary intention, the Act is to be interpreted so as to avoid imposing royalties according to the method of delivery of a protected work.

c) Technological neutrality is determined by functional equivalence so that if two technologically distinct operations produce the same result (delivering a copy of a work to the consumer), the incidence of royalties should be the same in both cases.

40 In light of these different views of technological neutrality, it is difficult to know how one is to approach technological neutrality post-*ESA*. This is particularly true when one considers that in both *Robertson v. Thomson Corp.* [2006 CarswellOnt 6182 (S.C.C.)] and *ESA* the Court's decision was reached following an analysis that did not rely on any of the possible variants of technological neutrality.

41 In *Robertson*, the issue was whether the Globe and Mail infringed the copyright of freelance contributors when it contributed their work to electronic databases. The case was one of overlapping copyrights as the freelance contributors retained the copyright in their article while the Globe and Mail had the copyright in the newspaper as a whole, whether considered as a compilation or a collection: see *Robertson*, at paragraph 31. The majority in the Supreme Court held that the databases infringed the freelancer's copyright because the databases did not involve a reproduction of the newspaper as such but of discrete elements such as articles, even though these were tagged with the name of the original publication, date of publication and other publication specific identifiers. The basis of the Supreme Court's decision is that the database reproduced the freelance contributor's, not the newspaper's, originality. The result was that the inclusion of the

article in the database was an infringement of the freelancer's copyright and was not covered by the newspaper's copyright.

42 The decision in *Robertson* turned on the originality of the work being reproduced and not on the nature of the medium on which the articles were republished. While the Court's conclusion was technologically neutral, in the sense that the medium on which reproduction occurred was not a relevant consideration, its decision provided no guidance as to how technological neutrality was to be achieved.

43 Similarly, the majority decision in *ESA* was the result of an analysis of the legislative history of the Act and of the jurisprudence showing that communication to the public by telecommunication was historically an aspect of the performance right, and that this right did not include the delivery of a permanent copy of the work. Since the download did result in the creation of a permanent copy of the work on the downloader's computer, it was not a performance and thus not a communication of the work to the public by telecommunication.

44 The majority's analysis did not rely on nor refer to any of the shades of technological neutrality that it discussed in the earlier part of its reasons. As a result, *ESA*, while restating the principle of technological neutrality in copyright law, provides no guidance as to how a court should apply that principle when faced with a copyright problem in which technological change is a material fact.

45 *Bishop v. Stevens* was just such a case. In it, the broadcaster argued that the right to broadcast a performance necessarily included the right to make ephemeral recordings in support of the broadcasting activity. The broadcaster argued that pre-recording was virtually essential "to ensure the quality of broadcasts and to enable broadcasters to offer the same programming at convenient times across five different time zones": see *Bishop v. Stevens*, at paragraph 23. This argument was rejected on the basis of the statutory distinction between the right to make a recording of a work and the right to perform that work.

46 The Supreme Court's reasoning in *Bishop v. Stevens* is worth repeating here as it foreshadows the arguments made in this case:

> In sum, I am not convinced that there is any reason to depart from the literal meaning of s. 3(1)(d) and the introductory paragraph to s. 3(1) of the Act, which on their face, draw a distinction between the right to make a recording and the right to perform. Neither the wording of the Act, nor the object and purpose of the Act, nor practical necessity support an interpretation of these sections which would place ephemeral recordings within the introductory paragraph to s. 3(1) rather than in s. 3(1)(d). On the contrary, policy considerations suggest that if such a change is to be made to the Act, it should be made by the legislature, and not by a forced interpretation. I conclude that the right to broadcast a performance under s. 3(1)(d) of the Act does not include the right to make ephemeral recordings for the purpose of facilitating the broadcast.

Bishop v. Stevens, at paragraph 33

47 This reasoning is taken up in the following passage from *ESA*:

> 40 SOCAN submits that the distinction between reproduction and performance rights in *Bishop* actually supports its view that downloading a musical work over the Internet can attract two tariffs. Since reproduction and performance-based rights are two separate, independent rights, copyright owners should be entitled to a separate fee under each right. This is based on the Court's reliance in *Bishop*, at p. 477, on a quote from *Ash v. Hutchinson & Co. (Publishers), Ltd.*, [1936] 2 All E.R. 1496 (C.A.), at p. 1507, per Greene L.J.:
>
> > Under the *Copyright Act*, 1911 [on which the Canadian Act was based], ... the rights of the owner of copyright are set out. A number of acts are specified, the sole right to do which is conferred on the owner of the copyright. The right to do each of these acts is, in my judgment, a separate statutory right, and anyone who without the consent of the owner of the copyright does any of these acts commits a tort; if he does two of them, he commits two torts, and so on. [Emphasis added.]
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> 41 In our view, the Court in *Bishop* merely used this quote to emphasize that the rights enumerated in s. 3(1) are distinct. *Bishop* does not stand for the proposition that a single activity (i.e., a download) can violate two separate rights at the same time. This is clear from the quote in *Ash v. Hutchinson*, which refers to "two acts". In *Bishop*, for example, there were two activities: 1) the making of an ephemeral copy of the musical work in order to affect a broadcast, and 2) the actual broadcast of the work itself. In this case, however, there is only one activity at issue: downloading a copy of a video game containing musical works.
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> *ESA* at paragraphs 40-41

48 In my view, this passage reaffirms the fundamental distinction between reproduction and performance (communication to the public by telecommunication) that the Court articulated in *Bishop v. Stevens* Nothing in this passage, or elsewhere in *ESA*, would authorize the Board to create a category of reproductions or copies which, by their association with broadcasting, would cease to be protected by the Act. ESA did not explicitly, or by necessary implication, overrule *Bishop v. Stevens*.

49 As a result, I am unable to accept the Broadcasters' argument that the comments about technological neutrality in *ESA* have changed the legal landscape to the point where the Board erred in finding that incidental copies are protected by copyright. The Broadcasters' argument with respect to technological neutrality fails.

Additional Grounds of Review

50 The Broadcasters raise a number of other issues in their attack on the Board's Decision. They can be summarized as follows:

> 1 - The Board failed to carry out or to properly carry out its role as economic regulator by wrongly deciding a number of questions that arose before it in the course of its decision.
>
> 2 - The Board exceeded its jurisdiction when it imposed a general licence on the Broadcasters notwithstanding the latter's expressed preference for transaction-based licences if the Board ordered the payment of royalties for ephemeral reproductions.
>
> 3 - The Board failed to consider a relevant factor when it refused to take into account the CBC's ability to pay when fixing licence fees that were substantially more than those which CBC has paid historically.

I will now address each of these in turn.

1- The Board failed to carry out or to properly carry out its role as economic regulator by wrongly deciding a number of questions that arose before it in the course of its decision.

51 This heading covers a number of distinct findings by the Board whose common denominator is their economic impact. Most of these findings relate to the exercise of the Board's judgment in assessing the evidence put before it by the parties and in putting a value on reproduction rights in different contexts, such as radio, television, internet, and film and DVD distribution.

52 Such questions are reviewable on the standard of reasonableness since they inevitably involve the weight to be given to the evidence heard by the Board and the conclusions to be drawn from that evidence. Reasonableness, in this context, means "within the range of acceptable outcomes that are defensible in terms of the facts and the law": *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), at paragraph 74.

53 Many of the points raised by the Broadcasters are an attempt to re-argue before us the evidence that was before the Board. In essence, the questions raised by the Broadcasters turn on whether ephemeral copies have economic value and, if so, the proper quantification of that value in the setting of royalties.

54 The Broadcasters' first approach to the question of the value of ephemeral copies was to argue that any value attached to ephemeral copies was compensated in the through-to-the-viewer licence issued to the producers who paid for a synchronization licence with respect to an audiovisual work. A good deal of evidence was led to show that the through-to-the-viewer licence was the industry standard in Canada and that the terms of such a licence made the issue of broadcast-incidental copies redundant since all downstream reproductions are covered by the terms of the licence.

The Broadcasters say that the Board cannot or should not make an order contrary to established commercial practice in the broadcasting industry.

55 Notwithstanding the Broadcasters' attempt to make this a question of law, it is one of fact. Did the producers from whom they obtained programs (with respect to which SODRAC administered the reproduction rights) obtain a through to the viewer licence from SODRAC? If the answer to the question is no, it is of no assistance to the Broadcasters to say that they thought the producers had obtained such licences or that they ought to have.

56 The Board examined the evidence submitted by the parties on this question, including a number of synchronization licences issued by SODRAC and came to the conclusion that "in the relevant market, the province of Québec, through-to-the-viewer licensing exists but is not the norm": Decision, at paragraph 78. It is not this Court's role to review the evidence and to decide if it would come to the same conclusion. The Board's conclusion is based on the evidence, it is intelligible and it is within the range of acceptable outcomes, having regard to the facts and the law.

57 The Broadcasters also challenge the Board's conclusion that Québec is the relevant market but in light of the fact that SODRAC represents the majority of reproduction rights holders in Québec (see Decision, at paragraph 18), it is not unreasonable to consider the market where SODRAC is the most active as the relevant market.

58 The Broadcasters go on to say that the formula devised by the Board to credit them in cases where programs which they broadcast have cleared to the viewer is wrong and produces an absurd result because even if all programs broadcast in a given period were cleared to the viewer, the formula would still require them to pay royalties with respect to those programs. For reasons that will become apparent, I believe that this issue is best dealt with under the heading dealing with the Board's power to issue a blanket licence over CBC's objections.

59 The remaining "economic" issues involve questions such as the fixing of SODRAC's royalties as a percentage of royalties payable to SOCAN, and the fact that some royalties imposed by the Board (e.g. Internet TV) are inconsistent with those ratios. These decisions are based upon the evidence that the Board had before it and to which it makes reference in its Decision. The Board has expertise in the setting of appropriate royalties as a result of its long experience in doing so. It has the advantage of having heard all the evidence as well as having an in-depth understanding of the context in which these questions arise. These factors suggest that we should defer to the Board's expertise, unless it can be shown that the Board has come to an unreasonable conclusion. That has not been shown with respect to these issues.

2- The Board exceeded its jurisdiction when it imposed a general licence on the Broadcasters notwithstanding the latter's expressed preference for transaction-based licences in the event that the Board ordered the payment of royalties for ephemeral reproductions.

60 CBC argues that the Board exceeded its jurisdiction when it imposed a blanket synchronization licence. CBC says that it indicated to the Board that, at the royalty rates proposed by SODRAC, it would proceed by way of transactional licences as the need arose. This argument does not arise for Astral as it is not a producer of audiovisual works and therefore does not require a synchronization licence.

61 CBC's argument is based on the wording of section 70.2 of the Act, the provision that permits the Board to set the terms of a licence between two parties as opposed to fixing a tariff:

> 70.2 (1) Where a collective society and any person not otherwise authorized to do an act mentioned in section 3, 15, 18 or 21, as the case may be, in respect of the works, sound recordings or communication signals included in the collective society's repertoire are unable to agree on the royalties to be paid for the right to do the act or on their related terms and conditions, either of them or a representative of either may, after giving notice to the other, apply to the Board *to fix the royalties and their related terms and conditions*..
>
> (2) The Board may *fix the royalties and their related terms and conditions* in respect of a licence during such period of not less than one year as the Board may specify and, as soon as practicable after rendering its decision, the Board shall send a copy thereof, together with the reasons therefore, to the collective society and the person concerned or that person's representative.
>
> (My emphasis.)
>
> 70.2 (1) À défaut d'une entente sur les redevances, ou les modalités afférentes, relatives à une licence autorisant l'intéressé à accomplir tel des actes mentionnés aux articles 3, 15, 18 ou 21, selon le cas, la société de gestion ou l'intéressé, ou leurs représentants, peuvent, après en avoir avisé l'autre partie, demander à la Commission *de fixer ces redevances ou modalités.*
>
> (2) La Commission peut, selon les modalités, mais pour une période minimale d'un an, qu'elle arrête, *fixer les redevances et les modalités afférentes* relatives à la licence. Dès que possible après la fixation, elle en communique un double, accompagné des motifs de sa décision, à la société de gestion et à l'intéressé, ou au représentant de celui-ci.
>
> (Je souligne.)

62 CBC's argument is that the power to "fix the royalties and their related terms and conditions" does not include the power to decide if the parties will enter into a licensing agreement at all. If the parties do not agree that they wish to enter into a licence agreement, there is no agreement with respect to which the Board may fix the royalties and the terms and conditions. Thus, if "CBC does not want a blanket synchronization licence, the Board has no jurisdiction to impose it": Broadcasters' Memorandum of Fact and Law, at paragraph 18.

63 SODRAC points out that CBC has the right to refrain from using music in the SODRAC repertoire, in which case the question of the form of licence simply does not arise. However, where CBC chooses to use the SODRAC repertoire in its productions, it requires a licence. If it is not able to agree on the terms of that licence with SODRAC, then the latter is entitled to apply pursuant to section 70.2 of the Act to have the Board set the royalties and the terms and conditions which apply to them, including the basis upon which those royalties are calculated.

64 In its submissions before the Board, CBC seems to have conceded that the Board could impose a blanket licence. At paragraph 119 of its Decision, the Board summarizes one of the options put forward by CBC's experts with respect to a blanket through-to-the-viewer licence for CBC. Later on, at paragraph 132, the same experts propose a discount to the royalty payable pursuant to the proposal for a blanket licence favoured by the Board.

65 Finally, CBC's own submissions to the Board appear to have accepted that the Board could impose a blanket licence:

> 12.1 The Board should issue a blanket license covering all television production and broadcasting activities of SRC/CBC.
>
> Joint Application Record, Vol. 1 Tab 1

66 CBC's response to these facts is to say that the Board could impose a blanket licence with its consent but not without it.

67 If that is so, then the Board's remedial jurisdiction under section 70.2 is dependent upon the consent of one of the parties to the statutory arbitration. On its face, such a proposition is at odds with the objective of section 70.2, which is to resolve disputes that the parties have been unable to resolve themselves. In this case, CBC, having failed to agree with SODRAC on the terms of a licence, claims the right to decide that in the future, it will proceed by agreement with SODRAC.

68 CBC claims that its position is supported by a decision of this Court, *CTV Television Network Ltd. v. Canada (Copyright Board)*, [1990] 3 F.C. 489 (Fed. T.D.). In that case, the issue was whether CTV, as a network, was liable to pay royalties with respect to communication of a work to the public by telecommunication. That issue had been determined against the Copyright Board and the collective societies involved in *Composers, Authors & Publishers Assn. of Canada Ltd. v. CTV Television Network*, [1968] S.C.R. 676 (S.C.C.) (*Capac*) but, following amendments to the Act, the Board proposed, once again, to consider a tariff payable by the network. The Federal Court agreed with CTV that the amendments had not had the effect proposed by the Board. In the course of its reasoning, the Court said that the Board's only function was to fix the royalties that the collective societies could charge. On appeal, the Federal Court's decision was upheld though this Court took a broader view of the Board's jurisdiction. It quoted the following passage from

308 *Bell Canada v. Canadian Radio-Television & Telecommunications Commission*, [1989] 1 S.C.R. 1722 (S.C.C.), at page 1756:

> The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.

69 In my view, this statement remains good law. As a result, *Composers, Authors & Publishers Assn. of Canada Ltd.* is of no assistance to CBC. Its argument on this issue fails.

70 That said, the issue of the discount formula may go some way to meeting some of CBC's objections to a blanket license. The discount formula is a formula designed to give the Broadcasters credit when they broadcast a program in which the producer has in fact obtained a through to the viewer licence from SODRAC.

71 Before dealing with the specifics of the operation of the discount formula, it may be useful to review the context. At paragraph 62 of its Decision, quoted at paragraph 19 of these reasons, the Board held that liability for royalties exists only to the extent that the "envisaged use" requires a licence. The corollary of this proposition is that, to the extent that a licence has been obtained by others for the benefit of a broadcaster, no royalties are payable.

72 A second factor to be taken into account is that the formula for royalties payable in a given month reflects the fact that music from the SODRAC repertoire is only a fraction of the total music used by a broadcaster in any given month. As a result, in calculating the royalty rate for SODRAC, the Board allowed a "repertoire adjustment". Thus at paragraph 93 of its decision, the Board identified the portion of a broadcasting service's offerings which were drawn from the SODRAC repertoire. By way of example only, it found that music from the SODRAC repertoire was 46.33% of the music used on CBC television. To obtain the net royalty rate, the Board multiplied the base royalty rate by the repertoire adjustment. For CBC television, the base royalty rate of 31.25% was reduced by 46.33% to yield a net royalty rate of 14.78%: see paragraph 110 of the Decision.

73 As for the formula itself, SODRAC points out in its Memorandum of Fact and Law that the Board proposed the discount formula to the parties in pre-hearing mediation. When it introduced the discount formula the Board explained it as follows:

> Nouvelle disposition dont je suis maintenant autorisé à vous faire part. L'intention est de permettre à la SRC [Société Radio Canada] (et à Astral) de ne payer aucune redevance pour les reproductions incidentes de diffusion (broadcast incidental copies) si le producteur de l'émission a effectivement obtenu une licence « through to the viewer ».

> New provision which I am now authorized to share with you. The intention is to allow SRC [Société Radio Canada] (and Astral) to not pay any royalties for broadcast incidental copies if he producer of the program has in fact obtained a "through to the viewer" licence.
>
> Application Record, Vol. 23 Tab 14 Article 6.03, Footnote 10

74 It bears repeating that the royalties payable to SODRAC are only payable for the use of music in the SODRAC repertoire. Taking the Board at its word, if all the programs using music from the SODRAC repertoire in a given month were cleared through to the viewer, then the formula should result in a discount equal to the total royalties otherwise payable for that month.

75 The Board expressed the formula in terms of a discount per program. The formula itself is as follows:

> Discount per program = A × B / C

Where

> A = the monthly rate applicable to the service that broadcasts the relevant program,
>
> B = the program's production cost, in the case of a CBC program, and the program's acquisition cost, in the case of another program, and
>
> C = the total production and acquisition costs for the programs broadcast by the service during the month.

76 While the formula is calculated on a program basis and the royalties are calculated on a monthly basis, the monthly discount is necessarily the sum of all the individual program discounts for a given month. So, if the relevant costs for all SODRAC material "cleared to the viewer" broadcast in a month are aggregated under item B, the formula will yield the monthly discount.

77 In a given month, the royalty payable by a broadcaster is the net royalty rate less the total of the discounts for programs containing music from the SODRAC repertoire that have been cleared to the viewer. If the formula is properly constructed, in a month where all the music used from the SODRAC repertoire was cleared to the viewer, the discount should equal the net royalty rate so that, in that month, no royalties would be due. In order for the discount to equal the net royalty rate (item A in the formula), the fraction B/C must equal 1.

78 However, we know from the repertoire adjustment that music from the SODRAC repertoire is only 46.33% of all music broadcast by CBC television. As a result, item C in the formula, the total production and acquisition costs for the programs broadcast by the service during the month, will always be larger than item B since item the latter (music from the SODRAC repertoire) represents only 46.33% of the music broadcast in a month and presumably roughly the same proportion of the

310 total production and acquisition costs of all programs in a month. So, in a case where all music from the SODRAC repertoire broadcast in a month had been cleared to the viewer, the total discount for that month would be in the order of 46%, such that a royalty of 54% would be payable in a month in which all rights had already been cleared to the viewer.

79 Such a result is contrary to law, in the sense that royalties are not payable where the rights to use the music have already been cleared. The Board recognized this when it proposed the formula as a means of allowing the broadcaster an exemption for cleared to the viewer programs. In my view, the Broadcasters are correct when they say that the formula is flawed and needs to be corrected.

80 In order for the discount formula to work as intended, C must represent the production or acquisition cost of all music from the SODRAC repertoire that has been broadcast in the reference month. Where all of that music has been cleared to the viewer, then B/C will equal 1. In a case where some of the music has been cleared to the viewer and some has not, this amendment to the formula will reduce the royalties payable in proportion to the extent to which music has been cleared to the viewer.

81 This discussion is no doubt difficult to follow in the abstract. As a result, I have included an example demonstrating both the flaw in the formula as drafted by the Board, and the effect of the amendment to the formula that I propose, in an appendix to these reasons.

82 In the end result, I would allow the applications in part to allow for the amendment of the discount formula.

3- The Board failed to consider a relevant factor when it refused to take into account the CBC's ability to pay when fixing licence fees that were substantially more than those which CBC has paid historically.

83 CBC bases this argument on a heading at p. 50 of the Board's decision: Summary of the Rates to be Certified, Estimated Royalties and *Ability to Pay* (my emphasis). CBC points out, correctly, that nowhere in the two paragraphs that make up this portion of the Board's decision is the subject of ability to pay discussed. Furthermore, CBC says that the Board committed a reviewable error in ordering a four-fold increase in royalties payable at a time when, according to the evidence, CBC's revenues have diminished drastically.

84 This argument can be disposed of summarily. CBC is a publicly funded broadcaster whose basic allocation is voted by Parliament. If the CBC is not properly funded, as its submissions suggest, it is not the role of the artists whose works it uses in its broadcasts and productions to make up the shortfall by accepting less than the economic value of their rights under the Act. The Board's role as economic regulator does not extend to protecting CBC from the cost consequences of the programming choices it makes. This argument fails as well.

85 This disposes of the matters raised by the Broadcasters in files no. A-516-12 and A-527-12. The terms of the judgment to be issued pursuant to these reasons will be dealt with below. I now turn to the subject matter of file no A-63-12.

The application for judicial review of the interim licence issued on January 16, 2013

86 The licences issued by the Board following its November 2, 2012 Decision expired on March 31, 2012 (CBC) and August 31, 2012 (Astral). However, in 2009, the Board made an interim order continuing the then existing licences in place until it rendered its decision with respect to the 2008-2012 period. Those interim orders were of no further effect as of November 2, 2012 when the Board issued its Decision and the concomitant licences. This left a legal vacuum as the 2009 interim licences were at an end and the new licences had already expired.

87 In order to fill this legal vacuum, on January 16, 2013, the Board ordered that the licences for the 2008-2012 periods would continue in effect from the date of their expiry until the Board rendered a final decision with respect to the section 70.2 application made by SODRAC for the 2012-2016 periods. The Board's interim decision and the licences issued as a result are the subject of the third application for judicial review by CBC.

88 In its January 16, 2013 reasons (available online at http://www.cb-cda.gc.ca/decisions/2013/sodrac-16012013.pdf), the Board canvassed the factors that were relevant to the making of an interim order. It noted that an interim decision was intended to avoid the negative consequences resulting from lengthy proceedings and avoided the creation of a legal vacuum. It disagreed with CBC's argument that the 2008-2012 licence did not represent the *status quo* given its significant differences from the parties' prior pattern of dealings. The Board found that the *status quo* represented the state of the relationship between the parties at a given time, regardless of how long that state of affairs had been in place. Once the Board made the order with respect to the 2008-2012 period, the terms of that order became the new *status quo*.

89 CBC also argued that legislative changes and the Supreme Court's recent jurisprudence had or would significantly change the landscape between it and SODRAC. The Board held that the positions put forward by CBC on these issues (the effect of the Supreme Court's decision in *Public Performance of Musical Works, Re*, 2012 SCC 36, [2012] 2 S.C.R. 326 (S.C.C.) and the effect of the amendment to the Act, particularly section 30.9) were hardly non-contentious. The Board was of the view that these matters were more appropriately dealt with in the course of a full hearing rather than on an interim basis.

90 However, the Board was conscious of the fact that the parties might well choose to organize their affairs differently following the issuance of the 2008-2012 licence. It was of the view that any interim licence should facilitate that process without pre-empting it. As a result, it held that the blanket synchronization licence which it imposed, over CBC's objections, for the 2008-2012

period should be discounted by 20% during the interim period so as to facilitate the migration to a new way of doing business, if the parties were motivated to do so.

91 Before us, CBC made the same arguments as it had before the Board. It stressed that the *status quo*, in fact, was the state of affairs that was in place prior to the issuance of the 2008-2012 licence, particularly since the execution of that licence was stayed pending the outcome of these proceedings. It also pointed to the effect that it says the newly added section 30.9 of the Act will have on the question of incidental licences. That section provides an exemption in favour of broadcast undertakings reproducing a protected work solely for the purpose of their broadcasting, subject to certain conditions.

92 Finally, CBC questions whether SODRAC would be in a position to repay any amounts paid to it pursuant to the interim licence if it is successful in its challenge to the latter.

93 I agree with the Board that once it settled the terms of the 2008-2012 licence, it became the *status quo* between the parties, notwithstanding the stay of execution of that licence. Given that I propose to uphold the 2008-2012 licence with one small change, I can see no reason not to treat that order as the *status quo*. As for the changes in the way the parties do business in the future, in light of the 2008-2012 licence, legislative amendments and developments in the jurisprudence, this is a matter best considered by the Board in the hearings on the merits for the 2012-2016 licence which, as I understand it, were to begin within days of the hearing of this appeal.

94 As a result, I would dismiss the application for judicial review in file no. A-63-13.

Conclusion

95 For the reasons set out above, I would allow the applications for judicial review in part in files no. A-517-12, A-527-12 and A-63-12, but only for the purpose of amending the discount formula. I would amend the formula by defining element C of the formula where it appears at subsection 5.03 (2) of the CBC licence and subsection 6.03(2) of the Astral licence so that it reads as follows:

> (C) represents the total production and acquisition costs for all programs containing music from the SODRAC repertoire Broadcast by the service during the month.

96 The stays of execution of the licences issued by the Board on November 2, 2012 and January 16, 2013 are hereby dissolved.

97 SODRAC is entitled to one set of costs for all applications. However, in light of the Broadcasters' partial success, the amount of the costs, otherwise determined, will be reduced by 10 per cent.

***Marc Noël J.A.*:**

I agree

***Johanne Trudel J.A.*:**

I agree

Application granted in part.

Appendix

For the purposes of this example, I assume the following facts:

CBC television's repertoire adjusted royalty rate is 14.78 per cent of the royalty base (the amount of which royalties are calculated): paragraph 110 of the Decision.

The average amount of music from the SODRAC repertoire broadcast by CBC in a month is 46 per cent: paragraph 93 of the Decision.

The total production costs and acquisition costs of programs containing music from the SODRAC repertoire in the reference month is $100,000.

The total production costs and acquisition costs of all programs broadcast in the reference month is $210,000

The acquisition/ production costs of all programs containing music from the SODRAC repertoire in the reference month is as follows:

Program 1	-	$15,000
Program 2	-	$25,000
Program 3	-	$14,000
Program 4	-	$16,000
Program 5	-	$30,000
		$100,000

Assuming that rights to Program 1 have been cleared to the viewer, the royalties payable by the broadcaster for that month would be calculated on the basis of the discount formula A × B/C, where

A = the royalty rate otherwise payable,

B = the acquisition/production cost of the cleared program, and

C = the total acquisition/production cost of programs broadcast in the reference month.

Therefore

314

A = 14.78% B = $15,000 C = $210,000

Discount Program 1 = 14.78% × $15,000/$210,000 =14.78% × .071= 1.03%

Therefore, the royalties payable by the broadcaster in the reference month would be

14.78% - 1.03% = 13.75% × the royalty base

The discount for each of the other programs, in the event that the producer has cleared the rights to the viewer, applying the same formula, would be:

Program 2 = 1.77%

Program 3 = 0.88%

Program 4 = 1.12%

Program 5 = 2.11%

If all five programs had been cleared to the viewer, the total discount, as per the formula would be:

1.03% + 1.76% + .98% + 1.12% + 2.11% = 7%

The result would be the same if the acquisition/production costs were aggregated for the month, as shown below:

14.78 × $100 000/$210 000 = 14.78 × .476 = 7%

As a result, in a case where all programs containing music from the SODRAC repertoire had been cleared to the viewer, the discount formula established by the Board would result in the broadcaster paying royalties of:

14.78% - 7% = 7.78% of the royalty base

in a month in which there was no liability to pay royalties. This is contrary to law and to the Board's own stated objectives.

This can be remedied by defining C in the formula as the total acquisition/production cost of all programs containing music from the SODRAC repertoire broadcast in the reference month.

Using this formula, if the rights for the music from the SODRAC repertoire had been cleared to the viewer, the discount for Program 1 would be

A=14.78% B=$15,000 C=$100,00\

Discount Program 1 = 14.78% × $15,000/$100,000 = 14.78 × .15 = 2.22%

Royalties payable in reference month = 14.78% - 2.22% = 12.56%

If all programs broadcast in the month had been cleared to the viewer, the discount would be

A=14.78% B=$100,000 C=$100,000

Discount = 14.78% × $100,000/$100,000 = 14.78% × 1 = 14.78%

Royalties payable: 14.78% - 14.78% = 0 × royalty base = $0

This is the result intended by the Board.

2001 FCA 327
Federal Court of Canada — Appeal Division

Canadian National Railway v. Moffatt

2001 CarswellNat 2396, 2001 CarswellNat 3522, 2001 FCA 327, [2001] F.C.J. No. 1618, [2002] 2 F.C. 249, 109 A.C.W.S. (3d) 521, 207 D.L.R. (4th) 118, 278 N.R. 83

Canadian National Railway Company (Appellant) and Gordon Moffatt, Her Majesty in Right of the Province of Newfoundland and Labrador, Canadian Transportation Agency (Respondents) and Canadian Pacific Railway, The Atlantic Provinces Trucking Association (Interveners)

Richard C.J., Rothstein J.A. and Noël J.A.

Heard: September 24, 25, 2001
Judgment: October 31, 2001
Docket: A-613-99

Counsel: *Mr. Brian Crane*, *Mr. Ronald Lunau*, *Mr. Michel Huart*, for Appellant
Mr. Gary J. Corsano, for Respondent, Gordon Moffatt
Mr. Donald H. Burrage, for Respondent, Government for Newfoundland and Labrador
Mr. Ronald Ashley, for Respondent, Canadian Transportation Agency

Subject: Contracts; Torts; Constitutional; Public; Corporate and Commercial

***Rothstein J.A.*:**

INTRODUCTION

1 This is an appeal from Canadian Transportation Agency Decision 300-R-1999, dated June 2, 1999. Under Part IV of the *Canada Transportation Act*, S.C. 1996 c. 10 (CTA), where a shipper is dissatisfied with the rates proposed to be charged by a carrier for the movement of goods and the matter cannot be resolved between the shipper and the carrier, the shipper may submit the matter to the Canadian Transportation Agency (Agency) for final offer arbitration. On submission of a matter for final offer arbitration, the Agency is to refer the matter to the arbitrator chosen by the shipper and carrier or, if no arbitrator has been chosen by the parties, to an arbitrator chosen by the Agency. When this matter was submitted to the Agency for final offer arbitration, a constitutional question pertaining to the Terms of Union between Canada and Newfoundland was raised. It is the constitutional question that gives rise to this appeal.

FACTS

2 Agency Decision 300-R-1999 arose out of an August 26, 1997 submission by Gordon Moffatt for final offer arbitration of a freight rate dispute between him and the Canadian National Railway Company (CN). Mr. Moffatt wished to engage in the business of transporting goods in containers between Central Canada and Newfoundland.

3 In his submission for final offer arbitration, Mr. Moffatt stated what he thought were the highest rates CN could charge based upon the principles contained in Term 32(2) of the *Terms of Union of Newfoundland with Canada* (Schedule to the *Newfoundland Act*, (1949) (U.K.)). It appears these rates constituted Mr. Moffatt's final offer. (The actual rates are not before the Court and nothing turns on them.) Term 32(2) provides:

> 32(2) For the purpose of railway rate regulation the Island of Newfoundland will be included in the Maritime Region of Canada, and through-traffic moving between North Sydney and Port aux Basques will be treated as all-rail traffic.

I will return to Term 32(2) in the analysis portion of these reasons. At this point, it is sufficient to observe that, historically, Term 32(2) has been interpreted to require the extrapolation to points in Newfoundland, on a rail mileage basis, of rates applicable from Central Canada to the Maritime Provinces. Rates constructed on this basis were maximum rates; that is, CN could not charge rates to Newfoundland higher than those constructed according to Term 32(2).

4 Upon being served with Mr. Moffatt's submission to the Agency for final offer arbitration, CN wrote to the Agency by letter dated September 15, 1997, arguing that Moffatt's submission was not validly constituted and that the Agency was, therefore, not in a position to refer the matter to arbitration.

5 CN raised a number of objections, but the only ones dealt with in Agency Decision 300-R-1999 and that are the subject of this appeal, relate to Term 32(2) of the Terms of Union. CN objected to referral of the matter to arbitration on three grounds:

> 1. Term 32(2) had no further application after closure of the Newfoundland Railway in 1988;
>
> 2. There is no longer any relevant railway rate regulation to which Term 32(2) could apply;
>
> 3. CN is no longer a Crown corporation and there is no law binding on CN to implement Term 32(2) in its rate making with respect to movements to Newfoundland that include rail transportation.

6 In Decision 300-R-1999, the Agency rejected these objections and concluded that, as CN had offered "through" rates to Mr. Moffatt from the mainland of Canada to points in Newfoundland,

these rates fell within the purview of Term 32(2). Having come to that conclusion, the Agency then embarked upon a consideration of how rates should be developed to and from Newfoundland.

7 The Agency noted that the development of a Maritime rate structure was critical, since the extension of Newfoundland rates have historically been based on a mileage prorated extrapolation of rates found within an existing Maritime rate structure. However, the Agency acknowledged that identification of a Maritime rate structure had been difficult in recent years, as the majority of railway traffic now moves under rates contained in confidential contracts. Nonetheless, in the view of the Agency, as the Constitution requires Terms of Union rates, they must be developed "even if it means resorting to developing a 'best guess' figure" (at page 28 of Decision 300-R-1999).

8 The Agency concluded that Term 32(2) continued to apply to Mr. Moffatt's traffic and that CN had obligations under Term 32(2). While acknowledging that the development of a Maritime rate structure may be a difficult task for an arbitrator and that the arbitrator may not have expertise in rate matters, the Agency concluded that the arbitrator could use his own resources or ask for assistance from the Agency. It, therefore, submitted the matter for arbitration, assigning the task of developing a Maritime rate structure and Terms of Union rates to the arbitrator, reminding the arbitrator that the Terms of Union are mandatory and a paramount consideration in the arbitration.

ANALYSIS

9 The initial question to be addressed is whether, in the present circumstances, the Agency had the jurisdiction to conduct an inquiry into the application of Term 32(2) to the setting of freight rates to Newfoundland and to assign to the arbitrator the task of developing rates to Newfoundland according to Term 32(2). The Agency was of the view that it possessed such jurisdiction. The Agency referred to the test for jurisdiction set out in *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5 (S.C.C.) , that for a tribunal to address a constitutional issue, it "must already have jurisdiction over the whole of the matter before it, namely, the parties, subject matter and remedy sought". The Agency found it met the *Cuddy Chicks Ltd.* test. The Agency states, at page 16 of Decision 300-R-1999:

> In this case, the Agency finds that it meets the tests for jurisdiction set out by the Supreme Court of Canada in the Cuddy Chicks case. That is, the Agency has before it an application for statutory arbitration under Part IV of the CTA. Parliament has specifically mandated the Agency to receive such applications pursuant to section 161 of the CTA and refer them to an arbitrator, subject to any interlocutory objections that may arise. Thus, in terms of the tests established in Cuddy Chicks the Agency has jurisdiction over the subject matter. Further, there is no debate here that Mr. Moffatt is a shipper and that CN is a federal railway company; thus, the Agency has jurisdiction over the parties. Finally, the requested remedy here is referral of the matter (or in the case of CN's objection, the refusal to refer the matter) to an arbitrator. The remedy is, therefore, also in the Agency's specific mandate.

In my respectful opinion, the Agency erred in concluding that it had such jurisdiction.

10 I commence my analysis with the basic proposition that the Agency is a creature of statute and the powers it exercises must be found in statutory law, either expressly or by necessary implication: see *Duthie v. Grand Trunk Railway* (1905), 4 C.R.C. 304 (Bd. of Railway Commissioners). This principle is expressed by La Forest J. in *Cuddy Chicks Ltd.* , supra, with reference to subsection 52(1) of the *Constitution Act* not functioning as an independent source of an administrative tribunal's jurisdiction to address constitutional issues. At page 14, he stated:

> Rather, jurisdiction must have expressly or impliedly been conferred on the tribunal by its enabling statute or otherwise. This fundamental principle holds true regardless of the nature of the issue before the administrative body. Thus, a tribunal prepared to address a *Charter* issue must already have jurisdiction over the whole of the matter before it, namely, the parties, subject matter and remedy sought.

It is, therefore, necessary to consider whether jurisdiction has been conferred on the Agency by statute to conduct the inquiry into the application of Term 32(2), and to instruct the arbitrator to develop a Maritime rate structure and Terms of Union rates. There are three possible sources for such jurisdiction:

1. Part IV of the CTA under which the matter came before the Agency;

2. Other powers of the Agency under the CTA; and

3. Term 32(2) itself.

Part IV of the CTA

11 The matter came before the Agency under Part IV of the CTA, which is entitled "Final Offer Arbitration". The role of the Agency under Part IV is limited.

12 Under subsection 162(1), on the submission of a matter to the Agency for final offer arbitration, the Agency shall refer the matter for arbitration. (Section 161 and relevant statutory provisions not reproduced in the body of these reasons are set forth in Appendix A.) Under subsection 161(2), the submission shall contain the shipper's final offer and the railway company's last offer, an undertaking by the shipper to ship the goods in accordance with the decision of the arbitrator, an undertaking by the shipper to pay the shipper's portion of the arbitrator's fee, and the name of the arbitrator agreed upon between the shipper and carrier. Once the Agency determines that there has been compliance with subsection 161(2), the requirement to refer for arbitration is mandatory. The only exception appears to be in subsection 161(3), that the matter is not to be referred to arbitration if the shipper has not, at least five days before submission to the Agency,

served on the carrier a written notice indicating the shipper's intention to submit the matter to the Agency for final offer arbitration.

13 The only other duty assigned to the Agency is to choose the arbitrator if the parties have not already done so, or if the arbitrator selected by the parties is unavailable. Other than these three procedural functions, i.e. checking the contents of the submission, determining whether timely notice has been given to the railway company and, when necessary, choosing the arbitrator, Part IV does not provide for any other duties or functions by the Agency prior to referring the matter to the arbitrator.

14 The statutory history of final offer arbitration makes it quite clear that Parliament intended to restrict the Agency from involving itself in substantive matters preliminary to an arbitration. Final offer arbitration was introduced in the *National Transportation Act, 1987* S.C. 1987, c. 34 (NTA, 1987) in sections 47 to 57. Sections 47 to 57 are the predecessors to Part IV of the CTA. Part IV is similar in many respects to sections 47 to 57 but there are some significant changes indicating Parliament's intention in the CTA to restrict the Agency's role prior to referring a matter to arbitration.

15 One change is that unless the parties otherwise agree, the arbitrator's decision is to be rendered within 60 days after the date on which the submission for final offer arbitration is filed with the Agency by the shipper (CTA paragraph 165(2)(b)). This compares to ninety days under the NTA, 1987 (NTA, 1987 paragraph 52(2)(b)).

16 This is a strong indicator that Parliament intended that the Agency refer the matter to the arbitrator without becoming involved in a preliminary regulatory proceeding. There is virtually no time for the Agency to deal with substantive matters if the parties are to exchange information, request and answer interrogatories, make submissions to the arbitrator and if the arbitrator is to be given a reasonable amount of time to consider the submissions and evidence and to make a decision.

17 Most significantly, under paragraph 48(3)(b) of the NTA, 1987, the Agency (under that legislation, the National Transportation Agency) was not to cause any matter submitted to it by a shipper to be arbitrated if the Agency was of the view that the matter raised issues of general public interest, that interests other than those of the shipper and carrier may be materially prejudiced by the matter submitted, and that the matter should be investigated under section 59 of that Act. Paragraph 48(3)(b) provided:

48(3) The Agency shall not cause any matter submitted to it by a shipper under subsection (1) to be arbitrated if (a) [...] (b) the Agency has, within 10 days after receipt of the submission, advised the	48(3) L'arbitrage prévu au paragraphe (1) est exclu dans les cas suivants: a) [...] b) l'Office a, dans les dix jours suivant réception de la demande, avisé par écrit l'expéditeur qu'il estime que la question

shipper in writing that the Agency is of the opinion that

(i) the matter raises issues of general public interest and that interests other than those of the shipper and carrier concerned may be materially prejudiced by the matter submitted, and
(ii) the matter should be investigated by the Agency pursuant to section 59.

soulevée est d'intérêt public général et que la tenue de l'arbitrage serait notablement préjudiciable aux intérêts autres que ceux du transporteur et de l'expéditeur en cause, et qu'il est d'avis qu'il y aurait lieu de procéder par voie d'enquête en application de l'article 59.

18 Section 59 of the NTA, 1987 was a provision under which the Agency could conduct an investigation into whether rates charged by a carrier were prejudicial to the public interest. Under the CTA, there is no provision similar to paragraph 48(3)(b) of the NTA, 1987. Nor is there a public interest rate investigation provision similar to section 59 of the NTA, 1987.

19 Clearly, the role of the Agency, when a matter was submitted to it for final offer arbitration, was broader under the NTA, 1987 than it currently is under the CTA. Under the NTA, 1987, the Agency was obliged to consider whether a final offer arbitration raised public interest issues and issues that affected others than the shipper and carrier involved. There is no such role for the Agency under the CTA.

20 Nevertheless, the Agency found that "Parliament has specifically mandated the Agency to receive such applications pursuant to section 161 of the CTA and refer them to an arbitrator, subject to any interlocutory objections that may arise" (at page 16 of Decision 300-R-1999). I see nothing in section 161 or elsewhere in Part IV that mandates the Agency to deal with "interlocutory objections that may arise". With respect, I think the Agency has read words into section 161 that do not appear, in order to justify its assumption of jurisdiction in this case. It goes without saying that the Agency must take the statute as it finds it.

21 Further, it was incorrect for the Agency to have found, at page 16 of Decision 300-R-1999, that it had jurisdiction over the subject matter and remedy in this case. As in *Cuddy Chicks Ltd.* , *supra*, where La Forest J. held that the subject matter in that case could not be characterized simply as an application for certification, in this case, the subject matter cannot be characterized simply as an application for final offer arbitration. The issue raised before the Agency by CN was whether the submission for final offer arbitration was properly before it and the remedy sought was not to refer the matter for arbitration. There is nothing in Part IV of the CTA that confers on the Agency jurisdiction to decide, on any substantive basis, whether a submission for final offer arbitration is properly before it. Nor is there authority for the Agency not to refer the matter for arbitration if

it meets the procedural requirements of Part IV. Thus, insofar as Part IV is concerned, the subject matter and remedy were not within the jurisdiction of the Agency.

22 Finally, the Agency argued that it has the expertise in such a matter and that it was necessary for it to have dealt with CN's objection relative to the Terms of Union as a preliminary matter. I acknowledge that the Agency does have expertise dealing with subsection 32(2) of the Terms of Union, that the matter was raised by Mr. Moffatt and that CN requested the Agency to deal with it as a preliminary matter (even though, before this Court, CN's position was that the Agency did not have such jurisdiction). However, jurisdiction cannot be conferred by agreement and expertise, on its own, is not a basis for a tribunal assuming a jurisdiction not conferred upon it by statute.

23 On the facts of this case, nothing in Part IV of the CTA authorizes the Agency to have conducted the inquiry it undertook regarding the Terms of Union and to have issued instructions to the arbitrator to develop a Maritime rate structure and Terms of Union rates. For these reasons, the test for jurisdiction in *Cuddy Chicks Ltd.* , supra, in respect of Part IV was not met.

Other Provisions of the CTA

24 Are there provisions of the CTA outside Part IV that confer jurisdiction on the Agency to conduct a Term 32(2) inquiry and issue instructions to the arbitrator? This Court has had the occasion to address the extent of the Agency's jurisdiction in the wider context of the CTA as a whole, in *Canadian National Railway v. Brocklehurst* (2000), [2001] 2 F.C. 141 (Fed. C.A.). In that case, as in this, the Agency relied on sections 26 and 37 of the CTA. They provide:

26. The Agency may require a person to do or refrain from doing any thing that the person is or may be required to do or is prohibited from doing under any Act of Parliament that is administered in whole or in part by the Agency.	26. L'Office peut ordonner à quiconque d'accomplir un acte ou de s'en abstenir lorsque l'accomplissement ou l'abstention sont prévus par une loi fédérale qu'il est chargé d'appliquer en tout ou en partie.
37. The Agency may inquire into, hear and determine a complaint concerning any act, matter or thing prohibited, sanctioned or required to be done under any Act of Parliament that is administered in whole or in part by the Agency.	37. L'Office peut enquêter sur une plainte, l'entendre et en décider lorsqu'elle porte sur une question relevant d'une loi fédérale qu'il est chargé d'appliquer en tout ou en partie.

The analysis undertaken by Décary J.A. in paragraphs 6 to 9 and 13 to 17 of *Brocklehurst* , supra, is applicable to this case. Specifically, at paragraphs 13 and 14, Décary J.A. stated:

> [13] The Agency interprets sections 26 and 37 to mean that once the Agency administers part of an Act of Parliament, it is deemed to be administering the whole of the Act and is therefore the appropriate authority unless the Act expressly says otherwise. I do not agree with that interpretation. The two sections, in my view, give jurisdiction to the Agency either with

> respect to the whole of a statute should the Agency be generally mandated by the statute to administer it, or with respect to parts of a statute should the Agency be specifically mandated by the statute to administer parts only of the statute.
>
> [14] The 1996 Act contains no provision conferring upon the Agency the power, duty or function of administering the whole Act. It is indeed noteworthy that neither section 26 nor section 37 refer expressly to the very statute in which they are found. The statute, however, contains numerous provisions that confer upon the Agency jurisdiction with respect to the administration of specific parts of the Act. Unless section 95 is one such provision, the Agency has no jurisdiction with respect to that section.

25 As Décary J.A. found, there is no provision in the CTA conferring upon the Agency the power, duty or function of administering the whole CTA. Unless there is specific jurisdiction in the CTA to conduct a Term 32(2) inquiry upon submission of an application for final offer arbitration, there is no such jurisdiction. As I have already determined, Part IV does not confer such jurisdiction on the Agency. Nor does any other provision of the CTA confer a general jurisdiction on the Agency to deal with Term 32(2).

26 The only other provision referred to by the Agency was section 5 of the CTA, the declaration of the National Transportation Policy. Section 5 declares that as part of the National Transportation Policy, the objective of carriers being able to compete must have "due regard [...] to legal and constitutional requirements". The Agency submitted that section 5 confers on it jurisdiction to deal with Term 32(2) as a constitutional requirement.

27 However, section 5 is not a jurisdiction conferring provision. While not minimizing its importance, I believe that section 5 is a declaratory provision which states the objectives of Canada's National Transportation Policy. Those objectives are implemented by the regulatory provisions of the CTA and, in the currently largely deregulated environment, by the absence of regulatory provisions. Section 5 does not, itself, confer on the Agency the jurisdiction it assumed in this case. If it were construed to do so, then presumably any legal question could also be brought before the Agency for determination. Obviously section 5 was not intended to confer on the Agency jurisdiction over all disputes of any sort affecting carriers, simply because they involve legal or constitutional questions. Of course, the Constitution must be respected. But section 5 does not give the Agency plenary power to address any constitutional question that is raised before it where there is no specific statutory authority for it to conduct such an inquiry. This is the point made by La Forest J. in *Cuddy Chicks Ltd.* , supra, in relation to subsection 52(1) of the *Constitution Act* and it is equally applicable to section 5 of the CTA. Indeed, unlike prior legislation, the CTA does not mention Term 32(2) and there is no general jurisdiction in the Agency to regulate freight rates as there was in such prior legislation.

28 In *Cuddy Chicks Ltd.* , supra, the Ontario *Labour Relations Act* stipulated that the Labour Board had exclusive jurisdiction "to determine all questions of fact or law that arise in any matter

before it [...]". The Act conferred on the Board the power to determine questions of law and fact relating to its own jurisdiction and specifically to decide if a matter is arbitrable. Such provisions are noticeably absent in the CTA and that is not surprising, given the highly regulated nature of labour relations and the relatively deregulated nature of transportation. The CTA does not, expressly or by necessary implication, confer jurisdiction on the Agency to regulate freight rates to Newfoundland or to deal with Term 32(2).

Term 32(2)

29 The only other possible source of Agency jurisdiction is Term 32(2) itself. Term 32(2) does not mention the Agency or its predecessor tribunals. It does not, therefore, expressly confer jurisdiction on the Agency to regulate railway rates generally or rates to and from Newfoundland specifically.

30 Could it be construed, however, that railway rate regulation by the Agency is necessarily implied? In other words, could it be said that Term 32(2) requires rate regulation, that such rate regulation necessarily implies that there be a regulator and that the regulator be the Agency? I think not. In my opinion, Term 32(2) does not, of itself, require rate regulation. The words" For the purpose of railway rate regulation" presume the existence of rate regulation that is relevant to the balance of the Term, but they do not mandate that Parliament enact or maintain such regulation. The railway rate regulation to which the words "For the purpose of railway rate regulation" refer, was always found in the *Railway Act*, the *National Transportation Act* or the *National Transportation Act, 1987*. For Term 32(2) to apply, there must exist some relevant railway rate regulation in legislation administered by the Agency.

31 Relevant rate regulation is railway rate regulation that has some relevance to the regulation of railway rates to Newfoundland. Specifically, it must be regulation that gives some meaning to Newfoundland being included in the Maritime Region of Canada and "through-traffic" between North Sydney and Port Aux Basques being treated as "all-rail traffic".

32 The nature of railway rate regulation contemplated by Term 32(2) was a power in an administrative tribunal, the Board of Transport Commissioners at the time, to identify a rate structure applicable to the Maritime Region of Canada so that rates could then be extrapolated on a rail mileage basis to points in Newfoundland, treating the water movement from North Sydney to Port Aux Basques as a rail movement and ignoring dissimilar circumstances between Newfoundland and the Maritime Provinces. The history of railway rate regulation and statutory provisions relating to Term 32(2) since its enactment in 1949 supports this view and demonstrates that such railway rate regulation no longer exists in the current deregulated environment.

33 This history, up to 1987, has been well documented in the jurisprudence of the Board of Transport Commissioners and the Canadian Transport Commission, particularly in *Newfoundland*

(Attorney General) v. Atlantic Container Express, [1987] C.T.C.R. 28 (Can. Transport Comm.) (ACE, 1987).

_The Railway Act_in effect in 1949

34 When Newfoundland became a province in 1949, railway rate regulation was pervasive. Railway rates had to be published in tariffs that were public. Railway rates for traffic under substantially similar circumstances and conditions had to be charged equally to all shippers (*Railway Act*, R.S.C. 1927, s. 314).

35 Unjust discrimination and undue preference were the terms applied when the principle of equal treatment of shippers in substantially similar circumstances was departed from by a railway company.

36 Under the *Railway Act* at the time, the Board of Transport Commissioners had the power to disallow tariffs of rates that were unjust or unreasonable and to require the railway company to substitute a tariff satisfactory to the Board (section 325).

37 Railway rates setting, therefore, had to take into account the necessity to treat shippers equally in each region of Canada, the Maritimes being one such region. And indeed, there was a rate structure applicable to the Maritime Region from Central Canada and within the Maritime Region itself (see ACE, 1987 at pages 60-61).

38 The concern of Newfoundland at the time of Confederation was that its circumstances were not similar to those of the Maritime Provinces. The movement from North Sydney to Port Aux Basques was a water movement. The railway on the island of Newfoundland was narrow gauge and traversed rough terrain. Under railway rate regulation at the time, it could not be said that a higher level of rates to Newfoundland than pertained to the Maritime Provinces would be unjustly discriminatory. Indeed, CN had imposed a surcharge for extra handling involved in transferring traffic at Port Aux Basques and also additional charges because the capacity of freight cars used in Newfoundland were smaller than the capacity of freight cars used on standard gauge railway lines.

39 The Province of Newfoundland brought an application to the Board of Transport Commissioners asking the Board to order CN to cancel the tariffs it had in effect and to substitute tariffs of rates based on the rate structure in effect into and within the Maritime Provinces. In *Newfoundland (Attorney General) v. C.N.R.* (1950), 64 C.R.T.C. 352 (Bd. of Transport Commissioners), the Board of Transport Commissioners held that railway companies had the right to discriminate in rates because of dissimilarity in circumstances and that Term 32(2) did not lay down a different rule for Newfoundland (at page 353).

40 Newfoundland then asked the Board to reconsider its decision. In *Newfoundland (Attorney General) v. C.N.R.* (1951), 67 C.R.T.C. 353 (Bd. of Transport Commissioners), Wardrope A.C.C.,

in reversing the Board's prior decision, interpreted the opening words of subsection 32(2) in the following manner, at page 357:

> In my opinion they must mean then that notwithstanding certain dissimilar, disadvantageous circumstances and conditions pertaining to Newfoundland, this province is to be included ratewise in the Maritime region on a general level of rates similar to the other Maritime Provinces [...]
>
> I further believe that in the absence of car ferries, the treating of traffic between North Sydney and Port aux Basques as rail traffic, apart from other purposes, is to provide an extension of a reasonable and comparable mainland rate from North Sydney to Port aux Basques.

41 Term 32(2) then, as a constitutional provision or "Special Act" as it was termed at the time in the *Railway Act*, took precedence over railway rate regulation under the *Railway Act*. It was intended to give to Newfoundland something to which it was not otherwise entitled under railway rate regulation pursuant to the *Railway Act*. It required the setting of freight rates to Newfoundland on a non-discriminatory basis, notwithstanding dissimilar circumstances between the Maritimes and Newfoundland. This required the extrapolation of rates to Newfoundland on a rail mileage basis, based upon the structure of rates applicable from Central Canada to the Maritimes and within the Maritimes. By reason of the pervasive nature of railway rate regulation and the extensive power of the Board as regulator under the *Railway Act*, there is no question the Board had the authority to require CN, in accordance with Term 32(2), to treat Newfoundland as a rail extension of the Maritime Provinces and to require CN to charge rates based on rates applicable to and within the Maritime Provinces, extrapolated on a rail mileage basis to points in Newfoundland.

NTA of 1967

42 That pervasive rail rate regulation remained until the *National Transportation Act* (NTA) was enacted in 1967 by S.C. 1966-67, c. 69. The NTA of 1967 reduced the regulation of railways and railway rates under the *Railway Act* significantly. The pervasive regulatory powers of the Board of Transport Commissioners over railway rates were replaced by amendments to the *Railway Act* which granted to the railway companies the power, subject to specific and limited exceptions to be administered by the Canadian Transport Commission (which replaced the Board), to fix rates unencumbered by legislative or regulatory restrictions.

43 One exception was Term 32 of the Terms of Union. Subsection 326(6) of the *Railway Act*, enacted by S.C. 1966-67, c. 69, s. 49, and renumbered subsection 269(6) pursuant to R.S.C. 1970, c. R-2, provided:

269(6) Notwithstanding section 3, the power given by this Act to the company to fix, prepare and issue tariffs, tolls and rates, and to change and alter the same, is not limited or in any manner affected by any	269(6) Nonobstant les dispositions de l'article 3, le pouvoir que la présente loi attribue à la compagnie de fixer, préparer et émettre des tarifs, taxes et taux, et de les changer et les modifier, n'est pas

Act of the Parliament of Canada or by any agreement made or entered into pursuant thereto, whether general in application or special and relating only to any specific railway or railways, except the *Maritime Freight Rates Act*, Term 32 of the *Terms of Union of Newfoundland with Canada*, and Part IV of the *Transport Act*.

limité ni d'aucune façon atteint par une loi quelconque du Parlement du Canada, ni par un traité conclu ou passé en conformité d'une telle loi, qu'elle soit générale ou spéciale dans son application et qu'elle ait trait à un seul ou à plusieurs chemins de fer particuliers, à l'exception de la *Loi sur les taux de transport des marchandises dans les Provinces maritimes*, de la clause 32 des *Conditions de l'Union de Terre-Neuve au Canada*, et de la Partie IV de la *Loi sur les transports.*

In ACE, 1987, at page 57, referring to subsection 269(6), the Review Committee of the Canadian Transport Commission concluded:

> We therefore conclude that subsection 269(6) of the *Railway Act* limits the powers of the railway in constructing rates to, from and within Newfoundland by making these powers subject to the rights guaranteed to Newfoundland in the Terms of Union. Hence, in constructing these rates, the railway must ensure that Newfoundland is accorded rates in compliance with the Terms of Union. [...]

44 Under the NTA, railway rates were public and had to be filed with the Commission. It appears there still existed a Maritime rate structure. Accordingly, the Review Committee ordered CN to review its rates and file new rates in compliance with the Terms of Union. At page 68, it concluded:

> To this end, we are directing CN to begin an immediate review of all its rates to, from and within Newfoundland to satisfy itself that each and every rate meets the criteria outlined in this decision and to inform the Committee when this review has been completed. Where rates are found to be too high and thereby out of line with similar mainland maritime rates adjusted for distance, or too low and thereby lower than similar mainland maritime rates adjusted for distance and lower than the compensatory level, CN is directed to file new rates no later than 90 days from the date of this decision.

It then provided that parties dissatisfied with the rates filed by CN could make application to the Commission under section 45 of the NTA:

> Should any of the parties or any other person be of the opinion that any rates in effect after that date do not comply with the *Railway Act*, they are free to refer the matter to the Commission pursuant to section 45 of the *National Transportation Act*.

45 Section 45 of the NTA gave the Canadian Transport Commission broad power to determine any application complaining that a railway company had failed to do anything required by the *Railway Act*, i.e. subsection 269(6), or the *Special Act* (Term 32(2)) and to order a railway company

to do forthwith anything that it was required to do under the *Railway Act* or *Special Act*. Section 45 provided in relevant part:

45(1) The Commission has full jurisdiction to inquire into, hear and determine any application by or on behalf of any party interested, (a) complaining that any company, or person, has failed to do any act, matter or thing required to be done by the *Railway Act*, or the Special Act [...] or that any company or person has done or is doing any act, matter or thing contrary to or in violation of the *Railway Act*, or the Special Act [...]	45(1) La Commission a pleine juridiction pour instruire, entrendre et juger toute requête présentée par une partie intéressée ou en son nom, a) se plaignant qu'une compagnie ou qu'une personne a omis de faire une action ou une chose qu'elle était tenue de faire par la *Loi sur les chemins de fer*, par la loi spéciale [...] ou qu'une compagnie ou une personne a fait ou fait une action ou une chose contrairement ou en contravention à la *Loi sur les chemins de fer* ou à la loi spéciale [...]
(2) The Commission may order and require any company or person to do forthwith, or at any specified time, and in any manner prescribed by the Commission, so far as it is not inconsistent with the *Railway Act*, any act, matter or thing that such company or person is or may be required to do under the *Railway Act*, or the Special Act [...]; and for the purposes of the *Railway Act* has full jurisdiction to hear and determine all matters whether of law or of fact.	(2) La Commission peut ordonner et prescrire à toute compagnie ou personne de faire immédiatement, ou dans tel délai ou à telle époque qu'elle fixe, et de telle manière qu'elle prescrit, en tant qu'il n'y a rien d'incompatible avec la *Loi sur les chemins de fer*, toute action ou chose que cette compagnie ou personne est, ou peut être, tenue de faire sous le régime de la *Loi sur les chemins de fer* ou de la loi spéciale; [...] et elle a, aux fins de la *Loi sur les chemins de fer*, plein juridiction pour entendre et juger toute question tant de droit que de fait.

Of significance is the breadth of the Commission's power to regulate railway companies under section 45 of the NTA, as contrasted with the currently limited powers of the Agency under sections 26 and 37 of the CTA. There is no question that, by reason of subsection 269(6) of the *Railway Act* and section 45 of the NTA, the Commission had the jurisdiction to order CN to file and charge rates in accordance with Term 32(2).

NTA, 1987

46 The next major legislative change affecting the regulation of railways in Canada came with the NTA, 1987. Subsection 269(6), under which the railway companies were free to fix rates subject to limited exceptions, was continued as section 111 of the NTA, 1987. Section 111 provided:

111. The powers given by this Division to a railway company with respect to tariffs, confidential contracts and agreed charges are not limited or in any manner affected by any Act of Parliament, other than this Act, or by any agreement made or entered into pursuant to any Act of Parliament other	111. Les pouvoirs, conférés par la présente section à une compagnie de chemin de fer, à l'égard des tarifs, des contrats confidentiels et des prix convenus ne sont pas limités ni touchés par une loi du Parlement, autre que la présente loi, ou par un accord conclu en application d'une loi du Parlement, autre

than this Act, whether general in application or special and relating only to any specific railway, except the *Atlantic Region Trade Assistance Act*, the *Maritime Freight Rates Act*, the *Western Grain Transportation Act*, Term 32 of the *Terms of Union of Newfoundland with Canada* set out in the schedule to the *Newfoundland Act* and section 272 of the *Railway Act*.

que la présente loi,d'application générale ou particulière à un chemin de fer, sauf la *Loi sur le taux de transport des marchandises dans les provinces Maritimes*, la *Loi sur le transport des marchandises dans la Région Atlantique*, la *Loi sur le transport du grain de l'Ouest*, la clause 32 des *Conditions de l'union de Terre-Neuve au Canada*, énoncée à l'annexe de la *Loi sur Terre-Neuve* et l'article 272 de la *Loi sur les chemins de fer*.

47 Under the NTA, 1987, railway rates continued to be published, although there was no requirement that they be filed with the National Transportation Agency. One exception to publication was the introduction of confidential contracts, in which the rate agreed between the railway company and shipper would not be public. However, such contracts had to be filed with the Agency. Thus, the Agency had access to information upon which it could determine rates in confidential contracts applicable from Central Canada to the Maritimes and within the Maritime Provinces as a basis for the extrapolation of rates to Newfoundland pursuant to Term 32(2). In Decision 266-R-1991, May 22, 1991 (ACE, 1991), the Agency found at page 17 that as a basis for constructing Term 32(2) rates, CN was required to determine a Maritime rate structure by including rates in confidential contracts with similar terms and conditions as those applicable to Newfoundland shippers.

48 However, the broad power of the prior Canadian Transport Commission under section 45 of the NTA to hear and determine complaints and make orders resulting from such determinations was vastly curtailed. The Agency's power under the NTA, 1987 was identical to its power under the CTA today. Sections 26 and 37 of the CTA are identical to subsections 35(4) and 35(1) of the NTA, 1987.

49 In ACE, 1991, the Agency's role with respect to section 111 was explained by the majority of the panel at page 13:

> Section 111 allows CN to set its rates as it sees fit subject only to various legal requirements including the Terms of Union. In the competitive environment established by the NTA, 1987, it is the responsibility of CN to establish rates and it is not within the mandate of the Agency except on a properly filed complaint within its jurisdiction, to interfere with that responsibility. The Agency, therefore, has no ongoing monitoring function to ensure that the Terms of Union rates are properly established.

50 Section 111 of the NTA, 1987 appeared in Part III, Railway Transportation Division 1, Rail Freight. That Part of the Act was regulatory in nature and placed regulatory obligations on railway companies. The Agency is referred to throughout the Part. Accordingly, the Agency had

the jurisdiction, at that time, to inquire into and determine the complaint made, namely that CN was not charging rates in accordance with the Terms of Union and require CN to charge rates in accordance with the Terms of Union.

CTA

51 Finally, we come to the CTA enacted in 1996. As indicated, the power of the Agency under sections 26 and 37 of the CTA remains the same as under subsections 35(4) and 35(1) of the NTA, 1987. However, section 111 of the NTA, 1987 has been repealed. In other words, there is no Term 32(2) limitation in the CTA on the power of a railway company to set freight rates.

52 Further, under the CTA, there is no longer a requirement for railway companies to file confidential contracts with the Agency. While freight rates in tariffs continue to be public, the evidence before the Agency in this case was that seventy-five to eighty percent of CN's domestic intermodal business to and from the Maritimes moves under confidential contracts and not rates in public tariffs (page 23 of Decision 300-R-1999). The Agency does not have access to such rates as there is no power in the Agency to call for such confidential contracts or information contained in such contracts. In repealing section 111 of the NTA, 1987, I think Parliament recognized the fact that the vast majority of rates are negotiated individually between shippers and railway companies, and there is no longer a requirement to charges rates equally to shippers under substantially similar conditions. The notion of a Maritime rate structure had become an anachronism and there was no basis upon which to establish a realistic Maritime rate structure from which could be extrapolated rates to Newfoundland.

53 In summary, initially it was the broad power of the Board of Transport Commissioners to enforce and require just and reasonable rates that was the rate regulation to which Term 32(2) referred. Subsequently, by the National Transportation Act of 1967, it was the combination of the Canadian Transport Commission's broad power to inquire into matters under its statutory administration and the Term 32(2) limitation on the power of railway companies to fix freight rates under section 269(6) of the *Railway Act*, that was the source of the Commission's jurisdiction to order CN to file freight rates that complied with the Terms of Union. Under the NTA, 1987, it was the existence of section 111 of that Act combined with the Commission's power under subsections 35(1) and 35(4) that was the source of the Agency's jurisdiction.

54 Under the CTA, there is no provision for the Agency to have access to the vast majority of rates governing railway freight traffic. Nor is there any regulatory basis for the Agency to require a railway company to maintain a Maritime rate structure. There is no Term 32(2) limitation on a railway company's power to fix freight rates. In the absence of such provisions, there is no railway rate regulation that engages Term 32(2).

55 In Decision 300-R-1999, the Agency, correctly in my view, found that there must be railway rate regulation in existence for Term 32(2) to be applied. The Agency stated at page 14:

> Contrary to the arguments of the Government of Newfoundland and Labrador and Mr. Moffatt, the Agency cannot ignore these words and conclude that no rate regulation is needed at all for this term to apply. While no legislation is mentioned in Term 32(2), not even in a general sense as is the case with Term 32(3), it does contemplate that there be at least some railway rate regulation in existence for the Term to be applied.

The Agency then went on to find that railway rate regulation currently exists under the CTA:

> Having so concluded, the Agency finds that 'railway rate regulation' currently exists. Such regulation exists today, albeit in a diminished and different form than that which existed even as recently as 1996. Today's rate regulation is far less pervasive and much narrower in focus or limited than that which existed in earlier legislation.

The Agency then provided examples of current railway rate regulation: interswitching rates, competitive line rates, joint rates, maximum grain rates, level of service obligations and final offer arbitrations. On this basis, the Agency concluded at page 15:

> There is still some rate regulation today and this is enough to conclude that Term 32(2) continues to apply.

However, these regulations do not limit the power of a railway company to set rates to Newfoundland and do not imply a requirement that a Maritime rate structure exists, from which Newfoundland rates could be extrapolated.

56 The Agency seems to have acknowledged this difficulty when it concluded that the development of Terms of Union rates might involve "developing a 'best guess' figure". At page 28 of Decision 300-R-1999, the Agency stated:

> A rate must be identified or developed because the Constitution requires it, and it is the task of the Agency or the arbitrator, or some other party, to determine an appropriate rate in the circumstances of any particular case. The fact that such a task is daunting is unfortunate, but no matter how difficult, it is necessary, even if it means resorting to developing a "best guess" figure. The Agency or the arbitrator, when so called upon, is charged by the Constitution to develop a rate - if there is no clearly identical or comparable rate in terms of the type and quantity of traffic, then the best estimate based upon all the available information, must suffice.

With respect, I do not think it is reasonable to conclude that the Constitution of Canada would require that regulation of freight rates would be based on "best guess" figures.

57 The Agency does not explain how any of the examples of railway rate regulation that are cited in its reasons have any relevance to railway rates to Newfoundland. Indeed, the type of

railway rate regulation to which the Agency referred has never been cited by the Agency, or its predecessor tribunals, as the basis for regulating railway rates to Newfoundland. In the absence of rate regulation that has some relevance to the setting of rates to Newfoundland by a railway company, there is no regulation that engages Term 32(2) and no basis for the Agency to have assumed the jurisdiction it did in this case.

58 Although final offer arbitration is a form of rate regulation that can be invoked by shippers relative to railway rates to Newfoundland, for the reasons that I found Part IV did not confer jurisdiction on the Agency to do so, final offer arbitration is not a regulatory basis for the Agency to have conducted the inquiry it did in this case or to have instructed the arbitrator to develop Terms of Union rates.

Living Tree Doctrine of Constitutional Interpretation

59 The Agency seemed to feel that, because the Constitution is the supreme law of Canada and because, in its view, the Constitution is to be interpreted flexibly, consistent with the "living tree" doctrine of constitutional interpretation (see, for example, *Edwards v. Canada (Attorney General)* (1929), [1930] A.C. 124 (Canada P.C.), at 136 per Lord Sankey L.C.; and *Ellett v. British Columbia (Attorney General)*, [1980] 2 S.C.R. 466 (S.C.C.), at 478), Term 32(2) must be made to apply to the current state of railway rate regulation in Canada. With respect, I think this approach is misplaced. Certainly the Constitution is the supreme law of Canada and, in appropriate circumstances, it must be adapted to conditions that did not exist when its various provisions were enacted. However, the constitutional provisions in question in any given circumstances must be carefully considered to determine whether the living tree approach is appropriate or whether, as I believe is the case here, the constitutional provision is simply no longer applicable. The living tree doctrine cannot be stretched to animate a provision that is a practical anachronism.

60 A clear example of a constitutional provision that is no longer applicable is Term 32(3) of the Terms of Union. It provides:

> 32(3) All legislation of the Parliament of Canada providing for special rates on traffic moving within, into, or out of, the Maritime region will, as far as appropriate, be made applicable to the Island of Newfoundland.

For many years, the *Maritime Freight Rates Act*, 17 Geo. V, cap 44, provided for reduced rates on traffic moving within or westbound out of the Maritime Region. In 1996, this legislation was repealed. (See *Budget Implementation Act, 1995*, c. 17, s. 25, repeal effective May 31, 1996 (P.C. 1996-804). It could not be seriously suggested that Term 32(3) still applies in such a manner as to require the continuation of legislation providing for special rates within or from the Maritime Region. In other words, Term 32(3) will only guarantee Newfoundland access to special rates provided to the Maritime Region in legislation, should Parliament choose, in the future, to enact

such legislation. However, Term 32(3) currently has no application. Term 32(3) is part of the supreme law of Canada, but the living tree doctrine does not make it effective at this time.

61 Similarly, Term 32(2) subsists and will guarantee Newfoundland the protection it affords should Parliament, in the future, enact railway rate regulation which is relevant to Term 32(2) . However, at the present time, when Parliament has not provided for any relevant railway rate regulation, the application of Term 32(2) is suspended. As with Term 32(3), the living tree doctrine does not require that Term 32(2) be made to apply in circumstances where there is no relevant railway rate regulation.

62 For these reasons, I do not think that Term 32(2) itself, either expressly or by necessary implication, confers jurisdiction on the Agency to have conducted the inquiry it did into Term 32(2), nor to issue instructions to the arbitrator to develop Terms of Union rates. In answering the jurisdictional question, it will be apparent that I have also had to address the substantive question raised by CN (in paragraph [5] above) of whether there currently exists rate regulation that engages Term 32(2) and I have concluded that there is not.

CONCLUSION

63 The appeal will be allowed and the decision of the Agency quashed. At the conclusion of the hearing, the question arose as to whether the matter should be remitted to the Agency for referral to an arbitrator to decide the dispute between Mr. Moffat and CN. However, the period during which the rate selected by the arbitrator was to have effect has long since expired. The Court was told that Mr. Moffatt did not ship any rail traffic with CN during the relevant period. Accordingly, no useful purpose would be served by remitting the matter to the Agency for referral for final offer arbitration.

64 As to costs, it was Mr. Moffatt who first raised the matter of Terms of Union rates in his submission to the Agency for final offer arbitration. However, it was CN who raised the inapplicability of the Terms of Union to the rate dispute, objecting to the matter being referred to arbitration. CN now agrees that the Agency did not have jurisdiction to deal with its preliminary objection. For these reasons, there will be no award of costs.

***Richard J.A.*:**

I agree.

***Noël J.A.*:**

I agree.

Appendix A

Statutory Provisions Referred To But Not Reproduced In The Reasons
Canada Transportation Act S.C. 1996, c.10

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,

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

(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,

Articles de la loi mentionnés mais non reproduit dans les motifs
La loi sur les transports au Canada S.C. 1996, c.10
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 une déficience, utilisant au mieux et aux moindres frais globaux tous les modes 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) le réseau national des transports soit conforme aux normes de sécurité les plus élevées possible dans la pratique;
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) 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 the purview of subject-matters under the legislative authority of Parliament relating to transportation.

161. (1) A shipper who is dissatisfied with the rate or—rates charged or proposed to be charged by a carrier for the movement of goods, or with any of the conditions associated with the movement of goods, may, if the matter cannot be resolved between the shipper and the carrier, submit the matter in writing to the Agency for a final offer arbitration to be conducted by one arbitrator or, if the shipper and the carrier agree, by a panel of three arbitrators.

2) A copy of a submission under subsection (1) shall be served on the carrier by the shipper and the submission shall contain
(a) the final offer of the shipper to the carrier in the matter, excluding any dollar amounts;
(b) the last offer received by the shipper from the carrier in the matter;
(c) an undertaking by the shipper to ship the goods to which the arbitration relates in accordance with the decision of the arbitrator;

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 la compétence législative du Parlement en matière de transports.

161. (1) L'expéditeur insatisfait des prix appliqués ou proposés par un transporteur pour le transport de marchandises ou des conditions imposées à cet égard peut, lorsque ceux-ci ne sont pas en mesure de régler eux-mêmes la question, la soumettre par écrit à l'Office pour arbitrage.

(2) Un exemplaire de la demande d'arbitrage est signifié au transporteur par l'expéditeur; la demande contient :
a) la dernière offre faite par l'expéditeur au transporteur;
b) la dernière offre reçue par l'expéditeur de la part du transporteur;
c) l'engagement par l'expéditeur d'expédier les marchandises visées par l'arbitrage selon les termes de la décision de l'arbitre;

(d) an undertaking by the shipper to the Agency whereby the shipper agrees to pay to the arbitrator the fee for which the shipper is liable under section 166 as a party to the arbitration; and

(e) the name of the arbitrator, if any, that the shipper and the carrier agreed should conduct the arbitration or, if they agreed that the arbitration should be conducted by a panel of three arbitrators, the name of an arbitrator chosen by the shipper and the name of an arbitrator chosen by the carrier.

(3) The Agency shall not have any matter submitted to it by a shipper under subsection (1) arbitrated if the shipper has not, at least five days before making the submission, served on the carrier a written notice indicating that the shipper intends to submit the matter to the Agency for a final offer arbitration.

(4)A final offer arbitration is not a proceeding before the Agency.

162 (1) On the submission of a matter to the Agency for a final offer arbitration, the Agency shall refer the matter for the arbitration

(a) to the chosen arbitrator, if any, referred to in paragraph 161(2)(e), if that arbitrator is available to conduct the arbitration; or

(b) where no arbitrator is chosen as contemplated—by paragraph (a) or the arbitrator chosen is, in the opinion of the Agency, unavailable to conduct the arbitration, to any other arbitrator, chosen by the Agency from the list of arbitrators referred to in section 169, that the Agency determines is appropriate and available to conduct the arbitration

(2) The Agency may, at the request of the arbitrator, provide administrative, technical and legal assistance to the arbitrator on a cost recovery basis.

165. (1) The decision of the arbitrator in conducting a final arbitration shall be the selection by the arbitrator of the final offer of either the shipper or the carrier and, for the purpose of this section,

(a) the final of the shipper shall be shipper's final offer set out in the submission to the Agency under subsection 161(1); and

(b) the final offer of the carrier shall be the last offer received by the shipper from the carrier as set out in the submission to the agency under subsection 161(1) or any other offer that the carrier, within tend days after the service referred to in subsection 161(2),

d) l'engagement par l'expéditeur envers l'Office de payer à l'arbitre les honoraires auxquels il est tenu en application de l'article 166 à titre de partie à l'arbitrage;

e) le cas échéant, le nom de l'arbitre sur lequel l'expéditeur et le transporteur se sont entendus.

(3) L'arbitrage prévu au paragraphe (1) est écarté en cas de défaut par l'expéditeur de signifier, dans les cinq jours précédant la demande, un avis écrit au transporteur annonçant son intention de soumettre la question à l'Office pour arbitrage.

(4) La soumission d'une question à l'Office pour arbitrage ne constitue pas une procédure devant l'Office.

162. (1) En cas de demande d'arbitrage, l'Office renvoie la question :

a) à l'arbitre visé à l'alinéa 161(2)e), s'il est disponible pour mener l'arbitrage;

b) en cas d'absence de choix d'un arbitre ou du manque de disponibilité, selon l'Office, de l'arbitre choisi, à un autre arbitre, que l'Office estime disponible et compétent et qui est inscrit sur la liste établie en vertu de l'article 169.

(2) À la demande de l'arbitre, l'Office lui offre, moyennant remboursement des frais, le soutien administratif, technique et juridique voulu.

165. (1) L'arbitre rend sa décision en choisissant la dernière offre de l'expéditeur ou celle du transporteur; pour l'application du présent article, la dernière offre :

a) de l'expéditeur est celle contenue dans sa demande présentée à l'Office en application du paragraphe 161(1);

b) du transporteur est la dernière offre du transporteur à l'expéditeur contenue dans la demande présentée à l'Office en application du paragraphe 161(1) ou toute autre offre, qualifiée de finale, que présente le transporteur à l'expéditeur et à l'Office

specifies in writing to the shipper and to the Agency as the carrier's final offer.
(2) The decision of the arbitrator shall
(a) be in writing;
(b) unless the parties agree otherwise, be rendered within sixty days after the date on which the submission for the final offer arbitration was received by the Agency from the shipper; and
(c) unless the parties agree otherwise, be rendered so as to apply to the parties for a period of one year or any lesser period that may be appropriate, having regard to the negotiations between the parties that preceded the arbitration.
(3) The carrier shall, without delay after the arbitrator's decision, set out the rate or rates or the conditions associated with the movement of goods that have been selected by the arbitrator in a tariff of the carrier, unless, where the carrier is entitled to keep the rate or rates or conditions confidential, the parties to the arbitration agree to include the rate or rates or conditions in a contract that the parties agree to keep confidential.
(4) No reasons shall be set out in the decision of the arbitrator
(5) The arbitrator shall, if requested by of the parties to the arbitration within thirty days after the decision of the arbitrator, give reasons in writing for the decision.
(6) Except where both parties agree otherwise,
(a) the decision of the arbitrator on a final offer arbitration shall be final and binding and be applicable to the parties as of the date on which the submission for the arbitration was received by the Agency from the shipper, and is enforceable as if it were an order of the Agency; and
(b) the arbitrator shall direct in the decision that interest at a reasonable rate specified by the arbitrator shall be paid to one of the parties by the other on moneys that, as a result of the application of paragraph (a), are owed by a party for the period between the date referred to in that paragraph and the date of the payment.
(7) Moneys and interest referred to in paragraph (6)(b) that are owed by a party pursuant to a decision of the arbitrator shall be paid without delay to the other party.
National Transportation Act, 1987 S.C. 1987, c.34
52. (1) The decision of the arbitrator in conducting a final offer arbitration shall be the selection by the arbitrator of the final offer of either the shipper or the carrier and,

dans les dix jours suivant la signification visée au paragraphe 161(2).
(2) La décision de l'arbitre est rendue :
a) par écrit;
b) sauf accord entre les parties à l'effet contraire, dans les soixante jours suivant la date de réception par l'Office de la demande d'arbitrage présentée par l'expéditeur;

c) sauf accord entre les parties à l'effet contraire, de manière à être applicable à celles-ci pendant un an, ou le délai inférieur indiqué, eu égard aux négociations ayant eu lieu entre les parties avant l'arbitrage.

(3) Le transporteur inscrit, sans délai après la décision de l'arbitre, les prix ou conditions liés à l'acheminement des marchandises choisis par l'arbitre dans un tarif du transporteur, sauf si, dans les cas où celui-ci a droit de ne pas dévoiler les prix ou conditions, les parties à l'arbitrage conviennent de les inclure dans un contrat confidentiel conclu entre les parties.

(4) La décision de l'arbitre n'énonce pas les motifs
(5) Sur demande de toutes les parties à l'arbitrage présentée dans les trente jours suivant la décision de l'arbitre, celui-ci donne par écrit les motifs de sa décision.
(6) Sauf accord entre les parties à l'effet contraire :
a) la décision de l'arbitre est définitive et obligatoire, s'applique aux parties à compter de la date de la réception par l'Office de la demande d'arbitrage présentée par l'expéditeur et, aux fins de son exécution, est assimilée à un arrêté de l'Office;

b) l'arbitre indique dans la décision les intérêts, au taux raisonnable qu'il fixe, à payer sur les sommes qui, par application de l'alinéa a), sont en souffrance depuis la date de la demande jusqu'à celle du paiement.

(7) Les montants exigibles visés à l'alinéa (6)b) sont payables sans délai à qui y a droit.

Loi nationale de 1987 sur les transports S.C. 1987, c.34
52. (1) L'arbitre rend sa décision en choisissant la dernière offre de l'expéditeur or du transporteur; pour l'application du présent article, la dernière offre:

for the purpose of this section, the final offer of
(a) the shipper shall be the shipper's final offer set out in the submission to the Agency under subsection 48(1); and
(b) the carrier shall be the last offer received by the shipper from the carrier as set out in the submission to the Agency under subsection 48(1) or such other offer as the carrier, within ten days after the service referred to in subsection 48(2), specifies in writing to the shipper and the Agency as the carrier's final offer
(2) the decision of the arbitrator shall
(a) be in writing;
(b) unless the parties otherwise agree, be rendered within ninety days after the date on which the submission for the final offer arbitration was received by the Agency from the shipper; and
(c) unless the parties otherwise agree, be rendered so as to be applicable in respect of the parties to the arbitration for a period of one year or such lesser period as may be appropriate, having regard to the negotiations between the parties that preceded the arbitration.
(3...)
59. (1) The public interest referred to in this section and in section 61 shall include the relevant matters required to be considered under section 60
(2) Where a person has reason to believe ——(a) that the effect of any rate established by a carrier or carriers, or —
(b) that any act or omission of a carrier, or of any two or more carriers,— may prejudicially affect the public interest in respect of rates for, or conditions of, the carriage of goods within, into or form Canada, the person may request the Agency to investigate the rate, act or omission and the Agency shall make such investigation of the rate, act or omission and the effect thereof as in its opinion is warranted.
(3) Where the Agency has, pursuant to section 48, received a submission for a final offer arbitration in respect of any matter and acted in accordance with paragraph 48(3)(b), the Agency shall be deemed to have received a request to investigate the matter under subsection (2).
(4) Where, at any time after a person has requested an investigation, the person by notice to the Agency withdraws the request, the Agency shall forthwith discontinue the investigation.

(a) de l'expéditeur est celle contenue dans sa demande présentée à l'Office en application du paragraphe 48(1);
(b) du transporteur est la dernière offre du transporteur à l'expéditeur contenue dans la demande présentée à l'Office en application du paragraphe 48(1) ou toute autre offre, qualifiée de finale, gue présente le transporteur à l'expéditeur et à l'Office dans le dix jours suivant la signification visée au paragraphe 48(2).
(2) La décision de l'arbitre est rendue:
(a) par écrit;
(b) sauf accord entre les parties à l'effet contraire, dans les quatre-vingt-dix jours suivant la date de réception par l'Office de la demande d'arbitrage présentée par l'expéditeur;
(c) sauf accord entre les parties à l'effet contraire, de manière à être applicable à celles-ci pendant un an, ou le délai inférieur indiqué, eu égard aux négociations ayant eu lieu entre les parties avant l'arbitrage.

(3...)
59. (1) L'intérêt public mentionné au présent article et à l'article 61 vise également les éléments don't il est tenu compte pour l'application de l'article 60.
(2) La personne ou l'organisme ayant des motifs de croire qu'un prix fixé par un or plusieurs transporteurs or qu'un acte ou une omission de ceux-ci risque de porter préjudice à l'intérêt public en matière de prix or de conditions de transport de marchandises à l'intérieur, à desitnation ou en provenance du Canada peut demande à l'Office de faire enquête sure le prix, l'acte ou l'omission celui-ci est alors tenu de mener l'enquête qu'il estime indiquée en l'espèce.

(3) Après avoir reçu unde demande d'arbitrage en application de l'article 48 e agi conformément à l'alinéa 48(3)(b), l'Office est réputé avoir recu une demande d'enquête sur la question en application du paragraphe (2).

(4) Sur avis de retrait de la personne qui a demandé la tenue de l'enquête, l'Office y met aussitôt fin.

The Railway Act, R.S.C. 1927, Cap. 170

314. (1) All tolls shall always under substantially similar circumstances and conditions, in respect of all traffic of the same description, and carried in or upon the like kind of cars or conveyances, passing over the same line or route, be charged equally to all person and at the same rate, whether by weight, mileage or otherwise.

(2) No reduction or advance in any such tolls shall be made, either directly or indirectly, in favour of or against any particular person or company travelling upon or using the railway.
(3) The tolls for carload quantities or longer distances, may be proportionately less that the tolls for less than car-load quantities, or shorter distance, if such tolls are, under substantially similar circumstances, charged equally to all persons.

(4) No toll shall be charged which unjustly discriminates between different localities.

(5) The Board shall not approve or allow any toll, which for the like description of goods, or for passengers carried under substantially similar circumstances and conditions in the same direction over the same line or route is greater for a shorter than for a longer distance, within which such shorter distance is included, unless the Board is satisfied that, owing to competition, it is expedient to allow such toll.

(6) The Board may declare that any places are competitive points with the meaning of the Act.
325. (1) The Board may disallow any tariff or any portion thereof which it considers to be unjust or unreasonable, or contrary to any of the provisions of this Act, and may require the company, within a prescribed time, to substitute a tariff satisfactory to the Board in lieu thereof, or may prescribe other tolls in lieu of the tolls so disallowed.

(2) The Board may designate the date at which any tariff shall come into force, and either on application or of its own motion may, pending investigation or for any reason, postpone the effective date of, or

La Loi des chemins de fer, R.S.C. 1927, Cap. 170

314. (1) Les taxes de transport doivent toujours, dans des conditions et circonstances essentiellement semblables, être exigeées également de tous, et d'après le même tarif soit au poids, sout au mille ou autrement, relativement à tout trafic de même genre et s'effectuant par la même espèce de wagons ou par le même mode de transport, sur la même voie ou le même parcours.
(2) Il ne doit être aucune réduction ni augmentation de ces taxes, soit directment ou indirectment, en faveurou au détriment d'une compagnieou d'un particulier qui vogage sur le chemin de fer ou qui s'en sert.
(3) Les taxes peuvent être proportionnellement moins élevées, s'il s'agit de chargements complets ou de plus longues distances à parcourir, qu'elles ne le seraient pour des quantités moindres ou dans le cas de moindres distances à parcourir, pourvu que ces taxes soient également exigées de tous dans des circonstances essentiellement analogues.
(4) Il ne peut être exigé de taxes don't l'imposition établirait une disparité en faveur ou au détriment de différentes localités.
(5) La Commission ne doit approuver ni permettre, pour les transports de voyageurs ou des marchandises, effectués dams des conditions et des circonstance essentiellement analogues, et dans la même direction ou sur la même ligne, des taxes plus élevées pour une plus courte distance que pour un plus long parcours, quand cette plus courte distance fait partie de ce plus long parcours, à moins que La Commission ne soit convaincue, vue la concurrence, de l'opportunité d'autoriser pareilles taxes.
(6) La Commission peut déclarer que n'importe quels endroits sont des points de concurrence au sens de la présente loi.
325. (1) La Commission peut rejeter un tarif ou une partie de tarif qu'elle considère injuste or déraisonnable, ou contraire à quelqu'une des dispositions de la présente loi, et exiger de la compagnie qu'elle y substitue, dans un délai prescrit, un tarif jugé satisfaisant par la Commission, ou elle peut prescrire d'autres taxes pour remplacer celles qui ont été ainsi rejetées.
(2) La Commission peut fixer la date à laqueslle un tarif doit entrer en vigueur et, soit sur demande, soit de son propre chef, elle peut, en vue d'une enquête ou pour une raison quelconque, retarder la date do son

either before or after it comes into effect, suspend any tariff or any portion thereof.

(3) Except as otherwise provided, any tariff in force, except standard tariffs hereinafter mentioned, may, subject to disallowance or change by the Board, be amended or supplemented by the company by new tariffs, in accordance with the provisions of this Act.

(4) When any tariff has been amended or supplemented, or is proposed to be amended or supplemented, the Board may order that a consolidation and reissue of such tariff be made by the company.

(5) Notwithstanding the provisions of section three of this Act the powers given to the Board under this Act to fix, determine and enforce just and reasonable rates, and to change and alter rates as changing conditions or cost of transportation may from time to time require, shall not be limited or in any manner affected by the provision of any Act of the Parliament of Canada, or by any agreement made or entered into pursuant thereto, whether general in application or special and relating only to any specific railway or railways, and the Board shall not excuse any charges of unjust discrimination, whether practised against shippers, consignees, or localities, or of undue or unreasonable preference, on the ground that such discrimination or preference is justified or required by any agreement made or entered into by the company: Provided that, notwithstanding anything in this subsection contained, rates on grain and flour shall, on and from the twenty-seventh day of June, one thousand nine hundred and twenty-five, be governed by the provisions of the agreement made pursuant to chapter five fo the Statutes of Canada 1897, but such rates shall apply to all such traffic moving from all points on all lines of railway west of Fort William to Fort William or Port Arthur over all lines now or hereafter constructed by any company subject to the jurisdiction of Parliament.

(6) the Board shall not excuse any charge of unjust discrimination, whether practised against shippers, consignees, or localities or of undue or unreasonable preference,

application effective, ou, soit avant soit après son entrée en vigueur, suspendre un tarif ou une partie de tarif.

(3) Sauf disposition contraire, un tarif en vigeur, excepté les tarif-types dont il est question ci-après, peut, subordonnément au rejet ou à des changements par la Commission, être modifié ou supplémenté par la compagnie au moyen de nouveaux tarifs, conformément aux dispositions de la présente loi.

(4) Lorsqu'un tarif a subi des modifications or additions, or lorsqu'on se propose d'y faire des modifications ou des additions, la Commission peut ordonner à la compagnie d'en publier une nouvelle édition.

(5) Nonobstant les dispositions de l'article trois de la présente loi, les pouvoirs attribués à la Commission sous le régime de la présente loi, pour fixer, déterminer et mettre en vigueur des tarifs équitables et raisonnables, et pour changer et modifier les tarifs, selon que peuvent, à l'occasion, l'exiger des circonstances nouvelles ou le coût du transport, ne doivent pas être limités ni d'aucune façon atteints par les dispositions d'une loi quelconque du Parlement du Canada, ou par un traité fait ou conclu en conformité de cette loi, qu'elle soit générale or spéciale dans son application et qu'elle ait trait à un ou plusieurs chemins de fer particuliers, et la Commission ne doit faire grâce d'aucune accusation de disparité injuste, qu'elle soit exercée contre des expéditeurs, des consignataires ou des localités, ou de préférence indue ou déraisonnable, pour le motif que cette disparité ou préférence est justifiée ou prescrite par une entente faite ou conclue par la compagnie. Toutefois, par dérogation à toute disposition contenue dans le présent paragraphe, les tarifs du grain et de la farine sont, à et à compter de la date du vingt-cinquième jour de juin mil neuf cent vingt-cinq, régis par les dispositions de la convention conclue en conformité du chapitre cinq du Statut du Canada, 1897; mais ces tarifs s'appliquent à tout trafic en circulation, à partir de tous les endroits sur toutes les lignes de chemin de fer à l'ouest de Fort-William jusqu'à Fort-William or Port-Arthur, sur tutes les lignes actuellement or désormais construites par une compagnie assujétie à la juridiction du Parlement.

(6) La Commission ne doit faire grâce d'aucune accusation de disparité injust, qu'elle soit exercée contre des expéditeurs, des consignataires ou des localités, ou de

respecting rates on grain and flour, governed by the provisions of chapter five of the Statutes of Canada 1897, and by the agreement made or entered into pursuant thereto within the territory in the immediately preceding subsection referred to, on the ground that such discrimination or preference is justified or required by the said Act or by the agreement made or entered into pursuant thereto.

préférence indue ou déraisonnable à l'égard des tarifs du grain et de la farine régis par les dispositions du chapitre cinq du Statut du Canada, 1897, et par la convention faite ou conclue en conformité dudit statut dans le territoire, et don't il est question au paragraphe précédent, pour le motif que cette disparité ou préférence est justifiée ou requise par ladite loi ou par la convention faite ou conclue en conformité de ladite loi.

2018 FC 380, 2018 CF 380
Federal Court

David Suzuki Foundation v. Canada (Health)

2018 CarswellNat 1745, 2018 CarswellNat 3718, 2018 FC 380, 2018 CF 380, 16 C.E.L.R. (4th) 216, 292 A.C.W.S. (3d) 333, 34 Admin. L.R. (6th) 21

DAVID SUZUKI FOUNDATION, FRIENDS OF THE EARTH CANADA, ONTARIO NATURE, and WILDERNESS COMMITTEE (Applicants) and MINISTER OF HEALTH, SUMITOMO CHEMICAL COMPANY LIMITED, BAYER CROPSCIENCE and VALENT CANADA (Respondents)

DAVID SUZUKI FOUNDATION, FRIENDS OF THE EARTH CANADA, ONTARIO NATURE, AND WILDERNESS COMMITTEE (Applicants) and ATTORNEY GENERAL OF CANADA, MINISTER OF HEALTH AND SYNGENTA CANADA INC. (Respondents)

Catherine M. Kane J.

Heard: November 15-16, 2017
Judgment: April 10, 2018
Docket: T-1070-16, T-1071-16

Proceedings: affirming *David Suzuki Foundation v. Canada (Health)* (2017), 2017 CarswellNat 8481, 2017 CF 682, 13 C.E.L.R. (4th) 215, 2017 CarswellNat 3285, 2017 FC 682, Mandy Aylen J. (F.C.)

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Matthew Fleming, Dina Awad, for Respondent, Sumitomo Chemical Company / Valent Canada
John P. Brown, Kara Smith, Brandon Kain, Stephanie Sugar, for Respondent, Syngenta Canada
Michael H. Morris, Andrew Law, Andrea Bourke, for Respondents, Attorney General of Canada and Minister of Health

Subject: Civil Practice and Procedure; Environmental; Public

APPEAL by respondents from order of Prothonotary, reported at *David Suzuki Foundation v. Canada (Health)* (2017), 2017 FC 682, 2017 CarswellNat 3285, 13 C.E.L.R. (4th) 215, 2017 CF 682, 2017 CarswellNat 8481, 34 Admin. L.R. (6th) 1 (F.C.), dismissing respondents' motion to strike applications for judicial review of alleged course of conduct by Pest Management Regulatory Agency.

***Catherine M. Kane J.*:**

I. Overview

1 The Respondents appeal the Order of Prothonotary Mandy Aylen [the Prothonotary], dated July 13, 2017, which dismissed their motions to strike the Applicants' Applications for Judicial Review (reported at *David Suzuki Foundation v. Canada (Health)*, 2017 FC 682 (F.C.)).

2 The Applicants (who were the Respondents on the Motion and are the Respondents on this Appeal) are a group of non-governmental organizations engaged in environmental advocacy. In their Applications for Judicial Review, they allege that the Pest Management Regulatory Agency [PMRA], a branch of Health Canada which administers the *Pest Control Products Act*, SC 2002, c 28 [the Act or the PCPA] as well as the *Pest Control Products Regulations*, SOR/2006-124 [the Regulations] and makes decisions as the delegated authority of the Minister of Health, has engaged in an unlawful course of conduct over several years by successively registering or amending the registration of certain pest-control products [PCPs] in the absence of necessary information regarding the environmental risks posed, in particular regarding the long-term toxicity risks to pollinators, primarily bees.

3 The Prothonotary captured the Applicants' allegations in the first paragraph or her Order as follows:

> According to the Applicants, bees in Canada may be at risk from exposure to the pesticides Clothianidin and Thiamethoxam. In these applications, the Applicants assert that the Pest Management Regulatory Agency [PMRA] has engaged in an unlawful course of conduct of improperly successively registering or amending the registration for these pesticides and their end-use products notwithstanding that the corporate Respondents have failed to provide the scientific information required, as a condition of their registrations, to demonstrate that the products' environmental risks are acceptable to pollinators.

4 Two Applications have been joined as they raise the same issues. *T-1070-16* pertains to the product Clothianidin. The Respondents are: the Attorney General of Canada [AGC], Bayer Cropscience Inc. [Bayer], Sumitomo Chemical Company Limited and Valent Canada Inc. [Sumitomo]. Sumitomo is the registrant of Clothianidin Active. Valent is Sumitomo's Canadian agent for the purpose of managing its registration of Clothianidin Active, and is itself a registrant of five Clothianidin-based "end use" products. Bayer is also a registrant of Clothianidin end-use products.

5 *T-1071-16* pertains to the product Thiamethoxam [TMX]. The Respondents are the AGC and Syngenta Canada Inc. [Syngenta]. Syngenta is the registrant for all TMX products.

6 The Applicants allege that the PMRA has consistently misused its statutory powers. The PMRA is required by law to collect certain information *before* registering PCPs, in order to ensure that the risks posed by the products are acceptable, in accordance with section 8 of the PCPA. The Applicants submit, however, that the PMRA's consistent practice has been to register the products and request, through the use of a notice issued pursuant to section 12 of the PCPA, that information about the risks be provided *after* registration. According to the Applicants, this has resulted in the continued registration of PCPs in the absence of necessary studies regarding the long-term risks those PCPs pose to pollinators.

7 On the motion to strike before the Prothonotary, as Case Management Judge, the Respondents argued that the Applications for Judicial Review did not target a course of conduct, but were instead an attempt to review 79 discrete registration decisions. The Respondents argued that this violated both Rule 302 of the *Federal Courts Rules*, SOR/98-106 [*Federal Court Rules*] which provides that an application for judicial review is limited to a single decision unless the Court orders otherwise, and subsection 18.1(2) of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*], which prescribes a 30-day limitation period to bring a Notice of Application for Judicial Review. They also argued that there was an adequate alternative remedy for the Applicants, which were the ongoing review processes launched by the PMRA in 2012.

8 In response, the Applicants argued that they were not seeking to review discrete registration decisions, but rather the PMRA's consistent practice of using section 12 of the Act to register PCPs as conditional registrations while deferring the receipt and review of necessary studies on their risks to bees, which should have been reviewed before the PCP was registered pursuant to section 8. They argued that this was a challenge to a course of conduct, rather than individual decisions, and was, therefore, not subject to Rule 302 or the limitation period in subsection 18.1(2). The Applicants also submitted that the PMRA's review processes would not provide an adequate alternative remedy because, among other things, they would not examine the lawfulness of the PMRA's conduct to date, and would not be expeditious.

9 The Prothonotary found that both issues were debatable and, therefore, should be determined by the judge on the Applications for Judicial Review, rather than on a preliminary motion.

10 The Prothonotary was presented with a voluminous record, which is not the norm on a motion to strike an application for judicial review. The Applicants presented evidence about the similarities of the registration histories of the PCPs at issue, highlighting what they allege is a consistent, ongoing practice (i.e. a course of conduct) of misusing section 12 of the Act. In turn, the Respondents submitted evidence about the various differences in the registrations at issue, which they submit highlights that there is no course of conduct, but rather that the Applicants are seeking to review a number of highly discrete decisions which were made by the PMRA at different times, in different contexts, and based on different information.

11 The starting point is that the facts pleaded are true. It is not the role of the Court on a motion to strike or on this Appeal to delve into this record more fully to determine which narrative reflects reality.

12 On this Appeal, the Respondents argue that the Prothonotary erred in several ways and, as a result of these errors, the Prothonotary erred in ultimately finding that it was debatable whether there was a course of conduct and whether there was an adequate alternative remedy. The Respondents reiterate that clearly there was no course of conduct and clearly there is an adequate alternative remedy.

13 The Respondents submit, among other things, that the Prothonotary failed to address specific arguments, certain cases cited, and elements of various tests. However, the jurisprudence has established that it is not necessary for a decision-maker to refer to each argument and each case cited by a party and that the reasons must be read in context (*Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157 (F.C.A.) at paras 68-69, [2017] F.C.J. No. 726 (F.C.A.) [*Mahjoub*]). In my view, the Prothonotary succinctly captured the key principles from the jurisprudence, key issues and key facts. The present decision, in comparison, will be criticized as unnecessarily long in its attempt to cover all the nuanced arguments of five Respondents and the collective Applicants.

14 For the reasons that follow, I find that the Prothonotary did not err in concluding that the issues raised on the motion were debatable, and, therefore, in refusing to strike the Applications for Judicial Review.

II. The Motion to Admit New Evidence

15 Following the hearing of this Appeal and while this decision was under reserve, the Respondents sought Directions with respect to their intention to bring a motion to seek leave to admit new evidence. The proposed new evidence is comprised of proposed registration decisions arising from applications by the Respondents to convert conditional registrations to full registrations, referred to as the PRDs, and the preliminary decision on the PMRA's re-evaluation of neonicotinoids, launched in 2012, referred to as the PRVD, both of which were issued on December 19, 2017. The Respondents argued that this evidence supports their claim that these processes present an adequate alternative remedy to these Applications, as well as their claim that these Applications do not target a course of conduct. As a result, the determination of this Appeal and the issuance of this decision were held in abeyance pending the scheduling and determination of the Respondents' motion.

16 The Respondents' motion to admit new evidence was heard on February 7, 2018 and dismissed. The Order and Reasons have been issued separately as *David Suzuki Foundation v. Canada (Health)*, 2018 FC 380 (F.C.) [*Suzuki 1*].

17 In *Suzuki 1*, the Court found that the new evidence did not meet the test established in the jurisprudence for the admission of new evidence as it would not have an impact on the determination of the Appeal. The new evidence does not provide certainty that the alternative remedy would be adequate, nor does it provide certainty that the Applicants' allegations do not relate to a course of conduct. However, as noted in the Order, the Court was required to consider the new evidence to determine if it could be admitted. Despite that the new evidence was not admitted, there are references to its content in this decision.

III. The Background

18 The parties are in general agreement about the plain wording of the Act and its Regulations. They acknowledge that there is no jurisprudence on the interpretation of the provisions at issue. However, the Applicants argue that the way in which the Act is supposed to operate differs from how it actually operates in practice.

19 A more detailed overview of the Act and the Regulations is provided in Annex A for context. In a nutshell, in order to register a PCP pursuant to section 8 of the PCPA, the PMRA requires reasonable certainty that the PCP poses no safety risks, including to the environment. At the same time of registration pursuant to section 8, the PMRA can request additional data from the registrant by issuing a notice pursuant to section 12. If a section 12 notice is issued, the registration of the PCP is deemed to be conditional, in accordance with the Regulations, on the receipt of the information requested.

20 The Applicants allege that the PMRA has consistently misused section 12 notices to defer the receipt and review of studies which are necessary in order to be reasonably certain that the PCPs at issue do not pose an unacceptable risk. The Applicants allege that the PMRA has maintained the conditional registrations of the PCPs at issue in the absence of this necessary data since at least 2006 by issuing section 12 notices.

21 The Respondents deny that the PMRA has misused section 12 notices. The Respondents submit that all registrations were made pursuant to section 8 and that the PMRA was satisfied that the PCPs did not pose an unacceptable risk.

IV. The Decision of the Prothonotary

22 As noted above, the Prothonotary dismissed the Respondents' motion to strike the Applications for Judicial Review based on finding that it was debatable whether the Applications seek to review a course of conduct and that it was debatable whether the Applicants have an adequate alternative remedy. She found that both issues should be determined by the judge on the Application for Judicial Review.

23 The Prothonotary summarized the statutory scheme, the submissions of the parties and the principles from the jurisprudence. More detail of the Prothonotary's decision is provided below with reference to the issues raised on this Appeal.

24 The Prothonotary referred to the governing principles in the jurisprudence. She noted that, in order to grant the motion to strike, an application must be "so clearly improper as to be bereft of any possibility of success" (*Pharmacia Inc. v. Canada (Minister of National Health & Welfare)*, [1994] F.C.J. No. 1629 (Fed. C.A.) at para 15, (1994), [1995] 1 F.C. 588 (Fed. C.A.) [hereinafter *David Bull*]). The Prothonotary also noted that there must be a "show stopper", i.e. an obvious, fatal flaw (*JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue*, 2013 FCA 250 (F.C.A.) at para 47, (2013), [2014] 2 F.C.R. 557 (F.C.A.) [*JP Morgan Asset Management (Canada) Inc.*]). The Prothonotary added that if an issue is debatable it should be determined by the judge at the application stage (*David Bull* at paras 12-13).

25 The Prothonotary acknowledged the need to read a notice of application with a view to understanding its essence and to "gain a realistic appreciation of the application's essential character by reading it holistically and practically without fastening onto matters of form" (at para 6, citing *JP Morgan Asset Management (Canada) Inc.* at paras 49-50).

26 The Prothonotary rejected the Respondents' preliminary argument, that the Applicants had re-characterized their pleadings in attempt to survive the motion to strike. The Respondents had argued that the Notices of Application clearly sought to challenge 79 individual registration decisions under section 8, and that the alleged course of conduct regarding the use of section 12 notices had not been pleaded. The Prothonotary disagreed, finding that the Applicants' response to the motion accurately characterized their pleadings. She found that a course of conduct was being challenged and described it at paragraph 20 of her decision:

> [20] As such, I find that what is being challenged in these applications, and what has been characterized by the Applicants as a course of conduct, is the PMRA's alleged unlawful practice of issuing section 12 notices that had the effect of deferring the receipt and review of necessary studies on the chronic toxicity risk of Clothianidin, Thiamethoxam and their end-use products to pollinators, thereby maintaining for over a decade the resulting conditional registrations of these pesticides and their end-use products without valid or sufficient studies.

27 The Prothonotary then addressed the Respondents' main arguments. The Respondents had argued that — regardless of how the pleadings were characterized - the Applicants were really seeking to review 79 distinct decisions of the PMRA, beyond the 30-day limitation period, which violated both Rule 302 of the *Federal Courts Rules* and subsection 18.1(2) of the *Federal Courts Act*. The Respondents also argued that the PMRA's re-evaluation of the PCPs pursuant to section 16 of the Act (now referred to as the PRVD) and outstanding conversion applications respecting

the PCPs at issue (now referred to as the PRD), provided an adequate alternative remedy to judicial review.

28 The Prothonotary noted that pursuant to Rule 302, applications for judicial review must be limited to a review of a single decision, unless it can be shown that the decisions at issue form part of a continuous course of conduct. The Prothonotary also noted that pursuant to subsection 18.1(2), reviews of a decision or order were subject to a 30-day limitation period, but that this rule did not apply where the subject matter of the judicial review is a matter that forms a continuous course of conduct. The Prothonotary referred to the relevant considerations set out in the jurisprudence, noting that the determination of whether a course of conduct is at issue, as opposed to multiple, discrete decisions, is a largely fact-based determination.

29 The Prothonotary considered the relevant jurisprudence, addressed the Respondents' arguments and, among other things, noted the various differences in the registration decisions as identified by the Respondents and the similarities identified by the Applicants. The Prothonotary concluded that whether the Applicants were seeking to challenge a course of conduct was debatable and should be left for the judge to determine on the Applications for Judicial Review.

30 The Prothonotary also addressed the Respondents' argument that the ongoing re-evaluation initiated by the PMRA (PRVD) and existing applications to convert conditional registrations to full registrations (PRD) provided an adequate alternative remedy.

31 The Respondents had argued that if the Applicants' primary goal is to fill the data gap respecting the PCPs risks to pollinators, these processes would be an adequate remedy. They also noted that these processes could result in the denial of registration to the PCPs. The Respondent, AGC, had also argued that it would be a waste of judicial resources to consider the Applications for Judicial Review because, even if successful, the likely remedy would be for the Court to remit the matter to the PMRA for redetermination, which is what the re-evaluations would accomplish. The Prothonotary disagreed, noting that the Applicants were not requesting a redetermination of the decisions. The Prothonotary was not convinced that the likely outcome of the Applications, if successful, would be to remit them to the PMRA for redetermination.

32 The Prothonotary noted that there were several factors to consider to determine whether the alternative remedy was adequate, citing *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713 (S.C.C.) [*Strickland*]. She expressed a particular concern that the other proceedings would not afford the Applicants the central remedy that they seek, which was a declaration of unlawful conduct by the PMRA, and that they would not be expeditious, given that public consultation would not begin until after the PMRA's final decision, which was anticipated to be December 31, 2018. She also noted that the public consultation and objection processes had not been shown to be expeditious for the Applicants in the past. The Prothonotary concluded

that it was debatable whether the re-evaluations would afford adequate and effective relief, when compared to the Applications for Judicial Review.

V. The Respondents' (Appellants') Overall Position

33 It appears that the arguments made to the Prothonotary were again made to the Court on this Appeal. The Respondents argue that due to the Prothonotary's errors — which they submit are palpable and overriding and include extricable errors of law — no deference is owed and the Court should make the Order that the Prothonotary should have made and dismiss the Applications.

34 All of the Respondents make similar arguments with some individual variations. The Respondents' position is generally that the Prothonotary: misunderstood the statutory regime for the registration of PCPs; misunderstood and mischaracterized the nature of the Applicants' claims, which properly construed, cannot be characterized as targeting a course of conduct; confused and misapplied the jurisprudence governing subsection 18.1(2) and Rule 302 and, as a result, erred in finding that it was debatable whether there was a course of conduct that was not subject to Rule 302 or subsection 18.1(2); and, erred in applying the legal test to determine whether there was an adequate alternative remedy. Each Respondent provided the Court with a detailed history of the registration status of the PCPs at issue. The Respondents again emphasize that these Applications implicate a number of highly discrete decisions made by the PMRA at different times, in different contexts, and based upon different information, which cannot form a course of conduct.

A. The Respondent, The Attorney General of Canada's, Submissions

(1) Overview

35 The AGC provided an overview of the PCPA and Regulations, and elaborated on the history of the registrations of Clothianidin and TMX. The AGC described the history of Clothianidin and TMX registration decisions and highlighted various differences, including that some PCPs were first registered under the previous Act and that PCPs have different proposed uses and different data requirements.

36 The AGC explained that the current re-evaluation process regarding neonicotinoids (which include Clothianidin and TMX) and the risks they pose to pollinators, which is being conducted pursuant to section 16 of the Act, was commenced in 2012 and is anticipated to be finalized by December 2018. The AGC explained that such evaluations usually take several years.

(2) Mischaracterization of the Notices of Application

37 The AGC argues that the Prothonotary both erred in law and made palpable and overriding errors in her characterization of the Notices of Application as a continuing course of conduct. In particular, the AGC argues that the Prothonotary failed to gain a realistic appreciation of the

essential character of the claims; and, that she did not understand the difference between section 8 and section 12. Pointing to the evidence of its affiant, Ms. Sterkenburg, the AGC explains that the PMRA will only register a PCP where there is no unacceptable risk, and that the issuance of a section 12 notice occurs *after* the finding that there is no unacceptable risk. The AGC stated that the section 12 notice is intended to provide additional information to confirm the results of the risk assessment.

38 The AGC submits that the course of conduct found by the Prothonotary is inconsistent with the Notices of Application. The AGC submits that neither of the Notices of Application seek relief in relation to the PMRA's issuance of section 12 notices, nor do they limit the challenge to the impact on pollinators. The AGC argues that even a successful judicial review of the PMRA's issuance of section 12 notices and the setting aside of the section 12 notices would not invalidate the underlying PCPs' registrations, which were registered in accordance with section 8 and based on a determination that there was no unacceptable risk.

39 The AGC also notes that in their Notices of Application, the Applicants seek a declaration of invalidity of the registrations under section 8. The AGC submits that this would require the review of 79 discrete decisions made pursuant to section 8 all the way back to 2006, which cannot be reviewed as a course of conduct. The AGC argues that the Prothonotary ignored relevant evidence which showed the differences in the various decisions and in the section 12 notices and, therefore, erred in presuming commonality between the decisions.

40 The AGC points to the information provided by its affiant, Ms. Sterkenburg, which notes the differences between the registration decisions. Ms. Sterkenburg explains that the decisions implicate different PCPs in different contexts. The data necessary to be reasonably certain that the PCPs pose no risk varies widely depending on these differences. The AGC adds that registration decisions involved different active ingredients (Clothianidin and TMX) and 31 separate end-use products (33 PCPs in total). According to the AGC, each of these individual decisions involved a determination under section 8 by the PMRA, based on separate records, that the registration, renewal, continuation or reinstatement of the product (as the case may be) did not present an unacceptable risk to human health or the environment.

41 The AGC adds that section 12 notices were not issued for all decisions, rather for 55 of the 79 decisions. However, the AGC acknowledges that the other 24 decisions were linked to registrations which did have such a notice due to the operation of section 15 of the Regulations (as explained in the Annex) and were, therefore, also conditional registrations.

42 With respect to the Court's observation that throughout the entire registration history of the PCPs at issue there was always an outstanding request via a section 12 notice for a study on the toxicity risks to bees, the AGC responded that the same section 12 notice was not issued in each

case; the section 12 notices are specific to each decision, which reflects that the science evolves over time as do the protocols for the evaluation of the risks posed to pollinators.

(3) Course of Conduct — Subsection 18.1(2) and Rule 302

43 The AGC argues that the Notices of Application must be struck because they violate subsection 18.1(2), and no extension of time was requested, nor would such an extension be justified as it would hinder the principle of finality.

44 The AGC further argues that the Notices of Application challenge more than one decision, contrary to Rule 302 and its purpose of efficiency. The AGC again notes no exemption was requested nor would it be justified.

45 The AGC submits that the allegations do not constitute a course of conduct because they do not challenge any policy, but rather seek to invalidate a number of individual registrations which, among other differences, were made at different times and on different records, and all of which could have been the subject of judicial review in a timely manner. In addition, the Prothonotary failed to consider whether it was difficult to pinpoint a single decision, which is a relevant indicia of a course of conduct.

46 The AGC further submits that, unlike the present circumstances, in the cases where the Federal Courts have allowed challenges to courses to conduct, the applications were about a discrete challenge to the legality of decision-making, the factual distinctions between the decisions were insignificant, the relief sought was forward looking, and the reasonableness of individual decisions was not in issue.

(4) Adequate Alternative Remedy

47 The AGC argues that the Prothonotary erred in her application of the legal test to determine the adequateness of the alternative remedy. The Prothonotary based her finding on her conclusion that the PMRA re-evaluation and the conversion application would not afford the "central remedy" sought by the Applicants, namely declarations of unlawful conduct. The AGC submits that the Prothonotary's reference to the "central remedy" is synonymous with a "preferred" remedy. However, whether an alternative remedy is an applicant's preferred remedy is not determinative of its adequateness (*Strickland* at para 59). The AGC further submits that the Prothonotary also erred by: focussing exclusively on expeditiousness and the remedial capacity of the alternative; failing to apply all of the relevant elements of the test, such as consideration of the expertise of the PMRA, which is in a better position to determine whether the impugned decisions were made with insufficient scientific information; and, failing to consider that allowing the Applications to proceed would be an inefficient use of judicial resources.

B. The Respondent, Bayer's, Submissions

48 Bayer argues that the Prothonotary made three key errors. First, the Prothonotary confused sections 8 and 12 of the Act, which led her to mischaracterize the nature of the Applicants' claims and the course of conduct alleged. This led her to err in finding that the registration decisions were implicated. Second, the Prothonotary erred by conflating the analysis for a course of conduct under subsection 18.1(2) and Rule 302, and by only conducting the Rule 302 analysis and, then, only in part. Third, the Prothonotary erred in applying the test for an adequate alternative remedy, including by focussing only on the alternative remedy and not on the appropriateness of judicial review as sought.

(1) Mischaracterization of the Notices of Application

49 Bayer argues that the construction of the pleadings is a legal determination and the Prothonotary's error is, therefore, an error of law. Bayer submits that the Notices of Application clearly focus on the registration decisions made under section 8, and not the issuance of the section 12 notices.

50 Bayer points to the Notice of Application with respect to Clothianidin, which seeks judicial review of the PMRA's course of conduct in "successively registering" PCPs without the necessary scientific information to be reasonably certain of the environmental risks and by "unlawfully extending the validity periods" of PCPs. Bayer argues that both these allegations are about registration decisions made pursuant to section 8. In addition, the relief sought in the Notice of Application is to declare the course of conduct of successively registering and of extending the validity of the Clothianidin products unlawful, which also focuses on the section 8 decisions. Bayer adds that the requested declaration of invalidity would also only target section 8 decisions.

51 Bayer submits that the Notice of Application seeks to declare every aspect of Clothianidin Active and its end-use products' registrations unlawful, not just the risks the PCPs cause to pollinators. Bayer adds that both Notices of Application contain almost no reference to section 12 notices, adding that section 12 is not even referred to under the sub-heading "PMRA's course of conduct is unlawful". Bayer points to other parts of the Notices of Application and submits that all the allegations relate to the decision-making power under section 8, without any mention of unlawfully issuing or improperly using section 12 notices. Bayer argues that the relief now sought and the course of conduct now asserted is not the same as pleaded in the Notices of Application.

52 Bayer submits that the Applicants re-characterized their Notices of Application in response to the Respondents' motion to strike and then focussed on the PMRA's unlawful practice of issuing section 12 notices to maintain conditional registrations without sufficient studies.

53 Bayer submits that the Applicants' allegations regarding a critical data gap target the decisions made pursuant to section 8. However, contrary to the Applicants' allegations, the available evidence shows that for each registration decision, the PMRA had sufficient data to determine

that the risks were acceptable. In cases where section 12 notices were issued, the Respondents complied and provided the requested chronic toxicity studies, which were assessed by the PMRA. Bayer emphasizes that as the products were registered, or where requests were made to convert conditional registrations to full registrations, new and different section 12 notices were issued by the PMRA seeking additional information.

54 Bayer argues that if the Court finds that there is a misuse of section 12 notices, any resulting declaration would only invalidate those section 12 notices; the PCP's registration would continue, but would no longer be conditional on providing the additional information requested in the section 12 notice.

(2) Course of Conduct — Subsection 18.1(2) and Rule 302

55 Bayer submits that although the jurisprudence under subsection 18.1(2) and Rule 302 both use the term "course of conduct", the analysis of what constitutes a course of conduct differs because the purpose of the two provisions differs. Bayer argues that the Prothonotary conflated the legal tests applicable to subsection 18.1(2) and Rule 302, and only conducted the analysis with respect to Rule 302.

56 With respect to subsection 18.1(2), Bayer argues that there is no course of conduct and no policy of general application at issue. Bayer submits that the Applicants' assertion that they seek to review a practice is an after-the-fact attempt to connect 35 disparate decisions based on the issuance of section 12 notices, which is an attempt to "plead around" subsection 18.1(2). Rather, there are 35 discrete decisions regarding Clothianidin at issue, of which 21 were made between 2 and 10 years beyond the 30-day limitation period, and no extension of time was requested by the Applicants.

57 Bayer submits that labelling the decisions at issue as a policy cannot avoid subsection 18.1(2). The only evidence before the Court is the affidavit of Ms. Sterkenburg who answered on cross-examination that there is no policy or guidelines regarding the use of section 12 notices. Bayer submits that the case law relied on by the Applicants (discussed below) does not assist them, because those cases deal with a formal policy or its implementation, which are not present here.

58 Bayer argues that the Prothonotary really only conducted the analysis to determine whether an exemption from Rule 302 should apply, but erred by focussing only on the similarities and differences in the decisions and by failing to consider whether reviewing all 35 Clothianidin decisions would advance judicial efficiency. Bayer submits that the test in *Truehope Nutritional Support Ltd. v. Canada (Attorney General)*, 2004 FC 658, 251 F.T.R. 155 (F.C.) [*Truehope Nutritional Support Ltd.*] governs, which considers whether the similarities between the decisions outweigh the differences such that requiring two or more applications would be a waste of time and effort, or whether the time and effort of the parties and Court would be conserved by a single application.

59 Bayer submits that the exceptions to Rule 302 in the case law are few and have generally been limited to no more than four decisions which were not spread out over years, but a much shorter period.

60 Bayer argues that it would not be efficient to review 35 discrete decisions together. Bayer points to the registration history of one product as an example. For this product, a section 12 notice was issued after registration requesting a full study on toxicity to honey bees, a protocol was developed for the study, it was conducted and submitted. The product was again registered and a new section 12 notice was issued requesting a new hive study. Bayer submits that in each case, the risks were found to be acceptable. Bayer submits that if these Applications were to proceed, each decision would have to be reviewed on the record before the PMRA at the time; each record would be different and likely voluminous; and the review would be long and resource intensive, contrary to the purpose of Rule 302 and the requirement that judicial reviews be heard without delay.

61 Bayer further argues that, even if a course of conduct is found pursuant to the Rule 302 analysis, this does not exempt an applicant from subsection 18.1(2) because a separate analysis and determination under subsection 18.1(2) is required. Bayer relies on *James Richardson International Ltd. v. R.*, 2004 FC 1577 (F.C.) at para 22, (2004), [2005] 2 F.C.R. 534 (F.C.) [*James Richardson International Ltd.*] to assert that the test for a continuing course of conduct pursuant to Rule 302 cannot be used to allow an applicant to overcome the 30-day limitation period in subsection 18.1(2) and states that "*yet this is what occurred here*".

62 Bayer adds that an application to judicially review multiple orders could comply with subsection 18.1(2) (i.e. as a course of conduct or policy) yet still breach Rule 302, again because a separate analysis is required. Bayer also notes that a party could be granted leave to challenge more than one decision under Rule 302 (i.e. because the decisions were all very similar) but still not be granted an extension of time under subsection 18.1(2) (relying on *Whitehead v. Pelican Lake First Nation*, 2009 FC 1270 (F.C.) at para 54, (2009), 360 F.T.R. 274 (Eng.) (F.C.) [*Whitehead*]).

63 Bayer acknowledges that the test on a motion to strike is high but submits that the "knock-out punch" in this case is that the Notices of Application seek to review 79 decisions beyond the 30-day limitation period, without an extension of time being granted, and, therefore, in contravention of subsection 18.1(2). Similarly, they seek to review more than one decision contrary to Rule 302; the decisions differ and it would be contrary to judicial efficiency for the decisions to be reviewed together.

(3) Adequate Alternative Remedy

64 Bayer argues that the Prothonotary erred in focussing only on whether the re-evaluation launched by the PMRA in 2012 will provide the Applicants with the declaratory relief they seek

and whether it will be expeditious. According to Bayer, the alternative remedy need not be identical to that sought by the Applicants and need not be equally expeditious.

65 Bayer also argues that the Prothonotary further erred by not considering whether the Applications for Judicial Review would be suitable and appropriate as required by *Strickland*, and erred in not assessing the balance of convenience between the proposed alternative and the Applications for Judicial Review. Bayer submits that judicial review is not appropriate because it duplicates the PMRA's ongoing re-evaluations and raises the possibility of conflicting decisions.

C. The Respondent, Sumitomo/Valent's, Submissions

66 Sumitomo also provided an overview of the PCPA, emphasizing that all registration decisions are made pursuant to section 8 and require a determination of whether the risks posed are acceptable, and that section 12 notices are only issued after this assessment has already been made.

(1) Mischaracterization of the Notices of Application

67 Sumitomo submits that in determining a motion to strike an application for judicial review, the first step is to identify the essential character of the claims. However, the Prothonotary's fundamental misconception about sections 8 and 12 resulted in her failure to appreciate the essential character of the claims as set out in the Notices of Application.

68 Sumitomo argues that paragraph 20 of the Prothonotary's decision demonstrates that she mischaracterized the effect of a section 12 notice. Section 12 notices do not defer the receipt of necessary studies. Rather, pursuant to section 14 of the Regulations, the effect of a section 12 notice is to shorten the validity period of the registration to three years and to defer the public consultation process and Notice of Objection. Sumitomo adds that the section 12 notices did not result in the continued registration of Clothianidin products; the PMRA's decisions under section 8 did so.

69 Sumitomo submits that the Prothonotary's characterization of the claims does not reflect the relief sought by the Applicants, which is to invalidate the registration decisions. Sumitomo argues that if the Applications were really about an unlawful practice of issuing section 12 notices, the relief sought should target the consequences of section 12, such as the suspension of public consultation.

(2) Course of Conduct — Subsection 18.1(2) and Rule 302

70 Sumitomo argues that whether there is a course of conduct is not debatable, and that clearly there is no course of conduct. The Prothonotary erred in her interpretation of the jurisprudence regarding subsection 18.1(2) and Rule 302 and in her analysis.

71 Sumitomo submits that where decisions are made at different times and involve a different focus, they do not constitute a course of conduct. Sumitomo adds that these Notices of Application

do not challenge a policy in the PMRA regarding section 12, but rather a number of distinct decisions, made at different times about different products, any of which could have been judicially reviewed. Sumitomo adds that in the present case, the differences in the decisions outweigh their similarities and there is no difficulty pinpointing an individual decision for review.

72 Sumitomo submits that to allow the Applications to proceed would undermine principles of finality and efficiency which inform subsection 18.1(2) and Rule 302, and would signal to litigants that wide-ranging attacks on historical administrative decisions can be pursued under the guise of an alleged course of conduct.

(3) Adequate Alternative Remedy

73 Sumitomo argues that this issue is also not debatable; clearly there is an adequate alternative remedy. The Prothonotary erred in law by failing to consider the essential elements set out in *Strickland* to determine whether there is an adequate alternative remedy, and as a result, no deference is owed.

74 Sumitomo submits that in *Strickland*, the Supreme Court of Canada established that many factors must be considered. Sumitomo argues that the Prothonotary focused on only two factors — expeditiousness and the "identicality" or sameness of the alternative remedy — which is what the Prothonotary meant by "central remedy". They submit that the alternative need only be adequate, not identical to that available on judicial review.

75 Sumitomo points to case law to argue that expeditiousness cannot outweigh other factors (*Girouard c. Canada (Procureur général)*, 2017 FC 449, [2017] F.C.J. No. 675 (F.C.)) and that applications for judicial review should not proceed where they would interfere with ongoing administrative processes before they are completed (*C.B. Powell Ltd. c. Canada (Agence des services frontaliers)*, 2010 FCA 61, [2011] 2 F.C.R. 332 (F.C.A.) [*CB Powell Ltd.*]).

76 Sumitomo further argues that the Prothonotary failed to consider other relevant factors in her analysis of an adequate alternate remedy, including the expertise of the PMRA, the economical use of judicial resources, the possibility of inconsistent findings between the re-evaluation and judicial review, and more generally, whether judicial review would be appropriate. Sumitomo submits that it would not be appropriate because it would entail the review of 79 decisions with their own records and would duplicate the ongoing re-evaluation process.

77 Sumitomo submits that the PMRA's re-evaluation process is adequate because the Applications are really about whether the environmental risks posed by the PCPs are acceptable, which will be assessed in the re-evaluation. The re-evaluation will result in the registrations being either cancelled, amended or confirmed by the PMRA. At the conclusion of this process, the Applicants could then seek judicial review of the final decisions. Awaiting the outcome of the re-evaluation before pursuing judicial review is more prudent, because it would provide the Court

358 with the benefit of the most recent scientific analysis and conclusions of the PMRA based on its expertise. Sumitomo also notes that the Applicants could achieve the results they seek in the re-evaluation, making a subsequent judicial review unnecessary.

D. The Respondent, Syngenta's, Submissions

(1) Mischaracterization of the Notices of Application

78 Syngenta notes the registration history of TMX as described by its affiant, Ms. Tout: 44 discrete registration decisions were made over 10 years; 19 registrations are at issue; and, in each case, the PMRA made independent decisions based on a risk assessment, and a determination that there were no unacceptable risks. Syngenta also notes that the history described by the Applicants for Clothianidin is not the same as the history of registration for TMX. In particular, there was never any mention of a "critical data gap" with respect to TMX.

79 Syngenta points to paragraph 20 of the Prothonotary's decision, as did the other Respondents, and submits that the Prothonotary misunderstood the role of sections 8 and 12. The Prothonotary's description of the unlawful course of conduct — i.e. the unlawful practice of issuing section 12 notices "that had the effect of deferring the receipt and review of necessary studies...thereby maintaining for over a decade the resulting conditional registrations" — is untenable, because the issuance of section 12 notices is not unlawful. Syngenta argues that judicial review can only be sought with respect to unlawful decisions or conduct.

80 Syngenta submits that the use of section 12 notices does not result in continuing the registration of PCPs without an assessment of the risk, because registration is always based on a determination made under section 8 that there are no unacceptable risks. Syngenta submits that the Applicants are really alleging that the PMRA acted unlawfully in making 44 decisions pursuant to section 8.

81 Syngenta points to the exhibits to demonstrate the registration history of its own products. In some cases, upon receipt of data in response to a section 12 notice, a subsequent and different section 12 notice was issued requesting other specific information or studies. Syngenta also points to the data it was required to submit in response to a section 12 notice as part of various requests for conversion to full registration following a conditional registration, registrations for new use-sites, and extensions of registrations to permit data to be generated as examples of how section 12 notices are unique and how, in every case, Syngenta complied and the product's registration was found not to pose unacceptable risks in accordance with section 8. Syngenta submits that: the nature of the risk assessment for each was distinct; scientific evidence was considered by the PMRA, including about pollinators, to permit the PMRA to make a determination under section 8; the PMRA considered the information that was current at the relevant time; and, the PMRA decision process was transparent, with all decisions posted on the Public Registry.

(2) Course of Conduct — Subsection 18.1(2) and Rule 302

82 Syngenta argues that the Applicants sought to avoid the obstacle created by their own pleadings by reformulating their theory of an unlawful course of conduct to focus on the issuance of section 12 notices rather than the registration decisions made pursuant to section 8.

83 Syngenta points to the Notice of Application with respect to TMX, and submits that it alleges an unlawful course of conduct that is specific to each of the 44 TMX decisions.

84 Syngenta argues that the section 8 registrations cannot constitute a course of conduct because the differences between the decisions significantly outweigh their similarities. Syngenta notes that: the 44 decisions related to TMX pertain to 18 products with different chemical formulations and concentrations; the risk profile differs for each depending on the mix of active ingredients; each decision is about different use-sites, applications and products; the data requirements differed and evolved over time, along with the state of the science; the decisions involved different decision-makers within the PMRA; and, different label restrictions were applied to different products and varied with the application method and other factors. Syngenta submits that the Application for Judicial Review would require an examination of each registration decision, which was made under different circumstances, involved different products, invoked different statutory provisions (depending, for example, on whether a registration was continued, renewed or reinstated), and was based on a separate determination of whether the risk was acceptable. Syngenta adds that the review would include over 50,000 pages of information regarding TMX and all the other scientific data and information held by the PMRA.

85 Syngenta adds that it has spent hundreds of millions of dollars to provide the necessary studies to the PMRA, and farmers have relied on its products for years. It submits that these registrations should not be invalidated years later, adding that this is the mischief designed to be prevented by subsection 18.1(2).

(3) Adequate Alternative Remedy

86 Syngenta argues, as did Sumitomo, that the Prothonotary erred in her analysis by focusing solely on whether the proposed alternatives would provide the central remedy and would be comparable to judicial review, without considering the appropriateness of judicial review. Syngenta submits that judicial review is neither appropriate nor respectful of the normal process for challenging decisions of the PMRA. It will require the Court to review decisions that date back more than 10 years and involve hundreds of thousands of pages of scientific material that has evolved over time. This would entail a massive expenditure of judicial resources and raise issues that are beyond the technical expertise of the Court.

VI. The Applicants' Submissions

(1) Overview

87 The Applicants submit that the Respondents have argued this appeal as if it were a *de novo* motion to strike. However, they point out that the first issue is not whether this Court should strike the Applications, but rather whether the Prothonotary erred in refusing to do so. The Applicants stress that in the decision under review the Prothonotary did not definitively decide the issues raised by the Respondents; rather, she found that they were debatable.

88 The Applicants argue that the Prothonotary's discretionary decision should be reviewed for palpable and overriding error (*Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331 (F.C.A.) [*Hospira Healthcare Corp.*]). As Case Management Judge since the time these Applications were filed in July 2016, the Prothonotary has held four case management conferences and fully understands the issues. Contrary to the Respondents' position, there is no extricable legal issue or principle and no palpable and overriding error has been demonstrated.

89 The Applicants note the high threshold the Respondents must meet to succeed to strike out a notice of application (*JP Morgan Asset Management (Canada) Inc.*). The extensive motion record before the Prothonotary is exceptional and all this evidence belies the Respondents' submissions that there is an obvious flaw in the Notices of Application.

90 The Applicants submit that their Notices of Application and the relief sought focus on an alleged unlawful course of conduct. The Applicants explain that section 12 notices have been the means by which the PMRA has deferred the receipt and review of necessary studies relating to the PCPs' impact on pollinators, which the PMRA has itself referred to as a "critical data gap". The Applicants allege that without the data requested in the section 12 notices it is impossible for the PMRA to assess whether the risks posed by the PCPs are acceptable, yet the PMRA has purported to do so consistently since 2006. They also allege that section 12 notices have been used to circumvent the PMRA's public consultation duty, particularly with respect to TMX, which has not been the subject of any consultation since 2006.

91 The Applicants acknowledge that section 8 governs whether the registration of a PCP will be granted or denied, based on whether the risk is acceptable. However, they question how the risk can be found to be acceptable where a critical data gap is identified and additional information is consistently requested as a condition of registration. The Applicants point to the exhibits in the affidavit of its affiant, Dr. Elaine MacDonald, which set out the chronology of registrations of the PCPs at issue, including requests for studies on toxicity as conditions of registration, the PMRA's determination that the studies submitted were not sufficient, and subsequent section 12 notices requesting other studies, all of which focussed on the toxicity risks to pollinators. The exhibits include original registrations, renewals and conversion to full registration applications, which are

accompanied by successive section 12 notices (not all identical) seeking additional information regarding the toxicity risks to pollinators.

92 The Applicants also point to examples where the registration of a PCP was continued although the section 12 requirement had not been complied with, or where the information or study provided to fulfill the previous section 12 notice was found to be unsatisfactory.

93 The Applicants submit that there is no evidence that any conditional registration has ever expired. Instead, the PCPs' registration has been continued due to conversion applications or renewals, with a further section 12 notice requesting additional information and resulting in another conditional registration. Each time an expiry date approached, the PMRA made a decision pursuant to section 8 (to renew, continue, or extend) despite the persistent critical data gap, and issued another section 12 notice asking for additional information regarding long-term toxicity risks for pollinators.

94 The Applicants acknowledge that as the science evolves, the requests for additional information also evolve and that, accordingly, the section 12 notices have not requested exactly the same information in each case. However, the section 12 notices have repeatedly requested studies to address the toxicity risks to pollinators based on the state of the science at the relevant time.

95 With respect to the Respondents' submissions that section 12 notices were not issued for each PCP at issue, the Applicants note that the PMRA used section 15 to conditionally register several new end-use products by linking them with previously issued section 12 notices with the same active ingredients or with related end-use products. As a result, each PCP at issue is conditional on the submission of further data with respect of their risk to pollinators, which was requested via a section 12 notice. (As noted above, the Respondent, AGC, acknowledged that although not all 79 registration decisions at issue were accompanied by section 12 notices, those that were not were linked in this manner.)

96 The Applicants note that there is no jurisprudence on the interpretation of the provisions of the PCPA at issue. The Applicants submit that the provisions of the PCPA do not appear to accord with the PMRA's conduct over the years. The concept of a conditional registration is not in the Act. The effect of a conditional registration is discerned only from the Regulations, which were promulgated after the Act was brought into force. Although the Respondent, AGC, described section 12 as allowing for confirmatory information, this is not described in the Act nor is it reflected in the history of registrations of the products at issue.

97 The Applicants also note that the PMRA extended the registrations of PCPs in December 2015 without any statutory authority. The PMRA wrote to registrants advising them that the validity of registrations would be extended from 2015 for two additional years to align with the target date of completion of the evaluation of neonicotinoids. Ms. Sterkenburg, the AGC's affiant, explained on

cross-examination that the PMRA purportedly rectified this in June 2016 by issuing new section 12 notices and reinstating the registrations of the products at issue.

(2) No Mischaracterization of the Notices of Application

98 The Applicants submit that the Prothonotary's reasons demonstrate that she fully understood the statutory scheme and did not confuse sections 8 and 12.

99 The Applicants submit that the alleged improper use of section 12 Notices, although not elaborated on in detail in the Notices of Application, was fully explained in the motion record before the Prothonotary. The Applicants note the presumption that the Prothonotary considered everything before her applies and has not been rebutted (*Mahjoub* at para 67).

100 The Applicants acknowledge that the issuance of section 12 notices is not itself unlawful. The Applicants explain that their position has never been that the course of conduct alleged to be unlawful is only about section 12 or only about section 8. Rather, it is about the interaction between sections 8 and 12 in the registration process. The Applicants submit that the Prothonotary read the Notices of Application holistically and did not err in finding that the Applications are about the PMRA's practice of issuing section 12 Notices, which had the effect of deferring the receipt and review of necessary studies on the PCPs effect on pollinators, resulting in conditional registrations of those PCPs for over a decade without necessary information. The Applicants argue that the Prothonotary understood that the alleged course of conduct was this practice of melding section 12 notices into the Act's registration process in a way that undermines the Act's objectives, which require the PMRA to be reasonably certain about products' environmental risks when making registration decisions.

101 The Applicants respond that, contrary to the Respondents' submissions, they did not make up a theory to survive the motion to strike. Although the Notices of Application say less about section 12 than other provisions, the Notices describe the interaction between section 8 and section 12 that the PMRA relied on to continue to register PCPs without the data it had identified as a "critical data gap". The Applicants add that the Prothonotary's reasons convey that she understood that section 12 notices are what makes a registration conditional, and are central to the unlawful conduct alleged.

102 The Applicants emphasize that the main relief sought in the Applications is a declaration of unlawful conduct, not the invalidation of registration decisions, although that would be a consequence of the declaration and that relief is also sought. The pleadings properly seek relief addressing the alleged course of conduct.

(3) Course of Conduct — Subsection 18.1(2) and Rule 302

103 The Applicants highlight that the Prothonotary did not decide that there was a continuing course of conduct. Rather, she was uncertain.

104 The Applicants submit that the Prothonotary did not confuse the purposes of Rule 302 and subsection 18.1(2). The Applicants also dispute that separate analyses are required for Rule 302 and subsection 18.1(2). They submit that a fact-based assessment is required with respect to both.

105 The Applicants submit although the PMRA may not have an explicit policy, the PMRA's consistent approach to issue section 12 notices and to continue the registrations of the PCPs shows an ongoing practice which constitutes a course of conduct as exemplified in the case law. The Applicants point to *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2016 FC 933, [2017] 2 F.C.R. 304 (F.C.) [*CBC*], where the Court found that there was no specific policy at issue, rather an ongoing practice, and found that this constituted a course of conduct and was not subject to the time limit in subsection 18.1(2).

106 The Applicants also point to *Fisher v. Canada (Attorney General)*, 2013 FC 1108, 441 F.T.R. 273 (Eng.) (F.C.) [*Fisher*], where the Court found that it could review a "general decision, the implementation steps, or a combination of the two where they combine to result in unlawful government action". The Applicants note that, as in *Fisher* (at para 79), their Applications seek to restrain a "closely connected course of allegedly unlawful government action" by way of declaratory relief.

107 The Applicants submit that the Prothonotary addressed the Respondents' argument that the essence of the Applicants' claims is a challenge to 79 decisions of the PMRA pursuant to section 8. The Prothonotary considered the jurisprudence, noting that a course of conduct could be found even where discrete decisions could be pinpointed.

(4) Adequate Alternative Remedy

108 The Applicants note that, in accordance with *JP Morgan Asset Management (Canada) Inc.*, an application should not be prematurely struck on the basis of an adequate alternative remedy unless it is certain that there is recourse elsewhere and that it is adequate. The Prothonotary was not certain that there would be an adequate alternative remedy. This issue should be determined by the judge on the Applications for Judicial Review.

109 The Applicants also note that the PMRA's re-evaluation of neonicotinoids was launched in 2012, an interim report was expected in December 2017 and a final report is expected in December 2018. They point out that this is a substantive review, i.e., a science-based process, intended to globally assess neonicotinoids, which will not address the PMRA's regulatory practices or the registration process or the practice of using section 12 notices to fill the data gaps.

110 The Applicants support a science-based re-evaluation, but question how the PMRA's re-evaluation can be considered as an alternative remedy, or how a Notice of Objection to the findings of the re-evaluation could result in the relief requested in these Applications for Judicial Review.

111 The Applicants submit that their past experience supports their argument that the PMRA's internal review processes are not adequate alternatives. The Applicants note that public consultation by the PMRA is the trigger for a party's right to file a Notice of Objection to a registration decision. They add that given the PMRA's persistent use of section 12 notices, which suspend the requirement for consultation, their right to file a Notice of Objection in respect of a decision dealing directly with the PCPs at issue was triggered only once, in 2013, with respect to the PMRA's decision to renew "Clothianidin foliar/soil product registrations". The Applicants' objection was focussed on the PMRA granting the renewals without having received chronic toxicity and other studies required by the section 12 notices. In other words, the Notice of Objection was based both on a regulatory practice, (the outstanding critical data gap), and on substantive grounds, (that the scientific literature impugns the science relied on by the PMRA). The Applicants note that the PMRA took 3 years to decide *not* to establish a review panel. The PMRA refused to consider the objection and explained that objections that concern regulatory practice are not normally referred to a panel. The Applicants add that the PMRA's decision was made after the conditional registration at issue had theoretically expired (in early 2016). The Applicants also note that they were informed of the decision one day after they filed the current Applications for Judicial Review.

112 The Applicants dispute that the Supreme Court of Canada set out essential elements of a legal test in *Strickland*, or that the Prothonotary failed to consider any essential elements. They submit that this is an attempt by the Respondents to frame a question of mixed fact and law as a question of law, which the Supreme Court of Canada cautioned against in *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 (S.C.C.) at para 45, [2017] 1 S.C.R. 688 (S.C.C.) [*Teal Cedar Products Ltd.*].

113 The Applicants submit that the Prothonotary's reasons convey that she considered all of the submissions and all the relevant factors from *Strickland* in the context of this case. The Prothonotary did not limit her consideration to only two factors. Rather, she found that two factors were of particular concern — the expeditiousness and the remedial capacity of the alternative remedy proposed - and gave them more weight. She did not find that a perfect or identical remedy was required.

114 The Applicants acknowledge that the new evidence the Respondents sought to admit, which is comprised of the December 2017 proposed decisions of the PMRA, clarifies that the Notice of Objection process will still apply to the re-evaluation of neonicotinoids (the PRVDs), but will not apply to the decisions regarding the conversion of conditional registrations to full

registrations (the PRDs). The PRDs will be the subject of a public consultation process and may result in final decisions by December 2018, and at that time, an interested party could pursue an application for judicial review of the final decision. The Applicants submit that regardless of this new evidence, the adequacy of the alternative remedy remains debateable as the change to the consultation process affects only the PRDs, and even then, only modestly. Moreover, the Applications for Judicial Review can be heard before December 2018.

115 The Applicants also dispute the Respondents' submissions that the record of each of the 79 decisions at issue would be required to be reviewed, making it complex and lengthy. The Applicants submit that the record would not be as large as suggested because the allegations pertain to specific data about pollinators and not the several other risks that may have been considered by the PMRA in registering the PCPs at issue. Although judicial review will be complex, it will not be unmanageable. The Prothonotary, as Case Management Judge, is clearly aware of the issues and the scope.

VII. The Issues

116 The issue on this Appeal is whether the Prothonotary erred in finding that it was *debatable* whether the Applications for Judicial Review relate to an alleged course of conduct and that it was *debatable* whether there was an adequate alternative remedy for the Applicants, and, therefore, erred in refusing to strike the Applicants' Notices of Application. The Respondents appear to have reiterated to the Court the same arguments made to the Prothonotary.

117 Based on the arguments advanced, the following issues must be addressed:

- What is the applicable the standard of review?
- Did the Prothonotary err in her understanding and application of the test to strike an Application for Judicial Review?
- Did the Prothonotary err in her understanding of the statutory regime and did she confuse the purpose and effect of section 8 and section 12?
- Did the Prothonotary err in characterizing the Applicants' claims?
- Did the Prothonotary err in her understanding of the jurisprudence governing subsection 18.1(2) and Rule 302 and in her determination that it was debatable whether the allegations for which the Applicants seek judicial review relate to a course of conduct?
- Did the Prothonotary err in finding that it was debatable whether there was an adequate alternative remedy for the Applicants?

VIII. The Standard of Review

118 The Respondents argue that the issues at stake are legal issues for which the standard of review is correctness and/or that the Prothonotary's discretionary decision is based on palpable and overriding errors. The Respondents also argue that some errors arise from extricable questions of law, and no deference is owed. For example, Bayer argues that the Prothonotary mischaracterized the pleadings, which it submits is an extricable error of law that led to other errors. Sumitomo argues that the Prothonotary failed to consider a required element of the legal test to determine whether there was an adequate alternative remedy, resulting in an error of law.

119 The Respondent, AGC, takes the position that whether the issues are characterized as questions of law or of mixed law and fact is immaterial because the errors are so significant, they are palpable and overriding and no deference is owed.

120 The Applicants argue that the Respondents' are attempting to characterize the alleged errors as extricable questions of law to achieve a particular result; however, the alleged errors should be reviewed on a palpable and overriding error standard.

121 The Applicants submit that, as Case Management Judge, the Prothonotary is very familiar with the particular circumstances and issues and, as a result, an enhanced level of deference is warranted (*Hospira Healthcare Corp.*). They note that there is a rebuttable presumption that the Prothonotary considered and assessed all the material before her, and that her reasons should be read holistically when determining whether she committed a palpable and overriding error (*Mahjoub*).

122 There is no dispute that the applicable test for reviewing discretionary orders of motions judges, including case management judges, is set out in *Hospira Healthcare Corp.*. Such orders are to be reviewed on the ordinary civil appellate standard set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.) [*Housen*]. Questions of law are to be reviewed on a correctness standard, and questions of fact are owed deference unless there is a palpable and overriding error. Questions of mixed fact and law are also owed deference absent palpable and overriding error, unless the analysis contains an extricable error of law or legal principle. If so, no deference is owed (*Hospira Healthcare Corp.* at para 66).

123 An extricable error of law or principle would include the "application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle" (*Housen* at para 36). More recently, in *Teal Cedar Products Ltd.*, the Supreme Court of Canada cautioned lower courts against finding extricable errors of law too readily, noting that "mixed questions, by definition, will involve aspects of law", adding the caution that counsel are motivated to "strategically frame a mixed question as a legal question".

124 Justice Stratas explained "palpable and overriding error" in *Mahjoub* at para 61,

> [61] Palpable and overriding error is a highly deferential standard of review: *Benhaim v. St. Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at para. 38; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall. See *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 at para. 46, cited with approval by the Supreme Court in *St. Germain*, above.

125 Justice Stratas described "palpable" as an error that is obvious (at para 62) and "overriding" (at para 64), as "an error that affects the outcome of the case. It may be that a particular fact should not have been found because there is no evidence to support it. If this palpably wrong fact is excluded but the outcome stands without it, the error is not "overriding." The judgment of the first-instance court remains in place."

126 Justice Stratas also clarified the standard of review for exercises of discretion by a first-instance court, which would include decisions of the Case Management Judge, noting that exercises of discretion involve applying legal standards to the facts as found and are questions of mixed fact and law (*Mahjoub* at para 72). He explained at para 74:

> [74] Under the *Housen* framework, questions of mixed fact and law, including exercises of discretion, can be set aside only on the basis of palpable and overriding error — the high standard described above — unless an error on an extricable question of law or legal principle is present. So, for example, if an appellate court can discern some error in law or principle underlying the first-instance court's exercise of discretion, it can reverse the exercise of discretion on account of that error. Another way of putting this is whether the discretion was "infected or tainted" by some misunderstanding of the law or legal principle: *Housen* at para. 35.

127 A judge's characterization of the notice of application was also found to be a conclusion of mixed fact and law in *Apotex Inc. v. Canada (Minister of Health)*, 2012 FCA 322 (F.C.A.) at para 9, (2012), 443 N.R. 291 (F.C.A.) [*Apotex FCA*].

128 Contrary to the Respondents' submissions, the Prothonotary's characterization of these pleadings is a conclusion of mixed fact and law. The other issues in this Appeal, as explained below, are also questions of mixed fact and law. Unless the Prothonotary made an extricable error of law (such as failing to consider a required element of a legal test) the issue is whether the Prothonotary made a palpable and overriding error — i.e., an obvious error that affects the outcome.

IX. Did the Prothonotary err in her understanding and application of the test to strike an Application for Judicial Review?

129 In *JP Morgan Asset Management (Canada) Inc.* the Court of Appeal set out the requirements for notices of application for judicial review, as well as the correct approach for motions to strike applications for judicial review.

130 The Court of Appeal reiterated that the threshold to strike out a notice of application for judicial review is high, at para 47,

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

131 In *David Bull*, the Federal Court of Appeal noted that such instances are "very exceptional and cannot include cases...where there is simply a *debatable issue* as to the adequacy of the allegations in the notice of motion" (emphasis added).

132 In *JP Morgan Asset Management (Canada) Inc.*, at para 48, the Court of Appeal explained the reason for this high threshold: the jurisdiction to strike a notice is based on the Court's plenary jurisdiction rather than a specific Rule; and, applications for judicial review should proceed without delay and in a summary way. The Court added that "An unmeritorious motion — one that raises matters that should be advanced at the hearing on the merits — frustrates that objective".

133 The Court also highlighted the importance of reading the notice of application "with a view to understanding the real essence of the application", noting that "The Court must gain "a realistic appreciation" of the application's "essential character" by reading it holistically and practically without fastening onto matters of form..." (at paras 49-50, internal citations omitted).

134 In addition, the Court addressed the issue of the admissibility of affidavits on a motion to strike, confirming that the general rule is that affidavits are not admissible (at para 51). The Court explained the rationale: affidavits have the potential to trigger cross-examinations and refused questions which can delay applications for judicial review; and, because the facts alleged in the notice of application are taken as true, there is no need for an affidavit to supply the facts. The Court added that a respondent must identify an obvious and fatal flaw on the face of the application, and "[] flaw that can be shown only with the assistance of an affidavit is not obvious" (at para 52).

135 In the present case, affidavit evidence was admitted before the Prothonotary, each with many exhibits. The receipt of such evidence on a motion to strike is unusual and exceptional. The voluminous evidence submitted to support the positions of the Applicants and the Respondents

highlights the debate between them, but it does not rebut the principle that, on a motion to strike, the facts alleged in the Notices are taken as true.

136 As noted, the threshold to strike pleadings — including a notice of application — is high. The "knock-out punch" or "obvious fatal flaw" cannot be found where there is no certainty (i.e. where the issues at stake are debatable). The Prothonotary clearly understood these principles. She considered whether the Notices of Application and the claims therein were "so clearly improper as to be bereft of any possibility of success", and found that they were not. As explained below, based on her findings, the Prothonotary did not err in refusing to strike the Notices of Application.

X. Did the Prothonotary err in her understanding of the statutory regime and did she confuse the purpose and effect of section 8 and section 12?

137 The Respondents all argue that the Prothonotary misunderstood the statutory scheme, and did not appreciate that section 12 notices are only used *after* a PCP has been registered under section 8 (i.e. after a finding that the risks posed are acceptable). The Respondents submit that this misunderstanding led the Prothonotary to accept that there was a course of conduct with respect to the section 12 notices, despite the fact that the course of conduct alleged has no relation to the relief sought (i.e. the invalidation of the PCPs at issue), because a successful challenge to the PMRA's issuance of a section 12 notice will not invalidate the registrations under section 8.

138 I do not agree that the Prothonotary misunderstood the statutory regime. The Prothonotary acknowledged at paragraph 11 of her decision that "under section 8(1) of the *Act*, the Minister (acting through the PMRA), must register a [PCP] where the [risks posed] are "acceptable"". The Prothonotary elaborated, at paragraph 12:

> At the time of registration, the PMRA may issue to the registrant a notice under s.12 of the Act that requires a registrant to compile information, conduct tests, or monitor experience with the pest control product, and to report the additional information within a set period of time as detailed in the notice. A requirement detailed in a section 12 notice becomes a condition of registration of the product.
>
> [Emphasis added]

At paragraph 13, she added:

> Pursuant to section 14 of the [Regulations], if a section 12 notice is delivered to a registrant at the time of registration of the product, the registration becomes a conditional registration with a limited validity period of approximately three years.
>
> [Emphasis added]

139 The Prothonotary's use of the words "additional information" required of a "registrant", "at the time of registration", shows that she was not confused about the temporal application of section 12. Her description of the process is accurate. The reasons clearly convey that the Prothonotary understood that registration decisions were made pursuant to section 8, and that requests for additional information via a section 12 notice were made at the time of registration, i.e., simultaneously with registration.

XI. Did the Prothonotary err by mischaracterizing the Applicants' claims?

140 The Respondents argue that the Prothonotary failed to gain a realistic appreciation of the Notices of Application and that this led her to err in finding an alleged course of unlawful conduct, which was not described in the Notices of Application. The Respondents argue that a true appreciation of the Notices of Application reveals that they target many highly distinct decisions made under section 8.

141 As noted above, the Prothonotary's appreciation of the Notices of Application raises questions of mixed fact and law, which are reviewed on the palpable and overriding error standard unless the Respondents can identify an extricable error of law (*Apotex FCA* at para 9, *Mahjoub* at para 74). The Respondents have not identified any extricable error of law. The Prothonotary's reasons convey that she understood the applicable law and applied it. Nothing in the Prothonotary's reasons suggests that she lost sight of the principles governing how to read pleadings. As a result, her characterization of the Notices of Application is owed deference unless there is a palpable and overriding error (i.e. an obvious error that affects the outcome of the case (*Mahjoub* at paras 62 and 64)). In my view, the Prothonotary's characterization of the Notices of Application contains no such error.

142 The Notices of Application explain that the PMRA can only register products under section 8 when assured that the risks posed by the PCPs are acceptable. The Notices also state that the PMRA may require registrants to provide additional information on the products' risks via a section 12 notice, which transforms the registration into a conditional registration. The Notices state that the PCPA does not define the term "conditional registration"; rather, the Regulations provide that certain provisions of the Act do not apply to conditional registrations. They also accurately characterize the impact of a section 12 notice on a registered PCP, including that otherwise mandatory requirements for public consultation are suspended, and that the registration is deemed valid for three years, subject to an extension where the requirements set out in the section 12 notice are met. In outlining the registration history of the products, the Notices allege, at paragraphs 15-20, among other things, that:

- The PCPs at issue were conditional registrations.

• The outstanding data represents "a critical data gap in the risk assessment" of the PCPs. The Applicants allege that this should have been required *before* a decision was made under section 8.

• The registrants have sought to convert their conditional registrations to full registrations upon submission of the data requested via a section 12 notice. Full registrations were not granted because the data remains outstanding. Instead, the PMRA established new deadlines for the outstanding information and granted further conditional registrations (which would be conditional on receipt of the information, as requested in a new section 12 notice).

• The PMRA has "successively continued the registrations of [the PCPs], and registered new [PCPs], all without [the necessary information]".

143 As noted above, the Prothonotary found (at para 20) that the Applicants were challenging:

> ... the PMRA's alleged unlawful practice of issuing section 12 notices that had the effect of deferring the receipt and review of necessary studies on the chronic toxicity risk of Clothianidin, Thiamethoxam, and their end-use products to pollinators, thereby maintaining for over a decade the resulting conditional registrations of these pesticides and their end-use products without valid or sufficient studies.

144 The Prothonotary found that the misuse of section 12 notices was clearly pleaded and that this fell within the described course of conduct and the prayers for relief in the pleadings. The Prothonotary's characterization is consistent with the conduct alleged in the Notices of Application.

145 As the Respondents point out and as the Applicants acknowledge, the Notices of Application contain only a few specific references to section 12 notices. However, when the Notices of Application are read holistically and practically, as required by the case law, the central role of section 12 to the allegations, and the interaction between sections 12 and 8, are apparent.

146 Further, the fact that there is not a specific section 12 notice for each registration decision is irrelevant. As explained above, section 15 of the Regulations provides that a section 12 notice issued for one PCP also applies to linked or related PCPs.

147 The Respondents' reliance on the fact that there is no reference to section 12 under the heading "The PMRA's conduct is unlawful", focuses on form over substance. This heading is followed by a description of how the registration scheme has operated, which contains the allegation that "the PMRA has registered and successively continued the registrations...without sufficient information" to know whether the risks posed by the PCPs are acceptable. Although this part does not cite section 12, it does not cite other provisions of the Act either (i.e. section 8). Rather, it sets out the alleged course of conduct based on the description of the Act and the registration history of the PCPs in the preceding paragraphs of the Notices of Application.

148 The argument of the Respondents, the AGC and Bayer, that a successful judicial challenge to the PMRA's issuance of a section 12 notice will not invalidate the section 8 registrations, was not overlooked by the Prothonotary. The Prothonotary addressed this argument in the context of the Respondents' argument that the Applicants had re-characterized their pleadings in response to the motion to strike. The Respondents' argument that even a successful judicial review of section 12 notices will not invalidate the section 8 registrations misses the point of the Applicants' allegations, which are about the interaction between section 8 and section 12. In other words, the Applications allege that section 12 was misused in order to permit a PCP to be registered under section 8 which should not have been registered. If a finding were made that section 12 was used for this purpose, it would implicate (and perhaps invalidate) individual registration decisions made pursuant to section 8.

149 Moreover, the primary relief sought by the Applicants is not the invalidation of section 8 decisions, but as set out in paragraph 1A of the Notices of Application, orders "declaring unlawful the PMRA's course of conduct in the manner of successively registering, or amending the registrations of [the PCPs]...while failing to ensure it had [the outstanding, necessary information]". As noted, while each section 8 decision would be implicated by such a declaration, and while invalidation of the decisions is also specifically sought, this does not transform the essential character of the Applications to an attack on each of the registration decisions made pursuant to section 8, as the Respondents suggest.

150 In *CBC* the applicants sought a declaration that the respondent's consistent practice of refusing to provide unredacted Court Martial decisions was unlawful. They also sought to set aside each of the implicated refusal decisions. The Court nonetheless found that the applicants were challenging a course of conduct. In the present case, as in *CBC*, the fact that the Applicants also seek to invalidate decisions does not take away from their challenge to a course of conduct.

151 The Prothonotary's characterization of the pleadings does not contain any palpable and overriding error, regardless of the fact that the Applicants also seek the invalidation of the registration of the PCPs. The essential nature of the applications is a challenge to a course of conduct. The Prothonotary understood the essential nature of the claims and described this succinctly in her decision.

XII. Did the Prothonotary err in her understanding of the jurisprudence governing subsection 18.1(2) and Rule 302 and in her determination that it was debatable whether the Notices of Application allege a course of conduct?

152 All the Respondents argue that the Prothonotary erred in her application of the relevant jurisprudence and in her determination that it was debatable whether the Applicants' allegations could be described as a course of conduct. The Respondents argue that there is no debate and, and as a result, the requirements of subsection 18.1(2), which imposes a 30-day limitation period,

and Rule 302, which provides that only a single decision can be the subject of one application for judicial review, govern.

A. The Relevant Statutory Provisions

153 Subsections 18.1(1) and (2) of the *Federal Courts Act*:

> **18.1 (1)** An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.
>
> **(2)** An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.
>
> **18.1 (1)** Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.
>
> **(2)** Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

154 Rule 302 of the *Federal Courts Rules*:

> **302** Unless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought.
>
> **302** Sauf ordonnance contraire de la Cour, la demande de contrôle judiciaire ne peut porter que sur une seule ordonnance pour laquelle une réparation est demandée.

B. The Principles from the Jurisprudence

(1) Subsection 18.1(2)

155 Generally, issues of timeliness (subsection 18.1(2)) are addressed at the application stage, and not on a motion to strike (*Hamilton-Wentworth (Regional Municipality) v. Canada (Minister of the Environment)* (2000), 187 F.T.R. 287, [2000] F.C.J. No. 440 (Fed. T.D.) [*Hamilton-Wentworth (Regional Municipality)*]; see also *James Richardson International Ltd.* at para 14).

156 The jurisprudence has established that the word "matter" in subsection 18.1(1) is broader than "decision or order" in subsection 18.1(2). The 30-day limitation period set out in subsection 18.1 (2) does not apply where an applicant is seeking to review a "matter" which is not a "decision or order" (*Krause v. Canada*, [1999] F.C.J. No. 179 (Fed. T.D.) at para 21, [1999] 2 F.C. 476 (Fed. C.A.) [*Krause*]; *Fisher* at para 72, *CBC* at para 23).

157 The jurisprudence provides guidance about what constitutes a "matter". A "matter" includes a policy or a course of conduct. For example, challenges to the lawfulness of ongoing governmental policies are matters which are not subject to the 30-day limitation period (see *Sweet v. R.*, [1999] F.C.J. No. 1539 (Fed. C.A.) at para 11, (1999), 249 N.R. 17 (Fed. C.A.) [*Sweet*] involving a challenge to a double-bunking policy in prisons; *Moresby Explorers Ltd. v. Canada (Attorney General)*, 2007 FCA 273, [2008] 2 F.C.R. 341 (F.C.A.) [*Moresby*], involving a challenge to a policy regarding a park reserve; *May v. CBC/Radio Canada*, 2011 FCA 130, 420 N.R. 23 (F.C.A.), involving a challenge to a Canadian Radio-television Telecommunications Commission policy excluding a party leader from a televised debate). Such policies can be challenged at any time, even *before* they are applied specifically to an applicant (*Moresby* at para 24).

158 In *Krause*, the applicants challenged the respondent's consistent failure to meet its statutory duties by not crediting the Public Service Superannuation Account with certain moneys each fiscal year, as required by the *Public Service Superannuation Act*. The respondent's failure to do so was a result of the implementation of an accounting procedure. The Federal Court struck the application for timeliness, finding that the implementation of the accounting procedure was a "decision", subject to subsection 18.1 (2). On Appeal, the Court of Appeal disagreed and found that the application targeted the decisions which implemented the accounting procedure in each fiscal year, and this constituted a course of conduct which was not subject to subsection 18.1 (2). The Court explained, at para 23,

> It is true that at some point in time an internal departmental decision was taken to adopt [accounting procedures] and to implement those recommendations in each fiscal year thereafter. It is not, however, this general decision that is sought to be reached by the appellants here. It is the *acts* of the responsible Minister in implementing that decision that are now claimed to be invalid and unlawful...The charge is that by acting as they have in 1993-1994 and subsequent fiscal years the Ministers have contravened the relevant provisions of two statutes thereby failing to perform their duties, and that this conduct will continue unless the Court intervenes with a view to vindicating the rule of law. The merit of this contention can only be determined after the judicial review application is heard in the Trial Division.

159 Similarly, in *Airth v. Minister of National Revenue*, 2006 FC 1442, [2007] 2 C.T.C. 149 (F.C.) [*Airth*], the applicants sought to challenge 42 Requests for Information issued by the respondent.

The respondent moved to strike the application on the basis that it contravened subsection 18.1(2). The Court relied on *Krause* and found that although the application for judicial review targeted several decisions, each decision was one part of a course of conduct challenged by the applicants and was a matter not subject to subsection 18.1(2). The Court also noted the high threshold required to strike an application (citing *David Bull*) and "cannot include cases such as the present where there is simply a debatable issue as to the adequacy of the allegations in the notice of motion" (at para 11). The Court acknowledged that the motion arose at the early stages of the proceedings and that its conclusion was, "...without prejudice to the ability of the judge hearing this judicial review to consider the matter afresh, which is the usual and preferred way to attack deficiencies in a notice of application for judicial review" (at para 13).

160 Although the Court in *Airth* did not refer to Rule 302, the Court added at para 12, "to the extent that judicial economy is a factor in this decision, I can see no advantage to striking this judicial review only to have the very same conduct come back before this Court when some next step is taken as a result of the RFIs." The Court also noted that the judicial review of 42 decisions may be difficult to manage and found that case management was appropriate (at para 14).

161 Subsequent decisions have expanded on what may be considered a course of conduct. In *Fisher*, the applicant, a parolee, was affected by a resolution of the Parole Board made in 1996 which imposed restrictions from which the applicant had previously been exempt. The applicant sought judicial review of the 1996 resolution many years later, arguing that he was not challenging a decision, but an ongoing policy. The Court relied on *Krause* and the cases that had applied it, and described the impact of *Krause* at para 73:

> *Krause* is authority that a general decision does not trigger a time limit that prevents the review of the implementation steps, on the unassailable logic that one should not be barred from relief "solely because the alleged... unlawful act stemmed from a decision to take the alleged unlawful step." *Krause* does not state that the general decision is itself reviewable. However, subsequent cases have applied *Krause* in a manner that permits a reviewing court to focus on the general decision, the implementation steps, or a combination of the two where they combine to result in unlawful government action vis-à-vis the applicant.
>
> [Emphasis added]

162 In *Fisher*, the Court also noted that other cases, including *Airth*, had captured the intent of *Krause* by making it clear that "the important point is not whether the policy itself or individual steps to implement it are challenged, but whether there is a closely connected course of allegedly unlawful government action that the applicant seeks to restrain" (at para 79). The Court found that there was such a connected course of action, therefore, subsection18.1 (2) did not apply to the applicant's challenge of the resolution.

163 In *CBC*, the applicants sought to review the Courts Martial Administrator's ("CMA") continued refusal to provide unredacted copies of decisions subject to a publication ban. The applicants alleged that this was an unlawful ongoing practice. In finding that the alleged ongoing practice was a course of conduct and not subject to the 30-day limitation period, the Court stated at paras 26-27:

> [26] The application for judicial review does not arise from a single decision of the CMA. Rather, the CBC requested a number of decisions involving a publication ban at different times, and on each occasion, the CMA informed the CBC that it was required, pursuant to the publication ban, to remove any information that could disclose the identity of the complainant or a witness in the case. In my view, it is the ongoing practice of the CMA to redact the court martial decisions subject to a publication ban that is alleged to be unlawful and subject to judicial review.
>
> [27] Moreover, the relief sought by the CBC in its Notice of Application for judicial review also confirms that it is a course of conduct that is at issue: the relief sought includes a declaration that the *Privacy A*ct does not apply to the court records of the courts martial, as well as an order of *mandamus* for the CMA to provide the CBC with unredacted copies of the requested decisions. While I recognize that the CBC is also seeking an order setting aside the decision of the CMA refusing to release unredacted copies of the fourteen (14) court martial decisions, I do not think this particular relief takes away from the conclusion that it is a course of conduct that is at issue. Fundamentally, the CBC is contesting the CMA's practice of redacting court martial decisions that are subject to a publication ban.

(2) Rule 302

164 The jurisprudence has also established the circumstances that may justify an exception to Rule 302 to permit judicial review of more than a single order. The exceptions are found where an applicant challenges continuing acts or a course of conduct.

165 In *Mahmood v. Canada*, [1998] F.C.J. No. 1345, 154 F.T.R. 102 (Fed. T.D.) [*Mahmood*], the applicant sought to challenge both the revocation of his passport *and* the denial of consular services by Canadian officials. The Court granted the respondent's motion to strike the application, noting, at para 10:

> While the rule states that only one decision ("order" solely, now) may be attacked, the Trial Division has also recognized that continuing "acts" or decisions may also be reviewed under s.18.1 of the *Federal Court Act* without contravening rule 1602(4) [now Rule 302] (see for example *Puccini v. Canada (Department of Agriculture)*, 1993 CanLII 2973 (FC), [1993] 3 F.C. 557). However, in those cases, the acts in question were of a continuing nature, making it difficult for the applicant to pinpoint a single decision from which relief could be sought

> by this Court. They did not involve, as in the facts here, two different fact situations, two different types of relief sought and two different decision-making bodies. The Court found that the two issues did not amount to a "continuing decision by the same body". The Court added that the applicant could seek to file a separate notice of application after seeking leave for an extension of time to do so.

166 In *Truehope Nutritional Support Ltd.*, the Court reviewed the jurisprudence and found on the facts before it that an exemption from Rule 302 was warranted. The Court noted that Rule 302 "reflects the policy of ensuring an expeditious and focussed process for challenging a single decision or order" (at para 5). The Court stated, at para 6:

> Continuing acts or decisions may be reviewed under s.18.1 of the *Federal Court Act* without offending Rule 1602(4) [now Rule 302], however the acts in question must not involve two different factual situations, two different types of relief sought, and two different decision-making bodies *(Mahmood...* [citation omitted]).

167 In *Mahmood*, the Court, in noting the similarities and differences in the two decisions, appears to have been simply making factual findings regarding whether the application targeted a continuing act. However, in *Truehope Nutritional Support Ltd.*, the Court appears to have adopted elements of *Mahmood* as a rule. The Court in *Truehope Nutritional Support Ltd.* concluded that the two decisions at issue could be challenged in one application (i.e., exempt from Rule 302), based on the similarities between the decisions, including the decision-maker, the basis for the decisions, and the legal issues involved (at para 18). The Court elaborated at para 19:

> In my opinion, the distinctions between the two decisions as argued by the Respondents do not outweigh the similarities, the distinctions are not so complex as to create confusion, and to require two separate judicial review applications to be made, given the similarities, would be a waste of time and effort.

168 In *Khadr (Next Friend of) v. Canada (Minister of Foreign Affairs)*, 2004 FC 1145, 266 F.T.R. 20 (Eng.) (F.C.) [*Khadr (Next Friend of)*] the applicant sought to challenge two decisions, one alleging the Minister's failure to provide him consular services, and the other about interviews conducted by ministerial officials while the applicant was at Guantanamo. The Court cited *Truehope Nutritional Support Ltd.* for the proposition that an applicant cannot challenge two decisions within one application "unless it can be shown that the decisions formed part of a 'continuing course of conduct'" (at para 9). The Court found that the two decisions could not be challenged in the same application as a continuing course of conduct because they "were made at different times and involve a different focus" (at para 10). The Court also found that there were parallel proceedings seeking the same relief.

(3) Rule 302 and subsection 18.1(2)

169 Both Rule 302 and subsection 18.1(2) were addressed in *Canadian Assn. of the Deaf v. R.*, 2006 FC 971, [2007] 2 F.C.R. 323 (F.C.) [*Canadian Association of the Deaf*]. The Court noted at the outset that the application sought judicial review of several alleged acts of discrimination on different occasions by different people employed by different departments. The Court considered whether the decisions were closely connected so as to constitute a course of conduct or a matter. The Court noted the jurisprudence regarding Rule 302, including *Khadr (Next Friend of)* and *Truehope Nutritional Support Ltd.*, and regarding subsection 18.1(2), including *Sweet* and *Puccini v. Canada (Director General, Corporate Administrative Services, Agriculture Canada)*, 1993 CanLII 2973, [1993] 3 F.C. 557 (Fed. T.D.) (which was also cited in *Mahmood*).

170 With respect to Rule 302, the Court found at para 66:

> In this case, the commonality among the four applicants is that their situations arose out of the application of the same set of guidelines for the provision of interpretation services. While each incident involved its own facts and decision-makers (different government departments and different employees), the heart of the matter is the application of the same policy to the same interested community. Accordingly, I agree that it would be unreasonable to split the application.

171 With respect to subsection 18.1(2), the Court regarded the closely connected decisions as an ongoing policy, noting at para 72:

> I accept the applicants' contention that where the judicial review application is not in respect of a tribunal's decision or order, the 30-day limitation does not apply. As stated by the Federal Court of Appeal in *Sweet v. Canada* (1999), 249 N.R. 17 at para. 11, [1999] F.C.J. No. 1539 (QL) concerning a "double-bunking" policy in a correctional institute "[t]hat policy is an ongoing one which may be challenged at any time; judicial review, with the associated remedies of declaratory, prerogative and injunctive relief is the proper way to bring that challenge to this Court."

172 The Court's analysis of the course of conduct alleged by the applicants, which was the systemic denial of sign language interpretation, guided both the subsection 18.1(2) and Rule 302 findings. The Court acknowledged that unreasonable or undue delay in bringing the application could still be a bar to judicial review (at para 73). However, the Court concluded that "the heart of the matter is the application of the same policy to the same interested community". Despite that there were different decision-makers and the decisions were made at different times, the Court found that the same policy was at issue and the application for judicial review could proceed.

(4) Summary

173 To summarize, the jurisprudence noted above highlights the following:

• Issues of timeliness (i.e. the application of subsection 18.1(2)) are generally addressed at the application stage, and not on a motion to strike (*Hamilton-Wentworth;* see also *James Richardson* at para 14, *Airth* at para 13).

• The 30-day limitation period in subsection 18.1(2) does not apply where the applicant is seeking to review a matter, which is not a decision or order (*Krause, CBC*).

• A matter includes a policy or a course of conduct (*Airth, Sweet, Moresby*).

• A course of conduct includes a "general decision, the implementation steps, or a combination of the two, where they combine to result in unlawful government action" (*Krause, Fisher*).

• In the context of government decisions and actions, the focus is on whether there is a "closely connected course of allegedly unlawful government action" (*Fisher* at para 79).

• A course of conduct may also include an ongoing practice (*CBC* at para 26).

• Both the Rule 302 and subsection 18.1(2) jurisprudence tend to use the term "course of conduct", and both consider whether there are closely connected decisions.

• More than one decision may be reviewed in a single application — as an exception to Rule 302 — where it is a continuing act (*Mahmood, Truehope*) or, as it was characterized in *Khadr*, a continuing court of conduct. The factors to consider in determining whether there is a continuing act or course of conduct include: whether the decisions are closely connected; whether there are similarities or differences in the fact situations, including, the type of relief sought, the legal issues raised, the basis of the decision and decision-making bodies; whether it is difficult to pinpoint a single decision; and, based on the similarities and differences, whether separate reviews would be a waste of time and effort (*Mahmood, Truehope*).

C. The Prothonotary did not err by conflating Rule 302 and subsection 18.1(2) or in her determination that whether there was a course of conduct was debatable.

(1) The Prothonotary did not conflate the analysis for subsection 18.1(2) and Rule 302

174 The Respondents submit that, despite the fact that the term "course of conduct" is used in the jurisprudence for both Rule 302 and subsection 18.1(2), the rationales for the two provisions are different and a separate analysis is required for each. They submit that Rule 302 is concerned with judicial efficiency, whereas subsection 18.1(2) is concerned with finality. Accordingly, a "course of conduct" found under one provision cannot determine the outcome on the other.

175 Contrary to the Respondents' submission, the jurisprudence has not established as a clear principle that the required analyses are completely different. Rather the jurisprudence has focused on the issue before it — i.e., whether subsection 18.1(2) is at issue or whether Rule 302 is at issue.

176 The factors to assess whether the Applications relate to separate decisions, or a course of conduct for the purpose of an exception to Rule 302 and/or subsection 18.1(2) are similar, and depend on the facts. In some cases, a finding of a course of conduct under subsection 18.1(2) appears to lead to the same conclusion under Rule 302. For example, in the Case Management Judge's [CMJ] Decision in *Apotex Inc. v. Canada (Minister of Health)*, 2010 FC 1310, [2010] F.C.J. No. 1634 (F.C.), the Court found that it was debatable whether the matter was a course of conduct for the purpose of subsection 18.1(2) (at para 12). The Court then proceeded with its Rule 302 analysis, noting that in view of the conclusion that the subject-matter of the application "is a debatable issue which must be determined by the application judge, it follows that that the question concerning the application of Rule 302 also ought to be left to the application judge" (at para 14). At the application stage, the Court found that the application violated *both* subsection 18.1(2) and Rule 302, but did not challenge the CMJ's singular treatment of the issue, or distinguish between the two provisions in its analysis (*Apotex Inc. v. Canada (Minister of Health)*, 2011 FC 1308 (F.C.) at para 21, (2011), 400 F.T.R. 28 (Eng.) (F.C.)).

177 In some cases, the factors typically considered under one provision are considered under the other, suggesting that the analyses are not highly distinct. This occurred in *Airth*, where the Court considered the application of subsection 18.1(2) and did not specifically consider Rule 302. The Court found that the complexity of judicial review of several (42) decisions was a relevant factor, (which is generally considered with respect to Rule 302), noting that this could be addressed by case management.

178 In my view, where the Court finds that an application challenges a "closely connected course of allegedly unlawful government action", which may impugn "a policy, the implementing decisions, or a combination of the two" (as in *Airth*, *Fisher*, or *Krause*) — i.e. cases where Courts find that subsection 18.1(2) does not apply — it may, in some cases, be duplicative and redundant to conduct a completely separate analysis of whether the conduct at issue relates to closely connected decisions for the purpose of Rule 302. Despite that the purposes of the two provisions are different, the alleged course of conduct would be the same.

179 As noted, the Respondents argue that the Prothonotary erred by confusing or blending the analysis under subsection 18.1(2) and Rule 302. The Respondent, Bayer, further argues that the Prothonotary really only performed the Rule 302 analysis. The Respondents' arguments are not supported by a reading of the Prothonotary's reasons. The Prothonotary specifically noted the Respondents' argument that the review of 79 decisions offends Rule 302 and that most of the section 8 decisions were beyond the 30-day time limit and offended subsection 18.1(2). The Prothonotary conveyed her understanding of the different purposes of the two provisions, and referred to the jurisprudence that has addressed whether a course of conduct could be found in the context of both Rule 302 and subsection 18.1(2), noting that the term "continuing course of

conduct" is used for both. She also referred to the relevant considerations with respect to both subsection 18.1(2) and Rule 302 (at paras 8-9).

180 The Prothonotary noted at para 34 that, "the determination of whether the underlying applications are directed to a continuous course of conduct — as opposed to multiple, discrete decisions — is a fact-based determination."

181 She then assessed the facts, including by addressing in detail (at paras 34 and 35 of her decision) the submissions of the Applicants and Respondents regarding the similarities and differences of the registration decisions.

182 While much of the Prothonotary's analysis consists of noting the differences and similarities of the impugned registration decisions — which is typically a consideration under Rule 302 — her decision cannot be read as *only* considering Rule 302. The Prothonotary also considered and applied the jurisprudence governing subsection18.1 (2), including *Krause* and *Fisher*. Moreover, in finding that it was debatable whether the Applications targeted a course of conduct, the Prothonotary's analysis clearly went beyond a consideration of the similarities and differences of the impugned decisions. The Prothonotary noted the Applicants' allegation that the PMRA was consistently "taking the same approach" over the years and that the "conditional registrations of the Clothianidin and Thiamethoxam end-use products have been inextricably linked in various ways since 2006..." (at para 35). These are considerations about the method or practice of making these decisions, and whether there is a "closely connected course of allegedly unlawful government action that the applicant seeks to restrain" (*Fisher*), which are relevant to the subsection 18.1(2) analysis.

183 Although the Prothonotary did not compartmentalize her analysis with respect to the application of subsection 18.1(2) and Rule 302, she clearly did not ignore subsection 18.1(2); she considered both provisions. Her analysis of whether the Applicants were seeking to challenge a course of conduct applied to both Rule 302 *and* subsection 18.1(2) because many of the same factors were relevant to both provisions.

(2) The Prothonotary did not err by conducting only part of the Rule 302 analysis; she conducted the full analysis

184 The Respondent, Bayer, further argues that the Prothonotary erred in her analysis to determine whether Rule 302 applied, including by only considering the similarities and differences of the decisions, and failing to consider judicial efficiency.

185 The argument that the Prothonotary erred in her Rule 302 analysis is without merit. The Prothonotary thoroughly considered the differences and similarities in the decisions. The differences noted by the Respondents emphasize that each decision was made based on the record before the PMRA at the time, and with respect to the particular features of the registration

application. However, the similarities in the decisions cannot be overlooked: including that the same decision-maker made all the decisions; two active ingredients are at issue despite the various uses; the registrants are the four corporate Respondents; and the data requested repeatedly and consistently via section 12 notices is very similar, although not identical. These factors reflect those noted in the jurisprudence where a course of conduct — or "a closely connected course of alleged unlawful government actions" — were found.

186 The Prothonotary addressed the Respondents' arguments that a course of conduct could not be found because the decisions were too many and too varied, there was no policy at issue, and individual decisions could be pinpointed. The Prothonotary referred to the same jurisprudence which the Respondents cite to the Court.

187 With respect to the Respondent, Bayer's, argument that the Prothonotary only conducted the Rule 302 analysis in part — by comparing the similarities and differences, but failing to consider judicial efficiency — this is not the case. The Prothonotary specifically referred to *Truehope Nutritional Support Ltd.* e and *Whitehead*, noting that the Court has held that where the similarities in the decisions outweigh the differences, the decisions should be reviewed in one application, as it would be a waste of time and effort (i.e. inefficient) to pursue more than one judicial review. Both *Truehope Nutritional Support Ltd.* and *Whitehead* note that the consideration of whether it would be a waste of time and effort is linked to and arises from the assessment of similarities and differences, which the Prothonotary acknowledged.

188 The Prothonotary also addressed whether it would be a waste of judicial resources to pursue the Applications for Judicial Review in the context of assessing the adequacy of the alternative remedy (at para 45).

(3) The Prothonotary did not err in other ways

189 In response to the Respondents' argument that there cannot be a course of conduct because there is no evidence of any general decision of the PMRA or of any policy regarding the issuance of section 12 notices, the Prothonotary did not err in finding that the absence of a stated or formal policy is not fatal. In *Krause*, the applicants maintained that they were challenging an "ongoing policy *or practice*" (at para 11, emphasis added). In *Airth*, the applicants challenged the Minister's issuance of 42 Requests for Information as a course of conduct, arguing that they sought to impugn the "method of proceeding by way of RFIs" against the applicants. No ongoing policy was at issue in *Airth*. Rather, the applicants were challenging an alleged unlawful practice of issuing RFIs against them. The Court found, relying on *Krause*, that the application properly challenged a course of conduct (at para 9).

190 *CBC* also supports the proposition that an ongoing practice may constitute a course of conduct. In that case, the CBC challenged the respondent's "continued refusal to provide unredacted copies of court martial decisions", based on its understanding that the *Privacy Act*

barred it from doing so (at para 27). The CBC sought a declaration that the *Privacy Act* did not apply, *and* an order setting aside each of the impugned refusal decisions. The parties acknowledged that there was no policy *per se* which governed the respondent's approach. The Court found that the applicants had properly challenged an ongoing practice that was a course of conduct, which was, therefore, not subject to the limitation period in subsection 18.1(2). The Court reached this conclusion despite the fact that the applicants were also challenging the individual decisions, which the Court found did not "take away" from the fact that, "[f]undamentally, the CBC is contesting the CMA's practice of redacting court martial decisions...". Similarly, in the present case, the Applicants seek a declaration that the alleged course of conduct — which is described as a practice — is unlawful, as well as orders declaring that the registrations of the products are invalid.

191 In *CBC* and *Airth* the Court considered challenges to a practice and a method, respectively, and not an explicit policy. In the present case, the Prothonotary found that the Applicants were challenging an allegedly "unlawful *practice* of issuing section 12 Notices that had the effect of deferring the receipt and review of necessary studies" (at para 20, emphasis added). In *Fisher* the Court noted that the focus is on whether there is a "closely connected course of allegedly unlawful government action". In *Canadian Association of the Deaf* the Court found that "the heart of the matter is the application of the same policy ..." even though there were different decision-makers. In the present case, the same decision-maker, the PMRA, on behalf of the Minister of Health, is alleged to have taken the same approach or followed the same practice in at least 55 of 79 decisions (with the others being linked).

192 Despite the unusual feature of voluminous evidence on this motion to strike, the Court still presumes that the facts alleged are true. The evidence does not rebut the presumption. The Notices of Application allege that registration decisions were made with insufficient information, via the use of section 12. The question is whether it is debatable that this constitutes an alleged course of conduct. While there is no evidence in this voluminous record to establish that there is a stated policy with respect to the use of section 12 notices, the evidence of all parties demonstrates that the history of the registrations of the PCPs at issue includes many section 12 notices which were issued to seek additional information about the toxicity risks to pollinators. The specific information varied as the registrations were considered, whether as conversion applications or otherwise, but in almost every case, some additional information pursuant to section 12 was sought to address the long term toxicity risks to pollinators, and the registrations were continued as conditional — not full — registrations. The Prothonotary's conclusion that this is a practice or consistent approach, even if there is no stated policy, which could *debatably* be a course of conduct is supported by the facts alleged in the Notices of Application, the evidence she considered, and the jurisprudence.

193 I do not accept the Respondents' argument that the Prothonotary erred by not considering that individual decisions could be pinpointed, or that this factor points away from finding a course of conduct. In *Khadr* and *Mahmood*, the focus was on whether there was a continuing act or course of conduct, and the ability to pinpoint a single decision was mentioned as a factor within that

consideration. However, the jurisprudence does not establish that the ability to pinpoint a decision is the decisive factor. Moreover, the Prothonotary specifically considered the Respondents' same argument at paras 23-24 and rejected it, noting that the Court has found a course of conduct in situations where individual decisions could have been easily pinpointed, including *Sweet*, *Krause* and *Fisher*. In *Airth*, also considered by the Prothonotary, a challenge was allowed to proceed despite the fact that 42 individual decisions could be identified. In *CBC* each refusal to issue an unredacted decision could have been reviewed, yet the Court found that the alleged course of conduct could be reviewed.

194 I also do not accept the Respondent, Syngenta's, argument that the Prothonotary erred in finding that there could be a course of conduct pertaining to section 12 notices because there is nothing unlawful about the use of section 12 notices and that a course of conduct cannot be judicially reviewed unless the conduct is contrary to law. This overlooks the nature of the course of conduct alleged, which is the *misuse* of section 12 notices. The Applicants acknowledge that the issuance of section 12 notices *per se* is not unlawful. Their allegations are that section 12 notices were used in a manner, for which they were not intended, which was unlawful, and specifically that section 12 notices were the mechanism by which the receipt of necessary studies and data was deferred until *after* registration.

195 Syngenta argues that the requirement of unlawfulness in the course of conduct itself is apparent from *Krause*. However, the jurisprudence that has applied *Krause* does not reflect this view. The nature of a Notice of Application for judicial review is to allege that a decision or course of conduct is unreasonable, incorrect or made without statutory authority — i.e. unlawful. The determination of whether it is unlawful is made at the application stage.

196 For example, in *Airth*, there was nothing unlawful about the use of a request for information *per se*. The applicants' challenge to the respondent's "method of proceeding"; i.e., the manner in which requests for information were used against them, was found to be the course of conduct. In the present case, the Applicants challenge the method or manner in which section 12 notices were used and allege that it was unlawful.

197 The Respondent, Bayer, also argues that a finding made with respect to Rule 302 cannot justify an exemption to subsection 18.1(2) — which appears to be related to Bayer's argument that the Prothonotary only conducted the analysis for Rule 302. As noted above, I do not agree that the Prothonotary only conducted the Rule 302 analysis or erred in doing so. I also do not agree that the jurisprudence has established as a clear principle that a separate analysis is required in all cases pursuant to subsection 18.1(2) and Rule 302 where both provisions are at issue. Regardless, in the present case, the Prothonotary addressed both subsection 18.1(2) and Rule 302 and found that it was debatable whether there was a course of conduct with respect to both.

198 *James Richardson International Ltd.*, relied on by Bayer to argue that separate assessments and determinations are required, and to argue that a finding of a course of conduct pursuant to Rule 302 cannot be used to overcome the 30-day limitation period, does not set out such clear principles. In *James Richardson International Ltd.*, the Court stated at para 22:

> The jurisprudence is clear: an order under Rule 302 of the *Federal Court Rules* can be refused where it would allow an applicant to overcome the 30-day limitation period fixed by section 18.1(2) of the *Federal CourtsAct*: see *Lavoie v. Canada (Correctional Service)*, [2000] F.C.J. No. 1564. The question, then, is whether the continuing nature of the process under scrutiny here should operate to relieve [the applicant] from its obligation to seek judicial review in a timely fashion.

199 The Court did not state that an exemption from Rule 302 cannot, or even should not, be granted where it would also allow an applicant to overcome the 30-day limitation period. The Court stated only that it *can* be refused where it would do so — i.e., there is discretion. On appeal, the Court of Appeal dealt only with the extension of time pursuant to subsection 18.1(2) and found that the Court should have considered additional factors to allow an extension. In my view, the passage in *James Richardson International Ltd.* supports the view that where there are grounds for an exemption to consider two or more decisions in the same application, the Court could either grant or refuse the exemption if the time limit had passed depending on the relevant considerations. In the present case, the Prothonotary considered both Rule 302 and subsection 18.1(2) — she did not rely on Rule 302 to dictate the timeliness issue.

200 In *Whitehead*, also relied on by the Respondents, the Court, on the application for judicial review, agreed to review four decisions together due to similarities, i.e., as an exception to Rule 302. With respect to subsection 18.1(2), the Court simply stated, at para 54, "that it is duly noted that no extension was sought or supported by affidavits". Although the application was out of time, the Court addressed the merits but dismissed the application. The Respondents' reliance on *Whitehead* for its argument that a Rule 302 exemption will not justify an exemption for subsection 18.1(2) reads far more into para 54 than is there. Moreover, this issue is not in dispute.

201 With respect to Bayer's argument that a course of conduct or matter could comply with subsection 18.1(2), yet still breach Rule 302, or *vice versa* — is also not the issue nor is this in dispute.

202 Moreover, the jurisprudence has repeatedly emphasized that issues of timeliness are best left for consideration at the applications stage. For example, in *Airth*, the Court acknowledged that the motion arose at the early stages of the proceedings and that its conclusion was "...without prejudice to the ability of the judge hearing this judicial review to consider the matter afresh, which is the usual and preferred way to attack deficiencies in a notice of application for judicial review" (at para 13; see also *Hamilton Wentworth*) (. In the present case, the Prothonotary correctly noted that

the assessment of a course of conduct under both provisions is a factual assessment. That factual assessment was conducted with respect to both provisions, with several of the same considerations applying to both. The Prothonotary found that the issue was debatable, and therefore should be determined on the Application for Judicial Review.

203 The Prothonotary concluded her analysis stating at para 36:

> Having weighed the similarities and differences of the implicated decisions, I find that there is certainly a debatable issue as to whether the Applicants are properly seeking to challenge a continuous course of conduct. As this remains a live issue, I do not see how it can be said that the applications are bereft of any chance of success on the basis that they offend Rule 302 and the time limitation set out in section 18.1(2) of the *Federal Courts Act*. The serious question of whether the proper approach is to view the underlying applications as directed to a continuous course of conduct is a question that ought to be determined by the application judge [see *Apotex*, *supra* at paras 12-13].

204 I do not find any palpable and overriding error in this finding. If I were to do a *de novo* review, I would reach the same conclusion that there is no certainty — i.e., it is debatable whether the Applicants' claims relate to a course of conduct that warrants an exemption from subsection 18.1(2) or Rule 302. Accordingly, I would also find that these issues are best left to be determined on the Application for Judicial Review.

XIII. Did the Prothonotary err in finding that it was debatable whether there was an adequate alternative remedy for the Applicants?

205 The Respondents argue that the adequacy of the alternative remedy is not debatable because there clearly is an adequate alternative remedy (i.e., the re-evaluation (the PRVD) and the conversion applications (the PRDs)) and, if the Prothonotary had properly applied the jurisprudence, she would have so found. Therefore, they submit that the Prothonotary erred in finding that the adequacy of the alternative remedy was debatable.

A. Principles from the Jurisprudence

206 The consideration of whether there is an alternative remedy is related to the principle that the "normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted", (*CB Powell Ltd.* at para 31). The Court of Appeal explained at para 31:

> ... This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court.

> Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

207 As noted above, a motion to strike should not be granted unless there is an "obvious, fatal flaw" in the application (*JP Morgan Asset Management (Canada) Inc.* at para 91). In *JP Morgan Asset Management (Canada) Inc.*, the Court noted that, if after ascertaining the true character of the application, the Court is not certain that: there is recourse elsewhere, now or later; the recourse is adequate and effective; and, the "circumstances pleaded are the sort of unusual or exceptional circumstances recognized by the case law or analogous thereto", the Court cannot strike the application for judicial review.

208 The Supreme Court of Canada's decision in *Strickland* guides the analysis to be conducted to determine the adequacy of an alternative remedy. The Respondents and the Applicants both rely on *Strickland*, but interpret it differently.

209 In *Strickland* the Court reviewed the relevant jurisprudence and identified the relevant factors that courts should consider, at para 42, which include:

- The convenience of the alternative remedy;
- The nature of the alleged error;
- The nature of the other forum which could deal with the issue, including its remedial capacity;
- The existence of adequate and effective recourse in the forum in which litigation is already taking place;
- Expeditiousness;
- The relative expertise of the alternative decision-maker;
- Economical use of judicial resources; and
- Cost.

210 The Court stated that "neither the process nor the remedy need be identical to those available on judicial review" in order to be adequate and that the basic test is whether "the alternative remedy [is] *adequate in all the circumstances* to address the applicant's grievance" (at para 42, emphasis added).

211 The Court elaborated, at paras 43-45, emphasizing that there is no checklist, the inquiry is broader than a summary of differences and similarities, and the appropriateness of both the

available alternative and the application for judicial review should be considered, which calls for a type of balance of convenience analysis. The relevant passages are set out in their entirety below:

> [43] The categories of relevant factors are not closed, as it is for courts to identify and balance the relevant factors in the context of a particular case: *Matsqui*, at paras. 36-37, citing *Canada (Auditor General)*, at p. 96. Assessing whether there is an adequate alternative remedy, therefore, is not a matter of following a checklist focused on the similarities and differences between the potentially available remedies. The inquiry is broader than that. The court should consider not only the available alternative, but also the suitability and appropriateness of judicial review in the circumstances. In short, the question is not simply whether some other remedy is adequate, but also whether judicial review is appropriate. Ultimately, this calls for a type of balance of convenience analysis: *Khosa*, at para. 36; *TeleZone*, at para. 56. As Dickson C.J. put it on behalf of the Court: "Inquiring into the adequacy of the alternative remedy is at one and the same time an inquiry into whether discretion to grant the judicial review remedy should be exercised. It is for the courts to isolate and balance the factors which are relevant ..." (*Canada (Auditor General)*, at p. 96).
>
> [44] This balancing exercise should take account of the purposes and policy considerations underpinning the legislative scheme in issue: see, e.g., *Matsqui*, at paras. 41-46; *Harelkin*, at p. 595. David Mullan captured the breadth of the inquiry well:
>
> > While discretionary reasons for denial of relief are many, what most have in common is a concern for balancing the rights of affected individuals against the imperatives of the process under review. In particular, the courts focus on the question of whether the application for relief is appropriately respectful of the statutory framework within which that application is taken and the normal processes provided by that framework and the common law for challenging administrative action. Where the application is unnecessarily disruptive of normal processes ... the courts will generally deny relief.
> >
> > [Emphasis added; p. 447.]
>
> [45] The factors to be considered in exercising this discretion cannot be reduced to a checklist or a statement of general rules. All relevant factors, considered in the context of the particular case, should be taken into account.

B. The Prothonotary did not err in finding that it was debatable whether there was an adequate alternative remedy

212 The Respondents argue that the Prothonotary erred in law by failing to apply essential elements of a legal test as set out in *Strickland*. The Applicants respond that this is an attempt to reframe a question of fact as a question of law.

213 As noted above, in *Teal Cedar Products Ltd.*, the Supreme Court of Canada cautioned lower courts against finding extricable errors of law too readily, noting that "mixed questions, by definition, will involve aspects of law", and adding the caution that counsel are motivated to "strategically frame a mixed question as a legal question".

214 I have heeded the caution in *Teal Cedar Products Ltd.*. Contrary to the submissions of the Respondents, I do not agree that *Strickland* set out essential elements of a legal test that a court must consider in every case and that the Prothonotary erred in law in not applying each essential element of such a test. Rather, the Court repeatedly stated that there is no checklist and that all relevant factors are to be considered in the context of the particular case.

215 The Prothonotary stated that she considered the factors detailed in *Strickland* at para 48 of her decision. Although she did not cite every single factor, she identified the relevant factors at para 39 of her decision. This approach accords with *Strickland*, which makes it clear that the relevant factors will depend on the context, and that the list of factors is neither closed nor a rigid checklist.

216 The Prothonotary addressed the parties' submissions on the adequacy of the alternative remedy at paras 39-47, before noting two particular concerns, at para 48:

> [48] Having considered the factors detailed in Strickland and the submissions of the parties, I am not certain that the Applicants have recourse to adequate and effective relief through the PMRA's on-going proceedings. I am particularly concerned that these other proceedings will not afford the Applicants the central remedy that they seek before this Court — namely, declarations of unlawful conduct by the PMRA — and that these other proceedings will not be expeditious.

217 The Prothonotary's reasons do not suggest that she considered only two factors or found only two factors to be relevant. When read as a whole, it is clear that she addressed all the submissions of the parties, considered several relevant factors — which include the remedial capacity of the alternative forum and its expeditiousness — and identified the remedial capacity and expeditiousness as particular concerns. Weighing the relevance of the various factors identified in *Strickland* and giving some factors more weight than others, in the context of the particular case, is exactly what the Supreme Court of Canada has guided decision-makers to do in *Strickland*.

218 The Prothonotary's concern about expeditiousness was based on the submissions made to her. The Respondents explained that once the PMRA re-evaluation (the PRVD) was finalized, which was expected in December 2018, there would be a Notice of Objection process which would precede any ability to pursue judicial review of a final decision. The Prothonotary considered the Applicants' past experience with a Notice of Objection process and also noted that this Application for Judicial Review would be heard before December 2018 (at para 48).

219 The Respondents also argue that the Prothonotary applied the wrong legal test when she expressed concern over whether the Applicants could obtain the "central remedy they seek" via the re-evaluation or conversion applications. In their submissions, this is akin to seeking an identical remedy or the preferred remedy, which *Strickland* states is not determinative.

220 Contrary to the Respondents' view, the Prothonotary did not look for an identical or a preferred remedy. Rather, she viewed the declaration of unlawful conduct as the central (i.e, the primary or main) remedy sought and concluded that it was debatable whether this would be addressed effectively in the proposed alternative processes (the re-evaluation and conversion applications). The Prothonotary's finding follows her detailed summary of the parties' submissions, including the Applicants' concerns that the alternative processes would not address the lawfulness of the PMRA's conduct. At para 44 of her decision, the Prothonotary squarely addressed this argument, noting that the remedies need not be identical, but they need to be adequate.

221 Although the Prothonotary did not make an explicit finding regarding the appropriateness of judicial review, this factor was not ignored. Reading the reasons as a whole, it is apparent that the Prothonotary questioned whether judicial review would be appropriate, just as she questioned whether the alternative remedy would be appropriate. For example, at para 45, the Prothonotary addressed the Respondent, AGC's, argument that the application was a waste of judicial resources because the ultimate relief would be the same as the re-evaluation process. She was not convinced by this argument, because the Applicants were not seeking a re-evaluation of the registration decisions.

222 The Prothonotary acknowledged that the issues were complex, but despite this, the Applications for Judicial Review could be heard before December 2018. At para 48, the Prothonotary stated:

> Notwithstanding the complexity of the issues raised on these applications, the applications will proceed to a hearing before the currently-proposed December 31, 2018 deadline for the release of the final decision in the pollinator re-evaluations. Even then, there would be further delays past December 31, 2018 before the Applicants could have recourse before this Court to challenge the outcome of the PMRA's on-going proceedings, as the Applicants would have to proceed through the notice of objection process first, which, from the evidence before me, has not been established to be an expeditious process.

223 This reflects both the Prothonotary's consideration of the alternative remedy, including its expeditiousness, and the appropriateness of judicial review. As the Case Management Judge, the Prothonotary is well positioned to gauge how the judicial reviews could unfold and be managed, and she was clearly not daunted by their scope or complexity.

224 Contrary to the Respondents' argument that the Prothonotary failed to consider the principle that normal or ongoing administrative processes should be permitted to run their course before resorting to judicial review, the Prothonotary squarely addressed this, noting that the present circumstances were not analogous to the cases relied on by the Respondents, on which this principle is based. She stated at para 47:

> The Applicants have not come before the Court seeking to review an interim decision rendering in an on-going administrative tribunal matter, nor have they come before this Court without having first followed a clearly prescribed appeal route in the applicable statutory regime. Rather, the alternative processes that the Respondents urge this Court to accept as providing an adequate remedy were commenced independent of the Applicants, and are distinct from the conduct that is being challenged in these applications.

225 The Respondents made similar submissions regarding the need to respect ongoing administrative process on this Appeal and on the motion to admit the new evidence. This is a relevant consideration in assessing whether the alternative remedy would be adequate, and whether the principle that administrative processes should be allowed to reach completion.

226 However, as the Applicants note, the review initiated by the PMRA differs from a review of the course of conduct alleged by the Applicants. Although the PVRD may address the data gap complained of, it will not necessarily address the unlawful conduct alleged here, and it will not be as expeditious as these Applications. The Prothonotary considered this in concluding that the adequacy of the alternative remedy was debatable.

227 In addition, the alternative process — the PMRA re-evaluation (the PRVD and PRDs) — which the Respondents characterize as the "normal process", is not disrupted by the current Applications for Judicial Review, since the PMRA re-evaluation process has been ongoing for five years and is not expected to be finalized until December 2018.

228 The new evidence, which the Respondents sought to admit on this Appeal, and which the Court considered in the course of determining whether it should be admitted, clarifies that the Notice of Objection process still applies to the re-evaluation (the PRVD) but does not apply to the PRDs (the applications to convert conditional registrations to full registrations) [see *Suzuki 1*].

229 As found in *Suzuki 1*, although the PRD decisions will not require the Notice of Objection process and the final PRD could be the subject of an application for judicial review once it is final, which is anticipated to be in December 2018, this change does not provide certainty that the alternative remedy would be expeditious, nor does it speak to the issue of remedial capacity. The issue would remain debatable.

230 The jurisprudence speaks of "effective remedies" or "effective recourse" (*JP Morgan Asset Management (Canada) Inc.*, *CB Powell Ltd.*, *Strickland*. The Prothonotary found that there was no certainty that the proposed alternative remedy — (i.e., the PMRA re-evaluation which, as noted, has been ongoing since 2012, as well as the conversion applications) — would offer an effective remedy for the Applicants. The Respondents are the only ones who are certain. In my view, the Prothonotary's finding that it is not certain is amply supported by the evidence before her, and this would remain so even if the new evidence were admitted.

231 In conclusion, I do not find that the Prothonotary erred in finding that it was debatable whether there is an adequate alternative remedy. The Prothonotary did not err in failing to apply an element of a legal test. The Prothonotary considered a range of factors and identified two particular concerns. In the course of her assessment, the Prothonotary considered the appropriateness of judicial review, finding that, although it would be complex, it could be managed and it would be heard by December 2018, before the other process had even triggered an opportunity to seek judicial review.

232 Moreover, if I had found an error of law or a palpable and overriding error and had conducted a *de novo* review of the motion to strike, I would reach the same conclusion. The relevant factors from the jurisprudence as applied to the present circumstances do not provide certainty. For example, the convenience of the alternative remedy would favour the Respondents only; the remedial capacity of the alternative differs from that of judicial review and will not necessarily address the conduct alleged; the expertise of the PMRA could favour the alternative remedy, but the expertise of the PMRA has been at issue in every decision challenged as part of the alleged course of conduct; and, the economical use of judicial resources may be a factor at the next stages of these proceedings, but judicial resources have already been spent on three rounds of motions. The Applications for Judicial Review, on the other hand, although complex, are being case managed and are on track to be heard before the final decisions in the alternative processes are issued.

XIV. Conclusion

233 The Prothonotary did not misunderstand the statutory regime set out in the PCPA nor did she confuse the purpose and effect of section 8 and section 12. She understood that registration decisions were made pursuant to section 8, and that notices under section 12 were issued at the time of registration requesting additional information, which resulted in the registration decisions being conditional registrations.

234 The Prothonotary did not err in characterizing the Applicants' claims. The characterization of the claims is a question of mixed law and fact. As such, unless there is palpable and overriding error, the Prothonotary's findings are owed deference. The Prothonotary's characterization reflects the essential nature of the Applicants' claims which was aptly captured at para 20 of her decision.

235 The Prothonotary did not err in her understanding or application of the jurisprudence governing subsection 18.1(2) and Rule 302. The Prothonotary conducted a factual assessment to assess whether there was a course of conduct alleged with respect to subsection 18.1(2) and Rule 302. As noted above, she addressed all the arguments raised by the Respondents and did not fail to apply the relevant considerations from the jurisprudence. Her finding that it was debatable whether the conduct alleged is a course of conduct, and that this issue should be determined by the Judge on the Applications for Judicial Review, is supported by the allegations in the Notices of Application and the jurisprudence.

236 Finally, the Prothonotary did not err in finding that it was debatable whether there was an adequate alternative remedy for the Applicants. The Prothonotary did not commit any error of law by failing to apply an element of a legal test. Rather, she applied the relevant factors from the jurisprudence and was left uncertain, due in particular to her concerns about whether the alternative remedy was expeditious or would address the central remedy sought, and reasonably concluded that it was debatable whether the alternative remedy would be adequate.

237 The new evidence, which was not admitted, but which was considered in the context of determining the Respondents' motion to admit that evidence, clarifies that one aspect of the re-evaluation process, the PRD, will permit judicial review following a final decision, anticipated in December 2018. However, this evidence does not change the facts considered by the Prothonotary that would have provided her with certainty regarding the adequacy of the alternative remedy.

238 The Prothonotary did not err in her application of the test to strike an Application for Judicial Review and in finding that the Notices of Application were "not so clearly improper to be bereft of any possibility of success" (*David Bull*). The "knock-out punch" required to warrant striking the pleadings is not possible where the issues are debatable.

239 In the present case, the Respondents have microscopically dissected the Prothonotary's decision and offered interpretations of the jurisprudence that stretch it beyond its meaning. The issues at stake were found to be debatable. The carefully crafted and extensive submissions of both parties, the voluminous record, the oral submissions over two days before the Prothonotary, and the oral submissions over two days before the Court on this Appeal, highlight that the issues are indeed debatable.

240 The Applicants are entitled to their costs on this Appeal which also include their costs on the motion to admit new evidence. In the event that the parties are unable to reach an agreement on the amount of costs and how they are to be paid, written submissions shall be provided to the Court according to the timetable set out below:

1. The Applicants shall serve and file costs submissions not to exceed three pages within 10 days of issuance of this Order;

2. The Respondents shall serve and file responding submissions, not to exceed three pages, within 7 days of receipt of the Applicants' submissions;

3. The Applicants shall file reply costs submissions, if any, not to exceed two pages, within 7 days of receipt of the Respondents' submissions; and,

4. The parties may modify the timetable set out above, on consent, and, if so, shall notify the Court of the revised timetable.

ORDER

THIS COURT ORDERS that:

1. The Appeal of the Order of Prothonotary Aylen dated July 13, 2017 is dismissed.

2. The Respondents shall pay the Applicants their costs of this Appeal, which include their costs on the motion to admit new evidence.

Appeal dismissed.

Annex A

The Statutory Scheme

The PMRA is responsible for the registration of pest control products [PCPs]. A PCP, which includes both an active ingredient and an end-use product, cannot be used in Canada unless it is first validly registered under the Act (section 6). An applicant seeking to register a PCP must submit an application to the PMRA (section 7). Section 8 provides that the PMRA shall register the PCP if it considers that the risks posed by the PCP are "acceptable", which is defined in subsection 2(2) as, "if there is reasonable certainty that no harm to human health, future generations or the environment will result from exposure to or use of the product, taking into account its conditions or proposed conditions of registration". If the risk is determined to be unacceptable, the PMRA shall refuse the application. The same basic process applies when a registrant applies to amend, renew or reinstate a previously registered PCP. A registration under section 8 can be valid for up to five years, although the PMRA may stipulate a shorter validity period (Regulations, section 13).

The process established by the PMRA for determining whether or not a PCP poses an acceptable risk varies depending on the specific nature of each application. However, in all cases, the PMRA must consider whether the applicant has provided sufficient information to make a determination as to the acceptability of the risk (subsections 7(1)-(2)). If the information is not sufficient, the PMRA may request other information before making a registration decision (subsection 7(4)).

The extent of the evaluations conducted by the PMRA vary depending on several factors, including: whether the PCP is a new "active ingredient" or an end-use product containing a

previously registered "active ingredient", the PCP's intended use, and whether the application seeks to register a new PCP or simply amend an existing one.

Public consultation may be required as part of the process, for example, where an applicant seeks to register a previously unregistered active ingredient, or where it is determined that the PCP poses a significantly increased risk (subsection 28(1)(a)).

Where the PMRA considers that the risks are acceptable, and therefore decides that the PCP will be registered pursuant to section 8, it may also request additional information about the risks posed by the PCP by way of a notice pursuant to section 12. Where additional information is required, this request becomes a condition of registration (subsection 12(2)), and the registration is deemed to be a conditional registration (Regulations, section 14). A conditional registration is only valid for up to three years, rather than the maximum five years where the registration is not conditional (Regulations, subsection 14(1)(a)). In addition, as explained by the AGC's affiant, Neilda Sterkenburg, the requirement for public consultation is suspended *until* "such time as the registration is renewed, continued, or converted to a full registration, whichever comes first." (Regulations, subsection 14(1)(b)).

Where the registrant complies with the section 12 notice and provides the additional information to the PMRA's satisfaction, the PCP's validity is then extended from three years to five years (Regulations, subsection 14(6)). The validity period of a conditional registration may also be extended by PMRA to allow it to undergo public consultations (Regulations, subsection 14(7)). Otherwise, the validity period of a conditional registration may not be extended (Regulations, subsection 14(5)).

The Regulations also provide that registrations and conditional registrations may be renewed (Regulations, subsection 16(1)-(2)). An application to renew requires the same information as required to register a new PCP (or to amend an existing one) (Regulations, subsection 16(4)). In other words, the PMRA must receive sufficient information to satisfy itself that the risk posed from granting the application for renewal is acceptable under section 8 of the Act. If a conditional registration is renewed under section 16, the Regulations require that a new section 12 notice be issued to the registrant, and the three year validity period for the renewed conditional registrations begins anew (Regulations, subsection 16(2)). A conditional registration may also be continued after the evaluation of data through the delivery of a further section 12 notice. This continued conditional registration is valid for three years (Regulations, subsection 14(2)). The PMRA may also reinstate an expired conditional registration by delivering further section 12 notices. A reinstated conditional registration is valid for three years (Regulations, subsection 14(2)). Whether the application is to renew, continue or reinstate a PCP, the PMRA must first determine that the risks posed by the PCP remain acceptable in accordance with section 8.

Paragraph 28(1) (a) of the Act provides that the PMRA must consult the public in respect of proposed decisions where the applicant seeks to register a previously unregistered active ingredient or where it is determined that the PCP poses a significantly increased risk.

Compliance with this public consultation duty is the trigger for a person's right to file a notice of objection to a registration decision. After an objection has been made, the PMRA must first decide whether to establish a review panel. If established, the review panel would ultimately recommend whether the decision should be confirmed, reversed, or varied (PCPA, section 35).

Section 16 of the Act provides that the PMRA *may* initiate a "re-evaluation" of a PCP if it is of the opinion that there has been a change in the information required to assess the risks. The PMRA is also required to conduct a re-evaluation no later than 16 years after the most recent decision relating to the PCP that was subject to public consultation. Both types of re-evaluations must allow for public consultation (subsection 28(1)(b)). This type of consultation will also be subject to the notice of objection procedure in section 35 of the Act.

Paragraph 28(1)(c) allows the PMRA to consult about "any other matter if the Minster considers it in the public interest to do so". Consultation conducted pursuant to this provision is *not* subject to the notice of objection procedure in section 35 of the Act.

As explained above, A PCP can become a conditional registration due to the issuance of a section 12 notice. However, a PCP can also become a conditional registration indirectly, via a "linked" PCP. Where a section 12 notice has been issued with respect to an active ingredient, any registered PCP that contains that active ingredient is deemed conditional (Regulations, subsection 15(1)). Similarly, where a section 12 notice is issued in respect of an end-use product, the active ingredient contained within it is deemed a conditional registration (subsection 15(2)). Therefore, multiple PCPs can become conditional registrations via a single section 12 notice.

Section 14 of the Regulations, which sets out the effect of conditional registrations, was repealed effective November 30, 2017.

2006 FC 933, 2006 CF 933
Federal Court

Delisle c. Canada (Procureur général)

2006 CarswellNat 2482, 2006 CarswellNat 4723, 2006 FC 933, 2006 CF 933, [2006] A.C.F. No. 1230, [2006] F.C.J. No. 1230, 155 A.C.W.S. (3d) 212, 298 F.T.R. 1 (Eng.)

Léopold Delisle, Applicant and The Attorney General of Canada and Ministry of Health (Health Canada) and Director General Therapeutic Products Directorate (Health Canada), Respondents

Dany Laforest, Applicant and The Attorney General of Canada and Ministry of Health (Health Canada) and Director General Therapeutic Products Directorate (Health Canada), Respondents

Laurent Légère, Applicant and The Attorney General of Canada and Ministry of Health (Health Canada) and Director General Therapeutic Products Directorate (Health Canada), Respondents

Daniel Grandmont, Applicant and The Attorney General of Canada and Ministry of Health (Health Canada) and Director General Therapeutic Products Directorate (Health Canada), Respondents

F. Lemieux J.

Heard: July 4-5, 2006
Judgment: July 28, 2006
Docket: T-698-04, T-2138-04, T-2139-04, T-2140-04

Counsel: Michel Bélanger, pour demanderesse
Carmela Maiorino, pour défenderesse

Subject: Public; Criminal

APPLICATIONS by patients for judicial review of decision by bureau director to terminate access to drug.

***F. Lemieux J.*:**

I. Introduction

1 There are four applications for judicial review, to be jointly examined, regarding some decisions by the federal authorities made under Health Canada's Special Access Programme (the "SAP") and especially the January 23, 2004 decision by the Director of the Senior Medical Advisor Bureau (the "Director"). The effect of this decision is two-fold:

> 1º it stated a public policy: access via the SAP to a product known as 714-X, a medication which has not been licensed by Health Canada, nor elsewhere, but whose sale has been authorized in Canada, since 1989 via the SAP following requests for access submitted by several physicians was thereafter to be limited. This policy required that significant evidence be included in all requests to the SAP before any new sales were authorized. It indicated that [TRANSLATION] "in view of this decision, it is unlikely that the SAP shall authorize sales of 714-X for new patients." It provided for a one-year transitional period for the patients currently taking the product. They were to have access to the product on the advice of their physician if they experienced no adverse reaction. Future use of the product was to be submitted to a clinical trial;
>
> 2º this is Health Canada's response to several requests for access to 714-X which were then still on hold.

2 The respondents explain the scope of this decision in the following terms, that can be found in their memorandum of points and authorities:

> [TRANSLATION]
>
> 2. This decision bears on the sales conditions via the Special Access Programme of a drug known as 714-X. Pursuant to a thorough review of the documentation, the Director concluded, on January 23, 2004, that there was no credible evidence establishing the effectiveness or the safety of this drug. The Director decided not to invoke the exceptional discretionary power conferred on him by section C.08.010 of the *Food and Drug Regulations*, which authorizes the sale of this drug to certain patients. The sale of this drug remains prohibited, in accordance with the *Food and Drugs Act* (hereinafter referred to as "FDA") and the *Food and Drug Regulations* (hereinafter referred to as "FDR").
>
> . . . . .
>
> 24. On January 23, 2004, Dr. Brian Gillespie, Director of the Senior Medical Advisor Bureau, made a public policy decision regarding access to a new drug, 714-X. Pursuant to this public policy, the Director informed referring physicians that the new 714-X drug would no longer be accessible via the SAP, except for a one-year grace period for those patients whose referring physicians had already received an authorization. Furthermore, this decision was to be applicable to all access requests which had been on hold since August 2003.
>
> . . . . .

> 26. The Director, however, did not rule out the possibility that 714-X might eventually be accessible to Canadians. The manufacturer shall be, however, required to request and obtain an authorization prior to undertaking clinical trials. These are obligations that the "FDA" and the "FDR" impose on all manufacturers of new drugs.
>
> [Emphasis added.]

3 The respondents focus on Dr. Gillespie's January 23, 2004 decision, claiming that said decision and all the issues raised by the applicants are inextricably interrelated;

4 As to the applicants, their submissions not only bear on Dr. Gillespie's decision, but also on the SAP's decision with regard to access requests by each of their referring physicians: they argue that those decisions were made within a reasonable time or that it is unwarranted to deny them access to the drug in issue;

5 The applicants raise several issues:

1.

Want of jurisdiction

They submit that access decisions were the prerogative of the Assistant Deputy Minister of the Food Directorate, Health Products and Food Branch within the Department, who could not delegate that power or, if he could, that the decision in issue was made by the wrong person, or that it should have been made on a case-by-case basis and not applied uniformly, or that a new delegation of powers was required in view of changes within Health Canada's administrative structure.

2.

Excess of jurisdiction

They submit that the SAP based sales authorizations of 714-X on requirements that went beyond the scope of the Regulations in several manners: (1) by requiring from referring physicians additional information on the product's effectiveness and safety that physicians do not have, (2) by asking for specific information that appeared in science magazines and pertained to the registration process, which is not part of the Regulations, and (3) by adopting a public policy going beyond the limits of its discretionary power;

3.

Breach of legitimate expectation

They contend that the SAP's mandate, as described by Health Canada, includes a commitment to treat every request for access within 24 hours after it is received. Not only was this policy

400 deviated from in several cases, but in the case of two of the applicants, the delay in the response was unreasonable. The applicants also submit that, after 15 years of access, they had a legitimate expectation that their requests for access would be authorized.

4.

The scope of the discretionary power

When construed in the light of their object, the Regulations creating the SAP provide for a restricted authorization power, exclusively based on the duties owed of the physician and his patient; there is nothing discretionary about it. The system thus created is that of access on demand.

5.

Abusive and patently unreasonable use of discretionary power

The applicants claim that 714-X is not toxic and is effective. In establishing its public policy, Health Canada is said to have ignored evidence from patients, their physicians, Mr. Nassens, as well as the scientific theory that supports 714-X. Furthermore, in its review of the issue of access to 714-X, the SAP acted arbitrarily in the evaluation and application of the evidence.

6.

Violation of sections 7 and 15 of the Canadian Charter of Rights and Freedoms *(the Charter)*

6 In my view, several of the issues raised by the applicants are essentially issues of statutory interpretation. The modern approach was reiterated by Mr. Justice Gonthier in *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476 (S.C.C.), who quoted the following excerpt from E.A. Driedger in his work, *Construction of Statutes* (2nd ed. 1983, p.87):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> [Emphasis added.]

7 Only two sections of the Regulations, captioned "sale of new drug for emergency treatment," relate to the SAP:

> C.08.010. (1) The Director may issue a letter of authorization authorizing the sale of a quantity of a new drug for human or veterinary use to a practitioner named in the letter of authorization for use in the emergency treatment of a patient under the care of that practitioner, if

(a) the practitioner has supplied to the Director information concerning

(i) the medical emergency for which the drug is required,

(ii) the data in the possession of the practitioner with respect to the use, safety and efficacy of that drug,

(iii) the names of all institutions in which the drug is to be used, and

(iv) such other data as the Director may require; and

(b) the practitioner has agreed to

(i) report to the manufacturer of the new drug and to the Director on the results of the use of the drug in the medical emergency, including information respecting any adverse reactions encountered, and

(ii) account to the Director on request for all quantities of the drug received by him.

(2) The Director shall, in any letter of authorization issued pursuant to subsection (1), state

(a) the name of the practitioner to whom the new drug may be sold;

(b) the medical emergency in respect of which the new drug may be sold; and

(c) the quantity of the new drug that may be sold to that practitioner for that emergency.

C.08.011. (1) Notwithstanding section C.08.002, a manufacturer may sell to a practitioner named in a letter of authorization issued pursuant to section C.08.010, a quantity of the new drug named in that letter that does not exceed the quantity specified in the letter.

(2) A sale of a new drug made in accordance with subsection (1) is exempt from the provisions of the Act and these Regulations.

[Emphasis added.]

C.08.010. (1) Le Directeur général peut fournir une lettre d'autorisation permettant la vente d'une certaine quantité d'une drogue nouvelle d'usage humaine ou vétérinaire à un praticien nommé dans la lettre d'autorisation pour le traitement d'urgence d'un malade traité par ledit praticien, si

a) le praticien a fourni au Directeur général des renseignements concernant

(i) l'état pathologique urgent pour lequel la drogue est requise,

(ii) les données que possède le praticien à propos de l'usage, de l'innocuité et de l'efficacité de ladite drogue,

(iii) le nom de tous les établissements où la drogue doit être utilisée, et

(iv) les autres renseignements que le Directeur général pourrait lui demander; et

b) le praticien a consenti à

(i) faire part au fabricant de la drogue nouvelle et au Directeur général des résultats de l'usage de la drogue au cours de l'urgence, y compris les renseignements se rapportant à toute réaction défavorable qu'il aura observée, et

(ii) rendre compte au Directeur général, sur demande, de toutes les quantités de la drogue qu'il aura reçues.

(2) Le Directeur général doit, dans toute lettre d'autorisation fournie conformément au paragraphe (1), spécifier

a) le nom du praticien auquel la drogue nouvelle peut être vendue;

b) l'état pathologique urgent pour lequel la drogue nouvelle peut être vendue; et

c) la quantité de la drogue nouvelle qui peut être vendue audit praticien pour ledit cas urgent.

C.08.011. (1) Nonobstant l'article C.08.002, un fabricant peut vendre à un praticien mentionné dans une lettre d'autorisation fournie conformément à l'article C.08.010, une quantité de la drogue nouvelle nommée dans ladite lettre qui n'excède pas la quantité spécifiée dans la lettre.

(2) La vente d'une drogue nouvelle faite en conformité du paragraphe (1) n'est pas soumise aux dispositions de la Loi et du présent règlement.

8 The sale of a new drug via the SAP is not subject to the requirements of section C.08.002 of the Regulations.

9 According to subsection C.08.002(1), it is forbidden to sell or advertise a new drug unless, upon request from the manufacturer, the Minister issues a notice of compliance. However, subsection 30(1)(*j*) of the Act authorizes the Governor in Council to exempt a drug from any or all provisions of the Act and to prescribe the conditions of exemption;

10 In order to enable the Minister to assess the safety and effectiveness of a new drug, the information demanded under subsection C.08.002(4) of the Regulations in support of such a request includes: 1) details of the tests to be applied to control the potency, purity, stability and safety of the new drug; 2) detailed reports of the tests made to establish the safety of the new drug for the purpose and under the conditions of use recommended; and 3) substantial evidence of the clinical effectiveness of the new drug for the purposes and under the conditions of use recommended.

11 Léopold Delisle currently has access to 714-X via the SAP. In his application for judicial review, filed April 2, 2004, Mr. Delisle seeks to:

> [TRANSLATION]
>
> 5. **Purpose of application for judicial review:** The application for judicial review relates to the decisions of the respondent Health Canada, and more specifically, of the Director General of the Therapeutic Products Directorate, who refused requests from physicians on behalf of their patients to make the 714-X product available through the Special Access Programme (hereinafter referred to as "the SAP") administered by the respondents. The application also seeks to order the respondents to allow the physicians' requests, without any further requirements and conditions within 24 hours of receiving these requests, whether the patients concerned have been granted or not in the past a similar authorization for access to the 714-X product;
>
> [Emphasis added.]

12 Although his physician has been requesting it since August 2003, Daniel Grandmont was never treated with 714-X. His application for judicial review, filed on December 1st, 2004, seeks to have the following order issued against Health Canada:

> [TRANSLATION]
>
> (a) Not to deny access requests to 714-X made by his physician through the Special Access Programme ((hereinafter referred to as the "SAP") on grounds of insufficient information regarding the effectiveness or toxicity of 714-X;
>
> (b) To allow the applicant to have access to 714-X upon request from his physician through the SAP, beyond January 2005 and for as long as his physician deems it necessary;
>
> [emphasis added.]

13 Laurent Légère, who currently has access to the 714-X via the SAP, is seeking the following relief in his application for judicial review, filed on December 1st, 2004:

[TRANSLATION]

12. Relief sought

12.1 The application for judicial review seeks to have the following order made against respondent Health Canada:

(a) To respond to special access requests within twenty-fours and to avoid any unreasonable delay, such as the applicant has suffered, in processing requests for access;

(b) Not to deny any requests for access to 714-X made by his physician through the Special Access Programme (hereinafter referred to as the "SAP") on grounds of insufficient information regarding the effectiveness or the toxicity of 714-X;

(c) To allow the applicant to have access to 714-X upon request from his physician pursuant to the SAP, after January 2005 and for as long as his physician deems it necessary;

[emphasis added.]

12.2 . . .

14 Dany Laforest was treated with 714-X, but no longer has access to it. Her application for judicial review, filed on December 1st, 2004, seeks to have the following orders made against Health Canada:

[TRANSLATION]

(a) To allow her request for access to 714- X, which the respondent has omitted or refused to do within a twenty-four-hour deadline;

(b) Where applicable, not to request that her physician submit any further information on the effectiveness or toxicity of 714-X than that provided in response to prior requests;

(c) To enable the applicant to have access to 714-X, upon request from her physician in compliance with the SAP, after January 2005 and for as long as her physician deems it necessary;

[Emphasis added.]

15 In the alternative, assuming that Health Canada has complied with the enabling legislation, each applicant is seeking that the Court declare that sections C.08.010 and C.08.011 violate sections 7 and 15 of the Charter, in that they allow the responsible authorities to deny and delay treatment in an unreasonable manner, or to reject in an abusive and arbitrary manner and without reasonable grounds the requests submitted by physicians for access to 714-X, thus resulting in a deprivation of the liberty and security of the person under section 7, or discrimination under section 15.

II. The SAP

16 The SAP is a programme instituted by Health Canada to facilitate emergency access to unapproved experimental drugs for serious illnesses when conventional therapies have failed, are unsuitable, or unavailable. The programme started in 1966 under a different name. The Department describes as follows the SAP's mandate in its request for special access Guideline (applicants' brief, volume 1, page 62):

> The Special Access Programme (the SAP) provides access to nonmarketed drugs for practitioners treating patients with serious or life-threatening conditions when conventional therapies have failed, are unsuitable, or unavailable. The SAP authorizes a manufacturer to sell a drug that cannot otherwise be sold or distributed in Canada. Drugs considered for release by the SAP include pharmaceutical, biologic, and radiopharmaceutical products not approved for sale in Canada.
>
> The SAP does not authorize the use or administration of a drug - this authority falls within the practice of medicine, which is regulated at the provincial level. The SAP authorization does not constitute an opinion or statement that a drug is safe, efficacious or of high quality. The SAP does not conduct a comprehensive evaluation to ensure the validity of drug information or attestations of the manufacturer respecting safety, efficacy and quality. These are important factors for practitioners to consider when recommending the use of a drug and in making an appropriate risk/benefit decision in the best interests of the patient. The SAP strongly encourages practitioners treating individuals with drugs obtained through the SAP to seek informed consent before treatment.
>
> Practitioners are encouraged to contact individual manufacturers to confirm the availability of a drug as well as to obtain the most up-to-date drug information such as prescribing information and other data supporting the use of the drug. In all cases, the manufacturer has the final word on whether the drug will be supplied. The manufacturer also has the right to impose certain restrictions or conditions on the release of the drug to ensure that it is used in accordance with the latest information available. For instance, they may restrict the amount of drug released, request further patient information, etc. Inquiries concerning the shipping, cost and/or payment should be directed to individual manufacturers.

> In seeking and receiving access to a drug through the SAP, the practitioner agrees to provide both the SAP and the manufacturer with a report on the use of the drug, including information on adverse reactions and, on request, account for all quantities of drug received.
>
> [Emphasis added.]

17 The patient's referring physician is the one who requests access to 714-X (or any other new drug) by completing a Health Canada form. In addition to giving information on the medication, the patient and the exact medical condition he wishes to receive for this medication, since 2002, the physician must: (1) provide a clinical rationale, including about the patient's medical history, prognosis, other treatments attempted or ruled out; (2) justify why this drug is the best choice for the patient, for example it is a drug of choice, he is undergoing a first or second line therapy, there are no product alternatives; and (3) reference any sources of information available, such as specific medical literature, product monograph, etc., with respect to the use, safety and effectiveness of the medication he is ordering.

18 The practitioner's consent on the form is as follows:

> I, the practitioner, am accessing this non-marketed drug for use in the emergency treatment of a patient under my care in accordance with the *Food and Drug Regulations* (C.08.010).
>
> I, the practitioner, am aware that by accessing this drug through the SAP, the sale of the drug is exempt from all aspects of the *Food and Drugs Regulations* including those respecting the safety, efficacy and quality.
>
> I, the practitioner, agree to provide a report on the results of the use of the drug including information on Adverse Drug Reactions and, on request, to account for quantities of the drug received.
>
> [Emphasis added.]

19 In its guidelines, Health Canada requests that the forms be faxed to the SAP and indicates that a complete form does not guarantee that a request will be authorized, as "additional information may be required during the review process." Health Canada states that "every effort is made to process requests within 24 hours of receipt" but warns that "given the mandate of the Programme and the volume of requests received, the SAP adopts a triage system to ensure that requests for drugs for life-threatening conditions take precedence over other less urgent matters" and that "if a drug is new to the Programme, the total processing time may be extended" (applicants' brief, at page 64).

20 Another Health Canada document (applicants' brief, at page 70) defines the SAP's objective:

> The Special Access programme (the SAP) allows practitioners to request access to drugs that are unavailable for sale in Canada. This access is limited to patients with serious or life-threatening conditions on a compassionate or emergency basis when conventional therapies have failed, are unsuitable, or are unavailable.
>
> [Emphasis added.]

21 In the same document, Health Canada responds as follows to the question: "Can the SAP be considered a fast-track approval process for medications?":

> No. The SAP is not intended to be a mechanism to promote or encourage the early use of drugs or to circumvent the clinical trials review and approval process or the new drug approval process, but rather to provide compassionate access to drugs on a patient by patient basis.
>
> [My emphasis.]

22 In 1997, the House of Commons Standing Committee on Health ("Standing Committee") reviewed the operation of the Emergency Drug Release Program ("EDRP"), the SAP's precursor.

23 In its report, the Standing Committee addressed the right of catastrophically-ill patients:

> The concept of catastrophic rights holds that: "a catastrophically-ill patient has the right to be free from any paternalistic interference in electing, in consultation with his physician, any therapy whatsoever that does not cause direct harm to others." (2) This concept is rooted in the principle of freedom.
>
> [Emphasis added.]

24 This Committee acknowledged, however, that "the catastrophic right to try to save one's own life is, unfortunately, neither straightforward nor simple in its application for this is a "positive" right, meaning that its fulfilment requires the participation of others," in other words, it "imposes a corresponding duty on those who have drugs or on those who manufacture drugs."

25 In the Committee's opinion, "the Act attempts to safeguard the health of Canadians by prohibiting the sale of drugs of unproven safety and efficacy." It stated:

> As such, the Act would disallow an individual's catastrophic right to an unproven therapy were it not for sections C.08.010 and C.08.011 of the Act's Regulations. These provisions establish the conditions for the Emergency Drug Release Program (EDRP); whereby, the Health Protection Branch (HPB) of Health Canada may authorize a pharmaceutical manufacturer to sell a drug, not approved for sale in Canada, to a physician for the emergency treatment of a specific patient. The program covers two therapeutic categories: investigational drugs and drugs approved in foreign countries. When the EDRP was established in 1966, it

was largely used for this latter function; however, since the emergence of the AIDS epidemic approximately 15 years ago, the focus of the EDRP has shifted to the point where the authorization of experimental drugs for people who are catastrophically ill is the program's major function. While catastrophic rights do not have the force of legal recognition in Canada, the government's action to facilitate the provision of unapproved medications "implicitly recognizes that critically-ill persons should be allowed to take much greater risks than would otherwise be acceptable."

[Emphasis added.]

26 It cautioned, however:

Round Table participants identified a number of problems associated with compassionate access; however, its potential to slow the drug regulatory process was probably the greatest concern. There was strong concurrence that nothing must interfere with the rapidity of drug development, which brings the best treatment to the most people, and is therefore of paramount importance. The availability of compassionate access may lead to high drop-out rates from trials in progress or it may slow or limit recruitment to controlled trials ... Not only did this slow the achievement of knowledge, but some volunteers were on drugs for three years without any evidence of a superior arm. There was considerable agreement that if compassionate access is to occur in parallel to clinical trials then creative solutions must be developed to protect the drug development process; but, it was also stressed that greater flexibility within the drug regulatory process is required in order to respond to the urgent need for drugs to treat immediately life-threatening conditions.

[Emphasis added.]

27 At page 10 of its report, the Standing Committee stated a consensus on the need for compassionate access:

From the briefs, presentations and five days of Round Table discussions, it appears that the provision of compassionate access to investigational therapies can and does have an impact on the drug development and evaluation process in Canada. In spite of this impact, however, not a single Round Table participant suggested that compassionate access programs should be curtailed in any fashion or that attempts to further liberalize the process should be avoided. ...

[Emphasis added.]

28 Under the heading "Ethical aspect, overarching considerations," at page 18, it was stated:

The five National Round Table sessions were characterized by a high level of agreement. Indeed, there was no stated disagreement to the concept of a catastrophic right. It was pointed out, however, that this right is only operational when the physician agrees with the choice

> of therapy; that is to say, an individual's right to an unmarketed therapy does not override the physician's equal right "to do no harm." This ethical obligation, to do no harm, goes to the heart of the question of when it becomes appropriate to consider an unproven therapy as a possible candidate for compassionate access. Although a few participants held that there should be no risk limitations on access to experimental drugs, the majority opinion held that release of a therapy should only be considered when "an acceptable balance between efficacy and toxicity" has been demonstrated. (43) Further, it was firmly held that the rights of those with catastrophic illness have defined limits. On this point, Neill Iscoe of the Canadian Cancer Society stated that "the society believes in the right to self-determination but does not believe this right permits one person to exercise that right to the disadvantage or detriment of another individual."(44) Specifically, it was felt that compassionate access, while necessary, should not be allowed to impede rapid drug development.
>
> [Emphasis added.]

III. 714-X

29 The inventor of the 714-X product is a biologist, Gaston Naessens. He submitted an affidavit in support of each application for judicial review and was not cross-examined. 714-X was developed in 1975 and is sold by its manufacturer, CERBE Distribution Inc. ("CERBE"). Mr. Naessens is the owner. This product enhances the natural defenses and the immune system when it is introduced directly into the lymphatic system.

30 714-X has been accessible to the SAP since December 18, 1989. Gaston Naessens stated that, between that date and March 30, 2004, 1,499 Canadian physicians received 20 985 authorizations from Health Canada for 714-X, which is the equivalent of 440,685 injections and 30,513 treatments by inhalation provided for 4,051 Canadian patients.

31 According to section C.08.001 of the Regulations, 714-X is a new drug because it has not been sold for a sufficient time and in sufficient quantity in Canada to establish its safety and effectiveness, a finding which is challenged herein.

32 However, CERBE made no request for a notice of compliance in connection with this product. It should be noted that, until now, 714-X has not been subjected to any clinical trials. Based on the evidence submitted, this product is not authorized in the United States, or anywhere else.

IV. The challenged decision and related decisions

33 On January 23, 2004, Dr. Gillespie wrote to several physicians to respond to their requests for access to 714-X and notified them of changes in the administration of the programme which would affect the processing of future requests for the product. He recalled that the SAP's mandate is to offer access to non commercial drugs to physicians who treat patients with serious or life-

410 threatening conditions when conventional therapies have failed or have proven to be unsuitable. (I also note that Dr. Gillespie had sent a similar letter to a smaller number of physicians on January 19, 2004.)

34 He cautions, however, that, as an emergency mechanism, [TRANSLATION] "*the SAP is not designed to circumvent the clinical trial process or the review process of new medications, nor to promote or encourage the marketing or early use of drugs before their safety and effectiveness has clearly been shown*." [Emphasis added.]

35 He lists Health Canada's efforts since 2001 to improve the SAP's operations. He mentions two initiatives:

> [...]The first, a drug audit process, was implemented to monitor all drugs on the programme and identify those for which there are identified concerns of safety, efficacy or quality and/or there is limited data to support widespread access. The second, a quality initiative, was implemented to review the administration of the programme to preserve its use as an emergency mechanism in accordance with the SAP provisions of the *Food and Drugs Regulations*.
>
> [Emphasis added.]

36 As to 714-X, Dr. Gillespie advises that this product [TRANSLATION] "has been identified from the start of the medication verification process as a product with limited data to support widespread access or long-term use, and with limited prospects."

37 Therefore, at the time, [TRANSLATION] "it was assigned some priority and it was added on to a list of products requiring sequential testing in an order of priority." Shortly thereafter, a new form was introduced in connection with the Health Canada initiative on the quality of the programme. [TRANSLATION] "The most important change is the requirement that practitioners provide a clinical rationale for its use ... and the sources of scientific information supporting this rationale."

38 He concluded by announcing:

> In the months after these procedures were introduced, the SAP received many 714-X requests that did not reference scientific data supporting the use, safety and efficacy of this product. The SAP responded to these apparent deficiencies through a routine fax-back procedure for incomplete requests. This process is used to identify specific request deficiencies, reference additional sources of programme information, ... and outlines our minimal request standards. In addition, it offers practitioners an opportunity to consider a deficiency in light of the minimal requirements of the *Food and Drug Regulations* and resubmit a request, with

additional information, for further consideration. Despite these efforts, the SAP continued to receive a large volume of 714-X requests with little or no data.

Based on a further review of evidence now available with respect to the use, safety and efficacy of this drug, as they relate to the emergency uses for which this drug has been requested, it has been determined that significant new evidence would have to be included in any SAP request before any further sales of 714-X could be authorized pursuant to requests made under section C.08.010 of the *Food and Drug Regulations*. Given this determination, it is unlikely that the SAP will authorize the sale of 714-X for new patients. During an interim period of one year, the SAP will take account of the special considerations relating to patients currently receiving the drug, who in the opinion of the practitioner have not experienced adverse effects from their ongoing treatment, and may continue to authorize requests made for such patients. The SAP then will revisit the merits of any such continued authorizations on the basis of reports filed on the previous use of the product, including any adverse events, in accordance with subparagraph C.01.010 (*b*)(i) [n'existe pas] of the Food and Drug Regulations.

The determination that has been made by Health Canada in this matter is consistent with that made by the U.S. National Cancer Institute (NCI) concluded that there have been no clinical studies (e.g. clinical trials, case series or case reviews) reported in peer-reviewed, scientific journals to support the safety or the efficacy of 714-X and it did not recommend the use of 714-X outside the context of well designed clinical trials. If you wish to pursue the use of 714-X, I recommend that you work with a manufacturer to develop and sponsor a clinical trial. A clinical trial would provide an opportunity to better understand the safety and efficacy of 714-X for specific indications and conditions. The regulatory review of the clinical trial would ensure that formal scientific and medical scrutiny is applied to the method of manufacturer of 714-X and the protocol and data supporting the use of 714-X in the proposed treatment. Most importantly, a clinical trial would ensure that the best interests of patients are protected through the required involvement of research ethics boards.

[Emphasis added.]

V. The SAP's evaluation of each applicant's file

39 Following is a history of each applicant's treatment with 714-X and the progress of their physicians' request for access underlying the application brought before the Court. None of the applicants was cross-examined on the affidavit that they submitted in support of their application for judicial review.

A. Léopold Delisle

40 Mr. Delisle's evidence is not limited to his own particular case. He studied the cases of several other patients who used the product or wished to have access to it. He obtained access to other documents by submitting a request pursuant to the *Access to Information Act*;

41 The applicant, Léopold Delisle, was diagnosed in 1989 with an immune system illness — mastocytosis. He stated that neither traditional medicine nor international research has found any medication to cure this disease. Between May 1994 and June 1997, he was treated with experimental medication, not only unsuccessfully, but with adverse results. On July 23, 1997, he was given access to 714-X. Paragraphs 38 to 40 of his affidavit read as follows:

> [TRANSLATION]
>
> 38. On October 21, 1997, my medical specialist noticed that my condition had improved, with a weight gain, a decrease in these signs and symptoms, the disappearance of a right-side inguinal hernia, which had been present since December 1995, and a significant decrease in my medication;
>
> 39. Since July 1997, I have administered myself several 714-X injections; in addition, I have received more than 714-X 100 treatments by inhalation in conjunction with these injections;
>
> 40. During this entire period, I observed no secondary side effects, except some painless redness on the site of the injections. The effects of 714-X have given me much more energy, fewer signs and symptoms of the illness, and have enabled me to substantially reduce my medication.. Furthermore, it has helped stabilize my immune system and, as such, has enabled me to have a better quality of life;

42 He was authorized by an order of the Court to file a further affidavit in order to explain how the SAP reviewed his September 3, 2004 request for access, a request made, I emphasize, following Dr. Brian Gillespie's January 23, 2004 decision and following the filing of evidence contained in the first affidavit from Ian MacKay, Director of the SAP. The chronology of events is as follows:

> (1) on September 9, 2004, his physician received a letter from the SAP [TRANSLATION] "rejecting my request on the grounds that the form is incomplete in that it lacks information." (Indeed, his physician's answer to question 3 on the clinical rationale was "documentation;" however, this question was asking for the available reference materials with regard to the safety and effectiveness of 714-X.)
>
> (2) in anticipation of a possible decision to extend access to the SAP for 2005, on December 1st, 2004, his physician received a letter from Dr. Gillespie asking him if he had scientific information establishing the effectiveness and safety of 714-X and more

particularly, reminding him that his incomplete September 9, 2004 request for access remained unanswered;

(3) on December 14, 2004, his physician submitted a new request for access;

(4) on December 15, 2004, his physician responded to Dr Gillespie's December 1st, 2004 letter:

> [TRANSLATION]
>
> With respect to 714-X and the scientific data, I should tell you that my patient ... submitted to me in December 2004, a letter from Dr Arthur B. Pardee of the Dana-Farber Cancer Institute, which confirmed scientifically what I had been observing for many years about 714-X. Notwithstanding the fact that there are no clinical trials on 714-X, it is very evident to me that this product has specific characteristics that are very beneficial to the immune system. Dr. Pardee's report clarifies the clinical observations I had made.
>
> As to the September 2004 request on behalf of my patient L.D., your rejection and the further information required were irrelevant and unjustified, considering that in May 2004, you had authorized my request, which set forth facts identical to the ones submitted in September 2004. Furthermore, my patient has been using 714-X for several years and this medication is of great help to him. I support him in his wish to maintain its use.
>
> Encl.: Dr Pardee's letter [Emphasis added.]

(5) on December 15, 2004, Mr. Delisle's request for access to the SAP was granted.

43 The enclosure is a letter dated August 9, 1999 from Dr. Pardee. It plays an important role in both parties' arguments, and shall be analysed further down.

B. Laurent Légère

44 Laurent Légère's situation is analogous to Léopold Delisle's. He currently has access to 714-X. He complained about the delay incurred in the processing of his most recent request, the one submitted by his physician on November 13, 2003, and rejected, it appears, in December 2003 for insufficient information, but authorized in February 2004 following an exchange from his physician.

45 *In October 1994*, after he was diagnosed with a carcinoma-type stomach cancer, his survival prognosis was six to eighteen months, and there was no conventional treatment for that type of cancer.

46 His physician, who knew about 714-X, requested access to the SAP. The access was authorized. At the end of October 1994, he received treatments for eleven cycles, amounting to 231 consecutive injections. After nine months of treatment, he returned to work, [TRANSLATION] "to his physician's surprise" and discontinued using it for almost three years. *In 1998*, his physician obtained two cycles of treatment, and later, in 2001, he obtained 23 more. His health remained stable; he, again, discontinued 714-X treatments.

47 *In October 2002*, he experienced a relapse and resumed his 714-X treatments until September 2003. He stated that his health improved once more "again, to the great astonishment of my medical specialists."

48 His application before the Court relates to the request for access that his physician completed on *November 13, 2003* and which, according to him, received no response, notwithstanding the fact that his physician attempted unsuccessfully to reach that office. He claimed that his wife tried twice to speak to the person responsible for authorizations, but "the receptionist refused to transfer the call."

49 Mr. Légère alleged that, in *December 2003*, he left a message on Mr. Ian MacKay's voicemail, asking him to call him. "He never returned the call."

50 According to him, in December 2003, following his deputy's intervention in Ottawa, Health Canada responded "*denying him, however, access to 714-X based on a lack of information*." [Emphasis added.]

51 *Following the information provided by his physician in February 2004*, this request was granted on March 11, 2004 "after a 199-day wait." Due to this delay, he stated, the state of his health greatly deteriorated and he was morally very affected. He added that he was feeling "*very anxious since Health Canada has informed his physician that he would be permanently denying him access to 714-X as of January 2005*." [Emphasis added.] Paragraphs 25 to 29 of his affidavit read as follows:

> [TRANSLATION]
>
> 25. It is unthinkable that the Government of Canada would restrict access to a product that has kept me alive and has enabled me to work and pay income taxes during all those years. Furthermore, by personally paying for 714-X, I saved the country money. My health remained stable, I was able to return to work and to continue to pay income taxes, although I should have been dead since 1994;
>
> 26. By denying me access to 714-X, which, according to my physician, I need to remain healthy, the Government of Canada is causing me irreparable harm that could even prove fatal;

27. My physician and I can testify as to what 714-X has already done for me, as there exists no conventional treatment for the type of cancer I have;

28. My gastroenterologist confirmed that the 714-X treatment has worked. As he had never heard of a surviving case of carcinoma-type stomach cancer without surgical procedure or chemical intervention, he told me to consider 714-X as an interesting option that I should keep.

29. As he did not previously know about 714-X, but as he was very curious about the product, he asked the manufacturer, CERBE, for further information.

[Emphasis added.]

C. Daniel Grandmont

52 Daniel Grandmont described his illness — a cancer known as adenocarcinoma, his two surgical procedures, in 1985 and 1990, and his remissions. He was never treated with 714-X, notwithstanding his having made several requests to the SAP, which, he claimed, were denied.

53 *In February 2003*, his cancer relapsed; no surgery was possible and no treatment, available. While researching alternative treatments, he found out about 714-X and telephoned the CERBE. *On August 6, 2003*, his physician completed the access form. This request *was returned to his physician on August 20, 2003* [TRANSLATION] "on grounds of insufficient information."

54 His physician was said to have then resubmitted the form to the SAP, with a note: [TRANSLATION] "*Why this sudden change in attitude? 714-X is well known to the Canadian government. Please contact CERBE for available sources of information*." [Emphasis added.] *On August 26, 2003*, his physician received a rejection letter from Dr. Gillespie [TRANSLATION] "again on grounds of insufficient information."

55 Mr. Grandmont's physician was then said to have told the applicant that he was concerned with Health Canada's attitude [TRANSLATION] "*since, for years, he had always completed his request for authorization in the same manner, and he told me he could not understand why I was unable to get it*." [Emphasis added.] Following his MP's intervention and following a discussion Mr. Léopold Delisle was said to have had with an official at Health Canada, his physician would have accepted to submit another request for access on December 22, 2003. *On February 11, 2004*, his physician's request for access *was again denied*.

56 Paragraphs 29 to 33 of his affidavit read as follows:

[TRANSLATION]

29. Notwithstanding the fact that I met all the requirements of Health Canada to obtain this authorization to use 714-X, Health Canada always denied my physician's requests for authorization;

30. No chemotherapy treatment is appropriate for the type of cancer I have, no radiation therapy is possible in my case, and no surgery may be contemplated;

31. Today, I suffer from left-side facial paralysis, I have great difficulty eating because I have trouble swallowing; I am deaf in my left ear, I have no voice left. I have great difficulty talking because I am out of breath. My eyelid moves with difficulty and my eyes are often dry. I am no longer able to make any physical effort;

32. The only alternative treatment remaining for me is 714-X, which has been highly recommended to me, especially by my physician and my medical specialist. 714-X is my only chance of survival;

33. The attitude, the rejections and the behaviour of Health Canada towards me have totally turned me off. The only thing I ask is the right to have a last chance, which Health Canada denies me, thus disregarding a request to that effect by my own physician;

[emphasis added]

D. Dany Laforest

57 Applicant Dany Laforest is 45 years old and had no health problems prior to 2000. In November 2000, her gynecologist found an abnormality in her right breast which tested positive following a mammography and a biopsy. After surgery, she received chemotherapy and radiotherapy, and, as a result, felt very weak.

58 After doing some research and after contacting CERBE, on August 3, 2001, her physician *was granted access to 714-X* via the SAP. After eight cycles of treatment, feeling considerably better, she interrupted the treatment. Her last authorizations date back to December 4, 2002 and July 7, 2003.

59 According to Ms. Laforest, on *February 19, 2004*, another request for authorization was submitted, but there was no response from the SAP. Ms. Laforest and her physician are still awaiting that response.

60 *She asserted that she never felt any adverse effects from the 714-X treatments, but rather experienced a sensation of well-being and of health improvement. She submitted that it is Health Canada's duty to respect requests made by physicians who, in her opinion, know more than anyone else what is good for their patients*.

VI. Ian MacKay's June 8, 2004 affidavit

61 As hereinabove mentioned, Ian MacKay is Director of the SAP. His June 8, 2004 affidavit is the main evidence relied on by the respondents in response to the applicants' evidence. He was cross-examined.

62 In the introductory paragraphs of his affidavit, he explained the basis of Health Canada's decision to limit access to 714-X through the SAP:

> 8. The *Food and Drug Act and Regulations* provide a comprehensive scheme designed to protect the health of Canadians. As such, they prohibit the sale of drugs where their safety, efficacy and quality have not been demonstrated in accordance with the said *Act and Regulations*.
>
> 9. As explained herein, it has been determined, taking account of the review conducted by the Bureau of the Senior Medical Advisor within Health Canada, that, unless sufficient evidence to support the emergency use of 714-X was provided by a physician, access to 714-X through the Special Access Programme should be limited. This position is based on a clear absence of credible evidence to support the safety and efficacy of 714-X.
>
> 10. I have read the affidavit of Léopold Delisle and Gaston Naessens and they disclose unsubstantiated and unfounded claims.
>
> 11. In this affidavit, I will respond to these claims by explaining:
>
> (a) the role of Health Canada as Canada's drug regulator;
>
> (b) drug development in Canada;
>
> (c) the scope and mandate of the Special Access Programme;
>
> (d) the impact of the quality review of the Special Access Programme on 714-X;
>
> (e) the impact of the prevailing consensus within the scientific community in Canada and the United States as to the lack of any evidence of the safety and efficacy of 714-X;
>
> (f) the carefully considered steps undertaken by the Special Access Programme with respect to the availability of 714-X;
>
> [emphasis added.]

63 I will not elaborate on the portions of Mr. MacKay's affidavit describing the role of Health Canada as a drug regulator, the development of drugs in Canada and the SAP's mandate.

64 With regard to Health Canada's role, Mr. MacKay invoked the Regulations.

65 Mr. MacKay explained that the system set up by the Regulations "is precautionary given that all drugs carry some level of risk ... [and] emphasizes the need to take timely and appropriate preventative action, even in the absence of full scientific demonstration of cause and effect." In his opinion, the approval system for new drugs rests on the fact "that there is extensive uncertainty regarding the effects of drugs in humans. Promising treatments do not always work out." He acknowledged that "[n]o drug is totally effective and likewise no drug is completely safe. *Thus, part of the regulatory review process weighs a drug's potential for benefit (degree of effectiveness) against its potential for harm, as compared with other current treatment options. The regulatory decision as to whether or not to approve a drug for the Canadian market is largely based on this risk/benefit assessment*". [Emphasis added.]

66 He identified the steps involved in the development and approval of a new drug: discovery of a new active pharmaceutical ingredient, laboratory and animal studies, and, ultimately, clinical trials on humans "to formally and systematically gather information on the safety and efficacy of a drug in humans, verify the claims made by a sponsor and the uncertainty regarding the harms or benefits of drugs in humans. Clinical trials are conducted by physicians, scientists and other health care professionals in controlled settings using good clinical practices."

67 There are three types of clinical trials: (1) Phase I clinical trials "in which an experimental drug is usually given to a small number of healthy volunteers. The goals of a Phase I trial is to determine how the drug is absorbed, distributed in the body, metabolized and excreted, as well as to estimate the initial safety and tolerability of the drug at different dosages »; (2) Phase II clinical trials "are the initial trials to assess efficacy in patients for a specific indication, ... they are also called therapeutic exploratory studies. Some of the information gained in Phase II trials includes the best dose and frequency of the drug, the target population ... and the best outcome measures ... to assess efficacy;" and (3) Phase III clinical trials "also called therapeutic confirmatory studies, is to demonstrate the safety and efficacy of the drug in the intended patient population under the intended conditions of use."

68 At paragraphs 49, 50, 51 and 52 of his affidavit, Mr. MacKay summarized his theory on the quality of the evidence required by Health Canada under the Regulations:

> 49. In summary, the regulatory approval process ensures that the manufacturer develops a drug which is well characterized, and that its production results in consistent pharmacologic properties. The process involves the systematic assessment and reporting of extensive information on the drug and its effects. Furthermore, it restricts the claims a manufacturer can make about a drug, limiting claims to those areas for which there is sufficient scientific evidence.

50. Universally, anecdotal evidence, which by definition is gathered without any experimental design, is insufficient to make informed decisions as to whether the benefits of a drug outweigh the risks.

51. Evidence and data gathered from well designed and executed non-clinical and clinical trials is considered credible when conducted by scientific and medical experts and subjected to scrutiny by peer review.

52. A physician's impression from an individual patient cannot be extrapolated to form a scientific basis of support for widespread use of a drug. Classically this is referred to as anecdotal information.

[Emphasis added.]

69 Wit respect to the SAP, M. MacKay explained that:

(1) the decision to authorize or deny access to the SAP is based "*on the data supplied by the physician and other information it may have in its possession*. The SAP carefully exercises this discretion by considering all information provided by the physician, the nature of the medical emergency, and the extent to which the data submitted in support of the request is credible and relevant to specified medical emergency" [paragraph 56] [emphasis added];

(2) "A physician is responsible for initiating a request on behalf of a patient and ensuring that the decision to prescribe the drug for a specific indication is supported by credible evidence available in the medical literature or provided by the manufacturer" [paragraph 57];

(3) "Health Canada also considers other information in its possession about the drug including the progress of clinical trials, safety information and the regulatory status of the drug in other countries" [paragraph 58];

(4) "If the data submitted is insufficient, in order to render an informed decision, the SAP has the authority to request additional information respecting the use, safety and efficacy of the drug from the requesting physician" [paragraph 59];

(5) "*The sale of a drug is authorized for emergency use through the SAP when some credible evidence is available respecting the use, safety and efficacy. Typically drugs available through the SAP are either: a) the subject of clinical trials in Canada or elsewhere; b) authorized by Health Canada but not yet launched onto the Canadian market, or c) authorized by one or more credible and competent regulatory agencies in other jurisdictions. 714-X does not fall within any of the aforementioned parameters*" [paragraph 69] [emphasis added];

(6) "... SAP authorization does not constitute an opinion or statement that a drug is safe, efficacious or of high quality. The SAP does not conduct a comprehensive evaluation to

ensure the validity of drug information or attestations from the manufacturer respecting safety, efficacy and quality such as that undertaken during review of clinical trial applications or new drug submissions" [paragraph 70];

(7) "*Nevertheless, the SAP does manage risk within the context of its review and consideration of data supplied by a physician or provided by a manufacturer*. This framework takes into consideration what is known about the risks and benefits of a product. The SAP considers, *inter alia*, the standards of manufacturing ..., the package of product information provided by the manufacturer, *whether the product has been reviewed by another regulatory jurisdiction or by Health Canada for purposes of a clinical trial or a new drug. The SAP also consults with medical and scientific experts within Health Canada to rule out any knowledge of serious safety issues or submission deficiencies, as was done in the case of 714-X"* [paragraphs 72 and 73] [emphasis added].

70 He enumerated and explained recent SAP initiatives to improve its operations: (1) *in 1999*, the SAP considered how a new drug was authorized under the SAP; (2) *in 2001*, the SAP implemented a verification process in order to determine the number of authorizations, the date of the last authorization and the conformity to the regulatory regime or development required to secure a notice of compliance; (3) a third initiative on quality relates to the administration of the programme and the need to maintain it as an emergency mechanism in accordance with regulatory provisions. It is pursuant to this initiative that the SAP modified its form in 2002 to include a clinical rationale.

71 Mr. MacKay examined the 714-X product and noted that it is "promoted by the manufacturer and patient advocates as a non-toxic immune modulator for use in the treatment of HIV, AIDS, cancer, and a variety of other diseases and conditions" [paragraph 86]. "Its use is recommended in the context of an unorthodox biologic theory whereby disease states are diagnosed and treatment regimens are proposed after examining whole blood samples with the aid of a specialized attachment to a standard light microscope" [paragraph 87].

72 He noted that 714-X was never subjected to a clinical trial, or to a formal development plan leading to licensing by Health Canada, and that it had never received approval from a credible and competent regulatory board. "*Hence its safety and efficacy has not been established*" [paragraph 89] [emphasis added].

73 CERBE never submitted a request for accreditation to Health Canada, or a request for a clinical trial. "*Therefore, Health Canada has not had the opportunity to conduct a comprehensive regulatory review of the safety, efficacy or quality of 714-X*" [paragraph 90] [emphasis added].

74 As to a clinical trial for 714-X, in his view, "If such a trial were to be conducted, it would represent *an avenue for limited and controlled access to the drug and at the same time generate*

credible data that would contribute to an objective understanding of the safety and efficacy of the drug » [paragraph 91] [emphasis added].

75 He reviewed all the scientific information on 714-X: two pre-clinical studies, one in 1985 and one by Drs. Pardee and Huang in 1999, as well as the manufacturer CERBE's data sheet, and stated that, in his opinion, it "describes potential drug interactions which presumably stems from specific reports of adverse events reported to the manufacturer or is a reasonable expectation from the manufacturer's perspective ... *These identified risks alone refute the claim that the drug is non-toxic*" [paragraph 95] [emphasis added].

76 He commented on Gaston Naessens' affidavit and, more particularly, on the mandate CERBE gave in 1998 to a Toronto consulting firm, Clinical Consortiums, to conduct complementary immunological tests on 714-X, which would be used to prepare a briefing paper for a clinical trial request. Under the direction of Dr. Lux, this firm retained the services of Dr. Van Alstyne, a virology and immunology specialist, who asked Dr. Pardee's laboratory, which is associated with the Dana-Fiber Cancer Institute of Boston, to conduct immunological tests. Dr. Van Alstyne's August 22, 2000 report summarized the results of the research conducted by Dr. Pardee and his colleague, Dr. Huang. According to Mr. MacKay, "*Dr. Huang's position is that the tests are preliminary and that the results are too premature*..." [paragraph 94] [emphasis added].

77 Gaston Naessens transmitted Dr. Van Alstyne's report to Health Canada. Mr. MacKay has attached as exhibit K to his affidavit a letter from Health Canada attorney to CERBE's attorney, notifying him that Health Canada could not review this report without a specific regulatory request.

78 According to him, between 1988 and the early 1990s, 714- X was well known to patients suffering from AIDS "who, in the absence of any treatment options advocated for access to the drug on an emergency basis." Mr. MacKay concluded:

> 98. The unprecedented nature of the AIDS crisis challenged physicians, patients and government authorities to act in the public interest to permit limited access to 714-X. Hence, 714-X was first released through the SAP in 1989.
>
> 99. After the first and subsequent AIDS drugs were approved and marketed in Canada, interest in the use of 714-X as a treatment for AIDS waned precipitously. After 1992, interest in the product shifted from AIDS to cancer and a variety of other diseases.

79 The initiatives implemented to improve the SAP's operations had an impact on 714-X: "*the introduction of the new request form in 2002 and the more consistent review of requests revealed that requests for 714-X did not reference credible scientific data supporting the use, safety and efficacy of this product. As a result, 714-X was identified early in the audit process 2002 as a product for which there was limited, if any, data to support widespread access for any medical*

condition. At that time, it was assigned a relative priority and added to a list of products for further review and possible action" [paragraphs 100 and 101] [emphasis added];

80 The SAP reacted to the absence of scientific information from physicians:

> 102 ... through a routine fax-back procedure it employed to manage incomplete requests. This procedure is used to identify specific deficiencies and outlines our minimal request standards. In addition, it offers practitioners an opportunity to consider a deficiency in light of the minimal requirements of the *Food and Drug Regulations* and resubmit a request, with additional information, for further consideration. Despite these efforts, the SAP continued to receive requests for 714-X with little or no supporting data.
>
> [Emphasis added.]

81 This deficiency worried the SAP, whose interest had increased, knowing that "the Office of Cancer Complementary and Alternative Medicines (OCCAM), National Cancer Institute, National Institute of Health" was contemplating a review of 714-X. He asserted that "*the ongoing problem with request deficiencies and the new knowledge of the OCCAM review prompted Health Canada to take a closer review of the information submitted by physicians and credibility of scientific evidence available to support the use, safety and efficacy of the drug in humans." A new policy for review of access requests to 714-X was put in place* [emphasis added]:

> 105. As of July 2003, requests for 714-X received by the SAP were subject to normal processing except where the physician provided information that was insufficient to allow me to render a decision. Notwithstanding our growing understanding of what little data existed on the drug, most requests were processed provided that the physician quoted at least one source of information about the drug. In some cases, requests were returned and additional information or clarification sought from the prescribing physician.
>
> [Emphasis added.]

82 That more thorough review showed "*that the status of 714-X within the SAP represented an exception since the physicians clearly did not refer to credible data to support the safety and efficacy of the drug*" [emphasis added];

83 The study, led by a group experts from the OCCAM, in July 2003, included a meeting with CERBE and a review of five cases (four American and one Canadian) "where the drug reportedly had dramatic positive effects."

84 On or about September 11, 2003, Mr. MacKay knew that the OCCAM had concluded "that there was insufficient evidence to support NCI research following their Best Case Series review of 714-X. After considering the information from the OCCAM, *we began to reconsider the release of the product through the SAP*" [emphasis added] [paragraph 107].

85 In October 2003, the SAP contacted the physicians whose requests for access to the SAP were under review to inform them about the OCCAM's conclusions on 714-X. It said:

> 108. ... I contacted several physicians and explained the importance and significance of the OCCAM review such that they could be informed and take account of this information in making requests for 714-X. I also explained that, we were undertaking a review of the drug with a view to determining the availability of evidence supporting the safety and efficacy of the drug.
>
> 109. Many of those contacted acknowledged the paucity of data respecting the safety and efficacy and while some argued that patients should have continued access, others expressed the ethical and professional dilemmas associated with prescribing such a drug.
>
> [Emphasis added.]

86 Faced with this situation, Health Canada contemplated some alternatives "and, in consultation with Health Products and Food Branch's Risk Management Committee, *considered the merits of limiting access to the product ... The merits of continuing to authorize the SAP requests for patients currently being treated with 714-X for the period of one year was also considered*" [paragraph 111] [emphasis added].

87 Health Canada undertook a systematic review of all the scientific literature published on 714-X and, to that end, gave Dr. Bryan Garber, a member of Health Canada's Senior Medical Advisor Bureau, a mandate whose scope Mr. MacKay describes as follows:

> 112. ... This review considered, among other sources, published statements from authoritative bodies such as the National Cancer Institute, the Canadian Breast Cancer Research Alliance, and the MD Anderson Cancer Centre. The review concluded there is no credible scientific basis to support the use of 714-X for cancer or any other disease or condition.
>
> [Emphasis added.]

88 *On or about December 20, 2003, all requests for access to 714-X were put on hold* "as the scientific review of information neared completion and as the SAP prepared to *render decisions on pending requests and publish guidance* for future applicants" [paragraph 113] [emphasis added].

89 The SAP's statistics revealed that six physicians submitted to the SAP 75% of requests for access to 714-X, and that the other physicians submitted such requests once or twice.

90 Following Dr. Garber's report in the wake of the OCCAM's conclusions on 714-X, Health Canada decided to limit access to the SAP with respect to 714-X, a decision announced by Dr. Gillespie in his January 23, 2004 letter, which was:

127 ... sent to physicians in January 2004 was an official response to physicians who had pending requests to access 714-X in 2003 and early 2004 and was a guidance document sent to all physicians who had requested 714-X in 2003 and early 2004.

91 Mr. MacKay's comments on this decision were as follows:

129. The letter indicated future requests for new patients would be denied unless significant new evidence was provided to support the use, safety and efficacy. With respect to pending requests for new patients, the letter constituted a denial for the reasons contained therein.

130. Special consideration would be given to both pending and future requests for repeat patients. The letter invited physicians to re-submit a new request making specific mention of the patient's experience on the drug and specifically whether the patient had experienced any adverse effects during therapy with 714-X. This approach would allow access to repeat patients on the basis of the follow-up reports provided by the requesting physicians and confirmation that the particular patient had not experienced adverse events from their ongoing treatment. Ongoing access will be revisited after one year on the basis of follow-up reports provided by the physician, during which time clinical trials may have commenced and/or conducted or the therapy abandoned.

131. In fact, physicians with pending requests for repeat patients did subsequently submit modified requests for these patients noting that their patients did not experience any adverse effects. Once received and these facts confirmed, these requests were authorized forthwith. On a couple of occasions, physicians did not specify whether their patients had adverse effects - in these cases we telephoned the physician or faxed the request back asking for that specific information. Once received, they were reviewed and considered in accordance with the new policy.

132. Health Canada carefully considered this issue and opted to grandfather patients who had taken 714-X in the past and who had not experienced adverse effects. This approach considered that the level of risk incurred differed for new patients compared with repeat patients.

133. Since January 23, 2004, all requests received by the SAP for special access to 714-X have been processed in a timely and uniform manner and in accordance with the guidance set forth in the letter sent to physicians in January 2004. As of this date, there are no pending requests for special access to 714-X.

134. Records show that since this letter was issued, the SAP has authorized 56 requests, for a total of 24 repeat patients on the basis of the patients' experience with the drug as provided. A total of 14 requests for new patients have not been authorized.

[Emphasis added.]

VII. Mr. Ian MacKay's additional affidavits

92 The purpose of the January 13, 2005 additional affidavits was to enable Health Canada to respond to the applicants' affidavits, save for Mr. Delisle's affidavit on which it had previously commented.

A. Response to Léopold Delisle's December 20, 2004 affidavit

93 Mr. MacKay explained that, in August 2004, the OCCAM published an update of its review of 714-X. The OCCAM concluded: [paragraph 126]

> The NCI's BCS Program review of the pertinent medical records, radiographic films and pathology specimens of 17 cancer patients who reportedly received 714-X has been completed. At this time, the judgment is that there is insufficient information to justify NCI-initiated research on 714-X as an anticancer therapy. The OCCAM is seeking authorization to solicit referral of other well-documented cases directly from U.S. cancer patients. If approved, such a solicitation will be posted on the OCCAM website.
>
> [Emphasis added.]

94 The OCCAM conclusion "is exactly consistent with the discussions and correspondence between the SAP and OCCAM in 2003."

95 In December 2004, the SAP asked 14 Canadian physicians who had access to 714-X and to CERBE if new information on the effectiveness and safety of the drug had been published since Dr. Garber's scientific review:

> 141. In anticipation of the end of the one-year period for repeat patients referred to in the letter sent to physicians in January 2004, the SAP wanted to confirm whether any data respecting the use, safety and efficacy of 714-X had been reported in the medical literature since the review undertaken ... in December 2003 and whether they were involved with or aware of any efforts to initiate a program of formal drug development. To this end, the SAP had sent letters to physicians who had gained access to 714-X in accordance with the terms set out in the original notice sent to physicians on January 23, 2004. This letter was sent to a total of 14 physicians. The letter was also sent to the manufacturer.
>
> 142. Responses were requested on or before December 10, 2004. To date the SAP has received four (4) responses. None of the responses was able to provide any credible scientific information supporting the use, safety and efficacy of 714-X.
>
> [Emphasis added.]

96 The four responses were reviewed by Mr. MacKay:

> 143. ... the response from Dr. Teresa Clark, on behalf of the Centre for Integrated Healing in Vancouver, added that they had not encountered any cases of adverse effects and found 714-X to be effective in some cancer patients helping to improve their survival from advanced metastatic disease. She provided no details on these cases and I assume that her conclusions about the efficacy of the 714-X have not been peer reviewed.
>
> 144. ... he was not aware of any credible scientific information regarding the use of 714-X.
>
> 145. ... the response from Gaston Naessens did not provide any credible scientific information respecting the use, safety and efficacy of 714-X and provided a review of interactions with OCCAM and an update to ongoing discussions with the National Institutes of Health in the United States. I am familiar with the process undertaken by the OCCAM and acknowledge the ongoing discussion between Mr. Naessens and the NIH [emphasis added].
>
> . . . . .
>
> 149. ... the response from Dr. D. Dagenais included a short letter outlining his experience with 714-X and a copy of the letter from Drs. Pardee and Huang referred to herein at paragraphs 145 and 146.

97 The SAP received from Gaston Naessens a copy of the letter from Drs. A.B. Pardee and L. Huang, "with which I am familiar. The letter comments on the *non-clinical* laboratory studies they conducted. The correspondents' final paragraph is worthy of note" [emphasis added]. I set out hereunder the last paragraph of that letter:

> 146. ... "we strongly feel that this agent deserves equal attention as other compounds in a peer-reviewed journal if positive scientific evidence comes up to support its *in vivo* function. Therefore we would like to write up our results and submit them to a peer-reviewed journal for consideration of publication. Only our data will be presented in the manuscript. We believe that our data will provide a foundation for future characterization of this compound. Once scientific characterization of this compound is established, large scale clinical trials would be feasible and this agent could be available to more patients."
>
> [Emphasis added.]

98 Mr. MacKay submitted that:

> 147. This confirms that the studies performed were very preliminary in nature and that, in the opinion of the authors, the drug must be subject to further in vitro characterization before clinical trials, including "first in human" studies can begin.
>
> 148 To date, I am not aware that these results were ever submitted for publication.

[Emphasis added.]

99 He concluded:

150. To date, no adverse events have been reported with the use of 714-X since January 2004 in patients who have gained continued access to the drug in accordance with the January 2004 letter sent to physicians. This fact, combined with the ongoing and as yet unresolved legal challenges to the regulator's decision making respecting 714-X, the SAP will continue to consider requests from physicians treating repeat patients for continued access to the drug until such time as the courts render a decision or the matter is otherwise settled. Practitioners will be notified of this position.

[Emphasis added.]

100 Finally, he explained how the SAP processed the request for access from Mr. Delisle's physician in September 2004:

152. ... The request was screened by a clerk and not by a reviewer using standard operating procedures for handling requests. Clerks make the first decision as to whether the request is complete which includes a judgment call about the completeness of answers to all questions and fields on the form. In my absence, the clerk made the decision that the word "documentation" was normally not something that we accept as a substantial answer to question 3 of the form. The request was not denied but returned to the physician with an accompanying note requesting clarification and additional information.

153. The word "documentation" does not provide any indication of what information Dr. Dagenais may have had in his possession at the time he filed the request. It was clearly appropriate and indeed the regulator was obliged to request further information and clarification with respect to the information and data that the physician had in his possession.

154. . . .

155. A request form that is returned to a physician specifically states the reason for the clarification and specifically states that the request will not be processed. It does not constitute a denial. A denial is a decision that is based on a review of all the facts submitted, including any clarifications sought and leading to the issuance of a specific letter of denial.

156. Once a request is returned, we rely on the physician to consider the notice and to respond to our request for clarification or additional information accordingly. Ordinarily, we do not follow up with the physician directly.

157. In this case, I have no records or recollection of any attempt made by Dr. Dagenais to communicate with my office in response to our request for additional information. It was

> only after reading the additional affidavit of Mr. Delisle dated November 5, 2004 that it became apparent that the request for information sent by my office in September 2004 had been considered by Dr. Dagenais as a denial. Hence, in addition to the standard letter sent to Dr. Dagenais in December 2004, ... it was decided that an additional paragraph be added to the letter seeking clarification as to whether Dr. Dagenais intended to pursue the request on behalf of the patient.
>
> 158. An additional request was filed by Dr. Dagenais on December 14, 2004, which included additional information on 714-X. ... The request was authorized the following day and processed in the usual way.
>
> [Emphasis added.]

B. Response to the November 1, 2004 affidavit from Laurent Légère

101 Mr. MacKay acknowledged that Laurent Légère used 714-X prior to the implementation of Health Canada's new policy and explained the processing of the request for access received from him in November 2003:

> 165. ... at a time when a notice respecting continued access to 714-X through the SAP to physicians who had filed requests was pending final review by senior Health Canada officials and was scheduled for distribution in December 2003. Given the anticipated short time frames the name of the physician who had filed the request was added to the mailing list of physicians to receive a formal response.
>
> 166. I can confirm that the Dear Health Care Professional Letter dated January 19, 2004 was sent to, and according to our records, received by Dr. J. Taylor on January 21, 2004.
>
> 167. A new request was received on March 11, 2004 and was authorized on the same day since it was in compliance with the parameters set forth.
>
> 168. The SAP has received a number of other requests throughout the 2004 and I therefore conclude that Dr. Taylor has had access to 714-X for the treatment of Mr. Légère in accordance with the parameters set forth in the letter of January 19, 2004.
>
> [Emphasis added.]

102 He admitted that there were a number of problems within the SAP in processing requests for access, that he hoped would be resolved "... through the development of a custom and state-of-the-art information management system that will change the way in which requests are received, processed, considered and decided upon."

103 His most telling acknowledgment of the SAP's administrative problems was as follows:

> 170. ... During this period, the number of requests grew from a few thousand to a peak of 33,000 in 2002. Innovations were realized during this period but the programme also had to contend with period of time when the amount of paper was very unpredictable and would overwhelm the ability of staff to appropriately and adequately manage requests effectively. As manager, I am confident that my staff does everything they can to manage the paper appropriately, but on occasion, requests are misplaced, go missing, are misfiled or for a variety of technological reasons, are never received. We regret these incidents but believe that under the current conditions a certain small percentage of errors is unavoidable. When they are brought to our attention, we endeavour to solve problems expeditiously. ...

C. Response to the October 28, 2004 affidavit from Daniel Grandmont

104 This affidavit confirmed the following facts: the request for access submitted by Daniel Grandmont's physician on August 20, 2003 was "processed by staff members in the usual way. The request was denied on August 26, 2003, citing the request did not contain sufficient information with respect to the use, safety and efficacy of the drug" [paragraph 165].

105 *A new request was submitted on December 22, 2003. "Given that a formal response to all outstanding requests was imminent," his physician's name was added on to the list of those who received the January 19, 2004 letter* [emphasis added].

106 *On February 2, 2004*, his doctor submitted a new request "which appeared to be the same request as was filed on December 22, 2003. Because the request was filed subsequent to the issuance of the January 19, 2004 letter, *it was formerly processed and identified as a new patient and therefore denied. According to our records, the denial was sent on February 5, 2004*" [emphasis added] [paragraph 169].

D. Response to Dany Laforest's affidavit

107 He acknowledged that a request for access was sent on February 19, 2004 "and appears to have been successfully sent from Dr. C. Fournier to the SAP. Despite an exhaustive search, I can confirm that we have no record of having received this request on or about the above date" [paragraph 165].

108 He added: "I do not recall nor does my staff recall receiving a call from Dr. Fournier's office following up on the said request. I can confirm that the Dear Health Care Professional Letter dated January 19, 2004 was sent to, and according to our records, received by Dr. Fournier's office on January 20, 2004."

VIII. Analysis

A. The review standard

109 The review standard depends on four contextual factors: (1) the presence or absence in the statute of a privative clause or of a right to appeal; (2) the administrative body's expertise in comparison to the reviewing court on the issue in dispute; (3) the purpose of the act and of the specific provision; and (4) the type of issue — of law, of fact, or of mixed law and fact.

110 In this case, the Act includes no privative clause and does not provide for a right to appeal the decisions. However, the judicial review of the Director's decision is provided for under section 18.1 of the *Federal Courts Act*.

111 Health Canada undoubtedly has more expertise than the Court if the decision or the issue in dispute requires specialized knowledge or experience in a particular area, when it comes to assessing the safety or the effectiveness of a drug and the scientific credibility of the evidence. (See Madam Justice Layden-Stevenson's opinion in *Reddy-Cheminor Inc. v. Canada (Attorney General)*, 2003 FCT 542 (Fed. T.D.)).

112 The third factor is the general object of the statutory scheme within which the administrative decision-making is taking place. With respect to this factor, Madam Justice Layden-Stevenson in *Reddy-Cheminor Inc.* , *supra*, wrote:

> ¶ 55 ... Parliament has legislated that persons suffering from particular ailments and relying on particular products to alleviate those ailments must be assured that their reliance is not misplaced: *Wrigley Canada v. Canada* (1999), 164 F.T.R. 283 (T.D.), aff'd. (2000), 256 N.R. 387 (F.C.A.). The intent of the Regulations is to provide a process for approval of new drugs to be marketed in Canada that is "... in the interest of, or for the prevention of injury to the health of the purchaser or consumer": *Apotex 2*. Put another way, a drug manufacturer, under the scheme of the Regulations, must satisfy the Minister of the safety and effectiveness of a new drug before selling it in Canada: *Merck & Co. v. Canada (Attorney General)* (1999), 176 F.T.R. 21 (T.D.). The Regulations vest complete and exclusive discretion in the respondent Minister to determine the requirements of a new drug submission in terms of the information or evidence to be provided by the manufacturer. The discretion must be exercised on consideration of factors that are relevant to the purposes of the Act and Regulations: *Apotex 2*. In my view, the purpose of the FDA and the Regulations passed pursuant thereto applies to all submissions for new drugs whether in the form of a NDS or an ANDS. Regarding the polycentric characteristics, Blanchard J., in *Bristol-Myers Squibb Co. v. Canada (Attorney General)* (2002), 22 C.P.R. (4th) 345 (F.C.T.D.) stated:
>
> > The purpose of the notice of compliance provisions of the *Food and Drug Regulations* is to protect public health by assuring a certain level of safety and efficacy for drugs. As such, the decision that a new drug submission has satisfied the *Food and Drug Regulations* is a polycentric one, given that it involves the implementation of "social and

economic policy in a broad sense". [*Pfizer Canada Inc. v. Minister of National Health and Welfare et al.*, (1986) 12 C.P.R. (3d) 438 (F.C.A.)]

[emphasis added].

113 Because it creates an exception to the statutory scheme under the Regulations, it is important to analyze the provision relating to the SAP;

114 In its Instructions for Making Special Access Requests, Health Canada stated that the SAP enables physicians who treat patients with serious or life-threatening conditions to have access to drugs unavailable on the market when conventional therapies have failed, are unsuitable, or unavailable.

115 In another document, Health Canada acknowledged that access to drugs via the SAP is limited to patients with serious or life-threatening conditions for humanitarian or emergency reasons;

116 In its report, the Standing Committee considered that the SAP's humanitarian element was important, as was the rapid development of a medication, and that access to a medication that has not proved itself required that no treatment be applied until after the analysis has shown [TRANSLATION] "an acceptable balance between efficacy and toxicity;"

117 The fourth factor pertains to the nature of the problem. As Madam Justice Layden-Stevenson stated in *Reddy-Chemicor Inc.*, *supra*:

¶ 50 ... When the finding being reviewed is one of pure fact, this factor will militate in favour of showing more deference towards the decision-maker's decision. An issue of pure law militates in favour of a more searching review. Regarding questions of mixed fact and law, this factor will call for more deference if the question is fact-intensive and less deference if it is law-intensive.

[Emphasis added.]

118 Madam Justice Layden-Stevenson's decision was appealed. The Federal Court of Appeal dismissed the appeal (see *Reddy-Cheminor Inc. v. Canada (Attorney General)*, 2004 FCA 102 (F.C.A.)). I quote paragraphs 8 and 9 of Mr. Justice Evans' reasons:

¶ 8 Second, I agree with Laydon-Stevenson J. that the pragmatic and functional analysis indicates that the decision under review is entitled to a high degree of deference. The drug approval process is a complex and technical area of public administration with a direct impact on the health of Canadians. Determining whether two products contain "identical medicinal ingredients" requires scientific understanding and regulatory experience, rather than knowledge of the law or legal principles.

¶ 9 Third, like the Applications Judge, I am not persuaded that it was either patently unreasonable, or unreasonable *simpliciter*, for the Minister to conclude that only drugs comprising the same chemical entities contain "identical medicinal ingredients", even though the active ingredients of drugs may deliver the same chemical substance to the body with the same therapeutic effects.

[Emphasis added].

119 Applying these principles herein, I hold:

(1) The applicants' alleged errors regarding the violation of the Charter, the decision-maker's want of jurisdiction, the relevant factors in the exercise of discretionary power and the scope of this power, as well as a violation of procedural fairness based on a breach of legitimate expectancy, must be assessed in accordance with the standard of correctness.

(2) As long as the decision challenged was based on an assessment of the evidence, the weighing of that evidence, or if it is alleged that that decision is based on an erroneous finding of fact, that decision is reviewable according to paragraph 18.1(4)(*d*) of the *Federal Courts Act*, which reads as follows:

> 18.1(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal
>
> . . .
>
> (*d*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
>
> 18.1(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas:
>
> [...]
>
> *d*) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

The standard under this section is the equivalent of the patently unreasonableness standard.

120 When the applicants reproached Dr. Gillespie for having ruled out evidence on the effectiveness and safety of 714-X, this argument must be examined in view of the standard provided for in section 18.1(4)(*d*).

B. A few principles

1. Discretionary power

121 In *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), Madam Justice L'Heureux-Dubé explained, at paragraph 52 of her reasons, the concept of discretionary power:

> ¶ 52 The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries. As K. C. Davis wrote in *Discretionary Justice* (1969), at p. 4:
>
> > A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.
>
> It is necessary in this case to consider the approach to judicial review of administrative discretion [page 853], taking into account the "pragmatic and functional" approach to judicial review that was first articulated in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, and has been applied in subsequent cases including *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at pp. 601-607, *per* L'Heureux-Dubé J., dissenting, but not on this issue; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; and *Pushpanathan*, *supra*.

122 Paragraph C.08.010(1) of the Regulations states that the "The Director may issue a letter of authorization authorizing the sale of a quantity of a new drug ..."

123 As held by Mr. Justice McIntyre in *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 (S.C.C.), relying on the reasons of Mr. Justice Le Dain's, who was then a member of the Federal Court of Appeal, section 28 of the *Interpretation Act* requires that the word "may" be interpreted as referring to an option, unless the context indicates otherwise.

124 In *Maple Lodge Farms*, *supra*, the Supreme Court of Canada teaches us how the courts should construe statutes that grant a discretionary power, and it lists errors which warrant the quashing of a discretionary administrative decision. Mr. Justice McIntyre wrote as follows:

> ¶ 9 In construing statutes such as those under consideration in this appeal, which provide for far-reaching and frequently complicated administrative schemes, the judicial approach should be to endeavour within the scope of the legislation to give effect to its provisions so that the administrative agencies created may function effectively, as the legislation intended. In my view, in dealing with legislation of this nature, the courts should, wherever possible, avoid a narrow, technical construction, and endeavour to make effective the legislative intent as applied to the administrative scheme involved. It is, as well, a clearly-established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it

been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice [page 8], and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere. This approach has been followed by Le Dain J. and I accept and adopt his words, at p. 514, where, though he had earlier noted that the appellant's view of the policy guidelines was not unreasonable, he said: ...

> In the present case the Minister, acting through the Office of Special Import Policy, appears to have adopted, as the reason for refusing the supplementary import permits sought by the appellant, the considerations which are disclosed in the passages quoted above from the letters of the Agency to the appellant. These considerations relate to the quantity of eviscerated chicken available and the over-all requirements of the market. Having regard to the terms of section 5(1)(a.1) of the *Export and Import Permits Act* and the description or definition of the product in Item 19 of the Import Control List, the proclamation establishing the Agency, and the Canadian Chicken Marketing Quota Regulations, I am unable to conclude that these considerations are clearly extraneous or irrelevant to the statutory purpose for which chicken was placed on the Import Control List and to which the exercise of the Minister's discretion must be related.
>
> [Emphasis added.]

2. Guidelines

125 It is obvious that, in January 2004, Health Canada established guidelines with regard to its discretionary power on access to 714-X through the SAP. Two classes were created: the old patients, those who had been treated with the product, and the new patients, those who had not been.

126 Although administrative law acknowledges the usefulness of guidelines as to the exercise of discretionary power, it also sets forth its limits. I quote again from the reasons of Mr. Justice McIntyre in *Maple Lodge*, *supra*:

> ¶ 8 It is clear, then, in my view, that the Minister has been accorded a discretion under s. 8 of the Act. The fact that the Minister in his policy guidelines issued in the Notice to Importers employed the words: "If Canadian product is not offered at the market price, a permit will normally be issued; ..." does not fetter the exercise of that discretion. The discretion is given by the Statute and the formulation and adoption of general policy guidelines cannot confine it. There is nothing improper or unlawful for the Minister charged with responsibility for the administration of the general scheme provided for in the Act and Regulations to formulate and to state general requirements for the granting of import permits. It will be helpful to applicants [page 7] for permits to know in general terms what the policy and practice of the Minister will be. To give the guidelines the effect contended for by the appellant would be to

elevate ministerial directions to the level of law and fetter the Minister in the exercise of his discretion. Le Dain J. dealt with this question at some length and said, at p. 513:

> The Minister may validly and properly indicate the kind of considerations by which he will be guided as a general rule in the exercise of his discretion (see *British Oxygen Co. Ltd. v. Minister of Technology* [1971] A.C. (H.L.) 610; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141, at pp. 169-171), but he cannot fetter his discretion by treating the guidelines as binding upon him and excluding other valid or relevant reasons for the exercise of his discretion (see *Re Hopedale Developments Ltd. and Town of Oakville*, [1965] 1 O.R. 259).

In any case, the words employed in s. 8 do not necessarily fetter the discretion. The use of the expression "a permit will normally be issued" is by no means equivalent to the words "a permit will necessarily be issued". They impose no requirement for the issue of a permit.

[Emphasis added.]

127 However, according to the case law, if a guideline is set forth, (1) it must be based on criteria that are relevant to the exercise of discretionary power, that is to say, related to the object of the law (*Maple Lodge Farms Ltd. v. Canada* (1980), [1981] 1 F.C. 500 (Fed. C.A.)) and (2) it must be in conformity with the enabling statute (*Ramsaroop v. University of Toronto*, [2001] O.J. No. 2103 (Ont. S.C.J.));

128 It is helpful to quote some excerpts from the reasons of Mr. Justice Doherty of the Court of Appeal for Ontario in *Ainsley Financial Corp. v. Ontario (Securities Commission)* (1994), 21 O.R. (3d) 104 (Ont. C.A.) .

> The authority of a regulator, like the Commission, to issue non-binding statements or guidelines intended to inform and guide those subject to Regulations is well established in Canada. The jurisprudence clearly recognizes that regulators may, as a matter of sound administrative practice, and without any specific statutory authority for doing so, issue guidelines and other non-binding instruments.
>
> . . .
>
> Non-statutory instruments, like guidelines, are not necessarily issued pursuant to any statutory grant of the power to issue such instruments. Rather, they are an administrative tool available to the regulator so that it can exercise its statutory authority and fulfil its regulatory mandate in a fairer, more open and more effective manner. While there may be considerable merit in providing for resort to non-statutory instruments in the regulator's enabling statute, such a provision is not a prerequisite for the use of those instruments by the regulator.
>
> . . .

> Having recognized the Commission's authority to use non-statutory instruments to fulfil its mandate, the limits on the use of those instruments must also be acknowledged. A non-statutory instrument can have no effect in the face of contradictory statutory provision or Regulations: *Capital Cities Communications Inc.*, *supra*, at p. 629; H. Janisch, "Reregulating the Regulator: Administrative Structure of Securities Commissions and Ministerial Responsibility" in Special Lectures of the Law Society of Upper Canada: Securities Law in the Modern Financial Marketplace (1989), at p. 107. Nor can a non-statutory instrument pre-empt the exercise of a regulator's discretion in a particular case: *Hopedale Developments Ltd.*, *supra*, at p. 263. Most importantly, for present purposes, a non-statutory instrument cannot impose mandatory requirements enforceable by sanction; that is, the regulator cannot issue de facto laws disguised as guidelines, Iacobucci J. put it this way in *Pezim* at p. 596:
>
> > However, it is important to note that the Commission's policy-making role is limited. By that I mean that their policies cannot be elevated to the status of law; they are not to be treated as legal pronouncements absent legal authority mandating such treatment.

(See also the judgment of the Court of Appeal of Saskatchewan in *Fairhaven Billiards Inc. v. Saskatchewan (Liquor & Gaming Authority)*, [1999] S.J. No. 307 (Sask. C.A.) and Mr. Justice Blanchard's decision in *Thamotharem v. Canada (Minister of Citizenship & Immigration)*, 2006 FC 16 (F.C.).)

3. Limitations on the exercise of discretionary power

129 For over 40 years, administrative law has recognized that a discretionary power is not an absolute and untrammelled power. In *Roncarelli v. Duplessis*, [1959] S.C.R. 121 (S.C.C.), Mr. Justice Rand is of the opinion that "there is always a perspective within which a statute is intended to operate."

130 A discretionary power may not be used to achieve a goal opposed to the object of the law. Rather, its exercise must be based on considerations relevant to the object of the statute at issue. This exercise must promote the scheme, the underlying policy and the object of the law. Following is the analysis by Mr. Justice Binnie on this point in *C.U.P.E. v. Ontario (Minister of Labour)* [2003 CarswellOnt 1770 (S.C.C.)] *supra*:

> ¶ 93 The exercise of a discretion, stated Rand J. in *Roncarelli*, "is to be based upon a weighing of considerations pertinent to the object of the [statute's] administration" (p. 140). Here, as in that case, it is alleged that the decision maker took into account irrelevant considerations (e.g., membership in the "class" of retired judges) and ignored pertinent considerations (e.g., relevant expertise and broad acceptability of a proposed chairperson in the labour relations community).

¶ 94 In this case, the "perspective within which a statute is intended to operate" is that of a legislative measure that seeks to achieve industrial peace by substituting compulsory arbitration for the right to strike or lockout. The "perspective" is another way of describing the policy and objects of the statute. In the language of Lord Reid in *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997 (H.L.), at p. 1030:

> ... if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court.
>
> [Emphasis added.]

Lord Reid added that "the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court" (p. 1030). See also: *Air Canada v. British Columbia (Attorney General)*, [1986] 2 S.C.R. 539; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 56; *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, 2001 SCC 41; G. Pépin and Y. Ouellette, *Principes de contentieux administratif* (2nd ed. 1982), at p. 264; D.J.M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at para. 13:1221.

[Emphasis added.]

131 However, Mr. Justice Binnie gives a word of caution:

> ¶ 107 The *HLDAA* contemplates the appointment of "a person who is, in the opinion of the Minister, qualified to act." The Minister is a senior member of the government with a vital interest in industrial peace in the province. His work in pursuit of that objective in the hospital sector, supported by his officials, should not be micro-managed by the courts. Still, as Rand J. said in *Roncarelli*, *supra*, at p. 140, the discretionary power is not "absolute and untrammelled." The discretion is constrained by the scheme and object of the *HLDDA* as a whole, which the legislature intended to serve as a "neutral and credible" substitute for the right to strike and lockout.

4. Abuse of discretionary power

132 The Supreme Court of Canada further analyzed the concept of discretionary power in *Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé & des Services sociaux)*, [2001] 2 S.C.R. 281 (S.C.C.). In that case, the challenged decision was that of the Minister who denied the Health Center a modified permit to legalize hospital services it had been providing for several years and which the Quebec government was aware of.

133 In Mr. Justice Binnie's opinion, the issue was "whether the Minister's decision was patently unreasonable in light of all the circumstances. This issue goes to the substance of the decision as opposed to the process by which it was reached." [paragraph 52] [emphasis added].

134 The concept of abuse of discretionary power originated in English administrative law. Mr. Justice Binnie stated:

> ¶ 53 I mentioned earlier the "abuse of discretion" exception to the customary deference paid to ministerial decision making as noted by Dickson J. in *Martineau v. Matsqui*, *supra*, and reported by Sopinka J. in *Reference re Canada Assistance Plan*, *supra*. Their concern was with procedural fairness. However, the English courts have long extended "abuse of discretion" to substantive decision making which they call "Wednesbury unreasonableness" after *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223 (C.A.). The Wednesbury case was cited with approval in *Baker v. Canada*, *supra*, at para. 53. See generally H. W. MacLauchlan, "Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada" (2001), 80 Can. Bar Rev. 281, at p. 285 et seq. ¶

135 Referring again to *Baker v. Canada (Minister of Citizenship & Immigration)* , *supra*, Mr. Justice Binnie explained why he rejected some developments under English law:

> ¶ 60 Resort to the doctrine of "unreasonableness" to test the validity of substantive decisions was elaborated in *Baker v. Canada*, *supra*, at para. 53:
>
> > A general doctrine of "unreasonableness" has also sometimes been applied to discretionary decisions: *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation*, [1948] 1 K.B. 223 (C.A.). In my opinion, these doctrines incorporate two central ideas — that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the scope of the decision-maker's jurisdiction.
>
> ¶ 61 *Baker v. Canada* went on to hold that the Minister and immigration officials had given insufficient weight to the impact of the decision on Ms. Baker and her Canadian-born children. This is part of the traditional *Wednesbury* test, as pointed out in *Coughlan*, *supra*, where Lord Woolf M.R. noted, at para. 58, that the test under *Wednesbury* "will be rationality and whether the public body has given proper weight to the implications of not fulfilling the promise" [emphasis added]. He went to say at para. 81: "We would prefer to regard the *Wednesbury* categories themselves as the major instances (not necessarily the sole ones) ... of how public power may be misused." On that basis he subsumed "unreasonableness" into the global English concept of administrative unfairness.

¶ 62 Where Canadian law parts company with the developing English law is the assertion, which lies at the heart of the *Coughlan* treatment of substantive fairness, of the centrality of the judicial role in regulating government policy. In *Coughlan*, it is said, at para. 76, that the decision to withhold substantive relief under the doctrine of legitimate expectation can only be justified if there is an overriding public interest. Whether there is an overriding public interest is a question for the court.

[Emphasis added.]

¶ 63 In Canada, at least to date, the courts have taken the view that it is generally the Minister who determines whether the public interest overrides or not. The courts will intervene only if it is established that the Minister's decision is patently unreasonable in the sense of irrational or perverse or (in language adopted in *Coughlan*, at para. 72) "so gratuitous and oppressive that no reasonable person could think [it] justified." This high requirement is met here where the unreasonableness, as in *Baker v. Canada*, turns on the singular lack of recognition of the serious consequences the Minister's sudden reversal of position inflicted on the [page 318] respondents who were caught in the transition between the old policy (50 short-term care beds are in the public interest) and the new policy (50 short-term care beds must be coupled to enhanced diagnostic and treatment facilities).

[Emphasis added.]

IX. Discussion and conclusions

A. Discretionary or non-discretionary power

136 No doubt that sections C.08.010 and C.08.011 of the Regulations grant the Director a discretionary power to authorize or not the sale of a new drug;

137 As Madam Justice L'Heureux-Dubé noted in *Baker*, *supra*, the concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries;

138 The language and structure of the provision, the selection of the word "may," the nature of the power — exempted from the requirements of the Regulations — and the purpose of the power, based partly on humanitarian considerations, demonstrate an intention to give the Director much leeway in granting, or not, a request for access to a new drug for the emergency treatment of a patient;

139 In this case, my colleague Madam Justice Tremblay-Lamer ruled on an application from Léopold Delisle seeking an interlocutory order whereby the respondent was to grant the special access requests for 714-X submitted by physicians without any further requirements and

conditions, and within 24 hours of receiving said requests without distinction, whether or not the patients had already received such an authorization. My colleague refused to make the order for several reasons (see *Delisle c. Canada (Procureur général)*, 2004 FC 788 (F.C.)).

140 In her opinion, the use of the word "may" at paragraph C.08.010(1) of the Regulations vested the Director General with a discretionary power to issue, or not, a letter of authorization for the sale of a new drug via the SAP. She wrote:

> ¶ 12 Thus, section 8.010 of the Regulations creates a discretionary authority, and not an obligation, to issue authorizations for special access. In the case at bar, the applicant is asking that the Court order the respondents to issue authorizations for special access. It is obvious that the relief sought by the applicant is a *mandamus*. But the case law on this point is well established. The Court may, in the context of an application for *mandamus*, order the performance of a public duty but it cannot dictate the appropriate result when the authority conferred by the enabling provision is discretionary (*Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 (F.C.A.), aff'd [1994] 3 S.C.R. 1100; see, to the same effect, *Martinoff v. Canada*, [1994] 2 F.C. 33 (C.A.); *Kahlon v. Canada (Minister of Employment and Immigration)*, [1986] 3 F.C. 386 (C.A.)).
>
> [Emphasis added.]

141 She added:

> ¶ 14 Finally, this Court cannot order the respondents to accept requests for access to 714-X "[TRANSLATION] without further requirements or conditions". Such an order would be illegal, since it would be in violation of the provisions of the Regulations, which stipulate certain conditions that must be met by a physician requesting access before the Director General can exercise his discretion.
>
> [Emphasis added.]

142 I concur with these reasons;

B. Want of jurisdiction

143 In reply, the applicants' counsel correctly downplayed his argument that the January 23, 2004 decision was invalid because it was taken by Dr. Gillespie, who did not qualify as Director General under sections C.08.010 and C.08.011, that define the Director as "the Assistant Deputy Minister, Health Products and Food Branch, of the Department of Health."

144 In this case, on August 14, 1989, Albert Joseph Liston, Assistant Deputy Minister, authorized certain persons "who may, from time to time, occupy the following positions within

the Bureau of Human Prescription Drugs, Drugs Directorate ... to sign on my behalf any letters of authorization issued pursuant to section C.08.010 of the *Food and Drug Regulations*."

145 Two of the officials mentioned in the delegation of authority are the Director of the Bureau of Human Prescription Drugs and the Emergency Drug Coordination within the Bureau. The parties acknowledge that the Bureau of Human Prescription Drugs, Drug Directorate, has become the Senior Medical Advisor Bureau, which Dr. Gillespie heads, and the Emergency Drug Coordination is the one responsible for the Emergency Drug Release Program, which is now the SAP, and which Mr. MacKay heads.

146 The Canadian doctrine and case law make it clear that the maxim *delegatus non potest delegare* is not a rule of law, but simply a rule of interpretation which, unless there is a provision to the contrary, authorizing a judge to conclude, from the nature of the powers assigned, as well as from the history and the spirit of the Act, that there may be an implied delegation or subdelegation of discretionary power (see *Peralta v. Ontario*, [1988] 2 S.C.R. 1045 (S.C.C.), confirming the judgment of the Ontario Court of Appeal (1985), 16 D.L.R. (4th) 259 (Ont. C.A.), and the work of Professor Garant, *Droit administratif*, 5 e ed. 2004, Editions Yvon Blais, at pages 219 and 220.)

147 I also quote from the Supreme Court of Canada judgment, *R. v. Harrison* (1976), [1977] 1 S.C.R. 238 (S.C.C.), at page 245:

> Thus, where the exercise of a discretionary power is entrusted to a Minister of the Crown it may be presumed that the acts will be performed, not by the Minister in person, but by responsible officials in his department: *Carltona, Ltd. v. Commissioners of Works* ... The tasks of a Minister of the Crown in modern times are so many and varied that it is unreasonable to expect them to be performed personally. It is to be supposed that the Minister will select deputies and departmental officials of experience and competence, and that such appointees, for whose conduct the Minister is accountable to the Legislature, will act on behalf of the Minister [page 246], within the bounds of their respective grants of authority, in the discharge of ministerial responsibilities. Any other approach would but lead to administrative chaos and ineffectiveness. It is true that in the present case there is no evidence that the Attorney General of British Columbia personally instructed Mr. McDiarmid to act on his behalf in appealing judgments or verdicts of acquittal of trial courts but it is reasonable to assume the "Director, Criminal Law" of the Province would have that authority to instruct.

148 In *Ahmad v. Canada (Public Service Commission)*, [1974] 2 F.C. 644 (Fed. C.A.), at page 651, the Federal Court of Appeal confirmed the principles of *Caltona Ltd. v. Works Commissioners*, [1943] 2 All E.R. 560 (Eng. C.A.).

149 In my opinion, in 1989, Mr. Liston was empowered to sub-delegate the administrative discretionary power to authorize access to the Emergency Drug Release Program, now called the

SAP, and of which Dr. Gillespie and Mr. MacKay became the delegated officers. Admittedly, as administrator of the SAP, Mr. MacKay is heading a team. The evidence, however, shows that his subordinates in this case did not make the final decisions with respect to the applicants on access to the SAP and that their intervention was limited to ensuring that the requests were in accordance with the administrative requirements. Furthermore, management of the SAP is subject to written administrative procedures (Standard Operating Procedures);

150 With respect to the processing of each of the applicants' request for access, the evidence shows that the decisions for or against access were made either by Dr. Gillespie or Mr. MacKay;

C. Excess of jurisdiction

151 The applicants deny that the SAP may require from physicians further information regarding the safety and effectiveness of 714-X. In their opinion, subparagraph C.08.010(1)(*a*)(iii) of the Regulations should be construed according to its plain meaning, that is, the data to be provided is [TRANSLATION] "the data *in the possession of the physician* [emphasis added] with respect to the use, safety and efficacy of that drug."

152 This is an argument without merit. It rules out the construction recognized in *Barrie Utilities*, *supra*. It completely ignores subparagraph C.08.010(1)9(*a*)(iv) of the Regulations, which provides that physicians must submit to the Director General "such other data as the Director may require." The words "other data" may not be limited, as the applicants submit, to data other than use, safety and effectiveness, which are limited under subparagraph (ii) to data "in the possession of the practitioner." Nothing in those provisions suggests such restrictions, that would, on the other hand, deviate from the object of the Act, which is to ensure the protection of the health of Canadians by banning the sale of medication whose safety and effectiveness are not proven. Furthermore, such a construction of the Regulations would bar the exercise of discretionary power assigned to the SAP's administrators by limiting the documentation required to make an informed decision.

D. Legitimate expectation

153 The applicants' legitimate expectation argument is two-fold:

> (1) the SAP's failure to comply with its promise that requests for access would be processed within 24 hours; and
>
> (2) after having approved authorization requests for 714-X in accordance with the regulations for more than fifteen years, the SAP created a legitimate expectation that it had to abide by with respect to the litigants, whether these were the patients or the referring physicians, who relied on this product as an alternative to ineffective treatments. The applicants submitted that the administration could not deny access to 714-X without new, concrete data leading to the conclusion that the product was toxic. They submit that Health Canada's position is that it has

no evidence that 714-X is effective in treating various cancers. The applicants respond that Health Canada has no evidence that the product is ineffective. In these circumstances, Health Canada was absolutely not justified in withdrawing 714-X from the SAP.

154 I cannot accept the applicants' arguments. The SAP's guidelines do not guarantee that each request for access shall be processed within 24 hours of receipt. The SAP's guidelines acknowledge that further information may be required during the review process and simply stated that "[E]very effort is made to process requests within 24 hours ..." The guidelines also mention a number of factors in the SAP's mandate that could impede its efforts.

155 At paragraph 32 in *Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé & des Services sociaux)*, *supra*, Mr. Justice Binnie stated that the scope of the doctrine of legitimate expectation "was shut only against substantive relief" and, at paragraph 29, that "the expectations must not conflict with the public authority's statutory remit."

156 In my opinion, the application of the doctrine of legitimate expectation, as proposed by the applicants, would provide substantive, and not procedural, relief, notwithstanding the considerable efforts deployed by the applicants' attorney in attempting to persuade me that the legal basis of the disputed decision was substantive, that is, the evidence rules.

E. The reasonableness of the January 23, 2004 decision

157 The applicants challenge the quality of the evidence required by Health Canada. They submit that this evidence is the type of evidence required for licensing, which is inappropriate with respect to the SAP.

158 I must reject that argument. During his cross-examination, Mr. MacKay clearly indicated that the level of evidence required to persuade the SAP to issue a letter of authorization is much lower than what is required to obtain a notice of compliance, but that evidence of effectiveness and safety was not considered unacceptable. As he stated:

> I'm describing here the discretion, that you don't need to back up a truck, but you need something, and what you send us has to be credible information to support the emergency use of that product within the context of the physician's request. Page 92 So you know when we're talking about emergencies here, we're talking about emergencies and we're talking about levels of evidence, we're not talking about truck loads we're talking about plausible basis that would be generally supported within the scientific and medical community, and in the context of emergency, that threshold no one would expect to be ridiculously high, but nevertheless, there is a threshold.

159 That position is highly reasonable when construing the provisions of the SAP in light of the overall framework of the Regulations and of the legislative intent, at subsection C.08.010(1)(*a*)(ii), regarding the effectiveness, use and safety of a medication accessible through the SAP;

160 The applicants' submissions on the assessment of the evidence are without merit.

161 At paragraph 85 in *S.C.F.P., Local 301 c. Québec (Conseil des services essentiels)*, [1997] 1 S.C.R. 793 (S.C.C.), at page 844, the Supreme Court of Canada stated as follows:

> 85 We must remember that the standard of review on the factual findings of an administrative tribunal is an extremely deferent one: *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, per La Forest J., at pp. 849 and 852. Courts must not revisit the facts or weigh the evidence. Only where the evidence viewed reasonably is incapable of supporting the tribunal's findings will a fact finding be patently unreasonable. An example is the allegation in this case, viz. that there is no evidence at all for a significant element of the tribunal's decision: see *Toronto Board of Education*, *supra*, at para. 48, *per* Cory J.; *Lester*, *supra*, at p. 669, *per* McLachlin J.. Such a determination may well be made without an in-depth examination of the record: *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, *per* Gonthier J., at p. 1370.

F. Unreasonable delay

162 Laurent Légère complains that the SAP did not grant him access to the SAP within a reasonable time. It appears that Dany Laforest was still awaiting a decision when she filed her application for judicial review;

163 In Laurent Légère's case, there was a delay due to what the SAP considered insufficient information in his request;

164 The Federal Court of Appeal in *Apotex Inc. v. Canada (Attorney General)* (1993), [1994] 1 F.C. 742 (Fed. C.A.)ruled that the Regulations vest Health Canada with the discretionary and exclusive power to set forth the conditions relating to the information and evidence required from the manufacturer when introducing new drugs;

165 Because, in this case, the delay was caused by the applicant, there was no unreasonable delay;

166 As to Dany Laforest, Mr. MacKay, upon cross-examination, acknowledged that her physician had submitted a request for access in early 2004. He also admitted that, from time to time, requests had been lost. Based on the balance of probabilities, my opinion is that Dany Laforest's request for access was lost by the SAP;

G. The January 23, 2004 public policy

167 The public policy on 714-X announced by Dr. Gillespie is, in fact, a set of guidelines relating to the SAP's exercise of discretionary power.

168 The case law is clear on such guidelines:

> (a) they are a unique tool, as the decision-maker announces, by and large, the type of considerations which will guide him in exercising this power;
>
> (b) however, the decision-maker may not impede the exercise of his discretion by considering this statement of policies as compulsory or binding, to the exclusion of all other valid or relevant reasons why he exercises his decision power.

169 In this case, what prompted the SAP to restrict access to the 714-X product was the lack of reliable evidence on its effectiveness and safety.

170 The SAP officials concluded that, with respect to 714-X, the SAP had become a mechanism used by the manufacturer to circumvent the general requirements of the Regulations.

171 Such considerations, in my opinion, are not unrelated to the reasons why the SAP was created.

172 But the analysis must go further. The issue is to determine whether the guidelines set out on January 23, 2004 unduly fettered the discretionary power granted to the SAP through the Regulations. In other words, was the January 23, 2004 policy mandatory? In my opinion, it was and, consequently, it is invalid for the following reasons:

173 Firstly, the SAP was created in an attempt to strike a balance between access to medication that has not yet proven itself and humanitarian reasons in the case of an illness for which the conventional treatments were ineffective or inadequate. In my opinion, the January 23, 2004 public policy does not reflect the balance sought by Parliament, because it does not take into consideration humanitarian or compassionate concerns.

174 Secondly, the public policy requires a clinical trial for 714-X before any discretionary power may be exercised.

175 Thirdly, with regard to new patients, the access door, for all intents and purposes, is shut. All requests for access on hold for new patients were denied on January 23, 2004 because they had not been treated with 714-X. The humanitarian factor was not taken into account.

176 Fourthly, the same fate awaits the old patients at the end of the interim period.

177 My finding is not harmful for Health Canada and the SAP. It simply requires a weighing of the valid objectives of the public policy against the humanitarian factor.

178 In these circumstances, there is no need to consider the argument relating to the Charter.

179 I hereby order that these reasons be filed in files T-698-04, T-2138-04, T-2139-04 and T-2140-04.

Applications granted.

2016 FC 456, 2016 CF 456
Federal Court

Dhillon v. Canada (Attorney General)

2016 CarswellNat 10388, 2016 CarswellNat 1378, 2016 FC 456, 2016 CF 456, [2016] F.C.J. No. 442, 10 Admin. L.R. (6th) 106, 129 W.C.B. (2d) 412, 266 A.C.W.S. (3d) 5

Navjeet Singh Dhillon, Applicant and Attorney General of Canada, Respondent

Patrick Gleeson J.

Heard: October 20, 2015
Judgment: April 22, 2016
Docket: T-794-14

Counsel: Mandy Aylen, for Applicant
Helene Robertson, for Respondent

Subject: Constitutional; Corporate and Commercial; Criminal; Customs; International; Public; Human Rights

APPLICATION for judicial review of Canada Border Services Agency's process by which applicant was repeatedly referred for secondary examination when he re-entered Canada after international travel.

***Patrick Gleeson J.*:**

I. Background

A. Facts

1 The applicant, Navjeet Singh Dhillon [Mr. Dhillon or the applicant], was approached by a Border Services Officer [BSO] as he was boarding an aircraft departing from Calgary to Europe in August, 2013. In response to questioning from the BSO, Mr. Dhillon advised that he was in possession of more than $10,000, Canadian, in cash. The BSO advised Mr. Dhillon that exporting cash in excess of $10,000, Canadian, not previously declared to the Canada Border Services Agency [CBSA], was in contravention of section 12 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 [the Contravention]. Mr. Dhillon reported that he was unaware of the obligation to declare currency exports. The currency in Mr. Dhillon's possession was seized. Mr. Dhillon was forthright and fully cooperative with the BSO.

2 The BSO provided Mr. Dhillon with the option of having the currency returned to him and to continue on his journey upon payment of a fine in the amount of $250, the lowest penalty available for a contravention of section 12 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 [Act] pursuant to paragraph 18(a) of the *Cross-border Currency and Monetary Instruments Reporting Regulations*, SOR/2002-412. Mr. Dhillon opted to pay the fine and he was permitted to board his flight. Mr. Dhillon states in his affidavit that prior to agreeing to pay the fine he asked the BSO if there would be any customs or immigration related consequences. The BSO responded in the negative. Mr. Dhillon did not challenge the BSO's finding of the Contravention, an option that was open to him for a 90 day period under section 25 of the Act.

3 Between August, 2013 and November, 2014, Mr. Dhillon re-entered Canada after international travel on eleven occasions. On each of these occasions he was referred to a secondary examination by CBSA officials. In each case his luggage was searched and he was delayed for 15 to 45 minutes. He was never provided a reason for the referrals.

4 Mr. Dhillon believed, contrary to what he had been told by the BSO in August, 2013, that the referrals were related to the Contravention. He commenced this application for judicial review challenging the decision that he believed had been made to place him on a lookout list. As a result of this application, Mr. Dhillon became aware that the Contravention had triggered the application of what CBSA refers to as the Previous Offender Regime and Mr. Dhillon refers to as the Previous Offender Process. The Previous Offender Process led to his automatic referral to secondary examination on ten occasions between August, 2013 and November, 2014, the eleventh referral to secondary examination in that time occurred as a result of a discretionary decision by a BSO. B. *The Previous Offender Process*

5 The Previous Offender Process is described by the respondent's affiant, Dawn Lynch, Manager of Enforcement Systems in the Enforcement and Intelligence Programs Section of the Business Systems Integration Division in the Programs Branch of the CBSA.

6 CBSA maintains and monitors enforcement information within the Integrated Customs Enforcement System [ICES]. The Previous Offender Process is a component of the ICES.

7 When a traveller enters the country identity documents are scanned and the traveller's name is queried against the ICES records. Where a traveller has a record of contravention there is a possibility that the Previous Offender Process will automatically generate a direction to the BSO to refer the traveller for a secondary examination.

8 The inclusion of an individual in the Previous Offender Process is non-discretionary. Where a contravention is recorded and a penalty imposed within the ICES a point value is automatically generated. The point value has been determined for each category of offence and is dependent

upon a combination of the type of offence, the value of the commodities involved and the type of commodity. The points value becomes the percentage frequency that a computer generated referral to a secondary examination will occur on subsequent entries into Canada. An individual can only be removed from the Previous Offender Process where an enforcement action is determined to have been invalid pursuant to section 25 of the Act.

9 In the case of Mr. Dhillon, upon the entry of the Contravention into the ICES, the system assigned 45 points for the failure to report the export of currency and a further 45 points on the basis that the commodity involved was currency. With a total point score of 90, Mr. Dhillon's subsequent entries into Canada would result in a computer generated referral to secondary examination 90% of the time.

10 The Previous Offender Process recognizes and accounts for subsequent compliance through the reduction of the point score on an annual and then semi-annual basis. Where a traveller demonstrates compliance the point score will be reduced to zero within a maximum of six years resulting in no further automatic referral through the Previous Offender Process, assuming one's continued compliance.

11 The entire Previous Offender Process is automated and controlled within the ICES. CBSA officials do not possess any discretionary authority over the process. While section 25 of the Act provides a right of review of a CBSA officer's decision that section 12 of the Act has been contravened, there is no independent ability to review the application of the Previous Offender Process to an individual who has been found in contravention of the Act.

II. Relevant Legislation

12 Relevant extracts from the *Canada Border Services Agency Act*, SC 2005, c 38 [CBSA Act], the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17, the *Customs Act*, RSC 1985, c 1 (2nd Supp), the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*] and the Cross-border Currency and Monetary Instruments Reporting Regulations, SOR/2002-412 are reproduced in Appendix "A" to this Judgment and Reasons.

III. Issues

A. Position of the Parties

13 In initially advancing this judicial review application, Mr. Dhillon took the position that CBSA lacked jurisdiction to subject him to the Previous Offender Process and that the mandatory referrals to secondary examination violated his section 10 rights under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. The applicant's written submissions did not address the *Charter* argument and in oral submissions counsel for the applicant advised that Mr. Dhillon is not

pursing arguments relating to either the *Charter* or CBSA's jurisdiction to create and implement the Previous Offender Process. Mr. Dhillon also did not take issue with CBSA recording the history of its interactions with him into the ICES. Nor did he take issue with a BSO, at the point of entry, complying with a system generated mandatory referral to secondary examination.

14 Instead the applicant's arguments focused on the manner in which CBSA subjected him to the Previous Offender Process. The applicant maintains that CBSA's implementation of the Previous Offender Process constitutes a fettering of discretion, a breach of procedural fairness, and is contrary to the applicant's legitimate expectations. The applicant submits that this application is not challenging the policy reflected by the Previous Offender Process but rather the manner in which CBSA applied the policy to him. The applicant's issue is with the decision to enter him into the system in the first place.

15 The respondent takes the position that the Previous Offender Process is an administrative consequence arising from Mr. Dhillon's admitted Contravention, that there is no decision for this Court to review and as such there is no discretion to fetter nor has there been a denial of procedural fairness.

B. Issues to be Addressed

16 The application requires that I address the following issues:

1) Is there a decision or matter to review?

2) What standard of review applies?

3) What are the consequences of subjecting the applicant to the Previous Offender Process?

4) If the applicant is successful, what is the appropriate remedy?

IV. Analysis

A. Issue 1 — Is there a Decision or matter to review?

17 The respondent submits that CBSA, in advancing its mandate under section 5 of the CBSA Act to manage risk while facilitating the flow of goods through Canada's borders relies on a variety of indicators to identify which travellers will be subject to a full examination and which will benefit from an abbreviated examination on entry. This is reflected in a policy framework that automatically places individuals who have previously contravened the Act or other statutes administered by CBSA into a class that will be selected for full examination on a specific proportion of their entries into Canada. The respondent further submits that within this framework the only decision made in respect of the applicant was to find that he contravened section 12 of

the Act, a fact that the applicant concedes. No specific or individual decision was made to subject the applicant to the Previous Offender Process.

18 The respondent further argues that as the Previous Offender Process does not involve the exercise of discretion, the applicant's complaint is about the policy underpinning the Previous Offender Process. The respondent argues that other than its legality, a policy decision is not subject to judicial scrutiny on judicial review (*Canadian Assn. of the Deaf v. R.*, 2006 FC 971 (F.C.) at paras 75-77, (2006), 298 F.T.R. 90 (Eng.) (F.C.) [*Canadian Assn of the Deaf*]; *Moresby Explorers Ltd. v. Canada (Attorney General)*, 2007 FCA 273 (F.C.A.) at para 24, (2007), 284 D.L.R. (4th) 708 (F.C.A.)).

19 The applicant argues that he is not seeking a review of the CBSA policy rather he is seeking a review of the decision to apply that policy to him. The applicant argues that the respondent cannot escape judicial scrutiny of its process simply because it has chosen to remove all discretion within that process through its automation.

20 While I take no issue with the respondent's position that the grounds upon which government policy can be challenged are limited, this does not, in my view, foreclose consideration of this application.

21 In order to determine whether or not an application engages questions of policy it is necessary to first properly characterize the circumstances of the dispute (*Smith v. Canada (Attorney General)*, 2009 FC 228 (F.C.) at paras 30-31, (2009), 307 D.L.R. (4th) 395 (F.C.)). In this case the applicant's concern arises out of the failure of CBSA to provide him with any notice of the possibility of a more detailed examination upon entry into Canada as a result of the Contravention. The applicant is not seeking a review of CBSA policy but rather seeks a review of the manner in which the Previous Offender Process has been applied in light of the impact that his inclusion in the process has had upon him.

22 I am further of the view that the absence of a "decision" to capture the applicant in the Previous Offender Process is not determinative of this Court's jurisdiction under the *Federal Courts Act*. In this respect I agree with the view expressed by Justice Anne Mactavish in *Shea v. Canada (Attorney General)*, 2006 FC 859 (F.C.) at paras 42-44, (2006), 296 F.T.R. 81 (Eng.) (F.C.) where she states:

> [42] The absence of a "decision" is not a bar to an application for judicial review under the *Federal Courts Act*, as Section 18.1 provides the Court with jurisdiction to grant relief to a party affected by "a matter" involving a federal board, commission or other tribunal: *Canadian Museum of Civilization Corp. v. Public Service Alliance of Canada, Local 70396*, [2006] F.C.J. No. 884, 2006 FC 703, at para. 47.
>
> [43] The role of this Court thus extends beyond the review of formal decisions, and extends to the review of "a diverse range of administrative action that does not amount to a 'decision or

order', such as subordinate legislation, reports or recommendations made pursuant to statutory powers, policy statements, guidelines and operating manuals, or any of the myriad forms that administrative action may take in the delivery by a statutory agency of a public programme.": *Markevich v. Canada*, [1999] 3 F.C. 28 (QL) (T.D.), at para. 11, reversed on other grounds, [2001] F.C.J. No. 696, reversed on other grounds, [2003] S.C.J. No. 8. See also *Nunavut Tunngavik Inc. v. Canada (Attorney General)*, [2004] F.C.J. No. 138, 2004 FC 85, at para. 8.

[44] A wide range of administrative actions have been found to come within the Court's jurisdiction: see, for *example Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services)*, [1995] 2 F.C. 694; *Morneault v. Canada (Attorney General)*, [2001] 1 F.C. 30 (C.A.), and *Larny Holdings (c.o.b Quickie Convenience Stores) v. Canada (Minister of Health)*, [2003] 1 F.C. 541 (T.D.).), 2002 FCT 750.

23 Similarly, in *Canadian Assn of the Deaf* at para 76, Justice Richard Mosely states "Judicial review is not restricted to decisions or orders that a decision maker was expressly charged to make under the enabling legislation. The word "matter" found in section 18.1 of the *Federal Courts Act* is not so restricted but encompasses any matter in regard to which a remedy might be available under section 18 or s-s18.1(3)".

24 The matter to be reviewed here arises out of CBSA's statutory mandate set out in section 5 of the CBSA Act to provide integrated border services that supports national security and public safety priorities while facilitating the flow of persons and goods through Canada's borders. The respondent stresses that there is an inherent tension between the mandated security and safety responsibilities and the facilitation responsibility resulting in risk management being an inherent part of the CBSA function, and the Previous Offender Process is one such risk management strategy. The issues raised however relate not to policy itself but the manner in which it has been implemented. This is a "matter" coming within the scope of section 18.1 of the *Federal Courts Act* and is justiciable.

B. Issue 2 — What is the Standard of Review?

25 The applicant raises questions relating to procedural fairness and the fettering of discretion in this application and submits that the correctness standard of review applies. The respondent has not advanced a position on the standard of review instead arguing that in the absence of a decision there is nothing to be reviewed.

26 The jurisprudence establishes that in considering questions related to the fettering of discretion and breaches of procedural fairness the correctness standard applies (*Okomaniuk v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 473 (F.C.) at paras 20-21, (2013), 432 F.T.R. 143 (Eng.) (F.C.)).

C. Issue 3 — What are the Consequences of Subjecting the Applicant to the Previous Offender Process?

27 This judicial review application turns on whether or not the nature of the consequence resulting from applicant's inclusion in the Previous Offender Process is such that it triggered an obligation upon the respondent to provide the applicant with notice, an opportunity to respond and to maintain the discretion for individual decision makers to consider and reach a determination on the applicant's inclusion in the Previous Offender Process.

28 The applicant argues in his Amended Notice of Application and written submissions that subjecting him to repeated referrals to secondary examination due to the Contravention constitutes an additional penalty or sanction. In oral submissions the applicant clarified this position arguing that while mandatory referral to secondary examination is not a penalty or sanction, it is a repercussion or consequence which impacts the applicant. The applicant argues that he is singled out from other travellers and is being detained in the physical sense, but not the legal sense, as the secondary examination is conducted. As such the applicant argues the respondent had a duty to provide notice of the potential for more detailed examinations on subsequent entries into Canada and to consider the underlying circumstances of a contravention when determining whether or not to subject him to the Previous Offender Process.

29 The respondent submits that it is well-established in the jurisprudence that CBSA has the right to conduct a full examination of every traveller seeking to enter Canada. The respondent further submits that the jurisprudence establishes that a full examination includes both the primary and secondary examination undertaken by a BSO. The respondent argues, relying on the evidence of Ms. Lynch, that while CBSA has the right to conduct a full examination of all travellers it does not do so in every case because of the practical challenges this presents in ensuring the efficient movement of goods and people across the border. Instead the CBSA has adopted a risk management strategy at Canada's borders that allows some travellers to undergo a less rigorous examination. However, this risk management policy does not create a right or expectation that any traveller will avoid a full examination upon entry into Canada.

30 I agree with the respondent. A process that results in an individual's mandatory referral to secondary examination upon entry into Canada, based on a prior contravention by that individual of program legislation which CBSA administers, does not trigger procedural fairness obligations on the part of CBSA. I find support for this conclusion in the jurisprudence, much of which the respondent cited, on the nature of the different types of searches and examinations at the border and ports of entry. Although in that jurisprudence *Charter* rights are at issue, the reasoning on the consequences of primary and secondary examinations apply to the present case.

31 In *R. v. Simmons*, [1988] 2 S.C.R. 495 (S.C.C.) Chief Justice Dickson describes, at paragraph 27, the three categories or types of border searches to which a traveller entering Canada may be subject:

> It is, I think, of importance that the cases and the literature seem to recognize three distinct types of border search. **First is the routine of questioning which every traveller undergoes a port of entry, accompanied in some cases by a search of baggage and perhaps a path or frisk of outer clothing. No stigma is attached to being one of the thousands of travellers who are daily routinely checked in that manner upon entry to Canada and no constitutional issues are raised** [emphasis added]. It would be absurd to suggest that a person in such circumstances is detained in a constitutional sense and therefore entitled to be advised of his or her right to counsel. The second type of border search is the strip or skin search of the nature of that to which the present appellant was subjected, conducted in a private room, after a secondary examination and with the permission of a customs officer in authority. The third and most highly intrusive type of search is that sometimes referred to as the body cavity search, in which customs officers have recourse to medical doctors, the x-rays, to a medics, and to other highly invasive means.

32 In *Dehghani v. Canada (Minister of Employment & Immigration)*, [1993] 1 S.C.R. 1053 (S.C.C.) at paras 38-39 [*Dehghani*], Justice Iacobucci, writing for a unanimous Supreme Court of Canada explained that the first type of border search or examination described in *Simmons* encompasses both the primary and secondary examination that a traveller is subject to undergo upon entry into Canada. This routine examination does not attract any stigma nor, as conceded by the applicant, does it amount to a detention in the Constitutional sense (*R. v. Jones*, [2006] O.J. No. 3315 (Ont. C.A.), at paras 32-37, (2006), 81 O.R. (3d) 481 (Ont. C.A.) [*Jones*]).

33 Similarly, in *R. v. Nagle*, 2012 BCCA 373 (B.C. C.A.) at para 34, (2012), 97 C.R. (6th) 346 (B.C. C.A.) [*Nagle*], Justice Chiasson and Justice Bennett held for a unanimous British Columbia Court of Appeal that:

> In the context of border crossings, routine questioning, the search of baggage and pat-down searches are standard practices, applicable to every ordinary traveller, and is expected and tolerated by anyone wishing to travel internationally. This conduct by border agents does not engage constitutional rights, including detention, the right to counsel or a reasonable expectation of privacy.

34 It is clear that the jurisprudence does not distinguish between initial routine questioning that a traveller is subjected to on an initial screening and the baggage and pat-down search that occurs in a secondary examination (*R. v. Darlington*, [2011] O.J. No. 4168 (Ont. S.C.J.) at para 75, (2011), 97 W.C.B. (2d) 370 (Ont. S.C.J.)). These are two parts of the first category of examination identified in *Simmons*. The jurisprudence demonstrates that a secondary examination within the

framework of the first category of search does not attract or engage a different set of factors for legal analysis or consideration (*Dehghani* at paras 38-39; *Jones* at paras 32-36).

35 In *R. v. Hudson*, [2005] O.J. No. 5464 (Ont. C.A.) at paras 34-35, (2005), 77 O.R. (3d) 561 (Ont. C.A.) [*Hudson*] the Ontario Court of Appeal considered the impact of an automatic referral to secondary examination of persons refused entry to the United States. Citing *Dehghani*, the Court concluded that an automatic referral to secondary examination arising out of that policy does not remove that examination from the first category of search set out in *Simmons*:

> [35] It is important to note that secondary inspection, in this context, does not remove it from the first category of search set out in *Simmons*. Iacobucci J. in *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053 at 1073 had this to say about a secondary inspection in the context of the *Immigration Act*, R.S.C., 1985, c. I-2:
>
> > [I]t would be unreasonable to expect the screening process for all persons seeking entry into Canada to take place in the primary examination line. For those persons who cannot immediately produce documentation indicating their right of entry, the screening process will require more time, and a referral to a secondary examination is therefore required. There is, however, no change in the character of the examination simply because it is necessary for reasons of time and space to continue it at a later time in a different section of the processing area. The examination remains a routine part of the general screening process for persons seeking entry to Canada.

36 In summary the jurisprudence establishes that: (1) the first category of border search or examination is comprised of two components, primary and secondary examinations (*Simmons* at para 27; *Dehghani* at paras 38-39); (2) these components are "standard practices, applicable to every ordinary traveller" (*Nagle* at para 34); (3) a first category border examination does not engage constitutional rights, the right to counsel or a reasonable expectation of privacy; (4) a secondary examination within the first category does not attract or engage a different set of factors for legal analysis or consideration; and (5) that a mandatory referral to secondary examination arising out of a practice or policy does not remove it from the first category of border search described in *Simmons* (*Hudson* at paras 34-35).

37 Referral to secondary examination as a result of the Previous Offender Process does not constitute an additional sanction, penalty or legal consequence.

38 In the circumstances of this case, I am unable to conclude that the consequence Mr. Dhillon complains of, a consequence that is a standard practice and applicable to all travellers, imposes any procedural fairness obligations upon CBSA (*Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) at para 20 [*Baker*]). CBSA has implemented the Previous Offender Process to strike a balance between the competing goals in discharging its statutory mandate under section 5 of the CBSA Act to support national security and public

safety while at the same time facilitating the free flow of persons and goods. Relying on prior contraventions of program legislation which CBSA administers and enforces under paragraph 5(a) of the CBSA Act in pursuit of this objective is both rational and connected to the CBSA mandate.

39 In addition, the evidence also demonstrates that the Previous Offender Process is intended to enhance the efficiency of the examination process at points of entry by automating some of the processes an experienced BSO would follow if they had the opportunity to fully review the history of individuals seeking to enter Canada (Cross-examination of Dawn Lynch on her Affidavits, Applicant's Application Record, Volume I, Tab 8 at page 282).

40 The Previous Offender Process essentially functions as part of CBSA's institutional memory. Its automation does not constitute a fettering of discretion because the process does not lead to automatic referrals to secondary examinations upon every attempted entry into Canada. Instead, the Previous Offender Process is designed to recognize future consistent compliance by decreasing the frequency of mandatory secondary examinations, presumably on the basis that compliance reflects a reduction in risk. This continued reduction in the frequency of automatic referrals through the Previous Offender Process demonstrates the latter's function as institutional memory: the longer Mr. Dhillon complies with the Act, the less likely that system will remember his Contravention at the time of Mr. Dhillon's entry into Canada.

41 While there is no doubt that the applicant subjectively views the inconvenience of frequent referrals for secondary examination as a significant negative consequence, that subjective view is not objectively sustainable in the context of port of entry examinations.

42 The applicant also takes issue with the lack of notice of the consequence in light of his specific request for information about the immigration and customs consequences at the time of the Contravention. The respondent notes that the applicant was not misled by the BSO since he specifically asked about consequences flowing from the payment of the fine as opposed to the commission of the Contravention.

43 It would have been preferable had the BSO advised Mr. Dhillon that he may be subject to a more detailed examination upon entry as a result of the Contravention. Yet this information is set out in the publicly available CBSA publication entitled "*I Declare: A guide for residents of Canada returning to Canada*" and is accessible on the CBSA website. It states "A record of infractions is kept in the CBSA computer system. If you have an infraction record, you may have to undergo a more detailed examination on future trips. You may also become ineligible for NEXUS and CANPASS programs" (Exhibit D to the Affidavit of Dawn Lynch, Applicant's Application Record, Volume I, Tab 6D at page 151). Moreover, the answer provided by the BSO is irrelevant to the consequence, in that it is the Contravention itself not the payment of the fine that led to Mr. Dhillon being included in the Previous Offender Process. As noted Mr. Dhillon has not disputed the fact of the Contravention.

44 In light of my conclusions there is no need to address the question of remedy.

V. Costs

45 The parties advised in oral submissions that they have agreed to a global costs award of $5000 inclusive of disbursements.

VI. Conclusion

46 The subjection of the applicant to the Previous Offender Process as a result of his Contravention of section 12 of the Act and in turn his mandatory referrals for secondary examination is reviewable by this Court. However, the consequences arising out of CBSA's actions in these circumstances do not engage rights, privileges or interests that impose procedural fairness obligations upon the respondent (*Baker* at para 20). Nor, based on the circumstances of this case, does Mr. Dhillon's inclusion in the Previous Offender Process constitute a fettering of CBSA's discretion.

Judgment

THIS COURT'S JUDGMENT is that the application is dismissed with costs to the respondent in the amount of $5000.

Application dismissed.

Appendix A

Canada Border Services Agency Act, SC 2005, c 38 (CBSA Act), paragraph 5(1)(a) and subsection 12(1):

> 5.(1) The Agency is responsible for providing integrated border services that support national security and public safety priorities and facilitate the free flow of persons and goods, including animals and plants, that meet all requirements under the program legislation, by
>
> > (a) supporting the administration or enforcement, or both, as the case may be, of the program legislation;
> >
> > [...]
>
> 12. (1) Subject to any direction given by the Minister, the Agency may exercise the powers, and shall perform the duties and functions, that relate to the program legislation and that are conferred on, or delegated, assigned or transferred to, the Minister under any Act or regulation.

Proceeds of Crime (Money Laundering) and Terrorist Financing Act, SC 2000, c 17:

2. The definitions in this section apply in this Act. "Centre" means the Financial Transactions and Reports Analysis Centre of Canada established by section 41. "President" means the President of the Canada Border Services Agency appointed under subsection 7(1) of the *Canada Border Services Agency Act*.

[...]

12. (1) Every person or entity referred to in subsection (3) shall report to an officer, in accordance with the regulations, the importation or exportation of currency or monetary instruments of a value equal to or greater than the prescribed amount.

[...]

(5) The Canada Border Services Agency shall send the reports they receive under subsection (1) to the Centre. It shall also create an electronic version of the information contained in each report, in the format specified by the Centre, and send it to the Centre by the electronic means specified by the Centre.

[...]

18. (1) If an officer believes on reasonable grounds that subsection 12(1) has been contravened, the officer may seize as forfeit the currency or monetary instruments.

(2) The officer shall, on payment of a penalty in the prescribed amount, return the seized currency or monetary instruments to the individual from whom they were seized or to the lawful owner unless the officer has reasonable grounds to suspect that the currency or monetary instruments are proceeds of crime within the meaning of subsection 462.3(1) of the Criminal Code or funds for use in the financing of terrorist activities.

[...]

20. If the currency or monetary instruments have been seized under section 18, the officer who seized them shall without delay report the circumstances of the seizure to the President and to the Centre.

[...]

25. A person from whom currency or monetary instruments were seized under section 18, or the lawful owner of the currency or monetary instruments, may, within 90 days after the date of the seizure, request a decision of the Minister as to whether subsection 12(1) was contravened, by giving notice to the Minister in writing or by any other means satisfactory to the Minister.

Cross-border Currency and Monetary Instruments Reporting Regulations, SOR/2002-412 (*Reporting Regulations*):

> 18. For the purposes of subsection 18(2) of the Act, the prescribed amount of the penalty is
>
> (a) $250, in the case of a person or entity who
>
> (i) has not concealed the currency or monetary instruments,
>
> (ii) has made a full disclosure of the facts concerning the currency or monetary instruments on their discovery, and
>
> (iii) has no previous seizures under the Act;
>
> (b) $2,500, in the case of a person or entity who
>
> (i) has concealed the currency or monetary instruments, other than by means of using a false compartment in a conveyance, or who has made a false statement with respect to the currency or monetary instruments, or
>
> (ii) has a previous seizure under the Act, other than in respect of any type of concealment or for making false statements with respect to the currency or monetary instruments; and
>
> (c) $5,000, in the case of a person or entity who
>
> (i) has concealed the currency or monetary instruments by using a false compartment in a conveyance, or
>
> (ii) has a previous seizure under the Act for any type of concealment or for making a false statement with respect to the currency or monetary instruments.

Customs Act, RSC 1985, c 1 (2nd Supp):

> 11. (1) Subject to this section, every person arriving in Canada shall, except in such circumstances and subject to such conditions as may be prescribed, enter Canada only at a customs office designated for that purpose that is open for business and without delay present himself or herself to an officer and answer truthfully any questions asked by the officer in the performance of his or her duties under this or any other Act of Parliament.

Federal Courts Act, RSC 1985, c F-7:

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

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

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

[...]

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

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

[...]

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

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

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

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

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

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

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

[...]

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

End of Document

2014 ONSC 4669
Ontario Superior Court of Justice (Divisional Court)

East Durham Wind, Inc. v. West Grey (Municipality)

2014 CarswellOnt 11055, 2014 ONSC 4669, [2014] O.J. No. 3742, 243 A.C.W.S. (3d) 1012, 28 M.P.L.R. (5th) 1, 324 O.A.C. 191, 85 C.E.L.R. (3d) 340

East Durham Wind, Inc., Applicant and The Municipality of West Grey, Respondent

Then, Aston, Harvison Young JJ.

Heard: June 13, 2014
Judgment: August 14, 2014
Docket: Toronto DC-14-116

Counsel: John Laskin, Sarah Shody, for Applicant
Michael Miller, Edward Velotboom, for Respondent

Subject: Environmental; Public; Property; Municipal

APPLICATION by business for order granting permits to construct wind turbines.

***Then J.*:**

Overview

1 The applicant East Durham Wind Inc. ("East Durham Wind") applies for judicial review of two municipal by-laws that, both in design and application, prevent it from proceeding with construction of a wind energy project in the Municipality of West Grey (the "Municipality"). East Durham Wind holds a Renewable Energy Approval ("REA") to construct a 14 turbine wind farm (the "project") but claims it cannot proceed with construction until it receives certain permits from the Municipality. The application raises the question of when and how a municipal by-law or policy may frustrate the purpose of a provincial legislative instrument. The factual backdrop for this legal question is the ongoing renewable energy revolution in Ontario that was ushered in by the *Green Energy Act*, S.O. 2009, c. 12 ("*GEA*"). This revolution has spawned much litigation, particularly around wind energy projects.

2 A developer wishing to build a wind energy project cannot do so without a REA, the provincial instrument that is the comprehensive approval required for renewable energy projects in Ontario. The REA application process has been crafted through detailed regulations and the power to issue

a REA is exclusively held by delegates of the provincial Minister of Environment. Despite the existence of this all-in-one provincial approval process, in practice a developer will need to get various operational permits from the local municipality in order to construct the approved project. Where a municipal government is opposed to wind energy projects generally, there potential for conflict is obvious.

3 In this case, the applicant East Durham Wind, Inc. ("East Durham Wind") applies for judicial review of two municipal by-laws it claims prevent it from constructing a provincially authorized wind energy project in the Municipality of West Grey (the "Municipality"). The by-laws authorize the Municipality to grant two types of municipal permits that, as a practical matter, East Durham Wind must acquire in order to construct its project.

Background

4 East Durham Wind, a wholly owned subsidiary of NextEra Energy Canada ULC, received a REA for its 14 turbine wind energy project on January 31, 2014. The validity of the REA itself is currently the subject of an appeal brought by a private citizen before the Environmental Review Tribunal ("ERT"); the Municipality has "participant" status in that proceeding.

5 To construct its project East Durham Wind will require "entrance permits" to connect access roads on private lands where the turbines will be located to public highways in the Municipality. The Project will also require "oversize/overweight haulage permits" to allow for the conveyance of large and heavy project materials by truck along public highways.

6 Before describing East Durham Wind's efforts to acquire these permits, we pause to note East Durham Wind's submissions to this Court about what it claims is the Municipality's pattern of opposition to the development of any wind energy projects in its jurisdiction, and in particular its project. Some of the events cited by East Durham Wind predate the events relevant to this application but they nevertheless provide useful context to the issues currently dividing the parties.

7 Briefly, on October 12, 2012, the Municipality's council ("Council") passed a resolution declaring it "is not a willing host for any further industrial wind turbines." In March 2013, the Municipality amended a by-law to require a $100,000 performance bond for each new wind turbine constructed in the municipality. The amendments also imposed other fees on wind projects. East Durham Wind brought an application for judicial review challenging these amendments in June 2013 and, in July 2013, the Municipality rescinded the by-law.

East Durham Wind's application for entrance permits

8 In anticipation of receiving a REA for its project, East Durham Wind first submitted applications for entrance permits to the Municipality on August, 8, 2013 and October 7, 2013. From 1999 until February 2014 entrance permits were controlled not through a by-law but through

the Municipality's entrance permit policy. Relevant aspects of the Municipality's entrance permit policy at the time East Durham Wind submitted its applications included the following:

- The application form required applicants to indicate whether the proposed entrance was for: (1) Commercial, (2) Residential, (3) Field/Bush, or (4) Public Street use. No "Industrial" use category existed.

- Council amended the policy on July 15, 2013, to make Council, not an administrative delegate of Council, responsible for approving entrance permits intended for "Industrial" use.

- The maximum width for any entrance was set at 8 metres "measured along the street line," with "street line" being an undefined term in the policy.

9 Council took the position that East Durham Wind's permit applications were for industrial use and thus had to be determined by Council. Council then communicated to East Durham Wind, in a letter dated November 21, 2013, that it did not have to decide the applications unless and until a REA had been granted. However, the letter went on to state the applications would have been rejected in any event because the proposed industrial use of the permits did not fit the applications within the "commercial" category. Moreover, the proposed entrances exceeded the 8 metre rule when measured at the line "where the proposed ingress/egress driveway located in municipal property meets the travelled portion of the road" or, in other words, where the border of the gravel shoulder meets the public highway.

10 East Durham Wind resubmitted its permit applications on January 23, 2014, after receiving its REA. Included in the revised applications was a consultant's memo, commissioned by East Durham Wind, explaining that the redesigned entrance proposals all met the 8 metre rule, and the "angle of intersection" rule, when measured according to East Durham Wind's definition of the "street line." East Durham Wind interpreted the "street line" as the point where a private property line ends and the municipal road allowance begins, not where the shoulder meets the road. The memo also noted that this interpretation was consistent with the definition of "street line" used in the Municipality's zoning by-law and the general practice of other municipalities.

11 Council rejected the revised applications on February 17, 2014. Subsequent communications confirmed the Municipality's position was that the proposed entrances still violated the 8 metre rule at the street line (based on the Municipality's interpretation of "street line") and also violated the policy's provision on the minimum "angle of intersection," which had to be more than 60 degrees, measured from a focal point along the "street line."

12 The same day Council passed a new by-law regulating entrance permits (the "entrance permit by-law"). The Municipality stated that the by-law was passed to remedy deficiencies in the old entrance permit policy. Among other things, the new by-law defined "street line" according to the interpretation favoured by the Municipality, permitted entrances significantly wider than 8 metres,

and prohibited the granting of permits for "additional entrances" on lots with existing entrances, subject to four exceptions. The parties agree that none of the proposed entrances applied for by East Durham Wind can meet the prescribed exceptions, though the Municipality also notes that East Durham Wind has not applied to widen any of the existing entrances on the private lands to be used for the Project.

East Durham Wind's applications for oversize/overweight haulage permits

13 The provincial *Highway Traffic Act*, R.S.O. 1990, c. H-8 ("*HTA*"), prescribes limits for the size (s. 109) and weight (Part VIII) of trucks that can travel on public highways. The *HTA* gives municipalities discretion, however, to permit oversize and/or overweight vehicles and loads to travel on roads in their jurisdiction (s. 110). The *HTA* specifically authorizes municipalities to attach conditions restricting the times during which oversize/overweight vehicles or loads can travel and requiring security for any damage caused to public roads (s. 110(2)). The *HTA* also provides that the operator of a permitted vehicle is responsible for all damages that may be caused to public highways (s. 110(5)).

14 The Municipality's by-law for oversize/overweight vehicles, enacted in 2004, allows the Municipality to issue such permits. The by-law contemplates permit conditions requiring, among other things, restricted travel hours, the use of police escorts, and modest amounts of security for damages. A page appended to the by-law also prohibits vehicles defined as "Exceptional Movement Vehicles" from using public roads altogether. An Exceptional Movement Vehicle is defined on that page as a vehicle over 5 metres in width, 45.75 metres in length, or 63,500 KG in weight.

15 East Durham Wind submitted eight applications for oversize/overweight haulage permits to the Municipality on January 31, 2014. As part of its applications East Durham Wind committed to providing a traffic impact study, escorts, surveys, undertakings to repair any potential damage, and $250,000 in security for any damage caused.

16 Prior to these applications East Durham Wind and the Municipality had unsuccessfully tried to negotiate a comprehensive "Road Use Agreement" in 2013. The negotiations collapsed when East Durham Wind refused to consent to funding a peer review study on its proposed road use without an express condition prohibiting the use of that study in any appeal of its forthcoming REA.

17 Council discussed the permit applications on February 17, 2014 and, on February 18, requested clarifications about the $250,000 security. On February 24, East Durham Wind told the Municipality that the $250,000 would be in the form of a performance bond. On March 3, Council met and determined that a security contract would need to be negotiated with East Durham Wind before the permit applications could be considered. The mayor of the Municipality speculated that negotiations could take 6-8 months. The Municipality also revived the issue of a peer review study but no agreement was reached between the parties.

18 Shortly after this East Durham Wind applied for judicial review of the two permitting by-laws. East Durham Wind claims it will suffer a financial penalty of $3,450 per day under its FIT contract with the Ontario Power Authority if the project is not operational by July 13, 2014. The contract was not submitted as part of the record on this application.

Issues

19 The main issue on this application is whether the Municipality's by-laws conflict with East Durham Wind's REA by frustrating its purpose. The by-laws are inoperative to the extent of any conflict pursuant to s. 14 of the *Municipal Act*, S.O. 2001, c. 25. If there is no conflict, a second issue is whether East Durham Wind's permit applications complied with the relevant criteria and should have been considered and/or granted by the Municipality.

Standard of review

20 The issue of whether the by-laws conflict with East Durham Wind's REA is a question of the *vires* of the by-laws. The question is not whether the by-laws fall within the scope of the Municipality's authority to regulate, but rather whether the by-laws conflict with a provincial instrument. The Supreme Court of Canada has made it clear that reasonableness, taking its colour from the context, is the standard to be applied when the question is the scope of the authority to regulate: *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 (S.C.C.), at para. 15. Where the issue is conflict, this is more akin to the Superior Court of Justice's ability to quash a by-law for illegality under s. 273(1) of the *Municipal Act*, and therefore the standard of review is correctness: *Friends of Lansdowne Inc. v. Ottawa (City)*, 2012 ONCA 273, 110 O.R. (3d) 1 (Ont. C.A.), at para. 14.

21 Conversely, if the by-laws are not in conflict with a provincial legislative instrument, the secondary issue of whether the Municipality's permitting criteria was complied with concerns an exercise of the Municipality's discretion on a question that is within its jurisdiction. It must be reviewed on a deferential standard of reasonableness: *Catalyst Paper*, at para. 15; *Friends of Lansdowne*, at para. 15.

Positions of the parties

22 East Durham Wind argues that its REA is a provincial legislative "instrument" under the meaning of the term in s. 14(1) of the *Municipal Act*. The purpose of the REA is to authorize East Durham Wind to build a 14 turbine wind farm, mostly on private lands, in the Municipality of West Grey. It is necessary for East Durham Wind to acquire entrance permits and oversize/overweight haulage permits in order to construct its project and yet the design of the by-laws prevents East Durham Wind from obtaining those permits. East Durham Wind says this puts the by-laws in direct conflict with the REA and, accordingly, the by-laws must be inoperative to the

extent of the conflict under s. 14(1), citing *Suncor Energy Products Inc. v. Plympton-Wyoming (Town)*, 2014 ONSC 2934 (Ont. S.C.J.). Moreover, the permitting by-laws are in conflict generally with the regime for REAs established under the *Environmental Protection Act*, R.S.O. 1990, c. E.19 ["*EPA*"]. Alternatively, East Durham Wind submits that the Municipality has acted in bad faith in enacting and interpreting its by-laws, or in exercising its discretion when considering East Durham Wind's approval applications.

23 The Municipality makes a preliminary argument that East Durham Wind's requested relief is not available on judicial review. It notes that s. 14 of the *Municipal Act* only applies to by-laws, not policies, and therefore could not apply to its entrance permit policy which formerly governed the issuance of entrance permits. Even if s. 14 applies to both the new entrance permit by-law and the oversize/overweight haulage permit by-law, the remedy requested by East Durham Wind — a declaration of the invalidity of the by-laws — is not available on judicial review. The only remedy available to East Durham Wind is *mandamus* to order the granting of the permits, and this is not available because the issuance of the permits is discretionary.

24 Alternatively, the Municipality argues that its authority to both control entrances from private land onto public highways in its jurisdiction and to permit the travel of oversize and/or overweight vehicles and loads on its roads is unfettered. The permitting by-laws are validly enacted within the Municipality's powers and do not conflict with East Durham Wind's REA or the *EPA* generally because:

- They relate only to the use of municipal, not private property.
- They were enacted long before East Durham Wind's project took shape and were not designed to thwart wind turbines. (In the case of entrance permits, these were of course controlled by the entrance permit policy prior to the recent enactment of the new entrance permit by-law).
- They have no specific application to wind turbines.

25 Moreover, East Durham Wind has not shown positively that it cannot construct the project without the permits. East Durham Wind has failed to show that materials could not enter the private lands by way of existing entrances (obviating the need of entrance permits) or that materials could not be broken into smaller loads and taken to the private lands separately (obviating the need for oversize/overweight haulage permits).

Analysis

26 We do not accept the Municipality's submission noted in paragraph 23 above. First, under s. 5(3) of the *Municipal Act* all powers of a municipality must be exercised by by-law. If entrance permitting powers were being exercised merely on the basis of a policy, without a

foundational by-law, those powers were exercised without lawful authority. Second, to quote from Brown and Evans, *Judicial Review of Administrative Action in Canada*, vol. 3 loose-leaf (Toronto: Canvasback Publishing, updated December 2013) at 15:32 - 83:

> Like other forms of administrative legislation, a Rule, policy, guideline, letter of understanding, manual, or directive will be invalid if it is inconsistent with or in conflict with a statutory provision... whether or not it imposes duties enforceable in the courts.
>
> [emphasis added]

The entrance permit policy pre-dating the by-law enacted February 17, 2014 can be found invalid on this basic principle of administrative law, even if a policy is not subject to the specific wording of s. 14 of the *Municipal Act*.

27 The test for conflict between a municipal by-law and provincial legislative instruments is set out in section 14 of the *Municipal Act*:

> 14. (1) A by-law is without effect to the extent of any conflict with,
>
> . . .
>
> (b) an instrument of a legislative nature, including an order, licence or approval, made or issued under a provincial or federal Act or regulation.
>
> (2) Without restricting the generality of subsection (1), there is a conflict between a by-law of a municipality and an Act, regulation or instrument described in that subsection if the by-law frustrates the purpose of the Act, regulation or instrument.

28 There is no question that the REA in this case is "an instrument of a legislative nature" within the meaning of s. 14(1) of the *Municipal Act*.

29 We do not accept the Municipality's submission that the by-laws are immune from a challenge on the basis that they only pertain to municipal property, not private property, or that its discretion over its own property is unfettered. Its powers can only be exercised by by-law. The test is whether the permitting by-laws frustrate the purpose of the REA, regardless of how. A municipality's general authority to regulate its own property under sections 27 and 35 of the *Municipal Act* does not trump the specific restrictions in s. 14(2) of that Act.

30 The test for conflict prescribed in s. 14 mirrors the two-pronged test used for determining whether conflict exists between federal and provincial laws: *Croplife Canada v. Toronto (City)* (2005), 75 O.R. (3d) 357 (Ont. C.A.), at para. 63. A by-law can be *ultra vires* for (1) operational conflict, or (2) frustration of the purpose of a provincial legislative instrument.

31 Operational conflict is determined according the impossibility of dual compliance test, which is met where compliance with the municipal by-law makes it impossible to simultaneously comply with the provincial legislative instrument: *Croplife Canada*, at para. 60. While East Durham Wind argues that this prong of the conflict test, codified in s. 14(1), is met, we find that the REA does not impose standards on entrances or the sizes and weights of trucks/loads, and therefore there can be no conflict of an operational nature between the REA and the by-laws. Nor is there operational conflict between the by-laws and the *GEA*. While the *GEA* amended the *Planning Act*, R.S.O. 1990, c. P.13, to exempt renewable energy projects from many municipal controls, including zoning by-laws, the *GEA* did not deal with the sort of permitting by-laws at issue here.

32 This focuses the analysis on the second prong — whether the by-laws frustrate the purpose of the REA, as a provincial legislative instrument. Determining whether the purpose of the REA is frustrated by the by-laws is, fundamentally, an interpretive exercise. The Supreme Court of Canada recently described this exercise in *Laferrière c. Québec (Juge de la Cour du Québec)*, 2010 SCC 39, [2010] 2 S.C.R. 536 (S.C.C.) ["*COPA*"], at para. 66. In that case the issue was whether provincial legislation governing the uses of agricultural land frustrated the purpose of the federal *Aeronautics Act*, R.S.C. 1985, c. A-2, thereby invoking the doctrine of interjurisdictional immunity. While the interjurisdictional immunity doctrine has no place in the analysis of conflict between municipal by-laws and provincial legislative instruments because municipalities are creatures of statute, the Court's words are nonetheless helpful in outlining the analysis on the issue of frustration:

> The question, therefore, is whether the provincial legislation is incompatible with the *purpose* of the federal legislation. To determine whether the impugned legislation frustrates a federal purpose, it is necessary to consider the regulatory framework that governs the decision to establish an aerodrome. The party seeking to invoke the doctrine of federal paramountcy bears the burden of proof. That party must prove that the impugned legislation frustrates the purpose of a federal enactment. To do so, it must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose. The standard for invalidating provincial legislation on the basis of frustration of federal purpose is high; permissive federal legislation, without more, will not establish that a federal purpose is frustrated when provincial legislation restricts the scope of the federal permission. [Citations omitted]

33 Here, East Durham Wind must establish the purpose of the legislative instrument (the REA) and then prove that the permitting by-laws are incompatible with this purpose. In *COPA* the Supreme Court noted that the standard for invalidating provincial legislation on the basis of frustration of federal purpose is high where federal legislation is permissive in a general sense. Similarly, the Ontario Court of Appeal has directed that courts should not "struggle to create a conflict where none exists" between a municipal by-law and provincial legislative instrument:

Brantford (City) Public Utilities Commission v. Brantford (City) (1998), 36 O.R. (3d) 419 (Ont. C.A.). Rather, they should require a "clear demonstration" of the by-law's invalidity: *Friends of Lansdowne*, at para. 14.

34 What is the purpose of East Durham Wind's REA? Answering this question requires consideration of the regulatory framework created by the *Green Energy Act* that governs the issuances of REAs, as well as consideration of the REA itself.

35 The introduction and key features of the *GEA* were summarized in *Suncor* by Justice Garson, at paras. 5-7 and 10-13:

> [5] In 2009, Ontario enacted the *Green Energy and Green Economy Act*, 2009, S.O. 2009 C.12 ("GEGEA"), which amended several acts including the *EPA*. The GEGEA encouraged the development of renewable energy and generally removed barriers for renewable energy projects within the province. Three important steps in this regard were:
>
> > 1. The creation of a feed-in tariff program ("FIT") to procure energy from renewable sources like wind farms.
> >
> > 2. The creation of the Renewable Energy Approval ("REA") process as prescribed in O. Reg. 359/09 made pursuant to the *EPA* and administered by the Ministry of the Environment ("MOE").
> >
> > 3. The placing of restrictions on municipal authority under the *Planning Act* and the *Municipal Act* when such projects are at issue.
>
> [6] Section 47.3 of the *EPA* mandates that an REA is required prior to any construction, installation, use, operation, or changing of the wind facility.
>
> [7] O. Reg. 359/09 sets out the requirements of the REA process. In short, it requires that proponents undertake detailed environmental studies and prepare corresponding technical reports that are prescribed in the regulation for review and approval by appropriate provincial ministries prior to a complete REA application package being submitted to a "Director" as appointed by the MOE. It includes requirements for consultation with the public and local authorities and posting of applications on the Environmental Registry website. It provides for public input prior to a decision by the Director.
>
> . . .
>
> [10] Under ss. 47.4 and 47.5 of the *EPA*, the Director makes the final call on the issuance and/or terms of an REA, having regard to "public interest".
>
> [11] Once issued, an REA may be appealed to the Environmental Review Tribunal by any person, resident in Ontario, on grounds that engaging the project approved by the REA will

> cause serious harm to human health, or serious and irreversible harm to plant life, animal life, or the natural environment. A further appeal can then be taken to the Divisional Court or the Minister of the Environment.
>
> [12] If there is a conflict between any provision of the *EPA* or its regulations and any other Act or regulation, s. 179 of the *EPA* sets out that its provisions or regulations prevail.
>
> [13] Normally, zoning by-laws may be passed by the councils of local municipalities under the provisions of Part V of the *Planning Act*. Those powers include controls on the use of land and on the erection of structures. However, s. 62.0.2(6) of the *Planning Act* specifically provides that a by-law passed under Part V does not apply to a renewable energy undertaking, which includes a renewable energy project and a renewable energy generation facility.

36 In *Hanna v. Ontario (Attorney General)*, 2011 ONSC 609, 105 O.R. (3d) 111 (Ont. Div. Ct.), this Court described, at para. 27, the *GEA*'s "main purpose" as streamlining the process for developing green energy projects:

> The Government of Ontario has a long-standing policy aimed at the reduction of annual greenhouse gas emissions for the purpose of protecting the environment and the health of the general public. One initiative is to work towards replacement of coal-fired electricity generation by increasing electricity generation capacity from renewable energy sources such as industrial wind turbines. The policy development process that began in 2003 culminated in the enactment of the Green Energy Act, 2009, S.O. 2009, c. 12, Sch. A ("GEA") on May 14, 2009. The main purpose of the GEA is to streamline the process for developing green energy projects, including wind facilities. The GEA did this by amending the EPA to add Part V.0.1, which deals with renewable energy. The GEA amended the EPA to establish processes for the approval of renewable energy projects, such as wind turbines, and the authorization of regulations governing those projects.

37 We find that the purpose of the *GEA* regime as a whole is to encourage and facilitate the development of renewable energy projects in Ontario, including wind energy projects. The *GEA* provides a complete regime for carrying out the government's policy in this regard. It features an economic incentive for project developers (the FIT program); a comprehensive approval process to scrutinize the potential effects of each project on the health of humans, plants and animals and to identify any conditions that might be necessary to account for local conditions (the REA); and an appeal process for REAs that utilizes a specialized tribunal (the ERT) and the oversight of the courts on questions of law. To maintain this streamlined system the ability of municipalities to restrict renewable energy development through various powers under the *Planning Act* and the *Municipal Act* has been curtailed.

38 The purpose of East Durham Wind's REA in particular is to authorize "the construction, installation, operation, use and retiring" of its 14 turbine wind energy project on lands in the

Municipality of West Grey. In other words, the purpose of the REA is to authorize East Durham Wind to build its particular wind energy project, which will contribute to the overall policy goals underlying the *GEA* regime. The project application went through the streamlined process described above and a REA was granted by the Director, having regard to the "public interest." The REA itself contains 20 pages of detailed terms and conditions, including three dealing with "Traffic Management Planning" that require East Durham Wind to create a Traffic Management Plan and to make reasonable efforts to reach a "Road Users Agreement" with the Municipality and Grey County based on this plan. As noted earlier, the efforts between East Durham Wind and the Municipality to reach such an agreement have proved fruitless.

39 We do not accept the Municipality's submission, noted in paragraph 25 above, that East Durham Wind has not shown positively that the permits are required to construct the project. In its letter of November 21, 2013 the Municipality acknowledged that "Council understood that the proposed entrances were required to facilitate construction (initially) and then ongoing maintenance of the Industrial Wind Turbines." It seems clear from the record before us that the necessity of the entrance permits and oversize/overweight haulage permits have never been an issue.

40 Based on our interpretation of the purpose of East Durham Wind's REA we find the permitting by-laws do prevent the project — which has been duly authorized by the province under a regulatory regime designed to encourage and facilitate the building of renewable energy projects in Ontario — from being built. Accordingly, we find that the permitting by-laws frustrate the purpose of East Durham Wind's REA and must be held inoperable, but only to the extent of their conflict with East Durham Wind's REA.

41 We accept, based on the record before us, that East Durham Wind requires entrances connecting public highways to access roads located on private lands in order to construct the project. The Municipality argues that, even if East Durham Wind cannot meet the exceptions for "additional entrances" under the new by-law, its application to this Court should be dismissed because it has not applied to widen existing entrances on the private lands it requires access to. These existing entrances, however, are designed for existing residential or agricultural uses, not to efficiently connect trucks carrying heavy construction equipment with the project sites. Equally, we accept that during construction oversize/overweight vehicles and/or loads will need to travel on public roads in order to deliver large materials necessary for the project's construction and ongoing operation. While two of the hauls proposed by East Durham Wind will not engage the prohibition on Exceptional Move Vehicles, there is no reason to believe the materials required to construct the project can be delivered other than via truck over public highways. These two key aspects of the project cannot be accommodated under the permitting by-laws.

42 The Municipality's position when East Durham Wind first applied for entrance permits was that the project amounted to an industrial use that was not contemplated by the permitting

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scheme. The new entrance permit by-law does no better. Specifically, the by-law classifies any new entrance on a lot with existing entrances as an "additional entrance" (defined as "an Entrance which would increase the number of Entrances to a lot and which Entrance is not a New Entrance") and does not authorize the Municipality to permit an additional entrance unless it:

- provides access to a portion of the lot separated by a "physical feature such as a cliff, steep slope, ravine, water course, etc."
- is approved by the Municipality under the *Planning Act*
- is for residential use, or
- is for agricultural use.

None of the entrances required to construct East Durham Wind's project meet these criteria, nor could they.

43 As for the oversize/overweight permitting by-law it simply prohibits the travel of "Exceptional Move Vehicles" over a certain size and weight. Most of the hauls required for East Durham Wind to construct its project would be caught by this prohibition and it therefore frustrates the purpose of East Durham Wind's REA.

44 Despite this prohibition, the record shows the Municipality nevertheless believes it has authority to issue permits for the proposed hauls. The real issue has not been the prohibition but, rather, the parties' inability to successfully negotiate conditions to the permits, including the amount of financial security necessary to sufficiently protect public roads. The Municipality's request for reasonable conditions, including financial security, is within its authority and at least implicitly included in the terms and conditions of the REA. We note, however, that the Municipality's concerns about the size and nature of any agreement on security may be overblown given East Durham Wind's commitment to providing a significant amount of security and its ultimate liability for any damage caused under s. 110(5) of the *HTA*.

45 Finally, we reject East Durham Wind's argument that the Municipality has acted in bad faith. The Municipality is a democratic body accountable to its constituents. It has a broad legislative discretion to enact by-laws governing issues that regulate daily life and the built infrastructure within its jurisdiction: *Catalyst Paper*, at para. 19. We agree with the observation of Justice Garson in *Suncor*, at para. 128, that Council's call for a moratorium on wind energy projects in Ontario and its declaration that it is an "unwilling host" for such projects are not acts that, in and of themselves, support a finding of bad faith. Moreover, a finding of bad faith is not required to ground our conclusion that the by-laws frustrate the purpose of East Durham Wind's REA.

46 Given our conclusion on the issue of conflict, it is not necessary to deal with the issue of whether the Municipality's permitting criteria was actually complied with by East Durham Wind its various applications.

Conclusion

47 We find both by-laws inoperative to the extent that they frustrate the purpose of East Durham Wind's REA, which is to authorize the building of the project in furtherance of the province's goal of increasing renewable energy generation. The entrance permit by-law cannot *de facto* prohibit the access required to build renewable energy projects on private lands in the Municipality's jurisdiction. Similarly, the oversize/overweight haulage permit by-law cannot *de facto* prohibit the hauls necessary to get construction materials to these private lands via the public highways. As noted, this conclusion does not affect the parties' abilities to engage in good faith negotiations around reasonable conditions, including sufficient financial security, regarding East Durham Wind's proposed use of the public highways.

48 The decisions of the Municipality rejecting two approval applications of East Durham Wind dated January 23, 2014 are quashed. The Municipality is ordered to reconsider those applications, or fresh applications, in light of the direction provided in these reasons. In our view, the entrance permit by-law in effect on January 23, 2014 is the governing by-law, unless the municipality is considering a fresh application by the applicant, in which case the new by-law passed February 17, 2014 would govern.

49 While the Municipality has not acted in bad faith up to this point, the failure to reasonably consider and determine any future applications (or resubmitted applications) by East Durham Wind for entrance permits or oversize/overweight haulage permits according to by-laws that do not frustrate the purpose of East Durham Wind's REA could be grounds for a finding of bad faith. In order not to continue to frustrate the applicants REA and in order to comply with the decision of this court we expect that the Municipality will see fit to interpret or modify the relevant by-laws which impede the issuance of permits as expeditiously as possible as since the applicant is subject to monetary penalties for not proceeding with the project.

50 The Municipality must discharge its public duties in accordance with the intent and purpose of the *Municipal Act*, and acting without a rational appreciation of that intent and purpose, or for an improper purpose, will mean it acts in bad faith: *Roncarelli c. Duplessis*, [1959] S.C.R. 121 (S.C.C.) at p. 143. The *Municipal Act* does not allow for conflict between municipal by-laws and provincial legislative instruments. Thus, any attempt to determine future permit applications by East Durham Wind according to unchanged versions of the permitting by-laws, which have been found to frustrate its REA, would be in bad faith. Additionally, any alteration of the permitting by-laws that amounts to an attempt to circumvent the effect of this Court's order would also constitute bad faith: *Chippewas of Saugeen First Nation v. Keppel (Township)* (1994), 117 D.L.R. (4th) 419

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(Ont. Gen. Div.), aff'd (1998), 164 D.L.R. (4th) 511 (Ont. C.A.); *Markham v. Sandwich South (Township)* (1998), 160 D.L.R. (4th) 497 (Ont. C.A.).

51 The parties have agreed that the successful party in this application should be granted $15,000 in costs. Accordingly, the Municipality shall pay $15,000 in costs to East Durham Wind within 30 days.

Application granted.

1994 CarswellOnt 1015
Ontario Court of Justice (General Division) [Divisional Court]

E.A. Manning Ltd. v. Ontario (Securities Commission)

1994 CarswellOnt 1015, [1994] O.J. No. 1026, 17 O.S.C.B. 2339, 18 O.R. (3d) 97, 24 Admin. L.R. (2d) 283, 3 C.C.L.S. 221, 47 A.C.W.S. (3d) 896, 72 O.A.C. 34

E.A. MANNING LIMITED, JUDITH MARCELLA MANNING, TIMOTHY EDWARD MANNING and WILLIAM DOUGLAS ELIK v. ONTARIO SECURITIES COMMISSION; APPLICATION UNDER THE JUDICIAL REVIEW PROCEDURE ACT, R.S.O. 1990, c. J.1

Montgomery, Dunnet and Howden JJ.

Heard: April 19 and 20, 1994
Judgment: May 13, 1994
Docket: Doc. 72/94

Counsel: *Bryan Finlay, Q.C.*, and *J. Gregory Richards*, for applicants.
Dennis R. O'Connor, Q.C., *James D.G. Douglas* and *Benjamin T. Glustein*, for respondent.

Subject: Securities; Public; Corporate and Commercial

Application for order prohibiting Ontario Securities Commission from proceeding with hearings.

The judgment of the court was delivered by *Montgomery J.*:

1 The applicants seeks prohibition to stop the Ontario Securities Commission ("OSC") from proceeding with two hearings that relate to allegedly improper sales practices by the applicants. Relief is sought on the ground of bias and in particular on the basis that the OSC has allegedly prejudged the case against the applicants.

The Issues

2 (1) Actual bias;

3 (2) Reasonable apprehension of bias;

4 (3) The doctrine of necessity.

5 These issues are to be decided under a legislative scheme which gives the OSC the following roles: investigator, prosecutor, policy maker and adjudicator.

6 The OSC is defined by s. 2 of the *Securities Act*, R.S.O. 1990, c. S.5 (the "Act") as consisting of a Chair and between 8 and 10 members, referred to as Commissioners, appointed by the Lieutenant Governor in Council. A quorum is two members. By subs. 3(3), where a Commissioner has, as part of his or her duties in the investigative and enforcement roles of the Commission, ordered proceedings to be instituted, that Commissioner may not participate in the resulting hearing. This is an important and apparently the only express statutory guide as to how the OSC is to keep its adjudicative role separate from its other duties. The issues in this case deal with the standard and application of the common law duty of a tribunal, with several conflicting functions assigned to its members and its staff, to act fairly, without bias or conduct indicating bias, when it comes to its adjudicative role.

The Facts

7 On December 15, 1993, the OSC issued a notice of hearing (the "first notice of hearing"), pursuant to the Act, to consider:

> (a) whether under s. 27 of the Act, it is in the public interest that the registrations of the applicants E.A. Manning Limited ("Manning Limited"), Judith Marcella Manning ("Judith Manning"), Timothy Edward Manning ("Ted Manning") and William Douglas Elik ("Elik") and certain other employees or officers of Manning Limited be suspended, cancelled, restricted or made subject to conditions;
>
> (b) whether under s. 128 of the Act, it is in the public interest to order that any or all of the exemptions contained in ss. 35, 72, 73 and 93 of the Act no longer apply to the said applicants and others.

First Notice of Hearing

8 With respect to the applicants named in the first notice of hearing, the staff of the OSC allege that they engaged in conduct involving trading in the securities of BelTeco Holdings Inc. ("BelTeco") and Torvalon Corporation ("Torvalon") which was abusive of the capital markets and contrary to the public interest.

9 In particular, the staff of the OSC allege that the applicants named in the first notice of hearing conducted trades in the securities of BelTeco and Torvalon contrary to the public interest by:

> (a) failing to adequately advise purchasers of the securities of BelTeco and Torvalon that Manning Limited was selling the securities as principal, not agent, and failing to disclose

to purchasers of the securities that mark-ups were included in the purchase price of those securities;

(b) permitting, encouraging or requiring salespersons of Manning Limited to approach customers with no bona fide independent verification of the nature of the businesses and the financial condition of BelTeco or Torvalon;

(c) failing to disclose to purchasers of the securities of BelTeco and Torvalon, inter alia, the limited marketability of the securities, and the nature of the businesses and the financial condition of BelTeco and Torvalon;

(d) using high pressure sales tactics to induce persons to purchase the securities of BelTeco and Torvalon;

(e) failing to comply with their suitability and "know your client" obligations, contrary to s. 114 of Regulation 1015, R.R.O. 1990;

(f) failing to make any bona fide independent effort to verify the nature of the businesses and the financial condition of BelTeco and Torvalon;

(g) giving undertakings to clients concerning the future value of the securities of BelTeco and Torvalon with the intention of effecting a trade in such securities;

(h) executing orders on behalf of clients in the securities of BelTeco and Torvalon without prior authorization;

(i) failing to execute, or refusing to accept, sell orders by clients in respect of the securities of BelTeco and Torvalon;

(j) failing to advise potential purchasers of the securities of BelTeco and Torvalon that investment in those securities was highly speculative and involved a significant risk;

(k) failing to advise clients of the commissions received by the salesperson in respect of the securities of BelTeco and Torvalon; and

(l) failing to deal fairly, honestly and in good faith with their clients in respect of the securities of BelTeco and Torvalon.

10 In addition, the staff of the OSC allege in the first notice of hearing that Judith Manning and Manning Limited failed to properly supervise the activities of Ted Manning and Elik, and the trading of Manning Limited in the securities of BelTeco and Torvalon.

11 The proceeding arising from the first notice of hearing is scheduled to commence on Monday, September 19, 1994.

Second Notice of Hearing

12 On February 1, 1994, the staff of the OSC informed Manning Limited that the staff would be attending before the OSC on February 2, 1994 at 2:00 p.m. to seek an order under s. 27(2) of the Act, for an interim suspension of the registration of Manning Limited.

13 On February 2, 1994, a panel of two Commissioners, Vice-chair Smart and Commissioner Blain, dismissed the s. 27(2) application and held that the allegations grounding the application should be considered at a full hearing under s. 27(1) of the Act.

14 Consequently, on February 4, 1994, the OSC issued a notice of hearing (the "second notice of hearing") to consider:

> (a) whether under s. 27(1) of the Act, it is in the public interest that the registrations of all of the applicants be suspended, cancelled, restricted or made subject to conditions; and
>
> (b) whether under s. 37(1) of the Act, it is in the public interest to suspend, cancel, restrict or impose terms and conditions upon the right of the applicants to call at or telephone to any residence in Ontario for the purpose of trading in any security or in any class of securities.

15 The staff of the OSC allege that from January 4, 1994, all of the present applicants, and from September 1992, the applicant Elik, have failed and continue to fail to deal fairly with and act in the best interests of clients during telephone calls made to induce individuals to purchase securities from Manning Limited, and in particular that the applicants:

> (a) failed to adequately disclose that Manning Limited was selling securities to its clients at markups and that Manning Limited's salespersons were receiving commissions at 17-1/2% on each client's purchase;
>
> (b) failed to disclose that Manning Limited salespersons would lose their entitlement to commissions if clients sold securities within a certain period of time;
>
> (c) used high pressure sales tactics;
>
> (d) resisted or refused to sell securities when so instructed by their clients;
>
> (e) failed to adequately advise about the risks associated with purchases and in particular that the purchases were highly speculative in nature and could result in significant loss of invested capital;
>
> (f) failed to comply with their "know your client" obligations;
>
> (g) misrepresented the commissions received by salespersons;

(h) gave oral undertakings relating to the future value or price of the securities sold or attempted to be sold and/or made unjustifiable statements with respect to the anticipated price of the securities sold or attempted to be sold;

(i) made unjustifiable, misleading and/or false statements with respect to companies whose securities were being sold or attempted to be sold;

(j) made representations based upon purported knowledge of inside information;

(k) misrepresented the results of previous securities recommendations; and/or

(l) instructed Manning Limited's salespersons to use the sale practices set out above.

16 The staff also allege that Manning Limited, Judith Manning and Mary Martha Fritz failed to adequately supervise salespersons of Manning Limited.

17 The proceeding arising from the second notice of hearing is scheduled to commence on Monday, June 13, 1994.

Background to Application

18 Policy 1.10 was adopted by the OSC on March 25, 1993. Its purpose was to address unfair or abusive sales practices that the OSC believed some securities dealers employed from time to time in connection with the marketing and sale of low cost, highly speculative securities ("penny stocks"). Policy 1.10 outlined certain business practices which the OSC regarded appropriate for securities dealers to adopt in connection with the marketing and sale of penny stocks. These practices were considered to be consistent with the duty to deal fairly, honestly, and in good faith with the securities dealers' customers.

19 Policy 1.10 purports to provide against any prejudgment of whether conduct by a particular securities dealer would constitute a breach of s. 27(1) of the Act. Page 2 of Policy 1.10 provided that:

> Subsection 27(1) of the Act provides that the Commission, after giving a registrant an opportunity to be heard, may suspend, cancel, restrict or impose terms and conditions upon the registration of or reprimand a registrant where in its opinion such action is in the public interest. In determining whether any failure to comply with this Policy constitutes grounds for the Commission taking action under subsection 27(1) of the Act or any other section of the Act, the Commission will continue to consider the particular facts and circumstances of each case.

20 The purpose of Policy 1.10 was to serve as a guide to assist securities dealers and their employees in satisfying their obligations under the Act in connection with the marketing and sale of penny stocks.

Investigation

21 I accept the fact that the Commissioners did not participate in the investigation of the alleged misconduct of the applicants. Investigations are conducted by OSC staff who make up the Enforcement Branch of the OSC. If an investigation discloses an apparent breach of the Act or conduct of a market participant contrary to the public interest, the Director of Enforcement, in consultation with the Executive Director of the OSC, considers whether it is appropriate to call a hearing before the Commissioners.

22 The investigation involving the shares of BelTeco and Torvalon arose out of two separate reports from the Toronto Stock Exchange. Neither of these reports was forwarded to nor reviewed by the Commissioners.

The Impugned Conduct

23 The applicants contend that the OSC has already made up its mind on the issues raised for hearings. Further, they say the Commissioners prejudged them before issuing Policy 1.10 and this is evidenced by the fact that the policy, as noted by the OSC in their factum of the *Ainsley*, infra, case, was issued in response "to the abusive and unfair sales practices that it had found to exist".

24 In *Ainsley Financial Corp. v. Ontario (Securities Commission)* (1993), 106 D.L.R. (4th) 507 [1 C.C.L.S. 1] (Ont. Gen. Div. [Commercial List]), Blair J. declared Policy 1.10 to be invalid as the Policy exceeded the OSC's statutory jurisdiction. At p. 509, the Court said:

> O.S.C. Policy Statement 1.10, with which the commission expects securities dealers to comply, contains very detailed and embracive measures regarding the trading of speculative penny stocks. Trading in such stocks comprises the predominant portion of the plaintiffs' business. They say that Policy 1.10 will drive them out of business and is designed to do just that.

And at pp. 511 to 513, Blair J. described in some detail its purpose and its very specific requirements:

> **Policy 1.10**
>
> Policy Statement 1.10, entitled "Marketing and Sale of Penny Stocks", was issued in its final form on March 25, 1993, to come into effect on June 1, 1993. The commission has agreed to hold the policy in abeyance pending the release of this decision.

Purpose of the policy

Policy 1.10 was developed by the commission as result of a growing concern over the employment of high pressure and unfair sales practices by securities dealers on a widespread basis in connection with the marketing and trading of low cost, highly speculative penny stocks in the over-the-counter market. The policy is designed to redress the abuses perceived by the commission in this respect.

The purpose of the policy is stated at some length in the body of the text. I set out that statement of purpose in full, because it is of some importance. The policy asserts:

> **Purpose of this Policy**
>
> The Act and the regulations under the Act (the 'Regulations' require, among other things, that registrants 'know their clients' and deal 'fairly, honestly and in good faith' with their customers and clients. The Commission is concerned that securities dealers engaged in unfair sales practices like those mentioned above are not complying with these obligations and are recommending investments in penny stocks that are highly speculative and often are not appropriate for an investor given his/her personal circumstances, investment experience, investment objectives and financial means. The Commission is also concerned that, as a result of the sales practices employed, investors often purchase penny stocks unaware of the risks involved and without adequate consideration being given to the suitability of the purchase. Losses of a significant portion of an investment in penny stocks are common. The Commission has concluded that these sales practices have a significant adverse impact on the fairness and integrity of the capital markets in Ontario.
>
> The Commission is issuing this Policy as a guide to identify what the Commission believes are appropriate business practices to assist securities dealers and their employees in satisfying their obligations under the Act in connection with the marketing and sale of penny stocks. This Policy is intended to inform interested parties that the Commission will be guided by this Policy in exercising its public interest jurisdiction under subsection 27(1) of the Act and its general public interest jurisdiction to protect investors and promote and maintain fair, equitable and efficient capital markets in Ontario.
>
> This Commission believes that the business practices set out in this Policy should be adopted by securities dealers when selling penny stocks. The Commission believes that such practices are in the public interest to promote and maintain fair, equitable and efficient capital markets in Ontario and to protect investors from high pressure and other unfair sales practices employed in the marketing and sale of penny stocks and that these business practices are consistent with the duty of securities dealers and their officers,

> partners, salespersons and directors to deal fairly, honestly and in good faith with their customers and clients. Subsection 27(1) of the Act provides that the Commission, after giving a registrant an opportunity to be heard, may suspend, cancel, restrict or impose terms and conditions upon the registration of or reprimand a registrant where in its opinion such action is in the public interest. In determining whether any failure to comply with this Policy constitutes grounds for the Commission taking action under subsection 27(1) of the Act or any other section of the Act, the Commission will continue to consider the particular facts and circumstances of each case.
>
> This policy is not intended to restrict unduly legitimate investment opportunities in the penny stock market or capital formation for small businesses but merely to regulate the high pressure and other unfair sales practices often employed in the marketing and sale of penny stocks. The Commission believes that this Policy will carry out its purposes without unduly inhibiting legitimate investment opportunities in the penny stock market or capital formation for small businesses.

In a section entitled "Appropriate Business Practices", the policy states:

> The Commission has concluded that it is in the public interest that the business practices identified in this Policy be adopted by securities dealers in connection with the marketing and sale of penny stocks.

The operative portions of Policy 1.10 call for the following, in furtherance of this conclusion and the objectives of the policy:

> (1) *the furnishing of a risk disclosure statement* to the client — in Form 1, attached to the Policy — together with a sufficient explanation of its contents to the client that the client understands he or she is purchasing a penny stock and is aware of and willing to assume the risks associated with such an investment; and before any order to purchase a penny stock can be accepted,
>
> (2) *the provision of a suitability statement in Form 2* (also attached to the policy) to the client, completed and signed by the salesperson, together with an explanation of its contents; and
>
> (3) *the return of the suitability statement, signed by the client*, to the securities dealer; and thereafter
>
> (4) *an agreement between the client and the securities dealer* with respect to the price of the penny stock to be purchased.

In addition, Policy 1.10 provides:

(5) that the securities dealer is to disclose to the client in advance of the trade that it is acting as principal or as agent for another securities dealer acting as principal on the transaction where that is so; *and*

(6) that the securities dealer is to disclose "the nature and amount of all compensation payable to the securities dealer, its salespersons, employees, agents and associates or any other person", including mark-ups, bonuses and commissions.

25 The OSC issued the Proposed Policy in draft form on August 11, 1992. In the "Introduction", the following appears:

1. *General*: The Ontario Securities Commission (the "Commission") is concerned about *the widespread use of high pressure and other unfair sales practices being employed* in connection with the marketing and sale of low cost, highly speculative securities commonly referred to as "penny stocks". These sales practices include:

(a) repeated unsolicited phone calls to potential customers at their homes and/or places of business and other high pressure tactics designed to encourage purchases of penny stocks;

(b) promises of great returns, including promises that the value or price of a penny stock will increase;

(c) representations that the dealer is in possession of favourable inside information;

(d) failing to advise customers that the dealer is selling the penny stocks as principal and is receiving a significant mark-up;

(e) failing to make necessary inquiries of customers to determine their personal circumstances, including their investment objectives, investment experience and financial resources, to enable the dealer to determine whether or not penny stocks are a suitable investment;

(f) failing to adequately advise investors of the risks associated with investing in penny stocks; and

(g) failing to advise customers of the compensation/commissions being paid to the salesperson.

These sales practices *are being engaged in by many securities dealers* and their salesperson engaged in the business of selling penny stocks and *who are not members of the Toronto Stock Exchange (the "TSE") or the Investment Dealers Association (the "IDA")*. The penny stocks involved do not generally trade on a stock exchange, but rather trade in the over-the-counter market in Ontario. The issuers of these securities often do not have significant tangible assets.

[Emphasis added.]

26 It is not disputed that there were, at the time the Policy was formulated, only some ten securities dealers trading primarily in highly speculative penny stocks. The applicant Manning was one of these dealers. Reliance is placed upon the underlined words to demonstrate that the OSC *had concluded* the ten or so were engaging in improper activity and, therefore, these comments are indicative of a closed mind.

27 On March 25, 1993, the *OSC* issued its Final Policy Statement 1.10. This document had been considered at many meetings of the Commissioners and was approved by them. The changes from the Proposed Policy are largely cosmetic.

28 As was the case in the Proposed Policy, the Final Policy reflected the OSC's *conclusion* that securities dealers like Manning Limited had engaged and continued to engage in the improper activity described in the Final Policy.

29 The *OSC* said in the "Background" portion of the Final Policy:

> The Ontario Securities Commission (the "Commission") is concerned about *high pressure and other unfair sales practices that are being employed on a widespread basis* in connection with the marketing and sale of low cost, highly speculative securities commonly known as "penny stocks". These sales practices include:
>
> • repeated, unsolicited phone calls to potential clients at their homes and/or places of business and other high pressure tactics designed to encourage purchases of penny stocks;
>
> • assurances of great returns, including assurances that the value or price of a penny stock will increase;
>
> • failing to advise investors adequately of the risks associated with investing in penny stocks;
>
> • failing to explain to clients adequately when the dealer is selling the penny stocks as principal and is receiving a significant mark-up;
>
> • failing to advise clients of the compensation/commission being paid to the salesperson; and
>
> failing to make necessary inquiries of clients to determine their personal circumstances, including their investment objectives, investment experience and financial resources, to enable the dealer to determine whether or not penny stocks are a suitable investment;

> *These sales practices often are conducted as part of a pattern of activity by securities dealers that* are engaged primarily in the business of selling penny stocks. While these Securities Dealers are registrants under the *Securities Act* (Ontario) (the "Act"), they *are not members of The Toronto Stock Exchange (the "TSE) or the Investment Dealers Association (the "IDA")* or any similar recognized self-regulatory organization and, accordingly, are not subject to the compliance, investigation, disciplinary or other rules, regulations, policies and by-laws of such self-regulatory organizations.

[Emphasis added.]

30 Under the heading "Purpose of this Policy", the *OSC* stated:

> The Act and the regulations under the Act (the "Regulations") require, among other things, that registrants "know their clients" and deal "fairly, honestly and in good faith" with their customers and clients. The Commission is concerned that *securities dealers* engaged in unfair sales practices like those mentioned above *are not complying with these obligations* and are recommending investments in penny stocks that are highly speculative and often are not appropriate for an investor given his/her personal circumstances, investment experience, investment objectives and financial means. The Commission is also concerned that, as a result of the sale practices employed, investors often purchase penny stocks unaware of the risks involved and without adequate consideration being given to the suitability of the purchase. Losses of a significant portion of an investment in penny stocks are common. The Commission *has concluded* that these sales practices have a significant adverse impact on the fairness and integrity of the capital markets in Ontario.

[Emphasis added.]

31 On August 18, 1993 the *OSC* issued a News Release in response to the *Ainsley* decision. The News Release stated in part:

> August 18, 1993 (Toronto) — The Ontario Securities Commission announced today that it is consulting with representatives of the Government of Ontario and other Canadian securities regulators, among others, with respect to the recent decision of the Ontario Court of Justice (General Division) in the action commenced by several securities dealers. In its decision, the Court concluded that the Commission does not have the jurisdiction to issue proposed Policy 1.10. *That policy was intended to address the abuses that the Commission believes to exist in the marketing and sale of penny stocks by certain securities dealers*. Among the issues under consideration is the desirability of an appeal of the court decision.
>
> . . . . .

> *The Commission has instructed its staff to continue to monitor penny stock abuses and to initiate any proceedings under the Act that may be available to protect investors from those abuses*.

[Emphasis added.]

32 As a further result of *Ainsley*, on October 7, 1993 the Ontario Minister of Finance announced the formation of a joint Ministry of Finance and OSC Task Force on securities regulation. The mandate of the Task Force was to review and to make recommendations in respect of the legislative framework for the development of securities policy in the Province of Ontario with particular attention to the policy-making role of the OSC.

33 The OSC staff, including the Chair and the other two full-time Commissioners, made a written submission to the Task Force. The submission was conveyed to the Task Force under cover of a December 17, 1993 transmittal letter from the OSC's Chair, Edward J. Waitzer.

34 I see nothing indicative of bias or reasonable apprehension of bias in the 13-page submission. It dealt exclusively with the reasons why the Task Force should recommend that the Legislature confer rule-making powers to the OSC.

35 The seven part-time Commissioners made a separate written submission to the Task Force. Their eleven-page submission is to the same effect as the prior submission and similarly contains no bias or views which would prompt any reasonable apprehension of bias.

36 The conclusions stated by the OSC in Policy 1.10 reflected the findings made in a Staff Report of July 8, 1992 which the Commissioners had before them and relied upon in formulating and approving Policy 1.10. The Staff Report sets out in detail the same allegations of ongoing improper conduct which are now the subject matter of the second notice of hearing. The sort of conclusions made in the Staff Report, which was in turn adopted by the OSC, can be observed in the following passage:

> Based upon our examination of the penny stock industry, we believe that as a result of the unfair sales practices engaged in by broker/dealers in the marketing of penny stocks:
>
> (a) Investors purchase penny stocks unaware of risks that:
>
> (i) there may be no market to sell their penny stocks after the broker/dealer has sold its inventory position; and
>
> (ii) they are likely to lose a significant portion of their investment.
>
> (b) Investors are unaware of the commission and/or mark-up charged by salespersons and broker-dealers;

(c) Investors are pressured into purchasing penny stocks over the phone; and

(d) Broker/dealers do not comply with their know-your-client obligations.

37 As can be seen, the unfair conduct alleged in the second notice of hearing has already been found to exist by the Commissioners. The *conclusions* stated in Policy 1.10 and the *conclusions* stated in the Staff Report, which the OSC expressly adopted in approving Policy 1.10, demonstrate that the subject matter of the hearing has already been decided by the Commissioners.

38 The affidavit of Mr. Gordon, a staff lawyer for the OSC, sufficiently creates the link between the unfair conduct alleged and the applicants. Mr. Gordon's affidavit was just part of the evidence relied upon by the OSC in the *Ainsley* case to support Policy 1.10. The conduct of Manning Limited which Mr. Gordon calls "unfair sales practices" is the same conduct alleged in the second notice of hearing.

39 Having considered all of the evidence filed by the OSC in the *Ainsley* case, the Honourable Mr. Justice R.A. Blair made a finding that the OSC had *concluded* that the plaintiff securities dealers (including Manning Limited) were guilty of various abuses. He said at p. 515:

> With the completion of this review, the commission was satisfied that it had found cogent evidence of abusive and unfair sales practices in the marketing of penny stocks, and in addition, I think it is fair to say, *had concluded that these abuses were centred in the practices of the plaintiff securities dealers*. It set out to remedy the situation for the reasons and in the manner outlined above. [i.e. by implementing Policy 1.10.]

[Emphasis added.]

40 On the material filed before me, it appears that the OSC has already decided that Manning Limited and related parties are guilty of these unfair practices.

41 The first notice of hearing merely goes through substantially the same allegations of improper conduct repeated in the second notice but relates them to the securities of two named companies, BelTeco and Torvalon, after certain dates in 1992 and 1994. These allegations are based on complaints of particular conduct about Manning Limited and other securities dealers which were before the Commissioners when they concluded such conduct was in fact occurring widely and approved Policy 1.10. In addition, on December 22, 1992, copies of the pleadings against the OSC in the *Ainsley* action were distributed to the Commissioners "to assist them in their review of the Draft Policy". In that action, substantial material was filed by the OSC specifically pertaining to complaints and practices now alleged against Manning Limited, its officers and employees and to be dealt with at the upcoming hearings.

42 Even if OSC staff tried to separate their investigative role from the Commissioners' role as adjudicators, the creation and adoption of Policy 1.10 and the additional evidence, including the mass of complaints specifically regarding Manning Limited and others in the staff report and the material led by the OSC in *Ainsley*, lead me to the irresistible conclusion that the roles have become so interwoven that there is a reasonable apprehension of bias against all Commissioners who took office prior to November 1993.

43 In a press interview, the Chair of the OSC, Mr. Waitzer, stated that dealing with penny stock dealers is a "perennial priority". "There will always be marginal players in the securities industry. Our task is to get these players into the self-regulatory system or get them out of the jurisdiction."

44 I conclude that Mr. Waitzer cannot sit on either hearing because of a reasonable apprehension of bias.

The Functions of the OSC

45 As previously noted, the OSC is investigator, prosecutor, policy maker and adjudicator. The 1993 annual report of the OSC to the Minister of Finance states in part:

> **The Mandate of the OSC**
>
> The OSC has administrative responsibility for the *Securities Act*, the *Commodity Futures Act* and the *Deposits Regulation Act*, as well as certain provisions of the *Ontario Business Corporations Act*. Most of the OSC's day-to-day operations relate to the administration and enforcement of the *Securities Act* and the *Commodity Futures Act*.
>
> **The Structure of the OSC**
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> The OSC is a Schedule I regulatory agency of the Government of Ontario. The Minister of Finance answers for the OSC in the Legislature and presents OSC financial estimates as part of the Ministry of Finance's estimates.
>
> **The Commission**
>
> The OSC has two distinct parts. One part is an autonomous statutory tribunal — the Commission — the eleven members of which are appointed by Order-in-Council. At present, there is a full-time Chairman, one full-time Vice-Chair, and nine part-time Commissioners.
>
> . . . . .
>
> The OSC is empowered to grant official recognition to Self-Regulatory Organizations, and has recognized The Toronto Stock Exchange and The Toronto Futures Exchange. SROs, such as the TSE, the TFE and the IDA, impose financial and trading rules on their membres that are enforced through independent audit and compliance checks. The OSC reviews those rules and hears appeals from decisions of the SROs.

. . . . .

The Chairman is by statute the Commission's Chief Executive Officer. The Commission assists in the formulation of policy, sits as an administrative tribunal in hearings, acts as an appeal body from decisions made by the Executive Director and staff, hears appeals from decisions of the TSE and the TFE, and makes recommendations to the government for changes in legislation. Two members constitute a quorum. The Commission holds regular policy meetings, and also convenes in panels for administrative hearings.

The *Office of the Secretary* provides support to the Commission meetings and hearings, receives and co-ordinates the processing of applications to the OSC, publishes the weekly *OSC Bulletin*, coordinates corporate communications, provides library services and coordinates meetings of the CSA. (The CSA is an association of securities administrators from each of the provinces and territories in Canada. It seeks to achieve uniformity in legislation and policies.)

The Staff of the Commission

The other major part of the Commission is an administrative agency composed of more than 230 lawyers, accountants, investigators, managers and support staff. The *Executive Director* is the OSC's Chief Operating and Administrative Officer and is responsible for the day-to-day activities of the seven operating departments of the OSC — the Offices of the Chief Accountant, the General Counsel and the Chief of Compliance, and the Corporate Finance, Capital Markets/International Markets, Enforcement, and Administrative and Systems Services branches. The Executive Director also participates actively in policy development.

The Law

46 In *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, Cory J., speaking for the Court, said at pp. 636 to 637:

The Duty of Boards

All administrative bodies, no matter what their function, owe a duty of fairness to the regulated parties whose interest they must determine. This was recognized in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311. Chief Justice Laskin at p. 325 held:

> ... the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question.

> Although the duty of fairness applies to all administrative bodies, the extent of that duty will depend upon the nature and the function of the particular tribunal. See *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602. The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. It is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.
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> In *Szilard v. Szasz*, [1955] S.C.R. 3, Rand J. found a commercial arbitration was invalid because of bias. He held that the arbitrator did not possess "judicial impartiality" because he had a business relationship with one of the parties to the arbitration. This raised an apprehension of bias that was sufficient to invalidate the proceedings. At p. 7 he wrote:
>
> > Each party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs.

And at pp. 638 to 639:

> It can be seen that there is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members of the board should be such that there could be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard will be much more lenient. In order to disqualify the members a challenging party must establish that there has been a prejudgment of the matter to such an extent that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the legislature.

And further at p. 642:

> During the investigative stage, a wide licence must be given to board members to make public comment. As long as those statements do not indicate a mind so closed that any submissions would be futile, they should not be subject to attack on the basis of bias.

47 Two other important cases must be addressed. *W.D. Latimer Co. v. Bray* [sub nom. *W.D. Latimer Co. v. Ontario (Attorney General)*] (1974), 6 O.R. (2d) 129 (C.A.) established the principle

that evidence of prejudgment, even in the context of the unique statutory scheme established by the *Securities Act*, is a ground for disqualification. However, it recognized that mere knowledge by Commissioners of market conditions or even of grounds for a complaint to be heard by them do not produce any apprehension of bias in the particular circumstances of this tribunal. Dubin J.A. (as he then was) delivered the judgment of the Court. He stated at pp. 140 to 141:

> Where by statute the tribunal is authorized to perform tripartite functions, disqualification must be founded upon some act of the tribunal going beyond the performance of the duties imposed upon it by the enactment pursuant to which the proceedings are conducted. Mere advance information as to the nature of the complaint and the grounds for it are not sufficient to disqualify the tribunal from completing its task. Evidence of prejudgment, however, is a ground for disqualification, unless the statute specifically permits the tribunal to have arrived at a preliminary judgment before conducting an inquiry.
>
> . . . . .
>
> I do not read s. 8 [now s. 27] of the *Securities Act* as permitting a prejudgment of the issues prior to the conduct of the inquiry.

48 The Court concluded on the facts there was no reasonable apprehension of bias.

49 In *Barry v. Alberta (Securities Commission)*, [1989] 1 S.C.R. 301, the Chairman of the Alberta Securities Commission was a member of a panel at a hearing under Alberta's securities legislation. At issue was whether or not there was a reasonable apprehension of bias because the Chair had received a report from the Deputy Director of Enforcement prior to the hearing.

50 In finding that there was no reasonable apprehension of bias on these facts, L'Heureux-Dubé J., delivering the judgment of the Court, relied heavily on the Court of Appeal's decision in *Latimer*. She said at p. 315:

> Dubin J.A. found that the structure of the Act whereby commissioners could be involved in both the investigatory and adjudicatory functions did not, by itself, give rise to a reasonable apprehension of bias.
>
> I am in agreement with this proposition. So long as the Chairman did not act outside of his statutory authority, and so long as there is no evidence to show involvement above and beyond the mere fact of the Chairman's fulfilling his statutory duties, a "reasonable apprehension of bias" affecting the Commission as a whole cannot be said to exist.

51 In the case at hand, the *OSC* did act outside its statutory authority in adopting Policy 1.10. The Commissioners, in effect, sought to legislate. This, as found by *Ainsley*, was ultra vires. In the process of formulating and deciding to issue the mandatory regulation presented by Policy 1.10, the Commissioners in March 1993 closed their minds to the issue of whether securities dealers, including Manning Limited, are guilty of unfair sales practices. This constitutes prejudgment.

52 In the context of the litigation brought by the securities dealers, including the motion for judgment in the *Ainsley* case and the pending appeal, the *OSC* went beyond merely defending itself and its jurisdiction and adopted the role of advocate against them and strenuously sought to demonstrate that Manning Limited and others are guilty of the very conduct which is now the subject of the current notices of hearing.

53 The affidavits filed on behalf of the *OSC* speak loudly in what they fail to address. The affidavit of Mr. Gordon does not say that there was no discussion between the staff and Commissioners about Manning Limited when Policy 1.10 was being prepared. There is no affidavit evidence to say the Commissioners have been canvassed and individually could make an unbiased decision. Further, there is no evidence to show that the 55 complaints about Manning, which were made to OSC staff and made know to the Commissioners in the 1992 report accepted by them, have not tainted them. It is reasonable to assume that the complaints played a part in the desire to establish Policy 1.10. Given these gaps in the respondent's material, it seems to me that "the informed bystander", to use the words of Cory J. in *Newfoundland Telephone*, "could reasonably perceive bias on the part of an adjudicator".

54 The OSC (both staff and Commissioners) were acting within the ambit of their statutory duties in assembling and considering information in respect of a certain segment of the securities market. But in using that information to conclude that the securities dealers (including Manning Limited) were in fact engaging in the practices alleged in Policy 1.10, and now in the notices of hearing, the Commissioners prejudged the case. They pursued a course in excess of their policy and regulatory functions due to a too-narrow focus on a small number of parties and very particular allegations of practices and that, in turn, has produced an overly specific regulation beyond the OSC's jurisdiction. It has also produced an obvious apprehension of bias, quite distinct from the situation in *Latimer*.

55 The OSC has repeatedly recorded its conclusion that the targeted dealers engaged in unfair sales practices. The OSC issued Policy 1.10 in an effort to protect the public from unfair sales practices it "had found to exist". In my view, this prejudgment coupled with the continued effort of the OSC to vindicate its position through the ongoing litigation with the security dealers, including the appeal in *Ainsley*, created a reasonable apprehension of bias that precludes all members of the OSC who were Commissioners prior to the fall of 1993 from sitting at the hearings involving the applicants. In addition, the new Chair, Mr. Waitzer, is precluded from sitting for reasons stated earlier.

Remaining Members of the OSC

56 By Order-in-Council dated November 3, 1993, John Arthur Geller was appointed a member and Vice-chair of the OSC for a period of three years. By Order-in-Council dated April 6, 1994,

Helen M. Meyer was appointed a member of the OSC for a period of six months. There still remains one vacancy on the OSC.

57 It is argued by the applicant that there is a corporate taint affecting all those Commissioners subsequently appointed to the OSC. There is no judicial authority for this proposition. Bias is a lack of neutrality.

58 Blake in *Administrative Law in Canada* (Toronto: Butterworths, 1992) states at p. 92:

> Many tribunals are part of a larger administrative body. The fact that one branch of that administrative body is biased does not mean that another branch that has carriage of the matter is biased. Bias on the part of an employee of the tribunal or a member who is not on the panel hearing the matter usually does not give rise to a reasonable apprehension of bias on the part of the tribunal. Even bias on the part of the Minister in charge of the department does not necessarily make the adjudicator employed by the Ministry biased.

59 There is no evidence that the views of the Chair are shared by the new Commissioners. Further, there is no evidence before the Court to indicate any underlying agenda of Mr. Geller or Ms. Meyer. As well, the minutes of the Commissioners indicate that they were not party to any of the decisions respecting Policy 1.10 or the OSC's position in *Ainsley*.

60 There must be a presumption in the absence of contrary evidence that a Commissioner will act fairly and impartially in discharging his/her adjudicative responsibility. As noted in *Bennett v. British Columbia (Securities Commission)* (1992), 69 B.C.L.R. (2d) 171 at 181 (C.A.); leave to appeal to the S.C.C. dismissed (27 August 1992), [1992] 6 W.W.R. lvii (note):

> Bias is an attitude of mind unique to an individual. An allegation of bias must be directed against a particular individual alleged, because of the circumstances, to be unable to bring an impartial mind to bear. No individual is identified here. Rather, the effect of the submissions is that all of the members of the commission appointed pursuant to s. 4 of the *Securities Act*, regardless of who they may be, are so tainted by staff conduct that none will be able to be an impartial judge. Counsel were unable to refer us to a single reported case where an entire tribunal of unidentified members had been disqualified from carrying out statutory responsibilities by reason of real or apprehended bias. We think that not to be surprising. The very proposition is so unlikely that it does not warrant serious consideration.

61 I therefore conclude that Mr. Geller and Ms. Meyer are not biased, nor is there any evidence of conduct by them raising any apprehension of bias. The vacant position may or may not be filled. The presumption remains that whomever is appointed to that vacancy is unbiased.

62 If it is felt elsewhere that there is some corporate taint, I would allow the above 2 or 3 persons, as the case may be, to sit on the basis of the doctrine of necessity. Natural justice must

give way to necessity. The doctrine of necessity was enunciated by Jackett C.J. in *Caccamo v. Canada (Minister of Manpower & Immigration)* (1977), 75 D.L.R. (3d) 720 (Fed. C.A.) at p. 726:

> As I understand the law concerning judicial bias, however, even where actual bias in the sense of a monetary interest in the subject of the litigation is involved, if all eligible adjudicating officers are subject to the same potential disqualification, the law must be carried out notwithstanding that potential disqualification. ... If this is the rule to be applied where actual bias is involved, as it seems to me, it must also be the rule where there is no actual case of bias but only a "probability" or reasonable suspicion arising from the impact of unfortunate statements on the public mind.

63 This case does not require the doctrine of necessity to be applied to the extent of the example referred to in *Caccamo v. Canada (Minister of Manpower & Immigration)*. The doctrine of necessity is properly used to prevent a failure of justice and not as an affront to justice: De Smith's *Judicial Review of Administrative Action*, 4th ed. (1980), at pp. 276-7. Neither new member has acted in any way or even participated in any process which could give rise to a reasonable apprehension of bias on their part. Therefore the doctrine of necessity is rightly applied in these facts to allow a panel to be constituted, in case any general corporate disqualification beyond those members' control were found. (R.R.S. Tracey, *Disqualified Adjudicators: The Doctrine of Necessity in Public Law*, [1982] Public Law 628, at p. 632.)

Conclusion

64 Mr. Geller and Ms. Meyer are capable of forming a quorum to conduct the s. 27 hearings. If the vacancy is filled, the person appointed could also sit, or any two of the three, as designated by the Chair of the OSC. The application is dismissed. The hearings may proceed only before a panel constituted as directed by this Court.

65 The matter of costs may be addressed by fax.

Application dismissed.

1995 CarswellOnt 1057
Ontario Court of Appeal

E.A. Manning Ltd. v. Ontario (Securities Commission)

1995 CarswellOnt 1057, [1995] O.J. No. 1305, 125 D.L.R. (4th) 305, 18 O.S.C.B. 2419, 23 O.R. (3d) 257, 32 Admin. L.R. (2d) 1, 55 A.C.W.S. (3d) 3, 7 C.C.L.S. 125, 80 O.A.C. 321

E.A. MANNING LIMITED, JUDITH MARCELLA MANNING, TIMOTHY EDWARD MANNING, WILLIAM DOUGLAS ELIK, MARY MARTHA FRITZ, MARC HAROLD SCHWALB and PETER JOHN FINANCE v. ONTARIO SECURITIES COMMISSION

Dubin C.J.O., Labrosse and Doherty JJ.A.

Heard: November 30 and December 2, 1994
Judgment: May 9, 1995 *
Docket: Doc. CA C18902

Counsel: *Bryan Finlay, Q.C.*, *Philip Anisman* and *J. Gregory Richards*, for appellants.
Dennis R. O'Connor, Q.C. and *Benjamin T. Glustein*, for respondent.

Subject: Securities; Corporate and Commercial; Public

Annotation

Introduction

On August 17, 1995 the Supreme Court of Canada refused leave to appeal the decision of the Ontario Court of Appeal in this case. [1] This brought to a close the efforts of Toronto-based broker dealer E.A. Manning Ltd. to prevent the Ontario Securities Commission from conducting a hearing into its fitness to stay in business.

The Issue

The central issue in this case was the allegation of a reasonable apprehension of bias. Bias cases tend to be quite rare. Cases in which tribunals are disqualified from proceeding, or have their decision quashed are rarer still. [2] There are several reasons why bias cases raise difficult issues.

Tribunals and Courts

A judge, in a court of law, will normally disqualify himself or herself before becoming involved in the proceedings if there is even the slightest question of bias. For example, a judge married to a lawyer in a particular firm will refuse to look at any files in which one of the counsel is from that firm. In other cases, a judge will ask counsel whether they would wish the judge to step down. [3]

Since judges are so cautious, if not hyper-sensitive, bias cases involving judges are exceedingly rare. The situation of administrative tribunals, however, is somewhat different, and not because of any lack of sensitivity on the part of tribunal members.

As the Court of Appeal in *Manning* quite appropriately observed, people are often appointed to tribunals for their expertise. For this reason, they are expected to have specialized knowledge of the matters within their jurisdiction. How are they to maintain this knowledge after they have been appointed, if not by reading about, and maintaining close contact with the regulated industry? Of equal importance, typically, a judge will encounter a particular set of parties only once in a judicial career (with the exception of special parties such as the Attorney General, who is really only notionally a party, but, in practice, the Government's lawyer). Many tribunals encounter the same few parties repeatedly.

A member of a regulatory tribunal such as the Ontario Securities Commission [4] will undoubtedly, over time, form opinions of the parties who appear before the Commission. Does this really mean that a party in a regulatory process must have a lower expectation of the degree of neutrality of the decision-maker than would a litigant in a court of law? The answer depends upon how one defines neutrality or, to put the issue the other way, how one defines bias.

The Open Mind

The public expectation is usually that the decision-maker will have an open mind. Rendering that expectation unrealistic is the obvious fact that there is no such thing as a totally open mind (except for a totally empty mind). The mature human mind can never be tabula rasa. There must be a continuum between a mind that is totally open to any point of view and one that is closed to at least one of the parties. At what point do the values and inclinations acquired during the lifetime of a decision-maker, or the views and inclinations of the matter at hand, as influenced by the firmly held opinions of a lifetime, give rise to a disqualifying bias? If one could measure degrees of open-mindedness as one does temperature, with a device analogous to a thermometer, one could easily set a standard. But there is no such scale. And even if there was, there would be no way to insert it into the mind of the decision-maker in order to obtain a reading. As we can never know what is in a decision-maker's mind we can never be certain whether it is or is not open or unbiased.

Every experienced counsel will have encountered decision-makers who appear to have it in for his or her client, judging by the decision-maker's demeanour and questions during the course of the

hearing, only to receive a favourable decision at the end of the case; or, conversely, to have the decision-maker smile approvingly and be friendly throughout, only to receive a decision which disagrees with the client's position on every important issue. Appearances can be, and frequently are, misleading. The more common situation, however, is that a negative or hostile reaction will precede loss of the case. But, even then, negative initial reactions of decision-makers can often be turned around through good advocacy. When they are not, it should still not be assumed that the negative initial reaction was due to bias against the individual applicant, rather than an honest expression of scepticism or disagreement with the individual applicant's arguments. In short, bias, like beauty, is very often in the eye of the beholder. The law, therefore, needs an objective test, and one that is not too quick to disqualify the relatively few members appointed to any tribunal from deciding cases.

The Presumption of Impartiality

Everyone is entitled to adjudication before an impartial decision-maker. But what does this mean in practice? Since, as we have said, there is no objective way to measure bias, and, as we do not give our decision-makers sodium pentathol, or some other "truth serum" before permitting them to make a decision, none of us can know what is in the mind of an individual decision-maker. The logical rule, therefore, as the Court of Appeal noted, is that the decision-maker is presumed not to be biased, absent proof to the contrary.

What form can this proof take? First, if the decision-maker writes an article or makes a speech which clearly indicates a pre-disposition in one direction, that may be a bias for suspecting that when a particular case appears before that decision-maker, the pre-disposition will determine the particular case. Canadian law, however, appears to require stronger proof than that before the decision-maker will be disqualified from participation in the decision, or the decision quashed. [5] There must be evidence that, for some further reason, the decision-maker cannot be trusted to bring objectivity to bear on the *particular* decision in issue. In other words, the presumption of impartiality in Canadian law is rather strong, and requires clear and direct evidence to overcome it. A mere apprehension of bias is not enough; a real likelihood of bias is required. [6]

The main occasions on which a disqualifying bias tends to arise, in practice, is where a decision-maker is alleged to have a proprietary or pecuniary interest in the outcome of a decision [7] or where there is some personal connection such as the decision-maker being a relative of one of the parties by birth or by marriage. Those cases are easy. They almost never result in litigation. The more difficult cases arise when a decision-maker has expressed a point of view on a subject, which is alleged to give rise to a real likelihood of bias. Judges can relatively easily avoid this problem by limiting their speeches to non-controversial subjects, or, at least, to subjects which are not likely to arise before them in a particular case. And, where a judge does make a speech on a subject, or writes an article, and the particular case does come up, there is usually a large enough pool of other judges available that there is no problem in finding an alternate judge. However, the problem is

greater for tribunals. Tribunal members are often required to make speeches, or to issue guidelines, as part of their regulatory duties, to provide guidance to the industry being regulated. The courts have held that it is better to do this openly and publicly than behind closed doors. [8] In some cases it will be necessary for a member of the tribunal, perhaps even one sitting on a case in which the issue is raised, to make a speech indicating a general policy or an inclination in a particular direction. The Court of Appeal left open the possibility that even that might not create a disqualifying bias, although the comment must be regarded as obiter, since it did not arise in the particular case. On the other hand, there are rare, extreme cases in which a member of a tribunal makes a speech which gives the impression that regardless of the evidence, he is very strongly inclined to a particular point of view, giving rise to a *real* likelihood of bias. [9]

Is There a Doctrine of "Corporate Taint"?

As if all of this was not complicated enough, the situation is further complicated when the decision-maker against whom bias is alleged may be only one member of a panel hearing the matter, or only one member of a tribunal, but not sitting on the panel hearing the matter. Is there some sort of doctrine of "corporate taint" in bias cases and, if so, when and how does it apply?

There does not appear to be any doctrine of "corporate taint" in Canadian law. The actions of one member of a tribunal do not, in ordinary circumstances, create a real likelihood of bias with respect to others. There are some circumstances, though, where the bias of one member will be imputed to others. If a tribunal makes a decision in a case, and then it is learned that one of the members of the panel which decided the case has a bias, a court will not speculate that the decision might have been the same had the member with the bias not participated. In those circumstances, the bias of one member will be seen as having tainted the entire panel. [10] On the other hand, as the Court of Appeal in *Manning* found, even if a member of a tribunal had a bias, if that member does not participate in making the decision, the decision is not tainted by that bias. [11] The reason for the difference in the two situations is that once a member with a bias participates on a panel, it becomes impossible afterwards to unravel what would have happened had that member not participated. Where, however, the decision-making panel has not yet been assembled, the presumption will be that the member with the bias will not participate and, therefore, taint the others. That presumption can be rebutted if there is evidence to the contrary.

The applicant in the *Manning* case had three grounds for its argument that the new Commissioners should be disqualified: first, the notion of "corporate taint"; second, by virtue of the comments of the Chair of the Commission; and third, because the Commission defended an action brought against it by some of the same parties, in the *Ainsley* case (annonated below). We have already discussed the scope and limits of the doctrine of corporate taint. The comments of the Chair were held, on the facts, not to give rise to a legal disqualification. Finally, the Court accepted the common

sense proposition that one cannot commence litigation against a tribunal, as in Ainsley, and then argue, when it defends itself, that that defence constitutes a bias.

Conclusion

There is nothing wrong with a member of a tribunal having a disqualifying bias. The problems arise when the member participates, or attempts to participate in making a decision in relation to which he or she should be disqualified. Fact situations in which the decision-maker is tainted by a proprietary or pecuniary interest, or a family connection, are fairly simple and straight-forward, although there may be difficulty in borderline cases. However, speeches and policy pronouncements, which chairs and members of tribunals, and sometimes even staff members, are often called upon to make, may make tribunal decisions targets for accusations of bias. Had the Court in the *Manning* case imposed a judicial standard of conduct on the Chair, despite his different institutional duties, and, had the Court expanded the notion from that of the bias of one member tainting a panel to that of the bias of one member tainting an entire tribunal, the decision in the *Manning* case could have gone the other way. Fortunately, the Court did not lose sight of the difference between tribunals and courts, and unequivocally rejected the new "corporate taint" doctrine advocated by the appellant.

Andrew J. Roman [12]

Appeal from judgment reported at (1994), 3 C.C.L.S. 221, 17 O.S.C.B. 2339, 18 O.R. (3d) 97, 72 O.A.C. 34, 24 Admin. L.R. (2d) 283 (Div. Ct.), dismissing application for order prohibiting Ontario Securities Commission from proceeding with hearings.

The judgment of the court was delivered by *Dubin C.J.O.*:

1 The appellants, by leave, appeal from the judgment of the Divisional Court, now reported at (1994), 18 O.R. (3d) 97 [3 C.C.L.S. 221], dismissing their application for an order in the nature of prohibition to prevent the Ontario Securities Commission (the "Commission") from proceeding with two hearings relating to allegedly improper sales practices by the appellants. The appellants alleged actual bias, and a reasonable apprehension of bias, principally arising out of a Policy Statement issued by the Commission relating to the sales practices of securities dealers recommending investment in penny stocks.

2 The Divisional Court held that the Commissioners who participated in the formulation and adoption of the Policy Statement and the Chair of the Commission appointed after the formulation and adoption of that Statement were precluded from participating in the two hearings then pending. The Divisional Court held, however, that the Commissioners who had been appointed to the Commission after the adoption of the Policy Statement were not disqualified and could preside over the hearings, and that the two hearings could proceed if presided over by the new Commissioners. The application for prohibition was therefore dismissed.

Facts

3 The appellant, E.A. Manning Limited ("Manning"), is registered as a securities dealer under s. 98(9) of the Regulation (R.R.O. 1990, Reg. 1015, as amended) enacted pursuant to the Ontario *Securities Act*, R.S.O. 1990, c. S.5. The other appellants at the material times were directors, officers or salespersons of Manning. The respondent Commission has a two-tiered structure, consisting of an appointed statutory tribunal (the Commission proper, or "Commissioners") and the Commission staff. The Commission is defined by s. 2(2) of the *Securities Act* as comprising a Chair, and not more than ten or less than eight other members. Section 2(4) of the *Securities Act* provides that two Commissioners constitute a quorum for any hearing held pursuant to the provisions of the *Securities Act*.

4 The Policy Statement sets forth the Commission's conclusion that abusive and unfair sales practices existed among securities dealers involved in the trading of the low-cost shares known as penny stocks. The Policy Statement sought to remedy these abuses by requiring securities dealers to provide potential purchasers with a risk disclosure statement and to complete a suitability statement in respect of each purchase. Brokers and investment dealers were excluded from the Policy Statement's consideration, the Commission having satisfied it self that traders registered under those classifications were adequately policed by the Toronto Stock Exchange and the Investment Dealers Association, the self-governing bodies to which they were respectively required to belong pursuant to the Regulation passed under the *Securities Act*.

5 The purpose of the Policy Statement was set forth in the statement as follows:

> **Purpose Of This Policy**
>
> The Act and the regulations under the Act (the "Regulations") require, among other things, that registrants "know their clients" and deal "fairly, honestly and in good faith" with their customers and clients. *The Commission is concerned that securities dealers engaged in unfair sales practices like those mentioned above are not complying with these obligations and are recommending investments in penny stocks that are highly speculative and often are not appropriate for an investor given his/her personal circumstances, investment experience, investment objectives and financial means. The Commission is also concerned that as a result of the sales practices employed, investors often purchase penny stocks unaware of the risks involved and without adequate consideration being given to the suitability of the purchase. Losses of a significant portion of an investment in penny stocks are common. The Commission has concluded that these sales practices have a significant adverse impact on the fairness and integrity of the capital markets in Ontario*.
>
> The Commission is issuing this Policy as a guide to identify what the Commission believes are appropriate business practices to assist securities dealers and their employees in satisfying

> their obligations under the Act in connection with the marketing and sale of penny stocks. This Policy is intended to inform interested parties that the Commission will be guided by this Policy in exercising its public interest jurisdiction under subsection 27(1) of the Act and its general public interest jurisdiction to protect investors and promote and maintain fair, equitable and efficient capital markets in Ontario.
>
> The Commission believes that the business practices set out in this Policy should be adopted by securities dealers when selling penny stocks. The Commission believes that such practices are in the public interest to promote and maintain fair, equitable and efficient capital markets in Ontario and to protect investors from high pressure and other unfair sales practices employed in the marketing and sale of penny stocks and that these business practices are consistent with the duty of securities dealers and their officers, partners, salespersons and directors to deal fairly, honestly and in good faith with their customers and clients. Subsection 27(1) of the Act provides that the Commission, after giving a registrant an opportunity to be heard, may suspend, cancel, restrict or impose terms and conditions upon the registration of or reprimand a registrant where in its opinion such action is in the public interest. *In determining whether any failure to comply with this Policy constitutes grounds for the Commission taking action under subsection 27(1) of the Act or any other section of the Act, the Commission will continue to consider the particular facts and circumstances of each case*.

[Emphasis added.]

6 On September 15, 1992, about one month after the issuance of the Policy Statement in its draft form, Manning and other securities dealers commenced an action (the *Ainsley* action) against the Commission alleging that the Policy Statement was ultra vires the Commission, that the Commission had no basis upon which to formulate the policy, and that they were being harassed and discriminated against by the Commission. In May 1993, the plaintiffs in that case brought a motion for summary judgment on the issue whether Policy Statement 1.10 was ultra vires the Commission. On August 13, 1993, Blair J. held that the Policy Statement, including the requirements with respect to the future business conduct of the securities dealers, was beyond the jurisdiction of the Commission ([*Ainsley Financial Corp. v. Ontario (Securities Commission)*] (1993), 14 O.R. (3d) 280). The decision of Blair J. was appealed to this court by the Commission, and the appeal was dismissed, the reasons for judgment being delivered by Doherty J.A. ((1994), 21 O.R. (3d) 104). The other allegations in the *Ainsley* action have not as yet been resolved, and they are still outstanding.

7 On December 15, 1993, the Commission issued a notice of hearing (the "first notice of hearing") to determine whether under s. 27 of the *Securities Act*, it was in the public interest to suspend, restrict, or cancel the registrations of Manning and three of the other appellants and to determine whether certain exemptions should no longer apply to the appellants. The notice alleged that the appellants traded in securities of BelTeco Holdings Inc. and Torvalon Corporation, contrary

to the public interest by, inter alia, using high-pressure sales tactics, failing to disclose that they were selling securities as principal and not as agents, and failing to disclose that mark-ups were included in the purchase price and that shares were of limited marketability. The hearing was scheduled to commence on September 19, 1994. On February 4, 1994, the Commission issued a second notice of hearing against Manning and five of the other appellants, the primary purpose of which was to seek an order prohibiting the named parties from calling on residences to sell securities (the Commission staff having failed in its attempt two days earlier to obtain an ex parte order under s. 27(2) of the *Securities Act* for an interim suspension of the registration of Manning). Essentially, the allegations in the second notice echoed the allegations in the first notice, but did not relate to the trading in the shares of specific corporations.

8 Following the release of the Policy Statement, Mr. Edward Waitzer was appointed the new Chair of the Commission; Mr. John Arthur Geller, the Vice-Chair of the Commission; and Helen M. Meyer, a member. A second new Commissioner has now also been appointed.

9 On December 7, 1993, one week prior to the issuance of the first notice of hearing, an interview with Edward Waitzer was published in the *Dow Jones News*. Mr. Waitzer was quoted as saying that dealing with penny stock dealers was a "perennial priority" of the Commission. He added, "[t]here will always be marginal players in the securities industry .... Our task is to get these players into the self-regulatory system or get them out of the jurisdiction."

10 Montgomery J., writing for the Divisional Court, made the following findings:

> i) There was a reasonable apprehension of bias on the part of the Commissioners who were involved in the adoption of the Policy Statement, as in the process of formulating it they had closed their minds to the issue whether securities dealers, including Manning Ltd., were guilty of unfair sales practices. Moreover, the defence of the *Ainsley* case was also evidence of prejudgment in that the Commission went beyond merely defending its jurisdiction and strenuously sought to show that Manning Ltd. (among others) was guilty of the very offences which were the subject of the hearings;
>
> ii) There was a reasonable apprehension of bias on the part of the new Chair, Waitzer, because of his public comments;
>
> iii) There was no evidence or reasonable apprehension of bias on the part of the two other Commissioners appointed after the adoption of the Policy Statement;
>
> iv) New Commissioners would not be affected by "corporate taint", and indeed, there is no judicial authority for such a concept;
>
> v) Even if the legal concept of "corporate taint" existed, the doctrine of necessity would apply to allow those Commissioners against whom no specific reasonable apprehension of bias was found to form a quorum for the hearings;

vi) That the hearings of the Commission could proceed only before a panel of Commissioners consisting of any two or more of Vice-Chair Geller and Commissioner Helen Meyer, or any Commissioner appointed after November 1, 1993. [A new Commissioner was appointed after the order of the Divisional Court.]

11 The appellants now appeal from the order of Montgomery J. dismissing their application for prohibition and submit that the Divisional Court erred in permitting the two hearings to proceed before the new Commissioners.

Issues

12 The appellants submitted that the Divisional Court erred in failing to give effect to their submissions that the conduct of the Commission in its formulation and adoption of the Policy Statement, its defence to the *Ainsley* action, and the comments of its Chair, Mr. Waitzer, had so tainted the entire Commission that even newly-appointed Commissioners should be excluded from sitting on the hearings to consider the allegations in the first and second notices of hearing. They also submitted that the Divisional Court erred in holding that even if the concept of corporate taint could be invoked to otherwise disqualify the new Commissioners, the doctrine of necessity would apply.

13 The respondent, although not conceding before the Divisional court that there was any basis for disqualification of any member of the Commission, did not seek to have any of the Commissioners who had participated in the formulation of the Policy Statement conduct the hearings. The respondent was content before the Divisional Court to have the hearings conducted by the new Commissioners. The respondent did not cross-appeal from the order of the Divisional Court.

14 On the appeal, the respondent submitted that the Divisional Court erred in holding that those Commissioners who participated in the formulation and adoption of the Policy Statement were disqualified to sit on the pending hearings, and that no case of bias had been made out against them. The respondent further submitted that the Divisional Court erred in holding that Mr. Waitzer, the Chair, was disqualified. It would follow that, under such circumstances, there would be no basis for questioning the qualification of the new Commissioners.

15 However, as has been noted, the respondent did not cross-appeal from the order of the Divisional Court and did not seek here, or in the Divisional Court, to have anyone other than the new Commissioners preside over the pending hearings. If the judgment under appeal permitting the new Commissioners to sit was dependent on the proposition that none of the Commissioners, nor the Chair, were disqualified, I would have to consider whether the Divisional Court was corrected in so holding. However, in my view, the status of the new Commissioners to conduct the hearings is not dependent upon the status of the others to do so. Assuming that the Divisional Court was

correct in disqualifying the Commissioners who had participated in and formulated the Policy Statement, it is only necessary to consider whether the new Commissioners are disqualified (1) on the doctrine of corporate taint, or (2) by reason of the comments of the Chair, or (3) by reason of the Commission's defence to the *Ainsley* action.

Overview

16 By statute, the Commission is given many independent responsibilities and duties, and, in considering issues of bias and reasonable apprehension of bias, regard must be had to the statutory framework within which the Commission functions.

17 Within that statutory framework, the Commission is, in disciplinary matters, the investigator, the prosecutor, and the judge. As a general principle, in the absence of statutory authority, this overlap would be held to be contrary to the principles of fairness. However, where such functions are authorized by statute, the overlapping of these functions, in itself, does not give rise to a reasonable apprehension of bias.

18 In this respect, Madam Justice L'Heureux-Dubé in *Barry v. Alberta (Securities Commission)*, [1989] 1 S.C.R. 301 [hereinafter referred to as *Brosseau v. Alberta (Securities Commision)*], observed as follows at pp. 313-314:

> Securities commissions, by their nature, undertake several different functions. They are involved in overseeing the filing of prospectuses, regulating the trade in securities, registering persons and companies who trade in securities, carrying out investigations and enforcing the provisions of the Act. By their nature, they will have repeated dealings with the same parties. The dealings could be in an administrative or adjudicative capacity. When a party is subjected to the enforcement proceedings contemplated by ss. 165 or 166 of the Act, that party is given an opportunity to present its case in a hearing before the Commission, as was done in this case. The Commission both orders the hearing and decides the matter. Given the circumstances, it is not enough for the appellant to merely claim bias because the Commission, in undertaking this preliminary internal review, did not act like a court. It is clear from its empowering legislation that, in such circumstances, the Commission is not meant to act like a court, and that certain activities which might otherwise be considered "biased" form an integral part of its operations.

19 In dealing with the issue of a reasonable apprehension of bias, Madam Justice L'Heureux-Dubé added at pp. 314-315:

> The particular structure and responsibilities of the Commission must be considered in assessing allegations of bias. Upon the appeal of *Latimer* to the Ontario Court of Appeal, Dubin J.A., for a unanimous Court, dismissed the complaint of bias. He acknowledged that

the Commission had a responsibility both to the public and to its registrants. He wrote at p. 135:

> ... I view the obligation of the Commission towards its registrants as analogous to a professional body dealing in disciplinary matters with its members. The duty imposed upon the Commission of protecting members of the public from the misconduct of its registrants is, of course, a principal object of the statute, but the obligation of the Commission to deal fairly with those whose livelihood is in its hands is also by statute clearly placed upon it, and nothing is to be gained, in my opinion, by placing a priority upon one of its functions over the other.

Dubin J.A. found that the structure of the Act whereby commissioners could be involved in both the investigatory and adjudicatory functions did not, by itself, give rise to a reasonable apprehension of bias.

I am in agreement with this proposition. So long as the Chairman did not act outside of his statutory authority, and so long as there is no evidence to show involvement above and beyond the mere fact of the Chairman's fulfilling his statutory duties, a "reasonable apprehension of bias" affecting the Commission as a whole cannot be said to exist.

20 In delivering the judgment of the Divisional Court, Montgomery J. stated as follows at p. 113:

> ... *W.D. Latimer Co. v. Bray* (1974), 6 O.R. (2d) 129 ... (C.A.), established the principle that evidence of prejudgment, even in the context of the unique statutory scheme established by the *Securities Act*, is a ground for disqualification. However, it recognized that mere knowledge by Commissioners of market conditions or even of grounds for a complaint to be heard by them do not produce any apprehension of bias in the particular circumstances of this tribunal. Dubin J.A. (as he then was) delivered the judgment of the court. He stated at pp. 140-141:
>
> > Where by statute the tribunal is authorized to perform tripartite functions, disqualification must be founded upon some act of the tribunal going beyond the performance of the duties imposed upon it by the enactment pursuant to which the proceedings are conducted. Mere advance information as to the nature of the complaint and the grounds for it are not sufficient to disqualify the tribunal from completing its task. *Evidence of prejudgment, however, is a ground for disqualification unless the statute specifically permits the tribunal to have arrived at a preliminary judgment before conducting an inquiry*.

[Emphasis added.]

Disqualification by Reason of Corporate Taint

21 As noted earlier, the appellants submitted that the Divisional Court erred in failing to prohibit the Commission from conducting the hearings pursuant to the two notices previously referred to. They submitted that the Divisional Court, having found that those Commissioners who had participated in the formulation and adoption of the Policy Statement had prejudged the matters to be considered, erred in failing to hold that this prejudgment tainted the entire Commission, including those members who were appointed after the formulation and adoption of the Policy Statement.

22 It should be noted that the Policy Statement was held to be beyond the jurisdiction of the Commission because it had crossed the line between a non-mandatory guideline, and a mandatory pronouncement having the same effect as a statutory instrument, without the appropriate statutory authority (Doherty J.A. in *Ainsley*, supra). However, there is no suggestion of bad faith.

23 For the reasons noted earlier, it is unnecessary to determine whether the Divisional Court was correct in finding that those Commissioners who had participated in the formulation and adoption of the Policy Statement were disqualified.

24 Assuming that the Divisional Court was correct in so finding, I agree with its conclusion that such a finding did not disqualify the new Commissioners. Montgomery J., at p. 116, stated, in part, as follows:

> It is argued by the applicant that there is a corporate taint affecting all those Commissioners subsequently appointed to the OSC. There is no judicial authority for this proposition. Bias is a lack of neutrality.
>
> Blake in *Administrative Law in Canada* (Toronto: Butterworths, 1992), states at p. 92:
>
> > Many tribunals are part of a larger administrative body. The fact that one branch of that administrative body is biased does not mean that another branch that has carriage of the matter is biased. Bias on the part of an employee of the tribunal or a member who is not on the panel hearing the matter usually does not give rise to a reasonable apprehension of bias on the part of the tribunal. Even bias on the part of the Minister in charge of the department does not necessarily make the adjudicator employed by the Ministry biased.

25 There was no evidence of prejudgment on the part of the new Commissioners. They were not involved in the consideration and adoption of the Policy Statement. Furthermore, none of the evidence which the staff of the Enforcement Branch proposed to adduce at the hearings was provided to them.

26 It should also be noted that the evidence to be adduced in connection with the second notice of hearing only came to the attention of Commission staff after final approval of the Policy Statement by the Commissioners. Furthermore, none of the details of the evidence proposed to be presented

to the Commissioners in connection with the first notice of hearing formed part of the staff report presented to those Commissioners who were present when the Policy Statement was adopted.

27 It is assumed, of course, that the new Commissioners would be familiar with the Policy Statement and the concerns of the Commission with respect to the trading in penny stocks.

28 Securities Commissions, by their very nature, are expert tribunals, the members of which are expected to have special knowledge of matters within their jurisdiction. They may have repeated dealings with the same parties in carrying out their statutory duties and obligations. It must be presumed, in the absence of any evidence to the contrary, that the Commissioners will act fairly and impartially in discharging their adjudicative responsibilities and will consider the particular facts and circumstances of each case.

29 As noted earlier, even advance information as to the nature of a complaint and the grounds for it, which are not present here, are not a basis for disqualification.

30 In *Brosseau*, supra, the fact that the Chairman of the Commission had received the investigative report and sat on the panel hearing the matter did not give rise to a finding of a reasonable apprehension of bias.

31 In *Bennett v. British Columbia (Securities Commission)* (1992), 69 B.C.L.R. (2d) 171 (C.A.), an allegation of bias against the Commission was made because the staff of the Commission had cooperated with Crown counsel in quasi-criminal proceedings against those who were subsequently to appear before the British Columbia Securities Commission.

32 In rejecting a motion to stay the proceedings before the Commission by reason of the participation of the staff in the quasi-criminal proceedings, the British Columbia Court of Appeal first referred to the following portion of the judgment at first instance, at p. 180:

> I have also indicated earlier in these reasons, as well, that the fact that employees of the commission swore the information used by the Crown to prosecute the Bennetts and Doman in the *quasi*-criminal trial and used their investigative capacity to provide the evidence, does not lead automatically to an inference of bias on the part of the commission, because of the very nature of the commission under the Securities Act. Indeed, I do not take an inference of bias from their having done so. Nor is there any other demonstrated evidence of bias in this case.

33 The British Columbia Court of Appeal went on as follows at pp. 180-181:

> We are fully in accord with these findings. In the absence of any evidence of bias we are unable to understand how it could be inferred that staff activities of the sort which occurred

> here could lead a reasonably informed person to apprehend that presently unknown hearing officers would not be able to act in an entirely impartial manner if the hearing proceeds...
>
> We wish to add one further observation and that is as to the target of a bias allegation. Bias is an attitude of mind unique to an individual. An allegation of bias must be directed against a particular individual alleged, because of the circumstances, to be unable to bring an impartial mind to bear. No individual is identified here. Rather, the effect of the submissions is that all of the members of the commission appointed pursuant to s. 4 of the *Securities Act*, regardless of who they may be, are so tainted by staff conduct that none will be able to be an impartial judge. Counsel were unable to refer us to a single reported case where an entire tribunal of unidentified members had been disqualified from carrying out statutory responsibilities by reason of real or apprehended bias. We think that not to be surprising. The very proposition is so unlikely that it does not warrant serious consideration.

34 A case very much in point is *Laws v. Australian Broadcasting Tribunal* (1990), 93 A.L.R. 435 (H.C.). In that case, three members of the Australian Broadcasting Tribunal, during the course of what was intended to be a preliminary investigation, concluded that the appellant (Laws) had breached broadcasting standards. Subsequently, the tribunal, as a whole, decided to hold a formal inquiry to consider whether it should exercise any of its regulatory powers against the appellant including the withdrawal of its licence. The appellant sought an order prohibiting the broadcasting tribunal from conducting such a hearing on the ground that the entire tribunal was tainted by reason of the prejudgment of three of its members. An employee of the tribunal, Ms. Paramore, the Director of its Programs Division, later gave an interview on behalf of the tribunal in which she repeated the conclusions made earlier by the three tribunal members. Mr. Laws submitted that this was a further ground for disqualification.

35 An action for defamation was commenced by Mr. Laws against the tribunal and Ms. Paramore arising from the radio interview. In defence, the tribunal pleaded justification. That also formed the basis of the appellant's application to prohibit the tribunal from proceeding with its formal inquiry. I find it convenient to deal with the impact of the lawsuit later.

36 At first instance, Morling J. concluded that the three members of the tribunal who had undertaken the preliminary investigation had gone much further and had made a positive finding that the appellant had violated broadcasting standards. He held that they were precluded from participating in the formal inquiry, but the appellant was not entitled to an order prohibiting the formal inquiry from continuing so long as it was conducted by other members of the tribunal who had not participated in the preliminary investigation. That conclusion was upheld by the full court and by the High Court of Australia.

37 With respect to the statements made by Ms. Paramore, the appellant contended that those statements reflected the corporate view of the members of the tribunal and thus formed the basis for an order of prohibition against the tribunal itself.

38 Morling J. held that there was no justification for attributing Ms. Paramore's views to the members of the tribunal who were to conduct a formal inquiry. That conclusion was upheld in the High Court of Australia. On that issue, Mason C.J. and Brennan J. stated at pp. 444-445:

> In order to examine this submission it is necessary to consider the interview given by Ms. Paramore. Although the Act did not authorise the publication of the findings of non-compliance by the appellant with RPS 3 [broadcasting standards], it was not disputed that Ms Paramore spoke for the tribunal when she gave an account of the vitiated decision of 24 November. The tribunal is constituted by the Act as a body corporate (s 7(1), (2)(a)) and it consists of a chairman, a vice-chairman and at least one other member but not more than six other members; s 8(1). There is nothing to identify the source of Ms. Paramore's authority to make the statements which she made in the interview on behalf of the tribunal. It is very likely that her authority arose from her responsibility as Director of the Programs Division; in other words, it was part of her general responsibility to publish and explain, by way of broadcast, interview and otherwise, decisions made by the tribunal. The fact that the decision which she sought to report and explain was vitiated, at least so far as it related to the appellant, did not deny to the interview the character of a corporate act performed in purported pursuance of s 17(1). *However, though it might be correct to regard the interview as a corporate act, it was not necessarily an act done on behalf of each of the individual members of the corporation. The circumstances are not such as to justify the drawing of an inference that each of the individual members of the tribunal authorised the interview or approved of its content. At best from the appellant's viewpoint, it might be inferred that the three members of the tribunal who made the decision of 24 November so authorised or approved the interview. Accordingly, the interview does not entitle the appellant to wider relief than that granted at first instance by Morling J.*

[Emphasis added.]

39 Although there may be circumstances where the conduct of a tribunal, or its members, could constitute institutional bias and preclude a tribunal from proceeding further, this is not such a case. This is not a case where the Commission has already passed judgment upon the very matters which are to be considered in the pending hearings by the new Commissioners and, in this respect, is distinguishable from the case of *Association des officiers de direction du service de police de Québec (ville) c. Québec (Commission de police)* (1994), 119 D.L.R. (4th) 484 (Que. C.A.), where that was the nature of the concern of the majority of the members of the court. In any event, and with respect, I prefer the dissenting reasons for judgment of Fish J.A.

Disqualification by Reason of the Comments of the Chair, Mr. Waitzer

40 In the reasons of the Divisional Court, Montgomery J. stated at p. 111 as follows:

> In a press interview, the Chair of the OSC, Mr. Waitzer, stated that dealing with penny stock dealers is a "perennial priority". "There will always be marginal players in the securities industry. Our task is to get these players into the self-regulatory system or get them out of the jurisdiction".
>
> I conclude that Mr. Waitzer cannot sit on either hearing because of a reasonable apprehension of bias.

Montgomery J. did not expand upon his reasons for arriving at that conclusion.

41 The appellants submitted that the statements of the Chair exhibited a bias against them which was reflective of the Commission as a whole, and, therefore, they could not get a fair hearing from any members of the Commission. They submitted that, having found Mr. Waitzer was disqualified by reason of a reasonable apprehension of bias, the Divisional Court erred in not prohibiting the hearings from proceeding.

42 Mr. Waitzer's comments were delivered in the context of a series of four articles published in the same issue of the *Dow Jones News*. They appeared under the titles: "OSC Chairman Sees Mandate To Improve Market Efficiency," "Growing Power of Institutions"; "Jurisdiction Debate Red Herring"; and "Market Transparency a Priority". In those articles, Mr. Waitzer discusses trends in the securities industry, and potential regulatory responses to them. He is quoted as saying that he sees as part of his job the removal of un necessary regulatory burdens from participants in Ontario capital markets, rather than the mere imposition of new measures. He also states that the Toronto Stock Exchange may well have to adapt to admit members who do not trade on the exchange. One of the articles notes his concern that the self-regulating agencies adapt to accommodate the trend to various proprietary trading systems:

> While Waitzer says he sees no immediate threat to the TSE, he says his concern is that the situation will evolve into one where "all of a sudden we have 20 trading systems and no self-regulatory system; we've got a real problem and it all lands in the Commission's lap."

In this context, Mr. Waitzer's comment about getting the penny stock dealers into the self-regulating system is clearly a reflection of what he sees as the ideal regulatory solution to the industry's problems. It is a solution he advocates for all players in the market, not just for the class of traders to which the appellants belong.

43 With respect, I fail to see how what was said by Mr. Waitzer could form any basis for concluding that there was a reasonable apprehension of bias if he were to sit on either of the pending hearings, let alone disqualify the other Commissioners from conducting the hearings. In making the comments complained of here, Mr. Waitzer was fulfilling his mandate as Chair of the Commission.

44 In this respect, what was stated by Doherty J.A. in *Ainsley Financial Corp. v. Ontario (Securities Commission)*, supra, at pp. 108-109, is apt:

> The authority of a regulator, like the Commission, to issue non-binding statements or guidelines intended to inform and guide those subject to regulation is well established in Canada. The *jurisprudence* clearly recognizes that regulators may, as a matter of sound administrative practice, and without any specific statutory authority for doing so, issue guidelines and other non-binding instruments: *Hopedale Developments Ltd. v. Oakville (Town)*, [1965] 1 O.R. 259 at p. 263, 47 D.L.R. (2d) 482 (C.A.); *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 at pp. 6-7; 137 D.L.R. (3d) 558; *Capital Cities Communications Inc. v. Canadian Radio-Television & Telecommunications Commission*, [1978] 2 S.C.R. 141 at p. 170, 81 D.L.R. (3d) 609 at p. 629; *Friends of Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at p. 35; 88 D.L.R. (4th) 1; *Pezim*, *supra*, at p. 596; Law Reform Commission of Canada, Report 26, *Report on Independent Administrative Agencies: Framework for Decision Making* (1985), at pp. 29-31.
>
> Non-statutory instruments, like guidelines, are not necessarily issued pursuant to any statutory grant of the power to issue such instruments. Rather, they are an administrative tool available to the regulator so that it can exercise its statutory authority and fulfil its regulatory mandate in a fairer, more open and more efficient manner. While there may be considerable merit in providing for resort to non-statutory instruments in the regulator's enabling statute, such a provision is not a prerequisite for the use of those instruments by the regulator. The case law provides ample support for the opinion expressed by the Ontario Task Force on Securities Regulation, *Responsibility and Responsiveness* (June 1994) at pp. 11-12:
>
> > A sound system of securities regulation is more than legislation and regulations. Policy statements, rulings, speeches, communiqués, and Staff notes are all valuable parts of a mature and sophisticated regulatory system. ...

45 Mr. Waitzer's comments did not in any way relate to the subject matter of the complaints made against the appellants in the pending proceedings, nor should they be viewed as a veiled threat against the appellants, as was contended.

46 However, even if statements by a regulator relate to the very matters which he or she is considering, that, in itself, is not a basis for concluding that the regulator has prejudged the matter.

47 In *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, Cory J. stated at p. 639:

> Further, a member of a board which performs a policy formation function should not be susceptible to a charge of bias simply because of the expression of strong opinions prior to

> the hearing. This does not of course mean that there are no limits to the conduct of board members. It is simply a confirmation of the principle that the courts must take a flexible approach to the problem so that the standard which is applied varies with the role and function of the Board which is being considered. In the end, however, commissioners must base their decision on the evidence which is before them. Although they may draw upon their relevant expertise and their background of knowledge and understanding, this must be applied to the evidence which has been adduced before the board.

48 Even if it could be said that the statements of the Chair exhibited bias against the appellants that, in itself, would not disqualify the other Commissioners from conducting the headings.

49 In *Van Rassel v. Royal Canadian Mounted Police*, (sub nom. *Van Rassel v. Canada (Commissioner of R.C.M.P.))* [1987] 1 F.C. 473 (T.D.), it was alleged that the Commissioner of the R.C.M.P. made a public comment strongly critical of the R.C.M.P. officer who faced a trial before the R.C.M.P. service tribunal. Joyal J. held that even if such a statement were made, it could not lead to a reasonable apprehension of bias against the whole tribunal, at p. 487:

> Assuming for the moment that the document is authentic and that the words were directed to the applicant, it would not on that basis constitute the kind of ground to justify my intervention at this time. The Commissioner of the RCM Police is not the tribunal. It is true that he has appointed the tribunal but once appointed, the tribunal is as independent and as seemingly impartial as any tribunal dealing with a service-related offence. One cannot reasonably conclude that the bias of the Commissioner, if bias there is, is the bias of the tribunal and that as a result the applicant would not get a fair trial.

50 As I indicated earlier, in my opinion, there was no merit in the contention that the new Commissioners were disqualified by reason of the comments made by the Chair.

Bias Resulting from Commission's Defence in the Ainsley Action

51 As noted earlier, the *Ainsley* action was an action commenced by several investment dealers, including the appellants, against the Commission.

52 In the judgment of the Divisional Court, Montgomery J. found that the Commission's defence of the *Ainsley* action offered further evidence of its prejudgment of the matters contained in the first and second notices of hearing. In part, he stated as follows at pp. 114-115:

> In the context of the litigation brought by the securities dealers, including the motion for judgment in the *Ainsley* case and the pending appeal, the OSC went beyond merely defending itself and its jurisdiction and adopted the role of advocate against them and strenuously sought to demonstrate that Manning Limited and others are guilty of the very conduct which is now the subject of the current notices of hearing.

53 Counsel for the appellants submitted that the Divisional Court, having come to that conclusion, erred in not holding that the Commission should be prohibited from proceeding with the two hearings even if such hearings were presided over by the new Commissioners.

54 In the action, the plaintiffs claimed, in part, that the Commission staff could neither establish the public interest basis for the Policy Statement, nor the truth of the conclusion reached in the staff report upon which it was based. The plaintiff's also alleged bad faith, harassment, intimidation, and intentional interference with their business interests and claimed damages in the amount of $1 million.

55 These were very serious allegations and certainly called for a vigorous defence. The Divisional Court did not detail the manner in which they felt that the Commission in its defence to the *Ainsley* action went beyond defending itself and its jurisdiction. It would be a strange result if a securities dealer, whose conduct is under investigation, could, by the institution of an action calling for a defence, prevent the Commission from taking proceedings against it.

56 However, it is unnecessary to determine whether the Divisional Court was correct in holding that the defence of the *Ainsley* action was a basis for disqualification of certain of the Commissioners.

57 It was the Commission staff, along with counsel, who were responsible for assembling the materials that formed the basis of the Commission's response to the plaintiffs' allegations in the *Ainsley* action. None of the Commissioners, with the exception of the former Chair, Robert Wright, participated in any way in assembling those materials, or preparing the Commission's response to the action.

58 In my opinion, it cannot be said tht the defence of the action was a basis to conclude that the new Commissioners had prejudged the complaints which were the subject matter of the notices of hearing, and, in this respect, I agree with the Divisional Court.

59 I agree with the way that this issue was dealt with in *Laws v. Australian Broadcasting Tribunal*, supra.

60 As noted above, in that case, an action for defamation had been commenced against the tribunal and one of its employees. The tribunal, in its defence, relied upon justification which, in effect, alleged that what the employee of the tribunal had stated was true, i.e., the Laws had violated the broadcasting standards. The High Court of Australia did not accede to the submission of the appellant in that case that the defence in the civil action demonstrated bias, or a reasonable apprehension of bias, on the part of all the members of the Commission, including those who had not participated in the preliminary investigation.

61 The court concluded that the defence in the defamation action did not preclude members of the tribunal who had not participated in the preliminary investigation from conducting the pending inquiry.

62 Mason C.J. and Brennan J., with respect to this matter, concluded as follows at pp. 447-448:

> We are left then with the suggestion that in the circumstances there is a reasonable apprehension of bias because the defences to the action for defamation give rise to a suspicion of prejudgment or because the members of the tribunal have a conflicting interest in defeating that action. *Granted that the existence of apprehended bias is a question of fact we are not persuaded that the appellant succeeds in making out such a case against members of the tribunal other than the chairman, vice-chairman and Ms Bailey, who participated in the decision of 24 November and may be taken to have approved the giving of the interview by Ms Paramore*.
>
> . . . . .
>
> *However, we do not consider that the inference drawn in the preceding paragraph, taken in conjunction with the other circumstances which we have described, would lead a fair-minded ob server to conclude that the members of the tribunal, apart from those who participated in the decision of 24 November, would bring other than an unprejudiced and impartial mind to the resolution of the issues which would properly arise in an inquiry to be held under s 17c; see Livesey v New South Wales Bar Association (CLR at 293-4)*.

[Emphasis added.]

63 Gaudron and McHugh JJ., concurring, added the following at pp. 457-458:

> In the present case, the most that can be said against those members of the tribunal who were parties to the filing of the defamation defences is that they believed that, upon the evidence then known to them, the assertions in the defences were true and that on that evidence they would probably have decided the s 17c issues adversely to the appellant. But to attribute that belief and that decision to them does not give rise to a reasonable fear that they would not fairly consider any evidence or arguments presented by the appellant at the s 17c inquiry or that they would not be prepared to change their views about the issues. When the defamation proceedings against the tribunal were commenced, the members of the tribunal were required to file the tribunal's defence on the evidence that they then had in their possession and without the benefit of evidence or argument from the appellant. When all the evidence is heard and the case argued, it may become apparent to them that the defences which the tribunal filed cannot succeed. However, there is no suggestion that the filing of the defences was itself an abuse of process or the product of prejudice. *To the contrary, the hypothesis is that the members of the tribunal believed that the assertions in the defences were true. But neither logic nor the evidence makes it reasonable to fear that because of that belief, the members of*

the tribunal will not decide the case impartially when they hear the evidence and arguments for the appellant at the s 17c inquiry.

[Emphasis added.]

64 As indicated earlier, I would reject the submission that the defence in the *Ainsley* action precluded the new Commissioners from presiding over the pending hearings.

Doctrine of Necessity

65 As noted earlier, the Divisional Court held that even if this were a case of "corporate taint," the doctrine of necessity could be invoked which would allow those Commissioners against whom no specific reasonable apprehension of bias was found to form a quorum for the hearings.

66 In the view that I take of the matter, it is not necessary to consider the doctrine of necessity.

Conclusion

67 I am indebted to counsel for their very thorough and able submissions.

68 In the result, I would dismiss the appeal with costs.

Appeal dismissed.

Footnotes

* Leave to appeal to the Supreme Court of Canada was denied (August 17, 1995), Doc. 24773, Lamer C.J.C., La Forest, and Major JJ. (S.C.C.).

1 *The Globe & Mail*, August 18, 1995, p. B.3.

2 The leading case in the area, which was not even referred to in the reasons of the Ontario Court of Appeal, is *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, 9 N.R. 115, 68 D.L.R. (3d) 716. The decision of the NEB in that case was overturned. However, the usual natural justice/fairness cases involve, primarily, allegations that for some reason the hearing itself was unfair.

3 For example, the writer was once asked by a judge as to whether he should disqualify himself on the ground that when he was an articling student (apparently at least 30 years earlier) he had worked on a file involving the parent company of the other party in the case.

4 Other examples might include professional disciplinary bodies, tribunals regulating prices of services, such as the CRTC for telephone rates, or issuing permits, such as the National Energy Board and numerous licensing bodies.

5 See the *R. v. Pickersgill*; *Ex parte Smith* (1970), 14 D.L.R. (3d) 717 (Man. Q.B.).

6 This was the central rule to emerge from the *Committee for Justice & Liberty* case, supra, at note 2, relying on the *PPG* case, ante, note 7.

7 See *Re Canada (Anti-dumping Tribunal)* (sub nom. *PPG Industries Canada Ltd. v. Canada (Attorney General)*), [1976] 2 S.C.R. 739, 7 N.R. 209, 65 D.L.R. (3d) 354, for a detailed discussion of this type of bias.

8 *Capital Cities Communications Inc. v. Canada (Canadian Radio-Television & Telecommunications Commission)*, [1978] 2 S.C.R. 141, 36 C.P.R. (2d) 1, 81 D.L.R. (3d) 609, 18 N.R. 181, at p. 629 (D.L.R.).

9 A rare, but clear example of this is found in the case of the consumer advocate who became a member of the tribunal in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissions of Public Utilities)*, [1992] 1 S.C.R. 623, 4 Admin. L.R. (2d) 121, 134 N.R. 241, 89 D.L.R. (4th) 289, 95 Nfld. & P.E.I.R. 271, 301 A.P.R. 271.

10 This was the situation in the *Committee for Justice & Liberty* case, supra, note 2, where only one member of the panel was found to have had a bias but the decision of the entire panel had been quashed by the Federal Court of Appeal.

11 The decision of the Supreme Court of Canada in *PPG*, supra, note 7, reversed the Federal Court of Appeal on a similar ground: although the Chair of the tribunal had a bias, he did not participate in making the decision.

12 Partner, Miller Thomson

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Alberta Court of Queen's Bench

Eco-Industrial Business Park Inc. v. Alberta Diluent Terminal Ltd.

2014 CarswellAlta 1147, 2014 ABQB 302, [2014] A.W.L.D. 3824, 242 A.C.W.S. (3d) 938

Eco-Industrial Business Park Inc., Plaintiff and Alberta Diluent Terminal Ltd, Defendant

J.B. Veit J.

Heard: May 13, 2014
Judgment: July 10, 2014
Docket: Edmonton 1303-16983

Counsel: Donald J. Wilson, Craig Brusnyk, for Plaintiff
Emi R. Bossio, Matthew Vernon, for Defendant

Subject: Civil Practice and Procedure; Contracts; Property

APPLICATION by plaintiff for mandatory interlocutory injunction requiring defendant to provide and facilitate rail access.

***J.B. Veit J.*:**

Summary

1 Eco-Industrial Business Park Inc. applies for a mandatory interlocutory injunction to facilitate its rail access across Alberta Diluent Terminal Ltd.'s property. Amongst other causes of action, ECO claims rectification of a written contract it executed limiting its rail access across ADT's property. ECO alleges that it has an oral agreement with ADL which predates, and is inconsistent with, the written agreement and asserts that ADL behaved unconscionably in not incorporating that oral agreement into the subsequent, formal, written agreements.

2 Alberta Diluent Terminal Ltd. cross-applies for summary dismissal of ECO's claim: relying both on the formal, written access agreement between the parties and on a quit claim executed by ECO, it states that ECO's claim has no hope of success and should therefore be weeded out at this early stage of the proceedings.

3 ECO's application is denied. First, because it is asking for a mandatory injunction, ECO must meet the higher test - that it will probably win at trial, i.e. that it has a strong *prima facie* case, rather

520 than the lower test for a prohibitory injunction - that there is a serious issue to be tried. ECO has failed to clear any of the five hurdles to rectification of a contract based on unilateral mistake set by the Supreme Court of Canada in *Sylvan Lake*. ECO has not established: the existence of a prior agreement; that ADT acted fraudulently in failing to incorporate a prior agreement; the precise form of the prior agreement; even acknowledging that the fourth hurdle set by the SCC in *Sylvan Lake* has been lowered from "convincing proof" to "proof on a balance of probabilities", ECO has not met that standard; and, that it has not acted negligently in reviewing the formal commercial agreement.

4 Second, ECO has failed to establish that it will suffer irreparable harm if the injunction is not granted. Despite having the clear right to require ADT to cooperate in constructing alternate rail access, ECO has done nothing to explore that possibility.

5 Third, ECO has failed to prove that the balance of convenience favours the granting of an injunction: ADT currently uses the rail lines on Lot 2 for its business whereas ECO does not currently use those lines. Moreover, the evidence on this application is that the existing Lot 2 lines could not support the shipment of crude by rail from ECO's proposed terminal as well as from ADT's Alberta Crude Terminal.

6 Overall, ECO has not established that it would be fair and just to issue the requested injunction.

7 ADT's cross-application is denied. The proceedings are in their infancy. On the existing record, it is not possible to state that ECO will not be able, at trial, to make out rectification, or rescission, or any of its other claims

8 *Cases and authority cited*

9 *By the Plaintiff/Applicant: Judicature Act*, RSA 2000, c J-2, s. 8 and 13; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, [1994] S.C.J. No. 17 (S.C.C.); *CCI Thermal Technologies Inc. v. Lewis*, 2005 ABQB 579 (Alta. Q.B.); *Catalyst Canada Services LP v. Catalyst Changers Inc.*, 2013 ABQB 73 (Alta. Q.B.); *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Ltd. Partnership*, 2011 SKCA 120 (Sask. C.A.); *Canadian Pacific Railway v. Gill*, 2013 ONSC 256 (Ont. S.C.J.); *Ron Ghitter Property Consultants Ltd. v. Beaver Lumber Co.*, 2003 ABCA 221 (Alta. C.A.); *Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.* (1979), [1980] 1 S.C.R. 888, [1979] S.C.J. No. 133 (S.C.C.); *Nexxtep Resources Ltd. v. Talisman Energy Inc.*, 2013 ABCA 40 (Alta. C.A.); *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.*, 2002 SCC 19 (S.C.C.); *C. (R.) v. McDougall*, 2008 SCC 53 (S.C.C.); *Canada Lands Co. CLC Ltd. v. Trizechahn Office Properties Ltd.*, 2000 ABQB 166 (Alta. Q.B.); *Brewers' Distributor Ltd. v. 1145127 Alberta Ltd.*, 2007 ABQB 493 (Alta. Q.B.); *Rocky Mountain House (Town) v. Alberta Municipal Insurance Exchange*, 2007 ABQB 548 (Alta. Q.B.); *Dingwall v. Foster*, 2014 ABCA 89 (Alta. C.A.); *Orr v. Fort McKay First Nation*, 2014 ABQB 111 (Alta. Q.B.); *Canalta Concrete Contractors v. Camrose*, [1985] A.J. No. 701 (Alta. Master).

10 *By the Defendant/Respondent: Catalyst Canada Services LP v. Catalyst Changers Inc.*, 2013 ABQB 73, 2013 CarswellAlta 295 (Alta. Q.B.); *Axia Supernet Ltd. v. Bell West Inc.*, 2003 ABQB 195, 2003 CarswellAlta 299 (Alta. Q.B.); *Medical Laboratory Consultants Inc. v. Calgary Health Region*, 2005 ABCA 97, 2005 CarswellAlta 333 (Alta. C.A.); *P. (M.) (Next Friend of) v. Chinook Regional Health Authority*, 2004 ABQB 10, 347 A.R. 302 (Alta. Q.B.); *B-Filer Inc. v. Bank of Nova Scotia*, 2005 ABQB 704, 2005 CarswellAlta 1365 (Alta. Q.B.); *B-Filer Inc. v. TD Canada Trust*, 2008 ABQB 749, 2008 CarswellAlta 1969 (Alta. Q.B.); *Wigglesworth v. Phipps*, 2001 ABQB 113, 284 A.R. 322 (Alta. Q.B.); *Quizno's Canada Restaurant Corp. v. 1450987 Ontario Corp.*, 2009 CarswellOnt 2280, 176 A.C.W.S. (3d) 1016 (Ont. S.C.J.); *Alberta Treasury Branches v. Ghermezian*, 1999 ABQB 1027, 1999 CarswellAlta 330 (Alta. Q.B.); *Longyear Canada, ULC v. 897173 Ontario Inc.*, 2007 CarswellOnt 7958, 162 A.C.W.S. (3d) 671 (Ont. S.C.J.).

11 *By the court*: *Taylor v. Atkinson*, [1984] O.J. No. 399 (Ont. H.C.); *Graymar Equipment (2008) Inc. v. Canada (Attorney General)*, 2014 ABQB 154 (Alta. Q.B.); *McLean v. McLean*, 2013 ONCA 788 (Ont. C.A.); *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Ltd. Partnership*, 2011 SKCA 120 (Sask. C.A.).

1. Background

12 The parties are both sophisticated commercial persons which were represented throughout the commercial dealings referred to in this factual background by experienced and sophisticated lawyers.

13 In 2008, a predecessor to ECO purchased a 583 acre property, previously owned by Celanese Canada, in the east sector of Edmonton. In March 2008, ECO sold a portion of those lands, comprising approximately 15 hectares within Lot 2 Plan 832 3217, to ADT. In conjunction with that sale, ECO and ADT entered into a Rail Line and Right of Way Agreement, hereafter called 2008 Access Agreement, dated March 14, 2008.

14 At the time of the 2008 access agreement, there were 14 rail lines on Lot 2. From the eastern edge of Lot 2, where the lines accessed the CN Rail Yard to the east, one line extended to the west along a relatively narrow strip of land and split into two lines. One of those lines goes south and branches into approximately 13 southern lines; the other line curves north to the southern end of lands which ECO retained. The 2008 agreement gave ECO access to, and non-exclusive use of, all of the existing rail lines on Lot 2.

15 On December 3, 2012, during negotiations for an anticipated new purchase and sale agreement between the same parties, a corporate representative of ECO responded to a request for clarification of the price per acre by stating:

> The Price per acre a minimum of $575,000 as we are giving away exclusivity to existing rail on ADT lands (excluding the Main Line) ...

On December 4, 2013, ADT responded

> We are able to agree on $575/per acre based on:
>
> . . .
>
> (6) Exclusivity to ADT for rail access on and through ADT other than off the panhandle ...

On December 4, 2013, ECO terminated this thread of communication by saying "ok".

16 In early April 2013, ECO sent the following email to ADT:

> ECO agreed to give exclusivity to ADT on its existing rail and the new rail it is buying. In no way ECO wants to be penalized for this concession; we cannot jeopardize our ability to use our own rail on site; we will definitely have to discuss this item on our Friday call.

17 Drafts of the eventual purchase and sale agreement, and of the 2013 access agreement, were exchanged between the parties and their legal advisors. ECO made some changes to the draft agreements which it received.

18 In May 2013, ECO formally agreed to sell the post-subdivision remainder of Lot 2 to ADT. As part of the 2013 sale, ECO and ADT entered into a Rail Line and Right of Way Agreement, hereafter called 2013 Access Agreement. ADT paid ECO in excess of $18.1 million as consideration for the 2013 agreements, including over $7 million which ECO specifically allocated to ADT's purchase from ECO of "exclusive rail rights" to the Lot 2 rail lines, other than what was termed in the agreement a non-exclusive right to use Lot 2 panhandle rail lines and a "new lot 2 rail line (if and when constructed) now or hereafter located on the Lot 2 panhandle", all as more fully described below.

19 Preamble paragraph H of the 2013 Access Agreement states:

> ADTL has agreed to grant to ECO and its successors in title with respect to each of the ECO lands:
>
> (i) a right of way upon and over, and
>
> (ii) the non-exclusive right to use
>
> the Existing Lot 2 Panhandle Rail Lines and the New Lot 2 Rail Line (if and when constructed) now or hereafter located on the Lot 2 Panhandle (collectively the "Lot 2 Panhandle Rail Lines") for the purpose of moving railcars and associated vehicles from the CN rail yard

> located south and east of Lot 2 to trackage on the ECO Lands, all subject to and in accordance with the provisions of this Agreement

20 Article 1.1 of the 2013 Access Agreement states:

> Subject to ECO complying with all of its covenants and obligations set forth herein, ADTL grants to ECO: a right of way upon and over the Lot 2 Panhandle Rail Lines, and (ii) a non-exclusive right to use the Lot 2 Panhandle Rail Lines for the purpose of moving railcars and associated vehicles from the CN rail yard located south and east of Lot 2 to trackage on the ECO lands, all subject to and in accordance with the provisions of this Agreement.

21 Article 1.4(k) of the 2013 Access Agreement provides that, to the extent that ECO is entitled to use the Lot 2 panhandle rail lines, "such rights shall not be construed as ADT granting ECO any access or rights in respect of any rail line that is not situated within the Lot 2 panhandle".

22 Over three pages of the 2013 Access Agreement detail terms by which ECO could connect rail located on ECO lands to the Lot 2 panhandle rail lines through the construction of "the New Lot 2 Rail Line".

23 Article 9.7 of the 2013 Access Agreement states:

> This agreement, the recitals hereto and the schedules attached hereto, together with all supplementary agreements and documents provided for herein, constitute the entire agreement among the Parties and supersedes all prior agreement between the parties with respect to the subject matter of this agreement.

24 A map is attached as Schedule B to the 2013 Access Agreement; that map delineates in red the lands which are referred to in the agreement as the panhandle rail lines. The portion of the map delineated in red does not include the portion of the Lot 2 lines which ECO has described as the "main line".

25 As part of the 2013 purchase and sale arrangement between the parties, ECO executed a Quitclaim Agreement which provides:

> ECO does hereby remise, release and quit-claim unto ADT forever, all the right, title, interest, claim and demand which ECO has in and to Lot 2 and the Improvements.

"Improvements" in this agreement is expressly defined to include the rail tracks situation on, in or under the reciprocal easement area as that term is defined in the Quit Claim. ECO's corporate representative acknowledges that at least part of what it refers to as the Lot 2 Main Line is situated in the reciprocal easement area.

26 ECO has never used what it calls "Lot 2 Main Line" and that line is not currently capable of being used.

27 Both parties agree that crude-by-rail services are likely to be an important market feature in coming years.

2. Is this a request for a mandatory injunction?

28 ECO's request is for a mandatory injunction rather than a prohibitory - sometimes called prohibitive - injunction.

29 In coming to this conclusion, I have taken the following into account:

- ECO's objective in bringing this application is not to stop or prohibit ADT from doing anything, but is rather to compel ADT to do something;

- what ECO is attempting to compel ADT to do is not only to engage in coordination of its use of rail lines with ECO's anticipated use of those lines, which type of coordination would presumably require active management of the rail lines, as well as active reduction of ADT's use of the lines, but also to actively assist ECO in accessing the existing off-panhandle Lot 2 lines by, for example, rectifying the necessary switches. In addition to the active rail traffic coordination which ADT would be required to engage in, because the existing lines go through ADT facilities, ADT would also be required to re-assess its facilities through a safety lens and may have to make whatever safety adjustments would be necessary. The evidence on this application is that ADT would be required to engage in substantial work in order to accommodate ECO's request.

3. What must an applicant for an interlocutory mandatory injunction establish?

30 Although there is interesting and helpful commentary in the case law about the nature and the weight of the components of what is sometimes called the tri-partite test for the granting of an interlocutory injunction, it is generally agreed that an applicant for an interlocutory mandatory injunction must establish that it is fair and just to grant such relief, taking into account whether the applicant has established a strong *prima facie* case, (*Medical Laboratory Consultants Inc.*) that it will suffer irreparable harm if the injunction is not granted, (*Catalyst Canada Services LP* at paras. 72 ff.) and that the balance of convenience favours the granting of the injunction (*Chinook Regional Health Authority*).

4. ECO has not established that it has a strong prima facie case.

31 A strong *prima facie* case has been defined as one in which the applicant has shown that he will probably win at trial: *Taylor* at para. 97. "*Prima facie* case", is defined in *Black's Law*

Dictionary, 7th ed., as "a party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favour". A strong *prima facie* case is, therefore, one where the inference can easily be drawn. When this notion of a strong *prima facie* case is coupled with the idea that respondents on an interlocutory injunction application should put their best foot forward, the result is the *Taylor* formulation.

32 ECO has not shown a strong *prima facie* case. In order to do so, ECO must overcome the fact that the formal, written commercial agreements which it executed after lengthy negotiations during which it had the assistance of experienced counsel would have to be rectified in order to give it the rights which it asserts. As the applicant itself recognizes, rectification of commercial contracts executed by sophisticated parties is not impossible, but the prerequisites for such a remedy are, understandably, demanding and the remedy itself will only be granted sparingly: see *Sylvan Lake*, where the court also said:

> When reasonably sophisticated businesspeople reduce their oral agreements to written form, which are prepared and reviewed by lawyers, and changes made, and the documents are then executed, there is usually little scope for rectification. ...

33 ECO may be able to obtain rectification at trial, but ECO has not led enough evidence on this application to allow the court to draw the inference that rectification will be granted. I note, as well, that ECO has pleaded several causes of action, only one of which is rectification. At this hearing, for understandable reasons, ECO decided to focus on what it perceives to be its strongest cause of action - rectification. Therefore, although the additional causes of action are not dealt with in this decision, it must not be forgotten that those causes of action could also be made out at trial.

34 In coming to the conclusion that ECO has not established that it will probably win at trial, I have considered the 5 hurdles which any litigant must meet in order to obtain rectification of a commercial contract based on unilateral mistake.

a) the existence of a prior, inconsistent, oral agreement

35 ECO points to two communications with ADT as evidence of a prior agreement that was inconsistent with the eventual formal written contract. The first was an ECO email to ADT which said, in part, "we are giving away exclusivity to existing rail on ADT lands (Excluding the Main Line) ..." and a response from ADT to ECO which said, in part, "we ... agree on exclusivity to ADT for rail access on and through ADT other than off the panhandle ...". and a final response from ECO to ADT, "ok".

36 The second communication relied on by ECO is a statement in which it said, in part:

> ...we cannot jeopardize our ability to use our own rail on site; we will definitely have to discuss this item on our Friday call.

37 With respect, taken in their entirety, these communications do not constitute a contract, because their main terms are insufficiently certain: what was meant by "Main Line" in the December 2 email from ECO to ADT and what was meant by "panhandle" in ADT's email to ECO on December 3, were not defined by the parties. Indeed, "Main Line" was never defined by the parties in the agreements; "panhandle" was defined in the eventual formal written contracts. On the face of it, therefore, ADT's response, or counter-offer, of December 3, 2012 means exactly what it says it means - ADT was willing to give up exclusivity off the panhandle for a new line to be constructed and to join with the panhandle; indeed, that interpretation of the words used by ECO appears to be confirmed by ECO in its April 2, 2013 email to ADT when it contrasted "existing" and "new" rails. Moreover, even though the law emphasizes that the courts cannot make an agreement for the parties, the court cannot set its own definition of what "Main Line" means because the line which ECO now identifies as the main line was unused and is unusable, and therefore hardly a "main" line as that word would generally be understood.

b) ADT knew about the prior inconsistent, oral agreement and it would be fraud, or akin to fraud, to allow ADT to take the benefit of the final written agreement

38 Rail access to the CN Rail Yard is a valuable asset whose importance is heightened in western Canada by the current market for crude-by-rail. It would be obvious to anyone dealing with ECO that ECO would be unlikely to dispossess itself of such an asset. However, the formal agreements which ECO had the opportunity of reviewing and revising prior to execution did not deny ECO access to the CN Rail Yard; rather, the agreements made it possible for CN to require ADT to cooperate in the construction of a new rail line that would link up with the "panhandle" on Lot 2, and would provide access to the CN Rail Yard.

39 By ECO's own characterization, it received $7 million from ADT in exchange for giving up its right to non-exclusive access over non-panhandle tracks on Lot 2. It may be, of course, that $7 million is a mere drop in the bucket in relation to the cost of constructing new track that would link ECO's remaining property with the panhandle; however, no evidence of the actual cost to ECO of taking advantage of the contractual right to construct new track was provided on this hearing.

40 The formal agreements pursuant to which ECO gave up its rights to existing rail lines other than on the panhandle were not rushed through, or snapped up, by ADT; on the contrary, drafts of the agreements were exchanged and the negotiation process took many months. There was adequate opportunity for ECO to ensure that its understanding of the arrangement with ADT was accurately represented in the formal agreements.

41 When sophisticated parties accept an "entire agreement" clause in a formal contract, they can be presumed to know what effect that clause will have on any alleged prior oral agreement or representation.

42 In summary on this point, nothing in ADT's conduct during the negotiations and in the preparation of the formal agreements establishes that ADT acted fraudulently or in a way akin to fraud or was morally blameworthy in executing the final agreements with ECO.

c) the precise form of the prior agreement

43 As indicated above, ECO does not meet the third of the SCC's requirements for rectification because it cannot assert the content of the prior agreement; the ambiguity of the language in the exchange of emails around the use of "main line" and "panhandle" is at the root of ECO's assertion of the existence of a prior inconsistent contract.

d) the obligation to establish entitlement by convincing proof

44 I agree with ECO that the Supreme Court of Canada's decision in *C. (R.)* suggests that, in civil matters, there is only one standard of proof and that is proof on a balance of probabilities. The difficulty with that decision is, of course, that it contains mixed messages; at para. 39, the court uses quite specific language — "I summarize the various approaches in civil cases *where criminal or morally blameworthy conduct is alleged*" (emphasis added) — whereas at other places, such as in paras. 45 and 49, it uses very broad language:

> 45 To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case.

Courts have struggled to reconcile the wording in the 2002 decision in *Sylvan Lake* and the 2008 decision in *C. (R.)*: see, for example, *Graymar Equipment*, at paras. 44-47. However, the Ontario Court of Appeal has opted for the broader interpretation of *Sylvan Lake*: *McLean* at paras 41-43. For the purposes of this decision, I assume that the fourth requirement set by the SCC in *Sylvan Lake* has been replaced by a requirement that the applicant establish its entitlement on a balance of probabilities.

45 In summary on this point, ECO has not established that it is more probable than not that there was a prior inconsistent contract between the parties that was fraudulently not carried into the formal agreements.

e) the lack of negligence in reviewing a commercial agreement

46 ECO was represented throughout the negotiations with ADT by experienced, sophisticated counsel. When the final form of written agreements represents the opposite of what ECO contends was the agreement between the parties, it is difficult to understand how a review of the agreements would not have identified that critical difference.

47 Overall, therefore, I must conclude that, on this application, ECO has not established a strong *prima facie* case.

5. ECO has not established that it will suffer irreparable harm if the injunction is not granted.

48 Clearly, ECO — or its related or affiliated firm — would suffer irreparable harm if it could not access the CN Rail Yard through Lot 2. However, on this application, ECO has not provided any evidence whatever that it cannot use 2013 contract terms to construct a new rail line that will provide it with access to the panhandle and thence to the CN Rail Yard.

6. ECO has not established that the balance of convenience favours the issuance of the injunction.

49 If I may say so with respect, I agree with the approach of the Saskatchewan Court of Appeal in *Potash*: the tri-partite test is not a set of hurdles, but rather a set of guidelines to determine equities and the analysis of the balance of convenience is the most comprehensive of those guidelines:

> The assessment of the balance of convenience is usually the core of the analysis. In this regard, the relative strength of the plaintiff's case, the relative likelihood of irreparable harm, and the likely amount and nature of such harm will typically all be relevant considerations. Depending on the particulars of the case, strength in relation to one of these matters might compensate for weakness in another. Centrally, the judge must weigh the risk of the irreparable harm the plaintiff is likely to suffer before trial if the injunction is not granted, and he or she succeeds at trial, against the risk of the irreparable harm the defendant is likely to suffer if the injunction is granted and he or she prevails at trial. That said, the balance of convenience analysis is compendious. It can accommodate a range of equitable and other considerations.

50 Here, ECO's claim for rectification of a formal commercial contract which it executed after having received assistance from sophisticated lawyers is not strong, since it would only suffer irreparable harm if it could not get access to the CN Rail Yard, but ECO has not shown that it cannot build the new track that would provide such access, and since granting its request would require ADT to materially change its operations, the balance of convenience does not favour ECO. Nor has ECO established any equitable right to the remedy which it seeks: there is no evidence that ADT has acted in a fraud-like way in obtaining ECO's execution of the agreements.

7. Overall, ECO has not established that it would be fair and just to issue the injunction.

51 In assessing the totality of the situation, the court cannot agree that it would be fair and just to issue the interlocutory mandatory injunction requested by ECO.

8. ADL has not established that ECO could not succeed at trial.

52 ADT correctly identifies the purpose of applications for summary judgment or dismissal: "It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage" *Papaschase Indian Band No. 136 v. Canada (Attorney General)* [2008 CarswellAlta 398 (S.C.C.)].

53 The basis for determining whether a case is hopeless has been articulated by our Court of Appeal in *Windsor v. Canadian Pacific Railway* [2014 CarswellAlta 395 (Alta. C.A.)]: "The modern test for summary judgment is therefore to examine the record to see if a disposition that is fair and just to both parties can be made on the existing record."

54 I have come to the conclusion that it is not fair and just to both parties to make final determinations of the parties' rights on the existing record. The proceedings are in their infancy. In this decision, the court has concentrated on ECO's claim for rectification of the contract based on unilateral mistake. Although the emails relied on by ECO do not constitute a previous, inconsistent, contract, it is not impossible that evidence may eventually be led to the effect than an oral contract was formed prior to the execution of the formal written contracts and that ADT subsequently acted unconscionably in ignoring that agreement. Moreover, ECO has pleaded other causes of action, such as rescission, and it is too early to determine if those causes of action are hopeless.

9. Costs

55 If the parties are not agreed on costs, I may be spoken to within 30 days of the release of this decision.

Application dismissed.

2006 SCC 13
Supreme Court of Canada

H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)

2006 CarswellNat 903, 2006 CarswellNat 904, 2006 SCC 13, [2006] 1 S.C.R. 441, [2006] S.C.J. No. 13, 147 A.C.W.S. (3d) 159, 266 D.L.R. (4th) 675, 347 N.R. 1, 42 Admin. L.R. (4th) 1, 48 C.P.R. (4th) 161, J.E. 2006-836

Attorney General of Canada (Appellant) and H.J. Heinz Company of Canada Ltd. (Respondent) and Information Commissioner of Canada (Intervener)

McLachlin C.J.C., Bastarache, Binnie, LeBel, Deschamps, Fish, Abella JJ.

Heard: November 7, 2005
Judgment: April 21, 2006 *
Docket: 30417

Proceedings: affirming *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)* (2004), [2005] 1 F.C.R. 281, 14 Admin. L.R. (4th) 123, 32 C.P.R. (4th) 385, 241 D.L.R. (4th) 367, 320 N.R. 300, 2004 CAF 171, 2004 CarswellNat 3911, 2004 FCA 171, 2004 CarswellNat 1202 (F.C.A.); affirming *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)* (2003), 230 F.T.R. 272, [2003] 4 F.C. 3, 2003 FCT 250, 2003 CarswellNat 539, 2003 CFPI 250, 2003 CarswellNat 1724, 25 C.P.R. (4th) 193 (Fed. T.D.)

Counsel: Christopher Rupar, for Appellant
Nicholas McHaffie, Craig Collins-Williams, for Respondent
Raynold Langlois, Q.C., Daniel Brunet, for Intervener

Subject: Public; Property; Intellectual Property

APPEAL by attorney general from judgment reported at *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)* (2004), [2005] 1 F.C.R. 281, 14 Admin. L.R. (4th) 123, 32 C.P.R. (4th) 385, 241 D.L.R. (4th) 367, 320 N.R. 300, 2004 CAF 171, 2004 CarswellNat 3911, 2004 FCA 171, 2004 CarswellNat 1202 (F.C.A.), dismissing appeal from decision that third party could raise personal information exemption under s. 44 review, and ordering severance of records containing personal information.

POURVOI du procureur général à l'encontre de l'arrêt publié à *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)* (2004), [2005] 1 F.C.R. 281, 14 Admin. L.R. (4th) 123, 32 C.P.R.

(4th) 385, 241 D.L.R. (4th) 367, 320 N.R. 300, 2004 CAF 171, 2004 CarswellNat 3911, 2004 FCA 171, 2004 CarswellNat 1202 (C.A.F.), qui a rejeté le pourvoi à l'encontre de la décision qu'un tiers pouvait invoquer l'exception relative aux renseignements personnels dans le cadre d'une révision en vertu de l'art. 44 et qui a ordonné le prélèvement de certains documents contenant des renseignements personnels

***Deschamps J.*:**

1. Introduction

1 This case concerns the delicate balance between privacy rights and the right of access to information. The respondent, H.J. Heinz Company of Canada Ltd. ("Heinz"), contests the disclosure of certain documents on the ground that they contain personal information. Heinz, as a "third party" within the meaning of the *Access to Information Act*, R.S.C. 1985, c. A-1 ("*Access Act*"), seeks to raise the personal information exemption set out in s. 19 by means of an application for review under s. 44 of that Act. The appellant, the Attorney General of Canada, and the intervener, the Information Commissioner of Canada, however, argue that the documents must be disclosed. They assert that the review mechanism provided for in s. 44 is limited to the confidential *business* information which was the basis for Heinz's third party status in the first place. In their submission, a person wishing to complain about the disclosure of *personal* information should instead seek a remedy under the *Privacy Act*, R.S.C. 1985, c. P-21.

2 The Attorney General's narrow interpretation of the legislative scheme is, in my view, too restrictive of the rights involved. This Court has stated on numerous occasions that the *Privacy Act* and the *Access Act* must be read together as a "seamless code": *Canada (Information Commissioner) v. Royal Canadian Mounted Police Commissioner*, [2003] 1 S.C.R. 66, 2003 SCC 8 (S.C.C.), at para. 22 ("*RCMP*"). The right of access to government information, while an important principle of our democratic system, cannot be read in isolation from an individual's right to privacy. By including a mandatory privacy exemption in the *Access Act* itself, Parliament ensured that both statutes recognize that the protection of the privacy of individuals is paramount over the right of access, except as prescribed by law. Where a third party becomes aware that a government institution intends to disclose a record containing personal information, nothing in the plain language of the *Access Act* prevents the third party from raising this concern by applying for judicial review. What matters is not how the reviewing court became aware of the government's wrongful decision to disclose personal information, but the court's ability to give meaning to the right to privacy. A reviewing court is in a position to prevent harm from being committed and the statutory scheme imposes no legal barrier to prevent the court from intervening. An interpretation of s. 44 that forces an individual to wait until the personal information is disclosed and the damage is done, or that imposes an onerous burden on the person seeking to avert the harm, fails to give actual content to the right to privacy and also fails to satisfy the clear legislative goals underlying the *Access Act* and the *Privacy Act*.

2. Facts

3 In June 2000, the Canadian Food Inspection Agency ("CFIA") received a request under the *Access Act* for access to certain records pertaining to Heinz. The CFIA determined that some of the records might contain confidential business or scientific information, as described in s. 20(1) of the *Access Act*, and requested, pursuant to ss. 27 and 28 of the Act, that Heinz make representations as to why the documents should not be disclosed. Heinz submitted its representations in early September. After reviewing them, the CFIA concluded that the records should be disclosed, subject to certain redactions, and notified Heinz of its decision. On September 27, 2000, Heinz commenced a review proceeding pursuant to s. 44 of the *Access Act*, arguing that certain records should not be disclosed because they fell under two exemptions established by the Act: that of s. 20(1), which prohibits the disclosure of confidential business information, and that of s. 19(1), which prohibits the disclosure of personal information relating to individuals.

4 In the review proceeding, the Attorney General argued that it was inappropriate for Heinz to raise any exemption other than s. 20(1) because it was the presence of business information which was the basis for Heinz's right of review in the first place. The application judge disagreed, concluding that Heinz could raise the personal information exemption under s. 19, and ordered the severance of certain records containing personal information relating to individuals. The Attorney General appealed that decision. The Federal Court of Appeal dismissed the appeal.

3. Judicial History and Case Law

5 The judgments of both the Federal Court of Appeal and the Federal Court- Trial Division are rooted in the jurisprudence of the Federal Court of Canada. I will therefore review the judgments in this case in conjunction with the case law of the Federal Court of Canada.

3.1 Federal Court-Trial Division, [2003] 4 F.C. 3, 2003 FCT 250 (Fed. T.D.)

6 In the Trial Division, Layden-Stevenson J. considered whether, in a s. 44 application for review, Heinz could raise the prohibition against the disclosure of personal information established by s. 19 of the *Access Act*. She reviewed two prior Federal Court of Canada decisions which appeared to come to contradictory conclusions regarding the scope of s. 44: *Saint John Shipbuilding Ltd. v. Canada (Minister of Supply & Services)* (1988), 24 F.T.R. 32 (Fed. T.D.), aff'd (1990), 107 N.R. 89 (Fed. C.A.), and *Siemens Canada Ltd. v. Canada (Minister of Public Works & Government Services)* (2001), 213 F.T.R. 125, 2001 FCT 1202 (Fed. T.D.), aff'd (2002), 21 C.P.R. (4th) 575, 2002 FCA 414 (Fed. C.A.).

7 *Saint John Shipbuilding*, concerned an application under s. 44 for a review of a decision by the Department of Supply and Services to release certain extracts from and summaries of a contract with the Government of Canada. The applicant was primarily concerned with the proper

application of s. 20(1)(*c*) and (*d*) of the *Access Act* but urged the court to consider s. 15 as well. Section 15 provides that the head of an institution "may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to . . . the defence of Canada". Because the material at issue consisted of defence-related contracts, the applicant raised the fact that s. 15 of the *Access Act* might also exempt the records from disclosure, and urged the court to be particularly reticent to allow the records to be released. However, both the Trial Division and the Federal Court of Appeal rejected the applicant's arguments respecting s. 15. Martin J., writing for the Trial Division, held that his powers of review in a s. 44 proceeding were limited to the considerations set out in s. 20(1) of the Act and that the national security issue was irrelevant to the proceeding. Similarly, Hugessen J.A. at the Federal Court of Appeal stated that "the appellant's interest, as third party intervenor in a request for information, is limited to those matters set out in subsection 20(1)" (para. 9).

8 In *Siemens*, by contrast, the Federal Court of Appeal held that it was unable to interpret s. 44 in a way that would limit the jurisdiction of the court and prevent s. 24 from being involved. By implication, therefore, the Court of Appeal found that the applicant was not limited to the exemption set out in s. 20(1) of the *Access Act*. The applicant objected to the disclosure of information on the ground that s. 30 of the *Defence Production Act*, which is incorporated into the *Access Act* by virtue of s. 24, precluded release of the documents. At trial, McKeown J. accepted that s. 30 of the *Defence Production Act* applied, thereby implicitly accepting that he had jurisdiction to apply s. 24 in the context of a s. 44 application. Crown counsel apparently argued against this approach on appeal, asserting that s. 44 limits the jurisdiction of the court such that only s. 20(1) can be raised in a s. 44 review. In delivering a laconic decision from the bench, however, the Federal Court of Appeal dismissed the Crown's arguments, stating simply: "We are unable to interpret s. 44 in this way".

9 At trial in the instant case, Layden-Stevenson J. reconciled *Saint John Shipbuilding* and *Siemens* by pointing out that the *Access Act* contains both mandatory and discretionary exemptions and that the procedure for refusing disclosure differs under the two types of exemptions. A mandatory exemption requires only a decision as to whether the material falls within the exemption; a discretionary exemption, by contrast, requires the government institution to determine, first, whether the information falls within the exemption and, second, whether the material should be disclosed regardless. Layden-Stevenson J. found that the holding in *Saint John Shipbuilding* related specifically to the application of a discretionary exemption and did not prohibit raising *mandatory* exemptions in an application for review under s. 44. She added that in *Siemens*, the Federal Court of Canada had, in addressing the application of a mandatory exemption (s. 24), found that the exemption in question could be raised in a s. 44 proceeding. She therefore concluded, on the basis that the s. 19 prohibition against disclosing personal information is a mandatory exemption, that Heinz could raise s. 19 in a s. 44 proceeding.

10 Finally, Layden-Stevenson J. relied on the principles of statutory interpretation stated in *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), to hold that Heinz was entitled to raise the personal information exemption because there is no restriction on the "representations" that can be made under s. 28 of the *Access Act*. She agreed that some of the requested information met the criteria of s. 19 and severed specific passages as a result. She ordered that the remaining records be disclosed.

3.2 Federal Court of Appeal, (2004), [2005] 1 F.C.R. 281, 2004 FCA 171 (F.C.A.)

11 On appeal, Nadon J.A. held that *Siemens* had settled the debate regarding the scope of s. 44 and that it was impossible to distinguish *Siemens* from the instant case on any basis. The Federal Court of Appeal had clearly decided in *Siemens* that a third party could, on a s. 44 application, seek to prevent the disclosure of records on the basis of exemptions other than confidential business information. Nadon J.A. refused to overturn *Siemens*, because it could not be said that the decision in that case was "manifestly wrong". He accordingly dismissed the appeal.

3.3 Applicability of the Case Law

12 Neither *Saint John Shipbuilding* nor *Siemens* provides this Court with specific reasoning on the proper scope of a s. 44 application. More importantly, the exemption provision at issue here (s. 19) differs markedly in nature, purpose and application from the exemption provisions raised in the prior cases. Parliament's harmonized design of access to information and privacy legislation clearly indicates, as this Court's jurisprudence has confirmed, that the *Access Act* and the *Privacy Act* must be read together, with special emphasis given to the protection of personal information.

13 The applicability of the personal information exemption in a s. 44 proceeding was also at issue in *SNC Lavalin Inc. v. Canada (Minister for International Co-operation)*, [2003] 4 F.C. 900, 2003 FCT 681 (Fed. T.D.) ("*Lavalin*"), which was heard by the Federal Court-Trial Division soon after the case at bar. In that case, SNC Lavalin, a large engineering construction company, contested a decision of the Canadian International Development Agency ("CIDA") to disclose documents to an access requester. Like Heinz, SNC Lavalin claimed that a number of the requested documents contained personal information relating to individuals and should not be released pursuant to s. 19 of the *Access Act*. The trial judge rejected Lavalin's arguments, suggesting that in order to confer on a third party a right to make representations unrelated to confidential business information (s. 20(1)), the court would have to read words into s. 28(1), the provision which establishes a third party's right to make representations. Reading in would violate the established principle that "the court should not accept an interpretation which requires the insertion of extra wording where there is another acceptable interpretation which does not require any additional wording": *Friesen v. R.*, [1995] 3 S.C.R. 103 (S.C.C.), at para. 27, as cited in *Markevich v. Canada*, [2003] 1 S.C.R. 94, 2003 SCC 9 (S.C.C.), at para. 15.

14 For the reasons discussed below, however, I am unable to agree with the trial judge's conclusions in *Lavalin*. The applicability of s. 19 in the context of a s. 44 review is now squarely before the Court and must be addressed keeping in mind the principles of statutory interpretation and, in particular, the broader purpose and context of the federal access to information and privacy legislation.

15 Before proceeding to the analysis, it will thus be helpful to review the legislative framework.

4. Legislative Provisions

16 The relevant legislative provisions are set out in the Appendix. However, the process under the *Access Act* for reviewing decisions to disclose information involves the interaction of multiple provisions, and it is worth examining the key provisions in greater detail.

17 The *Access Act* establishes a broad right of access to records under the control of government institutions (s. 4). At the same time, the Act recognizes that rights of access are not absolute by outlining a number of exemptions to disclosure (ss. 13-26). Most important for the purposes of this case are the exemptions relating to personal information (s. 19) and to confidential business information (s. 20(1)). They provide as follows:

> 19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the *Privacy Act*.
>
> (2) The head of a government institution may disclose any record requested under this Act that contains personal information if
>
> (a) the individual to whom it relates consents to the disclosure;
>
> (b) the information is publicly available; or
>
> (c) the disclosure is in accordance with section 8 of the *Privacy Act*.
>
> 20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains
>
> (a) trade secrets of a third party;
>
> (b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;

> (c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or
>
> (d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

18 Section 19(1) thus creates a mandatory prohibition against the disclosure of "personal information", which is defined in s. 3 of the *Privacy Act* as "information about an identifiable individual that is recorded in any form". Section 20(1) prohibits the disclosure of records containing confidential business information supplied by a "third party". A "third party" is defined as "any person, group of persons or organization other than the person that made the request or a government institution" (s. 3 of the *Access Act*). The parties are not debating at this stage whether certain information contained in the records meets the criteria of s. 19; rather, the issue in the case at bar is whether s. 19 may be raised in a s. 44 review proceeding.

19 Where a government institution intends to disclose confidential business information, the *Access Act* provides that the institution must give the third party notice (s. 27(1)) and that the third party has the right to make representations to the institution as to why the record should *not* be disclosed (s. 28(1)(*a*)). It is important to note that the third party also has the right to be given notice if the institution decides to go ahead and disclose the record (s. 28(1)(*b*)). (This right to notice is also triggered under s. 29(1) of the *Access Act* by a recommendation for disclosure by the Information Commissioner, although only s. 28(1) is relevant to the facts of the instant case.) If the third party wishes to contest the government institution's decision to disclose the record, he or she may apply to the Federal Court for a review of the matter pursuant to s. 44(1), which reads as follows:

> 44. (1) Any third party to whom the head of a government institution is required under paragraph 28(1)(*b*) or subsection 29(1) to give a notice of a decision to disclose a record or a part thereof under this Act may, within twenty days after the notice is given, apply to the Court for a review of the matter.

Third parties who have received notice regarding the disclosure of confidential business information are thus accorded a special right of review. Moreover, if a s. 44 review is initiated, the person who made the original request for access must be notified and given the opportunity to appear as a party (ss. 44(2) and 44(3)).

20 These provisions must now be put in context.

5. Analysis

5.1 Statutory Interpretation

21 As with most questions of statutory interpretation, the dispute can be resolved through what is now commonly referred to as the modern approach: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd.*, at para. 21).

5.1.1 Legislative History

22 Originally considered together by Parliament and enacted simultaneously in 1982, the *Access to Information Act* and the *Privacy Act* are parallel statutes which in combination provide a cohesive framework for balancing the right of access to information and privacy rights: *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 (S.C.C.), at para. 45. As is clear from the parliamentary debates at the time the Acts were introduced, Parliament intended the new, comprehensive access to information and privacy legislation to increase government accountability in two ways: first, by ensuring that access to information under government control is a public right rather than a matter of government discretion and, second, by strengthening the rights of individuals to know "how personal information will be used . . . that the information used for decision-making purposes is accurate . . . and that information collected by government institutions is relevant to their legitimate programs and operations": *House of Commons Debates*, vol. VI, 1st Sess., 32nd Parl., January 29, 1981, at pp. 6689-91, Second Reading of Bill C-43 by the Hon. Mr. Francis Fox, then Minister of Communications.

23 Significantly, while protecting personal information is the primary purpose of the *Privacy Act*, the *Access Act* also recognizes the importance of protecting privacy rights, and in so doing necessarily qualifies the right of access to information under government control articulated in s. 4(1) of the Act: *RCMP*, at para. 22. Indeed, when the *Access Act* and the *Privacy Act* were introduced in Parliament, the then Minister of Communications emphasized that, while the Bill dealt with both access to information and privacy, it ensured "a *consistent* treatment of personal information and the protection of individual privacy" (emphasis added (*House of Commons Debates*, at p. 6690)). More specifically, the legislature ensured the protection of personal information under the *Access Act* through s. 19, which mandatorily prohibits government institutions from disclosing personal information about an individual to an access requester, subject to certain exceptions.

24 As demonstrated by the background to the enactment of the two statutes, therefore, Parliament has created a legislative scheme which, while intended to ensure access to information on the one hand and protect individual privacy on the other, consistently protects personal information. As a result of these tightly interlaced legislative histories, s. 44 cannot be interpreted simply with regard to the purpose of the *Access Act*, but must also be understood with reference to the purpose of the *Privacy Act*. I will therefore now turn to an analysis of the differing, but connected, purposes of the two statutes.

5.1.2 Purpose

25 As I have suggested, the closely related legislative histories of the *Access Act* and the *Privacy Act* require a reviewing court to consider the purposes of both statutes rather than viewing each one in isolation from the other. In *Dagg*, La Forest J. (dissenting but not on this point) came to the same conclusion. Addressing the tension between "two competing legislative policies" (para. 45), he suggested that while some friction between the right of access to information and privacy rights is inevitable, the two statutes "set out a coherent and principled mechanism for determining which value should be paramount in a given case" (para. 45). Like two sides of the same coin, the *Access Act* and the *Privacy Act* ensure that neither the right of access to information nor the right to individual privacy is given absolute pre-eminence.

26 The intimate connection between the right of access to information and privacy rights does not mean, however, that equal value should be accorded to all rights in all circumstances. The legislative scheme established by the *Access Act* and the *Privacy Act* clearly indicates that in a situation involving personal information about an individual, the right to privacy is paramount over the right of access to information, except as prescribed by the legislation. Both Acts contain statutory prohibitions against the disclosure of personal information, most significantly in s. 8 of the *Privacy Act* and s. 19 of the *Access Act*. Thus, while the right to privacy is the driving force behind the *Privacy Act*, it is also recognized and enforced by the *Access Act*.

27 As I have mentioned, s. 44 provides third parties with a right to apply to the Federal Court for review of decisions to disclose records. This right of review helps to promote one of the underlying purposes of the *Access Act*: to ensure that decisions on disclosure are "reviewed independently of government" (s. 2(1)). Indeed, the review mechanisms created by the two Acts introduce an important level of governmental accountability. As the Minister of Communications stated upon introducing the *Privacy Act* and the *Access Act* in Parliament, the Acts allow the courts to examine whether a government institution had reasonable grounds for its decision to disclose a particular record, placing the burden squarely on the shoulders of government: *House of Commons Debates*, at p. 6691. Section 44 thus establishes a key mechanism by which a government institution's erroneous decision to disclose information may be reviewed and rectified pursuant to the principles of the *Access Act*.

28 Given the interlocking nature of the two Acts, the right of review provided for in s. 44 must be interpreted with regard not only to the purpose and structure of the *Access Act*, but also to the legislative purposes of the *Privacy Act*. As indicated, the purpose of the *Privacy Act* is to protect the privacy of individuals with respect to personal information about themselves that is held by a government institution (s. 2). The importance of this legislation is such that the Privacy Act has been characterized by this Court as "quasi-constitutional" because of the role privacy plays

in the preservation of a free and democratic society: *Lavigne v. Canada (Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, 2002 SCC 53 (S.C.C.), at para. 24; *Dagg*, at paras. 65-66.

29 The central protection relating to the disclosure of personal information is provided for in s. 8 of the *Privacy Act*, which establishes in strict terms that "[p]ersonal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section". The *Privacy Act* also provides a number of exceptions to the prohibition against disclosing personal information, including a "public interest" limitation on privacy rights (see s. 8(2)(*a*) through (*m*)). However, even where a government institution discloses personal information by exercising its public interest discretion, it must notify the Privacy Commissioner prior to disclosure where reasonably practicable, and the Privacy Commissioner may notify the individual (s. 8(5)). Thus, it is clear from the legislative scheme established by the *Access Act* and the *Privacy Act* that in a situation involving personal information about an individual, the right to privacy is paramount over the right of access to information.

30 It is worth noting, however, that despite the emphasis on the protection of privacy, the legislative scheme ensures that the rights of the access requester are also taken into account in the context of an application for review. Where a s. 44 review has been initiated, the person who made the original request for access must be notified and given the opportunity to make representations (ss. 44(2) and 44(3)). In this way, the statute provides a further mechanism for balancing the rights of access requesters and of those who object to disclosure.

31 It is apparent from the scheme and legislative histories of the *Access Act* and the *Privacy Act* that the combined purpose of the two statutes is to strike a careful balance between privacy rights and the right of access to information. However, within this balanced scheme, the Acts afford greater protection to personal information. By imposing stringent restrictions on the disclosure of personal information, Parliament clearly intended that no violation of this aspect of the right to privacy should occur. For this reason, since the legislative scheme offers a right of review pursuant to s. 44, courts should not resort to artifices to prevent efficient protection of personal information.

5.1.3 Legislative Context of Section 44

32 The histories and purposes of the *Privacy Act* and the *Access Act* illustrate the intimate relationship between the two statutes. This relationship is also reflected in the comprehensive legislative scheme created by the two statutes. The legislative context of s. 44 thus provides further guidance regarding the proper scope of the review power.

33 Structurally and conceptually, the *Privacy Act* and the *Access Act* create a complementary and harmonious legislative scheme: *RCMP*, at para. 22. This is evidenced in particular by the way in which the Acts make reference to each other (see, for example, ss. 19(1) and 19(2) of the *Access Act*, and ss. 3, 21, 46, and 65 of the *Privacy Act*) and by the lack of repetition between

them. The two statutes also establish analogous roles for the Information Commissioner and the Privacy Commissioner, each of whom is charged with carrying out impartial, independent and non-partisan investigations into the violation of, respectively, the right of access to information and privacy rights. Indeed, pursuant to s. 55(1) of the *Privacy Act*, the Information Commissioner may be appointed as Privacy Commissioner, and thus a single individual can hold both offices.

34 The Information Commissioner and the Privacy Commissioner benefit not only individuals who request access or object to disclosure, but also the Canadian public at large, by holding the government accountable for its information practices. As this Court has emphasized in the past, the Commissioners play a crucial role in the investigation, mediation, and resolution of complaints alleging the improper use or disclosure of information under government control: *Lavigne*, at paras. 37-39. Also, as former Justice La Forest notes in a recent report entitled *The Offices of the Information and Privacy Commissioners: The Merger and Related Issues*, Report of the Special Advisor to the Minister of Justice (November 15, 2005) ("La Forest report"), at pp. 17-18, the role and responsibilities of the Commissioners extend even further to include auditing government information practices, promoting the values of access and privacy nationally and internationally, sponsoring research, and reviewing proposed legislation.

35 However, as the following discussion will show, in the specific circumstances of the case at bar, the Privacy Commissioner and the Information Commissioner are of little help because, with no power to make binding orders, they have no teeth. Where, as here, a party seeks to *prevent* the disclosure of information as opposed to requesting its release, the Commissioners' role is necessarily limited by an inability to issue injunctive relief or to prohibit a government institution from disclosing information. Section 44 is therefore the sole mechanism under either the *Access Act* or the *Privacy Act* by which a third party can draw the court's attention to an intended disclosure of personal information in violation of s. 19 of the *Access Act*, and by which it can seek an effective remedy on behalf of others whose privacy would be affected by the disclosure of documents for which the third party is responsible.

36 The *Privacy Act* establishes a central role for the Privacy Commissioner in the protection of privacy rights. Under s. 29(1)(*a*) through (*f*), individuals who believe that personal information about themselves has been wrongfully used or disclosed by a government institution may complain to the Privacy Commissioner. The Privacy Commissioner is charged with receiving and investigating such complaints and, where they are well founded, with reporting his or her findings and recommendations to the appropriate government institution (ss. 29(1) and 35). To do this, the Commissioner is accorded broad investigative powers, including the powers to summon and enforce the appearance of persons, compel persons to give evidence, enter government premises, and examine records on government premises (s. 34). Pursuant to s. 37, the Privacy Commissioner may also carry out its own investigations in respect of personal information under the control of government institutions to ensure compliance with the *Privacy Act*. However, while these complaint mechanisms are important in the larger scheme of the *Privacy Act*, they are available

only where the wrongful disclosure has *already* occurred and where the complaint is laid directly by the person who is the subject of the information that was wrongfully disclosed (i.e. not by a third party). The Privacy Commissioner may not, therefore, act to prevent the disclosure of personal information.

37 Third parties may receive some assistance from the Privacy Commissioner pursuant to s. 29(1)(*h*)(ii) of the *Privacy Act*, which requires the Privacy Commissioner to receive and investigate complaints "in respect of any other matter relating to . . . the use or disclosure of personal information under the control of a government institution". In contrast to s. 29(1)(*a*) through (*f*), this provision accords the Privacy Commissioner a broader ambit of investigation and does not appear to be limited to situations where the wrongful disclosure of personal information has already occurred or where the complaint was received directly from the individual involved. It may therefore be open to a third party to initiate a complaint on behalf of employees or others *before* disclosure occurs. This broader complaint mechanism is inadequate, however, because the Privacy Commissioner has no authority to issue decisions binding on the government institution or the party contesting the disclosure. Nor does the Commissioner have an injunctive power which would allow it to stay the disclosure of information pending the outcome of an investigation. Indeed, s. 7 of the *Access Act* requires the government institution to disclose the requested information within a specific time limit once a disclosure order is issued. The Privacy Commissioner's ability to provide relief to Heinz is thus very limited.

38 In a manner similar to the *Privacy Act*, the *Access Act* establishes a central role for the Information Commissioner, who is charged with protecting and acting as an advocate of the rights of access requesters, and with conducting investigations. In a dispute under the *Access Act*, where a person makes a request to a government institution for access to a record and the request is denied, the requester may file a complaint with the Information Commissioner, which the Commissioner must investigate (s. 30). Section 36 of the *Access Act* accords to the Information Commissioner broad investigative powers similar to those of the Privacy Commissioner and, as a result of its expertise, staff and flexibility, the office of the Information Commissioner is in a unique position to conduct such investigations: *Davidson v. Canada (Solicitor General)*, [1989] 2 F.C. 341 (Fed. C.A.).

39 However, the Information Commissioner is of only limited assistance in circumstances like those in the case at bar. The primary role of the Information Commissioner is to represent the interests of the public by acting as an advocate of the rights of access requesters. Here, Heinz is *contesting* a decision to disclose information. While s. 30(1)(*f*) of the *Access Act* charges the Information Commissioner with receiving and investigating complaints "in respect of *any other matter* relating to requesting or obtaining access to records under this Act" (emphasis added), such broad language does not change the fact that the role of the Information Commissioner, and this is consistent with the purpose of the *Access Act* as a whole, is to act, where appropriate, as an advocate of the disclosure of information. Moreover, like the Privacy Commissioner, the

Information Commissioner may not issue binding orders or injunctive relief and accordingly cannot order the government not to disclose a record.

40 Section 44 thus establishes the sole mechanism within the scheme of the *Access Act* and the *Privacy Act* by which a third party may request an independent review of a ministerial or government decision to disclose information. As a result, s. 44 helps to promote the purposes of both Acts by providing an avenue for complaints relating to the violation of privacy and ensuring that government institutions are accountable for their information practices.

5.1.4 Plain and Ordinary Meaning

41 As has been discussed, a review under s. 44 of the *Access Act* is triggered by a third party's right to notice where requested records may contain confidential business information. While the notice provisions relating to the disclosure of confidential business information therefore necessarily limit the availability of a s. 44 review, the plain language of ss. 28, 44 and 51 of the *Access Act* does not explicitly restrict the scope of the right of review. On the contrary, four key words or expressions, read in their "plain and ordinary meaning", indicate the legislature's intention to give the court a generous ambit of review on a s. 44 application.

42 First, the plain language of s. 28 supports a broad interpretation of the review process. As has been mentioned, the *Access Act* provides that a third party has a right to make "representations" to the government institution as to why "the record or the part thereof should not be disclosed" (s. 28(1)(*a*)). As the trial judge noted, nothing in that section explicitly purports to limit the range of representations that can be made, "provided, of course, they are relevant to the issue of disclosure" (para. 24). Had the legislature intended to limit the scope of such representations, it would have included references to this effect.

43 Second, the use of the word "record" in s. 28 indicates a legislative intent to make the entire record available for review, not simply the specific information subject to s. 20(1). Section 3 of the *Access Act* specifies that "record" includes a wide range of "documentary material, regardless of physical form or characteristics", such as books, maps, drawings, photographs, sound recordings, and videotapes. This definition relates to the physical form of the information and places no limits on the scope of the review. Similarly, s. 51 of the *Access Act* refers to a reviewing judge in a s. 44(1) application determining whether a record "or part thereof" should be disclosed. The *Access Act* clearly envisions a "record" as a "set" of information which can be divided or severed. For example, a book may include many discrete and severable "pieces" of information, each of which might be reviewed on a different basis. This broader interpretation is confirmed by the use, in the French version of s. 28, of the word "*document*" rather than "*renseignements*".

44 Third, s. 44 allows the third party to apply to the court for a review of "the matter". Nothing in the plain language of s. 44 expressly limits the scope of "the matter". The French version is even more general because the subject of the review is not mentioned. What is more, in a case dealing

with the interpretation of s. 18 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, the Federal Court of Appeal held that "matter" embraces "not only a 'decision or order' but any matter in respect of which a remedy may be available under section 18 of the Federal Court Act": *Krause v. Canada*, [1999] 2 F.C. 476 (Fed. C.A.), at para. 21; see also *Morneault v. Canada (Attorney General)* (2000), [2001] 1 F.C. 30 (Fed. C.A.), at para. 42.

45 Finally, s. 51, which establishes the powers of the court on a s. 44 application, also suggests a broad interpretation. Section 51 states that:

> 51. Where the Court determines, after considering an application under section 44, that the head of a government institution is required to refuse to disclose a record or part of a record, the Court shall order the head of the institution not to disclose the record or part thereof or shall make such other order as the Court deems appropriate. [Emphasis added.]

Again, nothing in this section limits the court's discretion to a consideration of the s. 20(1) exemption alone. Indeed, the use of the word "required", coupled with the mandatory nature of s. 19(1), suggests that the court has an obligation to review any aspect of the record where the government has failed to abide by the provisions governing disclosure. This obligation is underscored by the emphasis placed on the protection of privacy rights in both the *Access Act* and the *Privacy Act*.

46 The broad language of s. 44, combined with the fact that this section provides the only direct access to the effective protection afforded by a reviewing court, lends support to the conclusion that the court's jurisdiction should not be limited by the circumstances under which the third party was given notice. The plain language of the statute, together with the legislative context and combined purposes of the *Access Act* and the *Privacy Act*, provides ample foundation for the conclusion that the reviewing court has jurisdiction to protect personal information on a third party application for review.

6. Arguments for Limiting the Scope of a Section 44 Review

47 The parties have presented a number of arguments in support of a more restrictive interpretation of s. 44 which merit further attention.

6.1 The History of Section 28(1)

48 The Attorney General argues that because s. 27 refers specifically to "information described in paragraph 20(1)(*b*)", s. 28 should also be read to include this reference. Prior to the revision and consolidation of the Statutes of Canada in 1985, the current s. 28(1)(*a*), which grants a third party the right to make representations to the government institution, and s. 27(1), which provides the third party with a right to notice of the decision to disclose, were combined in one provision (s.

28(5)). These rights to notice and to make representations were thus included in a single section which referred explicitly to the exemption under s. 20(1). Thus, according to the Attorney General, the right of a third party to make representations under s. 28 of the *Access Act* is limited to the part of the record which contains information described in s. 20 or, in other words, to confidential business information.

49 However, where a statutory provision is severed, the introductory words of the first provision are not necessarily read into the second: *R. v. McIntosh*, [1995] 1 S.C.R. 686 (S.C.C.). In *McIntosh*, a case concerning two provisions which had originally been combined in one, the Court refused to read the introductory words of the original provision into the new provisions. Finding that Parliament's decision not to reproduce the crucial words in the second provision "is the best and only evidence we have of legislative intention" (para. 25), Lamer C.J. concluded that he could not distort the clear and unequivocal wording of the provision. In the instant case, Parliament's decision not to link s. 28 explicitly to s. 20 must be regarded as significant. Moreover, no inconsistent results flow from a non-restrictive reading of the provision. Rather, interpreting ss. 28 and 44 to allow for representations based on s. 19 serves to strengthen the protection of personal information, which is a stated goal of the *Privacy Act* and an underlying theme of the *Access Act*.

6.2 The Notice Scheme

50 The Attorney General argues that the special notice accorded to third parties under the *Access Act* is proof that a third party should be able to raise only a s. 20(1) exemption in a s. 44 application. The right of review under s. 44 is triggered by a third party's right to notice where confidential business information is alleged to exist; therefore, the Attorney General asserts, the scope of s. 44 should be limited to such information. He suggests that Parliament's failure to provide similar notice provisions where personal information is involved indicates that the legislature did not intend that s. 19 should be available on a s. 44 application.

51 This argument is unconvincing. The unique notice given to third parties is tied to the specific nature of the exemption. While a government institution would not have any specific knowledge of the business or scientific dealings of a third party, the subject matter of the other exemptions falls generally within the expertise of government officials and/or the Privacy Commissioner. These exemptions relate, for example, to information obtained in confidence from a foreign state, federal-provincial affairs, international affairs, investigations and law enforcement, safety of individuals, the economic interests of Canada, advice and recommendations to a minister, testing procedures, solicitor-client privilege, and statutory prohibitions (see ss. 13 to 24 of the *Access Act*). Moreover, information covered by these exemptions would likely implicate the public interest in such a way that it would supersede any individual rights of access to information. In the case of confidential business information, however, the assistance of the third party is necessary for the government institution to know how, or if, the third party treated the information as confidential. Indeed, the third party's information management practices may be an important

means of determining whether the information actually meets the definition of "confidential": *Canadian Tobacco Manufacturers' Council v. Minister of National Revenue* (2003), 239 F.T.R. 1, 2003 FC 1037 (F.C.), at para. 114; *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 27 F.T.R. 194 (Fed. T.D.), at para. 37; *Brookfield Lepage Johnson Controls Facility Management Services v. Canada (Minister of Public Works & Government Services)*, [2003] F.C.J. No. 348, 2003 FCT 254 (Fed. T.D.), at para. 13. Whether the information is confidential cannot be determined without representations from the third party.

52 Moreover, in my view, the mandatory nature of s. 19 precludes the need for a notice provision. Notice under the *Access Act* is a right intended to enable a party to contest the release of information and is therefore required only where the statute contemplates the possibility of making information public, as is the case with confidential business information under s. 20(1). Section 19, however, provides that a government institution "shall refuse to" disclose personal information. The three exceptions carved out of this rule under s. 19(2) make it clear why a general notice provision is unnecessary.

53 First, personal information may be disclosed if the individual consents (s. 19(2)(*a*)). Clearly, if the individual consents, he or she will not contest the disclosure of the information, and as a result no express notice provision is necessary. A government institution can easily determine whether the individual has in fact consented to the release of personal information subject to s. 19.

54 Second, personal information may be disclosed where the government institution determines that the requested information is already in the public domain (s. 19(2)(*b*)). Again, in such circumstances, notice to the individual to whom the information relates would serve no useful purpose - the individual party cannot control access to information in the public domain and so, presumably, has no grounds on which to contest disclosure.

55 Third, a government institution may disclose personal information in exceptional circumstances in which the public interest in disclosure outweighs an individual's right to privacy (s. 19(2)(*c*) of the *Access Act* and s. 8(2)(*m*) of the *Privacy Act*). Should such circumstances arise, Parliament *has* provided for the individual to be notified via the Privacy Commissioner (s. 8(5) of the *Privacy Act*). Where the government exercises its discretion to disclose personal information on the basis of public interest, the Privacy Commissioner must be informed *prior to* the disclosure, where practicable, and may notify the individual involved.

56 In my view, therefore, the right to notice accorded to third parties follows logically from the specific nature of the confidential business information exemption and does not limit the right of review provided for in s. 44.

6.3 The Creation of "Two Levels" of Third Parties

57 The Attorney General further submits that allowing third parties to raise, on a s. 44 review, exemptions other than those provided for in s. 20(1) will result in the creation of two categories of third parties: those who receive notice under s. 20(1) and those who do not. If the possible application of s. 20(1) by the government institution had not occurred, the Attorney General argues, Heinz would not have received notice of the possible disclosure of records and would not have been able to make submissions in respect of the application of s. 19. To put it in more basic terms, why should Heinz be afforded an opportunity to invoke s. 19 that is not available to other parties who are not "third parties" under the *Access Act*?

58 This argument is, in my view, unsound. A basic premise of the *Access Act* is that personal information will not be disclosed in violation of the mandatory prohibition set out in s. 19. The access to information and privacy scheme is founded on the assumption that government institutions will respect the mandatory prohibition on disclosing personal information and that no notice is therefore required for personal information relating to individuals. As I have stated, in the specific circumstances in which the *Access Act* does authorize the disclosure of personal information - where the information is already publicly available, where the individual to whom the information relates consents, or where there is an overriding public interest - a notice provision is either superfluous or has in fact been provided for in the legislative scheme (s. 8(5) of the *Privacy Act*). Given this underlying presumption that personal information will not be disclosed as well as the paramount importance of individual privacy, it would therefore be absurd *not* to allow third parties to use the mechanism provided for by the legislature to prevent a violation of the spirit and the letter of the *Access Act* and the *Privacy Act*. Allowing Heinz to raise the s. 19 exemption on a s. 44 review does not create a "second tier" of third parties, but allows the *only* third party who has access to s. 44 to use this remedy to prevent harm from occurring needlessly.

59 A third party's right of review under s. 44 therefore provides an appropriate avenue for scrutinizing government decisions to disclose information that affects an individual's right to privacy. Of course, the court must be wary of attempts by third parties to avail themselves of the personal information exemption to prevent the legitimate disclosure of information. Such attempts to abuse the s. 19 exemption are easily uncovered, however, by determining whether the records in question actually contain personal information.

6.4 The "Discretionary" Nature of the Section 19 Exemption

60 The Information Commissioner suggests that the personal information exemption is more appropriately characterized as "discretionary" because the government institution has the discretion to disclose personal information where the violation of the right to privacy is clearly outweighed by the public interest in disclosure (s. 19(2) of the *Access Act*, s. 8(2)(*m*) of the *Privacy Act*). The parties dispute this characterization of s. 19 because, under the framework established

by Layden-Stevenson J. at trial, discretionary exemptions may not be raised in a s. 44 review proceeding.

61 Even if I accepted the dichotomy between discretionary and mandatory exemptions, I would disagree with the Information Commissioner's argument. The narrow scope of the discretion provided for in s. 19(2) was not at issue in this case and should not be viewed as undermining the mandatory character of s. 19(1), which clearly states that the government institution "*shall* refuse to disclose any record requested under this Act that contains personal information" (emphasis added). As this Court stated in *Dagg*, the personal information exemption should not be given a "cramped interpretation" by giving access pre-eminence over privacy: *Dagg*, at para. 51. Moreover, on the facts of the instant case, there is no debate regarding the existence of a pressing concern of public interest that would permit disclosure; both parties have conceded that s. 19(1) is the only relevant exemption.

6.5 The Availability of Judicial Review Under Section 18.1 of the Federal Courts Act

62 Finally, Heinz argues in the alternative that if the s. 44 review is limited to confidential business information, it retains an "independent" common law right of review that has been codified in s. 18.1(1) of the *Federal Courts Act*, which allows a party directly affected by a decision of a federal board, commission or tribunal to apply for judicial review. Having found that an application for a review under s. 44 *is* available to Heinz, I need not fully consider this argument. However, in my view, a conclusion that would force a party to split its complaint into two parallel proceedings is problematic. Such a scenario would become even more burdensome if the personal information related to multiple individuals. For example, if the requested records included personal information relating to a number of consumers or past employees, the third party might not be in a position to alert all the individuals concerned that their privacy rights were in danger of being violated. Moreover, not only would multiple proceedings be an unwarranted use of resources, but the applicable standard of review may not be the same in a s. 44 proceeding as would be the case in the context of a s. 18.1(1) application for judicial review. As I have suggested, however, I find that Heinz need not seek this residual right of review, because s. 44 already provides an adequate alternate remedy: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 (S.C.C.); *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 (S.C.C.).

7. Conclusion

63 The importance of protecting personal information, combined with the open language of ss. 28, 44(1) and 51 of the *Access Act*, leads to the conclusion that a reviewing court can, on a s. 44 application, consider and apply the privacy exemption set out in s. 19(1). Where it has come to the attention of a third party that a government institution intends to disclose information which will violate the statutorily mandated, quasi-constitutional privacy rights of an individual, the third party must have the right to raise this concern upon judicial review. A

contrary ruling would force individuals to wait until the personal information has been disclosed and the (potentially irreversible) harm done before looking to the Privacy Commissioner or the courts for a remedy. While the Privacy Commissioner and the Information Commissioner play a central role in the access to information and privacy scheme and have extensive responsibilities, s. 44 provides the sole recourse in situations where a third party seeks to prevent the disclosure of personal information. A narrow interpretation of s. 44 would thus weaken the protection of personal information and dilute the right to privacy.

64 For these reasons, I would dismiss the appeal with costs.

The reasons of McLachlin C.J. and Bastarache and LeBel JJ. were delivered by

Bastarache J. **(dissenting):**

1. Introduction

65 The issue on appeal is whether a third party can raise the exemption from disclosure for personal information contained in s. 19 of the *Access to Information Act*, R.S.C. 1985, c. A-1 ("*Access Act*"), and ss. 3 and 8 of the *Privacy Act*, R.S.C. 1985, c. P-21, during a review proceeding initiated pursuant to s. 44 of the *Access Act*. This case brings to the fore the delicate balance Parliament has struck between promoting rights of access to records under government control, and protecting the personal information of individuals appearing in those records.

66 Where a government institution receives a request under the *Access Act*, and it concludes that the requested record may contain confidential business information about a third party, it must provide notice to that third party. The third party then has the right to make representations on the record, and it is entitled to notice of the government institution's decision to disclose the record. A third party who has received such notice is subsequently entitled to bring a s. 44 review of the matter. Where the court determines that the government institution is required to refuse disclosure, then it shall order that the institution not disclose the record.

67 As the facts of this case and the decisions below have been addressed in the reasons of Deschamps J., I proceed directly to the statutory interpretation of s. 44 of the *Access Act*. This Court has consistently held that

> [t]oday there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(*Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21, citing E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87)

2. The Purpose of the Access Act

68 The *Access Act* must be read in light of the *Privacy Act*, which together form a coherent scheme governing the competing rights of access and privacy. They are complementary and equal statutes whose provisions must be construed harmoniously: *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 (S.C.C.), at para. 51, *per* La Forest J., dissenting but not on this point. Section 2(1) of the *Access Act* describes the purpose of the Act as follows:

> **2.**(1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

69 Access to information under government control is meant to facilitate democracy. As La Forest J. explained in *Dagg*, at para. 61, "[i]t helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry".

70 Nonetheless, the goal of access must be understood in the context of the Act, which itself provides for a number of exemptions in ss. 13 to 24 and 26. According to s. 2, these necessary exceptions to access should be limited and specific. However, Gonthier J., speaking for a unanimous Court in *Canada (Information Commissioner) v. Royal Canadian Mounted Police Commissioner*, [2003] 1 S.C.R. 66, 2003 SCC 8 (S.C.C.), explained that "[t]he statement in s. 2 of the *Access Act* that exceptions to access should be 'limited and specific' does not create a presumption in favour of access" (para. 21).

71 Personal information is specifically exempted from the general rule of disclosure pursuant to s. 19 of the *Access Act*, subject to certain exceptions which are not at issue on this appeal. Personal information is defined in s. 19 of the *Access Act* by reference to s. 3 of the *Privacy Act*, which illustrates the complementary relationship between both statutes that I have described above. Section 3 defines "personal information" as information about an identifiable individual that is recorded in any form, and lists a number of examples. Parliament has thus struck a careful balance between the right to access records within government control, and the right to have all personal information in those records kept private. La Forest J. in *Dagg*, went so far as to state that "[b]oth statutes recognize that, in so far as it is encompassed by the definition of 'personal information' in s. 3 of the *Privacy Act*, privacy is paramount over access" (para. 48).

72 Even accepting, however, that privacy is paramount over access, it does not follow that Parliament is obliged to create a notice and review mechanism prior to the disclosure of personal information. The policy decision of how to balance rights of access and the right to privacy is one reserved for Parliament. As the following analysis demonstrates, Parliament has entrusted

the promotion of access to government records and the protection of personal information to two Commissioners who effectively act as ombudsmen. Their offices are independent of government, and their role is to impartially investigate complaints made against government institutions. In fact, the structure of both the *Access Act* and the *Privacy Act* also indicates that, apart from s. 44 review proceedings, Parliament has seen fit to limit opportunities for judicial review until after the Information Commissioner has conducted its investigation of the complaint.

3. The Role of the Federal Information and Privacy Commissioners

3.1 Remedies Available Under the Access Act and the Privacy Act

73 The privacy interests of third parties are protected by the *Privacy Act*, in particular, by s. 29 which protects the personal information of third parties by establishing a complaint and investigation procedure:

> **29.** (1) Subject to this Act, the Privacy Commissioner shall receive and investigate complaints
>
> (a) from individuals who allege that personal information about themselves held by a government institution has been used or disclosed otherwise than in accordance with section 7 or 8;
>
> . . . . .
>
> (h) in respect of any other matter relating to
>
> . . . . .
>
> (ii) the use or disclosure of personal information under the control of a government institution
>
> . . . . .

74 Under s. 29(2), nothing precludes the Privacy Commissioner from receiving and investigating complaints submitted by a person authorized by the complainant to act on behalf of him or her. It would therefore be open to Heinz to initiate a complaint on behalf of its employees in order to protect their personal information. The Privacy Commissioner has the power to investigate the complaint and has broad powers under that process (ss. 31to 34 of the *Privacy Act*), including the rights to summon and enforce the appearance of witnesses, compel witnesses to give evidence or produce documents, and enter premises of government institutions and inspect records found there (s. 34(1)). The Privacy Commissioner also has the authority to access any document (except Cabinet confidences) under the control of a government institution, including documents that would otherwise be protected by a legal privilege (s. 34(2)). Section 33 of the *Privacy Act* ensures that every investigation of a complaint is conducted in private. Where the complaint is well-founded, the Privacy Commissioner reports his or her findings and recommendations to the appropriate government institution (s. 35). The Privacy Commissioner does not, however, have the

power to order the release of information or compel the institution to do anything or refrain from doing anything with respect to the information. Pursuant to s. 37, the Privacy Commissioner may also, from time to time, at his discretion, carry out investigations in respect of personal information under the control of government institutions to ensure compliance with ss. 4 to 8 of the *Privacy Act*, which deal with the collection, retention, disposal and protection of personal information.

75 I have already mentioned that the exemption from disclosure for personal information is subject to a number of exceptions. Pursuant to s. 19(2)(*c*) of the *Access Act*, the head of a government institution may disclose any requested record that contains personal information if the disclosure is in accordance with s. 8 of the *Privacy Act*. Section 8(2)(*m*)(i) of the *Privacy Act* authorizes disclosure of personal information "for any purpose where, in the opinion of the head of the institution, . . . the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure". Where a government institution uses this discretionary power to disclose personal information, s. 8(5) provides that it shall notify the Privacy Commissioner in writing prior to the disclosure where reasonably practicable. This results in an added measure of protection for personal information that is to be disclosed in the public interest, insofar as the Privacy Commissioner can intervene prior to the disclosure.

76 It may also be open to the Information Commissioner to receive and investigate a complaint brought by a third party resisting disclosure. The Information Commissioner can receive and investigate complaints "in respect of any other matter relating to requesting or obtaining access to records under this Act," pursuant to s. 30(1)(*f*) of the *Access Act*. It is unclear whether this might include complaints pertaining to the unlawful disclosure of personal information. The Information Commissioner typically receives complaints from information requesters, where disclosure of a requested record has been refused, delayed or otherwise unsatisfactory. In any event, the Office of the Privacy Commissioner would appear to be more suited to the receipt and investigation of a complaint by a third party resisting disclosure on the basis of the s. 19 exemption for personal information, since it is charged with receiving and investigating all complaints brought pursuant to the *Privacy Act*.

3.2 The Effect of Allowing the Section 19 Exemption to be Raised on a Section 44 Review Proceeding on the Role of the Commissioners

77 Generally, the *Access Act* requires an investigation by the Information Commissioner prior to proceeding to a judicial determination of whether the government institution can lawfully refuse disclosure. Section 44 proceedings constitute the sole exception to this scheme.

78 The Information Commissioner is authorized to receive and investigate complaints under s. 30(1) of the *Access Act*, where disclosure of a requested record has been refused, delayed or is otherwise unsatisfactory. The information requester, the head of the government institution who has control of the record, and, where the Commissioner believes that the record may contain

confidential business information, the third party, have participation rights in that investigative process. As with investigations conducted by the Privacy Commissioner, every investigation of a complaint by the Information Commissioner is conducted in private (s. 35). Pursuant to s. 36(1) of the *Access Act*, the Information Commissioner has the same broad investigatory powers as the Privacy Commissioner, which I have listed above. Section 36(2) of the *Access Act* provides the Information Commissioner with the right to examine any record to which the *Access Act* applies that is under the control of a government institution, regardless of privilege. Contrary to the *Privacy Act*, s. 36(2) of the *Access Act* does not exclude Cabinet confidences from this general right of access. Where the complaint is determined to be well-founded, the Information Commissioner can report his findings and recommendations to the head of the government institution that has refused disclosure (s. 37(1)), and must also notify any party who received notice of the investigation and opted to participate (s. 37(2)).

79 Where an information requester has been denied access to a record, s. 41 of the *Access Act* provides a right of review. However, this right is only available where a complaint was initially made to the Information Commissioner, and where the information requester has received notice of the results of the investigation. In other words, the *Access Act* ensures that the Information Commissioner, as opposed to the courts, is entrusted with the initial review of the complaint. Where the government institution refuses disclosure following the Information Commissioner's investigation and recommendation, it is also open to the Commissioner to bring an application for review so long as he has the consent of the information requester (s. 42(1)(*a*) of the *Access Act*).

80 Section 44 proceedings constitute the sole exception in this statutory scheme. A third party who has received notice that the government institution intends to disclose the record can apply directly to the court for a s. 44 review of the matter. Where the court determines that the head of a government institution is required to refuse to disclose a record or part of a record, the court shall order the head of the institution not to disclose the record (s. 51 of the *Access Act*). The information requester is given notice of the hearing and is entitled to appear as a party (s. 44(3) of the *Access Act*). The Information Commissioner, however, is only entitled to appear as a party with leave of the court (s. 42(1)(*c*) of the *Access Act*). Where a s. 44 proceeding results in an order not to disclose the record, the court order effectively precludes any investigation by the Information Commissioner. If a third party was also entitled to raise the s. 19 exemption for personal information at a s. 44 review proceeding, the role of the Information Commissioner would be further compromised.

3.3 The Broader Role of the Information and Privacy Commissioners

81 The function of the Information and Privacy Commissioners is described as akin to that of an ombudsman. Speaking of the Privacy Commissioner and of the Commissioner of Official Languages, this Court stated in *Lavigne v. Canada (Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, 2002 SCC 53 (S.C.C.), at para. 37, that:

In many significant respects, the mandates of the Commissioner of Official Languages and the Privacy Commissioner are in the nature of an ombudsman's role (see M. A. Marshall and L. C. Reif, "The Ombudsman: Maladministration and Alternative Dispute Resolution" (1995), 34 *Alta. L. Rev.* 215):

- They are independent of the government's administrative institutions and hold office during good behaviour for a specified period. They receive the same salary as a judge of the Federal Court. This independence is reinforced by the fact that they may not, as a rule, be compelled to testify, and no civil or criminal proceedings lie against them for anything done in the performance of their duties;

- They examine complaints made by individuals against the government's administrative institutions, and conduct impartial investigations;

- They attempt to secure appropriate redress when the individual's complaint is based on non-judicial grounds;

- They attempt to improve the level of compliance by government institutions with the *Privacy Act* and the *Official Languages Act*;

- As a rule, they may not disclose information they receive.

82 Both the Privacy Commissioner and the Information Commissioner hold office during good behaviour for a set term of seven years, though they may be removed by the Governor in Council at any time on address of the Senate and House of Commons: s. 53(2) of the *Privacy Act* and s. 54(2) of the *Access Act*. Both Commissioners are paid a salary equal to that of a Federal Court judge: s. 55(2) of the *Access Act* and s. 54(2) of the *Privacy Act*. No criminal or civil proceedings lie against them for anything done in the performance of their duties: s. 66(1) of the *Access Act* and s. 67(1) of the *Privacy Act*. Both Commissioners are authorized to receive and investigate complaints, and to secure appropriate redress via non-binding recommendations to the particular government institution. Both Commissioners may only disclose information they receive in the course of their investigation in the narrow circumstances set out in the statutes: see ss. 63 and 64 of the *Access Act*, as well as ss. 64 and 65 of the *Privacy Act*. I would also note that their independent function is underlined in the purpose section of the *Access Act*, which provides that the disclosure of government information should be reviewed independently of government (s. 2(1)).

83 The approach followed by the Commissioners in investigating complaints and making recommendations, where warranted, is understood to be less formal than the judicial process. The Commissioners' purpose is to resolve disputes in an informal manner, and their offices were specifically created to address the limitations of the legal proceedings in this respect: see *Lavigne*, at para. 38. At para. 39, the Court went on to explain that:

An ombudsman is not counsel for the complainant. His or her duty is to examine both sides of the dispute, assess the harm that has been done and recommend ways of remedying it. The ombudsman's preferred methods are discussion and settlement by mutual agreement. As Dickson J. wrote in *British Columbia Development Corp. v. Friedmann*, [1984] 2 S.C.R. 447, the office of ombudsman and the grievance resolution procedure, which are neither legal nor political in a strict sense, are of Swedish origin, *circa* 1809. He described their genesis (at pp. 458-59):

> As originally conceived, the Swedish Ombudsman was to be the Parliament's overseer of the administration, but over time the character of the institution gradually changed. Eventually, the Ombudsman's main function came to be the investigation of complaints of maladministration on behalf of aggrieved citizens and the recommendation of corrective action to the governmental official or department involved.
>
> The institution of Ombudsman has grown since its creation. It has been adopted in many jurisdictions around the world in response to what R. Gregory and P. Hutchesson in *The Parliamentary Ombudsman* (1975) refer to, at p. 15, as "one of the dilemmas of our times" namely, that "(i)n the modern state . . . democratic action is possible only through the instrumentality of bureaucratic organization; yet bureaucratic - if it is not properly controlled - is itself destructive of democracy and its values".
>
> The factors which have led to the rise of the institution of Ombudsman are well-known. Within the last generation or two the size and complexity of government has increased immeasurably, in both qualitative and quantitative terms. Since the emergence of the modern welfare state the intrusion of government into the lives and livelihood of individuals has increased exponentially. Government now provides services and benefits, intervenes actively in the marketplace, and engages in proprietary functions that fifty years ago would have been unthinkable.

84 Former Justice La Forest, in a recent report entitled *The Offices of the Information and Privacy Commissioners: The Merger and Related Issues*, Report of the Special Advisor to the Minister of Justice (November 15, 2005) ("La Forest report"), at p. 15, explains that the primary duty of both the Information and Privacy Commissioners to independently and impartially investigate complaints and make recommendations is in keeping with this ombudsman function.

85 La Forest notes that the Commissioners exercise a number of other important functions:

> The Privacy Commissioner, for instance, is empowered to audit government institutions to ensure that they are complying with their obligations under the Act, recommend changes to effect compliance, and report failures to comply to the institution and Parliament. The Privacy Commissioner may also assess whether a government institution's decision to designate a

> data bank as exempt from disclosure was correct, and ask the Federal Court to rule on the question if the government institution fails to accept the Commissioner's determination that it was not. Both commissioners must also submit annual reports to Parliament and may in addition submit special reports with respect to urgent matters.[Footnotes omitted; pp. 16-17.]

86 The Privacy Commissioner has inherited additional responsibilities with the enactment of Part 1 of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5. Moreover, the Commissioners are also active in promoting the values of access and privacy in a variety of national and international fora. The "Commissioners have commented on proposed legislation and government policies, appeared before parliamentary committees, conducted surveys, sponsored research, published summaries of findings, and given public lectures": see La Forest report, at p. 18.

87 This has led some commentators to conclude that the Privacy Commissioner is "expected at some point to perform seven interrelated roles: ombudsman, auditor, consultant, educator, policy advisor, negotiator and enforcer": C.J. Bennett, "The Privacy Commissioner of Canada: Multiple Roles, Diverse Expectations and Structural Dilemmas" (2003), 46 *Canadian Public Administration* 218, at p. 237, cited in La Forest report, at p. 18. Many of these roles are also performed by the Information Commissioner: La Forest report, at p. 18.

4. The Legislative Scheme Surrounding Section 44 of the Access Act

4.1 The Statutory Context

88 This Court has held that statutory interpretation cannot be founded on the wording of the legislation alone: *Rizzo & Rizzo Shoes Ltd.*, at para. 21. As the previous analysis demonstrates, s. 44 review proceedings are part of a complex statutory code. Heinz initially became aware of the access request that formed the basis of the s. 44 review via s. 27(1) of the *Access Act*, which provides:

> **27.** (1) Where the head of a government institution intends to disclose any record requested under this Act, or any part thereof, that contains or that the head of the institution has reason to believe might contain
>
> (a) trade secrets of a third party,
>
> (b) information described in paragraph 20(1)(*b*) that was supplied by a third party, or
>
> (c) information the disclosure of which the head of the institution could reasonably foresee might effect a result described in paragraph 20(1)(*c*) or (*d*) in respect of a third party,

> the head of the institution shall, subject to subsection (2), if the third party can reasonably be located, within thirty days after the request is received, give written notice to the third party of the request and of the fact that the head of the institution intends to disclose the record or part thereof.

Section 27(1) is a notice provision for third parties where there has been an access request for a record containing information listed in (*a*) to (*c*). Those subsections refer directly to the exemption from disclosure contained in s. 20(1) of the *Access Act*:

> **20.** (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains
>
> (a) trade secrets of a third party;
>
> (b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;
>
> (c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or
>
> (d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

89 For ease of reference, I refer to information exempted from disclosure pursuant to s. 20 as confidential business information. Where a third party has received notice pursuant to s. 27(1) because of the believed presence of confidential business information in the requested record, s. 28(1)(*a*) provides the third party with an opportunity to make representations to the head of the government institution as to why the record should not be disclosed. Pursuant to s. 28(1)(*b*), the third party is then entitled to notice of the government institution's decision as to whether or not to disclose the record. A third party who receives notice pursuant to s. 28(1)(*b*) of the government institution's decision to disclose the record has a right to apply for a review pursuant to s. 44:

> **44.** (1) Any third party to whom the head of a government institution is required under paragraph 28(1)(*b*) or subsection 29(1) to give a notice of a decision to disclose a record or a part thereof under this Act may, within twenty days after the notice is given, apply to the Court for a review of the matter.

. . . . .

90 Section 29(1) is not at issue on this appeal. It deals with the slightly different situation of a government institution initially refusing disclosure, and then opting to follow the recommendation

of the Information Commissioner to disclose the requested record. Pursuant to s. 29(1), notice must be given to the third party who initially received notice, or would have received notice, under s. 27(1) because of the believed presence of confidential business information in the record.

91 Pursuant to s. 51 of the *Access Act*, where the court determines, after considering an application under s. 44, that the head of a government institution is required to refuse to disclose a record, the court shall order the head of the institution not to disclose the record or shall make such other order as the court deems appropriate.

92 Deschamps J. relies on the broad wording of s. 44 and its related sections in order to conclude that a third party who has received notice pursuant to s. 28(1)(*b*) of the *Access Act* can raise the s. 19 exemption from disclosure for personal information on a s. 44 review. She relies, in particular, on the following:

- Section 28(1)(*b*) allows the third party to make representations as to why the record should not be disclosed. There is no language in that section that limits the range of representations that can be made.

- Similarly, the language of s. 28(1)(*b*) suggests that representations can be made as to why the record should not be disclosed, as opposed to explicitly limiting the right to make representations to that part of the record that contains confidential business information.

- Section 44 allows for a review of the matter, without expressly limiting the scope of what is reviewable.

- Finally, s. 51 states that the court shall make an order where it determines that the head of a government institution is required to refuse to disclose the record. In determining whether the government institution is required to refuse disclosure, s. 51 does not explicitly limit the court's consideration to the s. 20 exemption from disclosure for confidential business information.

93 The court is obliged to consider the total context of the provisions to be interpreted, no matter how plain the disposition may seem upon initial reading: *Chieu v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 84, [2002] 1 S.C.R. 84 (S.C.C.), at para. 34; *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 (S.C.C.), at para. 48; R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 20-21. Some of the legislative provisions at issue are broadly worded. The intended meaning of open-ended expressions such as "representations", "record", and "matter" is lost when they are read in isolation: see *ATCO*, at para. 46.

94 Within its proper statutory context, the intended meaning of "representations", "record", and "matter" becomes clear. The right to bring a s. 44 review flows from the notice a third party receives because of the believed presence of confidential business information in the requested

record. The parties, and indeed Deschamps J., concede that notice is only required where s. 20 is possibly applicable because of the very nature of that exemption. Only the third party itself can clearly state whether or not the grounds listed in s. 20 apply to the information requested. This is because, considering the criteria listed in s. 20, only the third party can establish what information it treated or treats as confidential, as well as the effect of disclosure on its revenue or on its competitive position.

95 Deschamps J. includes in her reasons for judgment a brief analysis of the legislative history of ss. 27 and 28 of the *Access Act*, the notice provisions ultimately resulting in a right to bring an application for a s. 44 review. I do not find this legislative history to be particularly helpful in determining the proper scope of a s. 44 review. The legislative context, by contrast, provides considerable insight into the legislative intent behind the review process.

96 The complaint and investigation process that I have outlined above constitutes the mechanism Parliament has selected in order to balance access rights with the need to protect individuals' personal information. Where the personal information of individuals is improperly disclosed, those individuals can bring a complaint to the Privacy Commissioner under s. 29 of the *Privacy Act*. There is no notice provision prior to the disclosure of a requested record that might contain exempted personal information, nor does the unlawful disclosure of exempted personal information give rise to a right of judicial review under the *Access Act* or the *Privacy Act*. Indeed, ss. 27, 28 and 44 of the *Access Act* constitute the only available notice and review mechanisms under the statutory scheme meant to permit resistance to disclosure of a requested record.

97 Considered in its proper statutory context, s. 44 has nothing to do with the s. 19 exemption from disclosure for personal information. The right to bring a s. 44 application arises from the believed presence of confidential business information in the requested record. The structure of the *Access Act* and of the *Privacy Act* suggests that Parliament intended that the protection of personal information be assured exclusively by the Office of the Privacy Commissioner. Equally important is Parliament's desire to have all judicial reviews under the Acts preceded by an impartial investigation conducted by the Information Commissioner. The only exception provided in the statutory scheme is where confidential business information potentially appears in the requested record.

4.2 To Allow the Section 19 Exemption to be Raised on a Section 44 Proceeding Would Lead to Absurd Results

98 It is presumed that the legislature does not intend its legislation to result in absurd consequences: see Sullivan, at p. 236. The only available notice and review mechanisms to resist disclosure is that provided in ss. 27, 28 and 44 of the *Access Act*. The Act does not require notice to a third party prior to disclosure of information relating to that party except in the circumstances set out in s. 28(1). Where the head of a government institution concludes that the information

requested is not confidential business information, notice to the third party is not required, will not be ordered by the court and no right to apply for review under s. 44(1) arises.

99 Unless the opportunity to raise exemptions at a s. 44 review proceeding is limited to that contained in s. 20, third parties who have received notice pursuant to s. 28(1)(*b*) will be afforded an opportunity to raise the s. 19 exemption for personal information in circumstances where no comparable right exists for a third party claiming only that the record contains personal information belonging to it.

100 The only reason Heinz is able to raise the s. 19 exemption in the present appeal is the possible application of s. 20 and the notice received pursuant to ss. 27 and 28. Were it not for the possible application of s. 20, there would be no possibility of bringing a s. 44 review. The effect of the proposed extension of the s. 44 review would be to create two categories of third parties: those who receive notice under ss. 27 to 29 of the *Access Act* and those who do not. In other words, the distinction would be between third parties who have relevant confidential business information and those who do not. Such a result is absurd insofar as it allows greater protection of certain individuals' personal information, depending on the possible application of s. 20. Individuals with relevant confidential business information would thus benefit from a greater protection for their personal information than individuals without such information. There is no basis for such a two-tiered system in either the *Access Act* or the *Privacy Act*.

101 Deschamps J.'s proposed interpretation of s. 44 leads to a second absurd consequence. It is unlikely that Heinz itself possesses personal information within the meaning of s. 3 of the *Privacy Act*. Section 3 includes a non-exhaustive list of information which is considered personal information. Elements of this list reinforce the conclusion that only human beings can constitute identifiable individuals, because only human beings have a race; colour; religion; age; marital status; education; medical, criminal or employment history; fingerprints; and blood type. Heinz is raising s. 19 in the present case in order to protect the personal information of several of its employees. While both the *Access Act* and the *Privacy Act* expressly allow an authorized agent to bring complaints to the Information Commissioner or to the Privacy Commissioner, respectively, s. 44 does not so provide.

102 The right to apply for a review under s. 44 belongs to the third party who has received notice of the decision not to disclose the record - in this case, Heinz. The employees of Heinz whose personal information is implicated do not have the right to apply for a s. 44 review. In other words, the interpretation proposed by Deschamps J. has the effect of allowing Heinz to object to the intended disclosure because of the presence of personal information belonging to its employees, in circumstances where the affected employees themselves have no right whatsoever to bring an application for review under the Act. It cannot be the intention of Parliament, in my view, that Heinz can raise s. 19 on behalf of its employees in circumstances where its employees have no

right under the *Access Act* or the *Privacy Act* to raise the objection on their own behalf at a judicial hearing.

5. Conclusion on the Proper Interpretation of Section 44 of the Access Act

103 Parliament has entrusted the monitoring of government compliance with the *Access Act* and the *Privacy Act* to the Office of the Information Commissioner and the Office of the Privacy Commissioner. The role of these offices is akin to that of an ombudsman and is indicative of a policy decision to adopt a non-litigious dispute resolution mechanism in the context of complaints arising from individuals seeking access to government information or from third parties seeking to protect their personal information. The current scheme creates a more accessible review process of the decision of a government institution to disclose or not to disclose a requested record.

104 This accessible, informal and non-litigious complaint resolution process results in the Commissioners making non-binding recommendations to the government institution that is the subject of the complaint. The consequence of such a policy decision is, as Deschamps J. has noted, that the role of the Commissioners is necessarily limited by their inability to issue injunctive relief or to prohibit a government institution from disclosing information. Pending the receipt of their recommendations, or even upon receipt of a recommendation not to disclose the record, there is nothing to prevent the government institution from proceeding with disclosure. In fact, the government institution is required by s. 7 of the Access Act to provide notice to the information requester of its decision to disclose or to refuse disclosure within 30 days following receipt of the request. If the government institution opts to disclose the record, then access must be provided to the requester within that same time frame. The government institution can however extend that time limit pursuant to s. 9(1) of the *Access Act*, if:

> **9.**(1) . . .
>
> (a) the request is for a large number of records or necessitates a search through a large number of records and meeting the original time limit would unreasonably interfere with the operations of the government institution,
>
> (b) consultations are necessary to comply with the request that cannot reasonably be completed within the original time limit, or
>
> (c) notice of the request is given pursuant to subsection 27(1)
>
> . . . . .

In all such cases, the requester must be notified of the extension and of his or her right to complain to the Information Commissioner about the delay. Where the head of a government institution extends a time limit for more than 30 days, notice of the extension must also be given to the Information Commissioner according to s. 9(2).

105 The Commissioners do not have the decision-making or remedial capacity to prevent the unlawful disclosure of a requested record. Moreover, apart from a s. 44 proceeding, judicial review under the *Privacy Act* and under the *Access Act* is limited to cases where the government institution has refused to disclose the requested information. Partly for these reasons, Deschamps J. expresses concern that a narrow interpretation of s. 44 would weaken the protection of personal information. The La Forest report mentions that a number of provinces, including Quebec, Ontario, British Columbia, Alberta and Prince Edward Island, have given the provincial Commissioners the power to issue final decisions settling disputes about complaints, subject to judicial review: see p. 50. This reflects a different policy decision than that taken by Parliament. La Forest explains, however, that

> Commissioners in most of these provinces use this power sparingly, preferring whenever possible to resolve complaints through conciliation, mediation, and other informal means. They nonetheless consider the existence of this power, which provides a strong incentive to the parties to settle on reasonable terms, to be essential to their effectiveness [Footnote omitted; p. 50.].

La Forest concludes that the option of granting such powers to the federal Information and Privacy Commissioners is worthy of further study: see p. 52. The decision of whether or not to extend such powers to the Commissioners is a complicated one that must balance the protection of personal information with the need for an accessible, informal and expeditious complaints resolution system in order to promote access to information. It is quite clearly a decision best left to Parliament.

106 In interpreting s. 44 of the *Access Act*, it is necessary to preserve the integrity of the mechanism Parliament has selected in order to balance the competing rights of access and privacy. Where personal information has been unlawfully disclosed, that mechanism consists of the complaint and investigation process provided by s. 29 of the *Privacy Act*, and of the additional protection provided by s. 8(5) of the *Privacy Act*, where a government institution intends to disclose personal information on the basis that the public interest in disclosure outweighs any invasion of privacy. This process is nothing more than the expression of a governmental policy decision reflecting its own evaluation of the advantages and disadvantages of various options, in terms of principles and operational requirements. Its integrity must be respected in order to give effect to legislative intent.

107 As previously mentioned, Deschamps J. expresses concern in her reasons about what she views as the lack of protection in the Acts for individuals' personal information. However, her interpretation of s. 44 of the *Access Act* only provides a right of review to resist disclosure on the basis of s. 19 in the limited circumstances where confidential business information potentially appears in the requested record. This results in inequities, as mentioned earlier. Moreover, as is the case here, that right of review may not even belong to the individuals whose personal information actually appears in the requested record. In the present case, only Heinz has the right to apply for

a review, notwithstanding that the personal information contained in the record actually belongs to its employees.

108 Deschamps J.'s interpretation of s. 44 does not result in better or fairer protection for individuals' personal information. Cases such as these will be limited in number. The large majority of individuals whose personal information is vulnerable will not benefit. Moreover, although I have concluded that a third party cannot raise the s. 19 exemption for personal information on a s. 44 review, I do not exclude the possibility of judicial review pursuant to the *Federal Courts Act*, R.S.C. 1985, c. F-7. Indeed, where the government institution acts without or beyond its jurisdiction, it remains open to a party directly affected by the decision to bring an application for judicial review pursuant to s. 18.1 of the *Federal Courts Act*.

6. The Possibility of Bringing a Judicial Review Application Pursuant to the Federal Courts Act

6.1 Whether Judicial Review is Available Under the Federal Courts Act

109 Once a third party has received notice of the government institution's intended decision to disclose a record that may contain personal information, it may consider bringing an application for judicial review under the *Federal Courts Act*. Section 18.1(1) and (2) of that Act provides:

> **18.1** (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.
>
> (2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

110 "Federal board, commission or other tribunal" is very broadly defined in s. 2(1) of the *Federal Courts Act*, and 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*;
>
> . . . . .

111 Pursuant to ss. 4, 7, and 10 of the *Access Act*, the government institution is under a duty to disclose all requested information that does not fall within one of the statutory exemptions listed in ss. 13 to 24 and 26 of that Act. The government institution thus exercises powers conferred by an Act of Parliament and falls within the meaning of "federal board, commission or other tribunal". Pursuant to s. 28(1)(*b*) of the *Access Act*, the government institution must provide notice to the third party whose confidential business information was initially believed to appear in the requested record of its decision concerning the disclosure of the record. That decision constitutes a decision of a federal board, commission or other tribunal within the meaning of the *Federal Courts Act* and is potentially reviewable. This is consistent with what Le Dain J. stated on behalf of a unanimous Court in *R. v. Miller*, [1985] 2 S.C.R. 613 (S.C.C.), at pp. 623-24:

> It is, of course, clear since the decision of this Court in *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, that *certiorari* is not confined to decisions required to be made on a judicial or quasi-judicial basis, but that it applies, in the words of Dickson J., as he then was, at pp. 622-23, "wherever a public body has power to decide any matter affecting the rights, interests, property, privileges, or liberties of any person."

112 Section 19 of the *Access Act* constitutes a mandatory exemption from disclosure for all personal information that does not fall into one of the stated exceptions. Although s. 8(2)(*m*)(i) of the *Privacy Act* allows the government institution to disclose personal information where it is deemed necessary in the public interest, that provision has not been invoked in the present case. As such, any decision to disclose a record containing information falling within s. 19 of the *Access Act* is clearly not authorized by the statute. Such a decision would be *ultra vires*, and would constitute a jurisdictional error pursuant to s. 18.1(4)(*a*) of the *Federal Courts Act*, which provides that:

> **18.1** . . .
>
> (4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal
>
> (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
>
> . . . . .

113 As a result, it would be open to the third party to seek an order prohibiting the government institution from disclosing the record containing personal information (s. 18.1(3)(*b*)).

114 I have thus concluded that the decision of the government institution to disclose the requested record is reviewable for jurisdictional error, and that the remedy of prohibition is available under the *Federal Courts Act*. Section 18.5 provides an exception to s. 18.1, where a right of appeal is

available from the decision of the federal board, commission or other tribunal. Such is not the case here.

115 Nonetheless, a judge, on judicial review, may exercise his or her discretion so as to refuse to grant a remedy where an adequate alternative remedy exists. Dickson C.J. explained in *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49 (S.C.C.), at p. 96, that:

> It may well be that once the alternative remedy is found to be adequate discretionary relief is barred, but this is nothing but a reflection of a judicial concern to exercise discretion in a consistent and principled manner. Inquiring into the adequacy of the alternative remedy is at one and the same time an inquiry into whether discretion to grant the judicial review remedy should be exercised. It is for the courts to isolate and balance the factors which are relevant to the inquiry into adequacy. [Cited in *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 (S.C.C.), at para. 36.]

In determining whether to require the applicant to utilize a statutory appeal procedure provided in the legislation, the Court in *Canadian Pacific*, at para. 37, identified the following factors as relevant: the convenience of the alternative remedy, the nature of the error, and the nature of the appellate body (i.e., its investigatory, decision-making and remedial capacities). The Court noted, however, that this list was not closed.

116 The complaint process in the *Privacy Act* is convenient and accessible, and the expertise and investigatory role of the Privacy Commissioner are relevant considerations. The structure of the Act establishes clearly that the protection of privacy is meant to be the domain of the Privacy Commissioner who can receive complaints, investigate, and report its findings and recommendations to the relevant government institution. The scheme and purpose of the Act can be relevant considerations for a judge in determining whether or not to grant a remedy on judicial review: *Canadian Pacific*, at paras. 43-46. Ultimately, however, the Privacy Commissioner has no decision-making or remedial capacity. I have already concluded that s. 44 of the *Access Act* does not allow a third party to raise the s. 19 exemption for personal information. I also agree with the parties and with Deschamps J. that the *Access Act* provides no other avenue to prevent a government institution from disclosing a requested record.

117 In the context of an application pursuant to s. 18 of the *Federal Courts Act*, I would conclude that the statutory scheme does not provide Heinz with an adequate alternative remedy. According to s. 29(1)(*a*) of the *Privacy Act*, the complaint process is generally initiated after an individual's personal information has been "used or disclosed" contrary to the *Privacy Act*. Thus, the purported adequate alternative remedy may not even be available prior to the actual disclosure. Moreover, the remedy sought by Heinz in this case, that the information not be disclosed, is simply not available pursuant to the existing scheme. The Attorney General asks this Court to substitute judicial review

prior to disclosure with an administrative investigation following disclosure and resulting in non-binding recommendations. In *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, 2005 SCC 26 (S.C.C.), at para. 83, I found, in dissent, that "an application for judicial review was the sole procedural means available to [the appellant] in order to quash the Minister's decision". The special statutory regime created by the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133, did not provide for the quashing of a notice of compliance, although it did provide for an order of prohibition pursuant to a statutory right of action. However, that cause of action was not open to the appellant in that case. Thus, the appellant was without a remedy. The same reasoning applies here.

118 Ultimately, the discretion to grant or refuse a remedy pursuant to ss. 18 and 18.1 of the *Federal Courts Act* rests with the Federal Court judge hearing the judicial review application. That judge will only decline to exercise his jurisdiction pursuant to the *Federal Courts Act* if he or she is satisfied that the statutory scheme provides an adequate alternative remedy. In a case similar to this, where the third party is attempting to protect personal information belonging to its employees, the judge would also have to decide whether the third party has standing to bring the application. This is because, according to s. 18.1, an application for judicial review may be brought by anyone "directly affected" by the matter in respect of which relief is sought.

6.2 Whether this Review Should Simply Be Allowed to Proceed under Section 44 of the Access Act for Reasons of Efficiency and Convenience

119 Deschamps J. expresses concern that forcing a party to split its complaint into two parallel proceedings might be an unwarranted use of resources. That concern is best left to Parliament to address, if it so chooses. Given the structure of the statutory scheme, I have concluded that a third party cannot raise a s. 19 exemption on a s. 44 review. I further conclude that there are valid reasons for refusing to collapse a s. 18.1 review within a s. 44 review.

120 There are critical differences between a s. 44 review and a s. 18.1 judicial review. Firstly, the Federal Court has held that a s. 44 review is a hearing *de novo*, whereas a s. 18.1 review requires the use of the pragmatic and functional approach to determine whether deference is owed to the decision of the government institution to disclose the record: *Aliments Prince Foods Inc. v. Canada (Department of Agriculture)* (2001), 272 N.R. 184 (Fed. C.A.), at para. 7. Secondly, s. 44 grants a right of review to third parties who have received notice under ss. 28(1)(*b*) or 29(1) of the *Access Act*. No other requirement exists. By contrast, s. 18.1 of the *Federal Courts Act* requires that the applicant have standing to bring the application for review. Finally, where the court, on a s. 44 review, determines that the government institution is required to refuse disclosure, s. 51 of the *Access Act* states that the court shall order the head of the institution not to disclose the record or to make such other order as the court deems appropriate. The remedies available under s. 18(3) of the *Federal Courts Act* are somewhat different. Most importantly, they are discretionary in nature.

121 I would also note that there is nothing to prevent a Federal Court judge from proceeding with both applications at the same time or consecutively, thereby addressing Deschamps J.'s concerns about unwarranted use of resources.

7. Conclusion

122 Only those third parties who are given notice pursuant to ss. 28(1)(*b*) or 29(1) of the *Access Act* of the government institution's decision to disclose the record will be in a position to seek a judicial review prohibiting the disclosure. This is because only such parties will usually have notice of the decision prior to disclosure. Presumably, judicial review will be of limited use to a third party after the record has been disclosed insofar as the damage to privacy will already have occurred. In such situations, the third party retains the option of laying a complaint with the Privacy Commissioner, as discussed above, who can report his findings and recommendations to the institution where warranted.

123 This inequality is a necessary result of the statutory scheme, which only provides notice prior to the actual disclosure in the circumstances outlined in ss. 27, 28 and 29 of the *Access Act*. In interpreting s. 44 of the *Access Act*, I concluded that it was necessary to respect the integrity of the complaint and investigation process contained in s. 29 of the *Privacy Act*, in order to give effect to legislative intent. Nonetheless, without providing an adequate alternative remedy, and without any privative clause whatsoever, the *Access Act* cannot oust the possibility of judicial review pursuant to the *Federal Courts Act*.

124 For these reasons, I would allow the appeal, set aside the decision of the Federal Court of Appeal, and award costs in all courts to the appellant.

Appeal dismissed.

Pourvoi rejeté.

Appendix

Relevant Statutory Provisions

Access to Information Act, R.S.C. 1985, c. A-1

> 2. (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

3. In this Act,

. . . . .

"third party", in respect of a request for access to a record under this Act, means any person, group of persons or organization other than the person that made the request or a government institution.

19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the *Privacy Act*.

(2) The head of a government institution may disclose any record requested under this Act that contains personal information if

(a) the individual to whom it relates consents to the disclosure;

(b) the information is publicly available; or

(c) the disclosure is in accordance with section 8 of the *Privacy Act*.

20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains

(a) trade secrets of a third party;

(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;

(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or

(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

(2) The head of a government institution shall not, pursuant to subsection (1), refuse to disclose a part of a record if that part contains the results of product or environmental testing carried out by or on behalf of a government institution unless the testing was done as a service to a person, a group of persons or an organization other than a government institution and for a fee.

(3) Where the head of a government institution discloses a record requested under this Act, or a part thereof, that contains the results of product or environmental testing, the head of the institution shall at the same time as the record or part thereof is disclosed

provide the person who requested the record with a written explanation of the methods used in conducting the tests.

(4) For the purposes of this section, the results of product or environmental testing do not include the results of preliminary testing conducted for the purpose of developing methods of testing.

(5) The head of a government institution may disclose any record that contains information described in subsection (1) with the consent of the third party to whom the information relates.

(6) The head of a government institution may disclose any record requested under this Act, or any part thereof, that contains information described in paragraph (1)(*b*), (*c*) or (*d*) if that disclosure would be in the public interest as it relates to public health, public safety or protection of the environment and, if the public interest in disclosure clearly outweighs in importance any financial loss or gain to, prejudice to the competitive position of or interference with contractual or other negotiations of a third party.

27. (1) Where the head of a government institution intends to disclose any record requested under this Act, or any part thereof, that contains or that the head of the institution has reason to believe might contain

(a) trade secrets of a third party,

(b) information described in paragraph 20(1)(*b*) that was supplied by a third party, or

(c) information the disclosure of which the head of the institution could reasonably foresee might effect a result described in paragraph 20(1)(*c*) or (*d*) in respect of a third party,

the head of the institution shall, subject to subsection (2), if the third party can reasonably be located, within thirty days after the request is received, give written notice to the third party of the request and of the fact that the head of the institution intends to disclose the record or part thereof.

(2) Any third party to whom a notice is required to be given under subsection (1) in respect of an intended disclosure may waive the requirement, and where the third party has consented to the disclosure the third party shall be deemed to have waived the requirement.

(3) A notice given under subsection (1) shall include

(a) a statement that the head of the government institution giving the notice intends to release a record or a part thereof that might contain material or information described in subsection (1);

(b) a description of the contents of the record or part thereof that, as the case may be, belong to, were supplied by or relate to the third party to whom the notice is given; and

(c) a statement that the third party may, within twenty days after the notice is given, make representations to the head of the government institution that has control of the record as to why the record or part thereof should not be disclosed.

(4) The head of a government institution may extend the time limit set out in subsection (1) in respect of a request under this Act where the time limit set out in section 7 is extended under paragraph 9(1)(*a*) or (*b*) in respect of the same request, but any extension under this subsection shall be for a period no longer than the period of the extension under section 9.

28. (1) Where a notice is given by the head of a government institution under subsection 27(1) to a third party in respect of a record or a part thereof,

(a) the third party shall, within twenty days after the notice is given, be given the opportunity to make representations to the head of the institution as to why the record or the part thereof should not be disclosed; and

(b) the head of the institution shall, within thirty days after the notice is given, if the third party has been given an opportunity to make representations under paragraph (*a*), make a decision as to whether or not to disclose the record or the part thereof and give written notice of the decision to the third party.

(2) Representations made by a third party under paragraph (1)(*a*) shall be made in writing unless the head of the government institution concerned waives that requirement, in which case they may be made orally.

(3) A notice given under paragraph (1)(*b*) of a decision to disclose a record requested under this Act or a part thereof shall include

(a) a statement that the third party to whom the notice is given is entitled to request a review of the decision under section 44 within twenty days after the notice is given; and

(b) a statement that the person who requested access to the record will be given access thereto or to the part thereof unless, within twenty days after the notice is given, a review of the decision is requested under section 44.

(4) Where, pursuant to paragraph (1)(*b*), the head of a government institution decides to disclose a record requested under this Act or a part thereof, the head of the institution shall give the person who made the request access to the record or the part thereof forthwith on completion of twenty days after a notice is given under that paragraph, unless a review of the decision is requested under section 44.

29. (1) Where the head of a government institution decides, on the recommendation of the Information Commissioner made pursuant to subsection 37(1), to disclose a record requested under this Act or a part thereof, the head of the institution shall give written notice of the decision to

(a) the person who requested access to the record; and

(b) any third party that the head of the institution has notified under subsection 27(1) in respect of the request or would have notified under that subsection if the head of the institution had at the time of the request intended to disclose the record or part thereof.

(2) A notice given under subsection (1) shall include

(a) a statement that any third party referred to in paragraph (1)(*b*) is entitled to request a review of the decision under section 44 within twenty days after the notice is given; and

(b) a statement that the person who requested access to the record will be given access thereto unless, within twenty days after the notice is given, a review of the decision is requested under section 44.

44. (1) Any third party to whom the head of a government institution is required under paragraph 28(1)(*b*) or subsection 29(1) to give a notice of a decision to disclose a record or a part thereof under this Act may, within twenty days after the notice is given, apply to the Court for a review of the matter.

(2) The head of a government institution who has given notice under paragraph 28(1)(*b*) or subsection 29(1) that a record requested under this Act or a part thereof will be disclosed shall forthwith on being given notice of an application made under subsection (1) in respect of the disclosure give written notice of the application to the person who requested access to the record.

(3) Any person who has been given notice of an application for a review under subsection (2) may appear as a party to the review.

51. Where the Court determines, after considering an application under section 44, that the head of a government institution is required to refuse to disclose a record or part of a

record, the Court shall order the head of the institution not to disclose the record or part thereof or shall make such other order as the Court deems appropriate.

Privacy Act, R.S.C. 1985, c. P-21

3. In this Act,

. . . . .

"personal information" means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,

(a) information relating to the race, national or ethnic origin, colour, religion, age or marital status of the individual,

(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual by a government institution or a part of a government institution specified in the regulations,

(f) correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual,

(h) the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual by an institution or a part of an institution referred to in paragraph (*e*), but excluding the name of the other individual where it appears with the views or opinions of the other individual, and

(i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,

but, for the purposes of sections 7, 8 and 26 and section 19 of the *Access to Information Act*, does not include

(j) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,

(i) the fact that the individual is or was an officer or employee of the government institution,

(ii) the title, business address and telephone number of the individual,

(iii) the classification, salary range and responsibilities of the position held by the individual,

(iv) the name of the individual on a document prepared by the individual in the course of employment, and

(v) the personal opinions or views of the individual given in the course of employment,

(k) information about an individual who is or was performing services under contract for a government institution that relates to the services performed, including the terms of the contract, the name of the individual and the opinions or views of the individual given in the course of the performance of those services,

(l) information relating to any discretionary benefit of a financial nature, including the granting of a licence or permit, conferred on an individual, including the name of the individual and the exact nature of the benefit, and

(m) information about an individual who has been dead for more than twenty years;

. . . . .

8. (1) Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section.

(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed

. . . . .

(m) for any purpose where, in the opinion of the head of the institution,

(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or

(ii) disclosure would clearly benefit the individual to whom the information relates.

. . . . .

(5) The head of a government institution shall notify the Privacy Commissioner in writing of any disclosure of personal information under paragraph (2)(*m*) prior to the disclosure where reasonably practicable or in any other case forthwith on the disclosure, and the Privacy Commissioner may, if the Commissioner deems it appropriate, notify the individual to whom the information relates of the disclosure.

. . . . .

Federal Courts Act, R.S.C. 1985, c. F-7

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

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

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

. . . . .

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

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

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

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

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

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

prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

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

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

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

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

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

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

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

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

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

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

Footnotes

* Corrigenda issued from the court on April 26, 2006 and May 24, 2006 have been incorporated herein.

1987 CarswellPEI 50
Prince Edward Island Court of Appeal

Island Telephone Co., Re

1987 CarswellPEI 50, [1987] P.E.I.J. No. 114, 206 A.P.R. 158, 67 Nfld. & P.E.I.R. 158, 7 A.C.W.S. (3d) 271

In The Matter of The Electric Power and Telephone Act, R.S.P.E.I. 1974, Chap. E-3.1

In The Matter of The Public Utilities Commission Act, R.S.P.E.I. 1974, Chap. P-31, as amended

In The Matter of an appeal by the Island Telephone Company Limited from an Order of the Prince Edward Island Public Utilities Commission made on the 8th day of October, A.D. 1987

Honourable Mr. Justice McQuaid

Judgment: November 26, 1987
Docket: Doc. AD-0007

Counsel: Solicitors for Island Telephone - *Linda St. Jean* and *Ronald J. Keefe*.
Solicitor for Public Utilities Commission - *Maureen M. Gregory* appearing for Ronald H. MacMillan, Q.C.

Subject: Public

***McQuaid, J.A.*:**

1 This is an application in chambers for a stay of proceedings with respect to an order issued by the Public Utilities Commission, dated 8 October, 1987, whereby the Commission imposed certain duties and obligations upon the Company to prepare and file with the Commission, immediately, certain materials.

2 The matter has its origin in an order of the Commission one year earlier, dated - October, 1986, requiring that a hearing be held "to investigate the Company's rate of return, operating expenses, overall revenue requirement and subscriber rates". This order was issued, on the initiative of the Commission itself, purportedly made pursuant to s. 28(1) of the *Electric Power and Telephone Act*, Stats, P.E.I. 1984, Cap. 20, which reads, in part:

> When the Commission believes ... that an investigation of any matter relating to any public utility should, for any reason, be made, it may, on its own motion, summarily investigate the same with or without notice.

3 The Commission, in fact, determined that the hearing in question should be made in two separate phases, phase I in which the Company's revenue requirements for two stipulated years would be reviewed, and phase II, to follow, in which the issue of just and reasonable subscriber rates would be reviewed.

4 The phase I hearing was, in fact, held during the summer of 1987. There were no intervenors. Following the conclusion of the phase I hearings, the Commission made certain findings, and on the basis of these findings, ordered that the phase II hearings should commence "shortly". In the meantime the company was to file other stipulated materials with the Commission in anticipation of the hearings to follow. This was the import of the order of the Commission, dated 8 October, 1987.

5 On 27 October, 1987, the Company filed notice of appeal from this order alleging several grounds which will be more specifically referred to infra.

6 This appeal was filed pursuant to s. 16.1 of the *Public Utilities Commission Act*, as amended in 1987. Two subsections of this section are relevant, the first touching the right of appeal, and the second touching the continuing involvement of the Commission in the proceedings.

> (1) An appeal lies from a decision or order of the Commission to the Appeal Division of the Supreme Court upon a question of law or jurisdiction,
>
> . . . . .
>
> (3) The Commission shall be deemed to be a party to the appeal.

7 The filing of this appeal triggered Rule 62.02(2) and (3) of the Rules of Court.

> (2) Unless the Appeal Division or a judge thereof, or the court appealed from so orders, the filing of a notice of appeal does not operate as a stay of proceedings under the order appealed from, or invalidate any interlocutory order in the proceedings;
>
> (3) An order under paragraph (2) may be granted upon such terms as are just...

Hence the requirement of this application, which was filed, with notice to the Commission, 16 November, 1987. The grounds for the application were set out at length in the notice of application, which need not be repeated here. Suffice it to say for the moment, they would appear, on the face of it, at least, not frivolous or vexatious, but rather arguable. As it transpired, these grounds were, in fact argued, competently and in depth, by counsel both for the Company and the Commission.

8 During the course of this argument, I raised, on my own initiative, the issue of the right to standing on the part of the Commission in the matter of the issue presently before the Court, i.e., an application for a stay of the order of the Commission. Neither counsel appeared to have considered this to be an arguable issue, being of the view that s. 16.1(3) of the *Public Utilities Commission Act* opened the door to the Commission to participate. I am not nearly so confident, as counsel appeared to be, that such is the case.

9 What is presently before the Court is not an "appeal" either in the sense in which it is used in the *Act*, or, indeed, in any other sense. Nor is it a matter touching the appeal itself, or arising out of the appeal, for I have no right or jurisdiction, on the hearing of this application, to consider the merits of the appeal.

10 I think the matter must be looked at from its logical perspective. There is an extant and presently operative order or judgment issued by the Commission. An appeal lies from that order, and has been taken, by the Company. Regardless of any ruling which I might now make, that order remains extant and operative until dealt with in the forum of the Appeal Division, which will deal with it in a substantive way, and may confirm it, quash it, or vary it. That is what an "appeal" is all about, and it is to that process which the Commission has been made a party by statute, and in that regard, it possesses only those rights and powers, including the right of appearance, as a party, which the statute gives it, and nothing more can be read into that right than can be read into the statute.

11 What is before me is an application by counsel for the Company that I exercise my discretion in a procedural, as opposed to a substantive, matter. I must consider throughout the order as being and remaining, notwithstanding any order which I may make, extant and operative. The only question before me is: shall that extant and operative order be implemented now, or is it more appropriate that its implementation be deferred pending the outcome of the indicated appeal.

12 Nothing in the exercise of that discretion goes to the validity or effectiveness of that order. Hence this application is not in any sense an appeal, nor does it in any way have any of the characteristics of an appeal. Accordingly, I would be of the view that the provisions of s. 16.1(3) have no relevance to the present proceedings. It follows, therefore, that the Commission is not a party to this application.

13 That does not mean, however, that the Company is automatically entitled to the relief which it seeks. It still must satisfy me that it is entitled.

14 Carruthers, C.J. in *Clow v. McNevin (No. 2)* (1986), 60 Nfld. & P.E.I.R. 360, in my view, correctly stated the guiding principle of law touching the grant of a stay of proceedings, in the following quotation:

> ...a stay of proceedings would be ordered only where some exceptional or unusual circumstances have been made known to the Court. Examples of such circumstances might include such situations where the appellant would be unduly prejudiced if no stay were granted pending appeal, if there has been a significant change in circumstances subsequent to the order appealed from, or if, on the face of the record, it would appear to the judge considering the application that it would be more likely than not that the appeal would be allowed.
>
> The onus lies upon him who seeks the stay to satisfy the court that the case falls within that class of exceptional or unusual circumstances.

15 It must be remembered that in *Clow*, as well as in virtually every other case on the issue that there existed both a plaintiff and a defendant, one of whom had secured judgment against the other, and whose right it would be for immediate execution. As a leading English authority (*The Annot Lyle*, (1886), 11 P.D. 114), stated, the Court does not

> make a practise of depriving a successful litigant of the fruits of his litigation and locking up funds to which prima facie he is entitled.

pending an appeal. On the other hand, it has also been said, in *Wilson v. Church* (*No. 2*) (1879), 12 Ch. D. 454, that

> when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory.

16 While these three authorities in their context, as representative of litigious issues as between adversarial parties, are undoubtedly credible beacons, it cannot be said that they have particular applicability to the present situation which is not in that sense, adversarial. Here we are dealing with a mandatory order issued by a regulatory body against a party which has been arbitrarily brought before it. There exists no plaintiff and no defendant, no successful party and no unsuccessful party, no litigant who, in the wording of *The Annot Lyle* case, might be deprived of the fruits of his litigation if a stay were to be granted. One must, then, look elsewhere for guidance.

17 This may, perhaps, be best found in the recent decision of the Supreme Court of Canada in *Attorney General of Manitoba v. Metropolitan Stores* (*MTS*) *Ltd.*, [1987] 1 S.C.R. 110, where the issue was stay of proceedings. Because of what it considered to be their marked similarity, the Court appears to have founded its decision on the principles normally applicable to interlocutory injunctions, as enunciated in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All E.R. 504.

18 Beetz, J., speaking for the Court in the *Metropolitan Stores* case, at p. 127, considers the tests which he considered appropriate to apply.

> The first test is a preliminary and tentative assessment of the merits of the case, but there is more than one way to describe this first test. The traditional way consists in asking whether the litigant who seeks the interlocutory injunction can make out a prima facie case.
>
> The injunction will be refused unless he can... The House of Lords has somewhat relaxed this first test in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All E.R. 504, where it held that all that was necessary to meet this test was to satisfy the Court that there was a serious question to be tried as opposed to a frivolous or vexatious claim.

19 It is instructive to consider precisely what Lord Diplock did say in *American Cyanamid*, at p. 510, being mindful that he was speaking on an application for the granting of an interlocutory injunction.

> The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
>
> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence in affidavits as to facts on which the claims of either party may ultimately depend, or to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be deal with at the trial... So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favor of granting or refusing the interlocutory relief sought.

20 Not only does this quotation from Lord Diplock clarify what was in the mind of Beetz, J., but, as well, it introduces another element, that the tests referred to throughout are disjunctive rather than conjunctive.

21 Beetz, J. goes on:

> The second test consists in deciding whether the litigant who seeks the interlocutory injunction, [or, in the instant case, the stay of proceedings], would, unless the injunction is granted, suffer irreparable harm, that is, hence not susceptible or difficult to be compensated in damages.

He then concludes:

> The third test called the balance of convenience, and which ought perhaps to be called more appropriately the balance of inconvenience, is 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.

The learned justice earlier observed that the public interest is one factor to be taken into consideration in determining the balance of convenience. Lord Diplock also commented to the effect that, in addition to the specific factors to which he referred, there might well be other special factors to be taken into consideration in the particular circumstances of individual cases.

22 With this as background, then, one must go back to the proceedings which give rise to the present application.

23 In its decision of 8 October, 1987, the Commission made what are alleged to be sundry findings of fact and law with respect the Company now takes issue as grounds for appeal. From this aspect of the decision a stay is irrelevant, for these findings, taken by themselves and in isolation, have no direct consequences applicable to the Company. The second aspect of the decision flows from the first. In consequence of having made those findings, the Commission went on to order the Company to conduct its immediate affairs in a manner specifically directed by the Commission.

24 I think it might be said that the appeal is directed primarily to the first aspect of the Commission's decision, whereas the application for a stay is directed primarily to the second aspect of the decision. If the Company's appeal be ultimately successful, then the duty imposed upon the Company by the Commission will be terminated *ab initio*. On the other hand, should the Company's appeal prove unsuccessful, then those duties will then unquestionably be required to be complied with.

25 The crux of the issue is this: if no stay be granted, then the Company must, forthwith, fulfill those duties which the Commission has imposed upon it with a view to proceeding with phase II of its inquiry. If it later proves on appeal that the conclusions arrived at by the Commission in phase I of its inquiry, and which are the *sine qua non* for the progression into phase II, are fallacious or otherwise ill conceived, for whatever reason, then phase II of the inquiry cannot proceed, and accordingly the exercise in which the Company was required to engage by the Commission would have been for naught.

26 The duty which, then, falls upon the Court is to apply, as best it might, the several tests, generally encunciated in *American Cyanamid*, and generally confirmed in *Metropolitan Stores*, to the appeal filed, all without, nonetheless, attempting to examine the merits of that appeal.

27 As to the first test, I propose to apply this, not in the traditional way of determining whether the applicant has made out a *prima facie* case, which almost, of its own nature, implies some examination of the possible merits, but rather whether there exists a serious question to be tried, as opposed to one which is frivolous or vexatious.

28 As I read the grounds for appeal, these touch upon such matters as allegations of excessive jurisdiction, misinterpretation or misapplication of the governing statutes, breach of rules of natural

justice in the conduct of the inquiry, interference in matters strictly falling within management discretion, and other issues of like nature. These are, indeed, all matters of grave import. Whatever the outcome at the appeal level might ultimately be, they are, on the face of it, serious questions to be tried, being neither frivolous nor vexatious.

29 With respect to the second test, irreparable harm, the Company argued, and I think with some merit, that compliance with the Commission's order touching the preparation of materials, would put it, the Company, to no inconsiderable expense which would be of no use should its appeal prove successful. Normally, this would be compensable in damages if such should be the case. However, it is questionable whether the Commission could be made liable in damages in such an eventuality. Even if it could, since the Commission is exclusively funded by those industries over which it has jurisdiction, the end result would be that the Company would, in reality, be required to contribute to the payment of its own award for damages. It appears to me that there is something not quite equitable in such an arrangement. I think the criteria required for the second test have been met.

30 The third test is that of the balance of convenience, or of inconvenience as the case may be. 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 theretofore existed. The public interest is equally well served, in the same sense, by any appeal, if one is to consider what has been advanced as the *quasi parens patriae* jurisdiction of the Commission.

31 On the other hand, compliance with the Commission's order imposes upon the Company the expenditure of a considerable investment in time and funds which may or may not serve any useful purpose. If the Company's appeal is successful, then the balance of inconvenience unquestionably lies in its favor. If its appeal is unsuccessful, no harm be done by a stay, for the same preparation may then be done, but then most assuredly for a useful purpose.

32 I am satisfied that all three preconditions, both individually and collectively, have been met and warrant the granting of the requested stay of proceedings, and it will be so ordered.

33 There will be no order as to costs.

1980 CarswellNat 633
Supreme Court of Canada

Inuit Tapirisat of Canada v. Canada (Attorney General)

1980 CarswellNat 633F, 1980 CarswellNat 633, [1980] 2 F.C. 735, [1980] 2 S.C.R. 735, [1980] S.C.J. No. 99, 115 D.L.R. (3d) 1, 33 N.R. 304, 5 A.C.W.S. (2d) 255, J.E. 80-873

The Attorney General of Canada, (Defendant) Appellant and Inuit Tapirisat of Canada and the National Anti-poverty Organization, (Plaintiffs) Respondents

Laskin C.J. and Martland, Dickson, Beetz, Estey, McIntyre and Chouinard JJ.

Judgment: February 12, 1980
Judgment: October 7, 1980
Docket: None given

Proceedings: On appeal from the Federal Court of Appeal

Counsel: *E.A. Bowie*, and *H.L. Molot*, for the defendant, appellant.
B.A. Crane, Q.C., and *Andrew J. Roman*, for the plaintiffs, respondents.

Subject: Public; Civil Practice and Procedure

The judgment of the Court was delivered by *Estey J.*:

1 This appeal relates to the proper disposition of an application made in the Trial Division of the Federal Court of Canada for an order pursuant to the rules of that Court striking out the statement of claim and dismissing this action on the grounds that the statement of claim discloses "no reasonable cause of action". Mr. Justice Marceau of the Trial Division of the Federal Court allowed the application, struck out the statement of claim, and dismissed the action. The Federal Court of Appeal set aside the order of the Trial Division although in doing so found that there was no basis for the relief sought in the statement of claim except with regard to one issue to which I will make reference later. The effect, therefore, of the disposition below is that if left undisturbed, the matter would go to trial on the basis of the pleadings as they now stand.

2 A brief outline of events leading up to these proceedings will be helpful. The Canadian Radio-television and Telecommunications Commission (herein for brevity referred to as the CRTC), in response to an application from Bell Canada, conducted lengthy hearings concerning a proposed increase in telephone rates to be charged to subscribes in the provinces of Ontario and Quebec and in the Northwest Territories. The plaintiffs/respondents participated in these

hearings as intervenants throughout. In conducting these proceedings, the CRTC was proceeding under authority provided in the *Railway Act*, R.S.C. 1970, c. R-2 as amended, the *National Transportation Act*, R.S.C. 1970, c. N-17 as amended, and the *Canadian Radio-television and Telecommunications Commission Act*, S.C. 1974-75-76, c. 49. We are not here concerned with the actual proceedings before the CRTC. The balance of the narrative can best be set out by quoting from the statement of claim which, because this is an application for dismissal, must be taken as proved.

> 5. On June 1st, 1977 the CRTC issued its decision in the matter, which decision denied some of the relief sought by each of the plaintiffs.
>
> 6. On June 10th, 1977 ITC [a respondent herein] appealed the decision of the CRTC to the Governor-in-Council pursuant to section 64 of the *National Transportation Act*, requesting the Governor-in-Council to set aside the relevant portion of the decision of the CRTC and to substitute its own order therefor. On June 29th, 1977 Bell Canada issued a reply thereto. While ITC was preparing its final reply to the reply of Bell Canada, the Governor-in-Council decided the appeal adversely to ITC. On July 14th, 1977 Order-in-Council P.C. 1977-2027 was made. ITC's final reply was never submitted.
>
> 7. On June 9th, 1977 NAPO [a respondent herein] also appealed the decision of the CRTC to the Governor-in-Council pursuant to section 64 of the *National Transportation Act*, to which Bell Canada prepared a reply dated June 29th, 1977. The Governor-in-Council decided this appeal adversely to NAPO without waiting to receive the final reply of NAPO. On July 14th, 1977 Order-in-Council P.C. 1977-2026 was made. NAPO's final reply was never submitted.
>
> 8. In arriving at its decision the Governor-in-Council, following customary practice, allowed no oral presentation but conducted the hearing entirely in writing. However, following the usual practice, the actual written submission of the parties were not presented to the members of the Governor-in-Council but rather, evidence and opinion were obtained from officials of the Department of Communications as to:
>
> > a) What that Department thought were the positions of the parties in the appeal;
> >
> > b) The position of the Department, or certain officials thereof, in relation to the facts and issues in the appeal;
> >
> > c) Whether either or both of the appeals should be allowed. None of this evidence or these opinions have ever been communicated to the appellants (plaintiffs herein).
>
> 9. The CRTC was requested by the Governor-in-Council to submit its views as to the disposition of the appeals. These views of the CRTC were neither made available to the appellants (plaintiffs herein) by the CRTC itself, nor by the Governor-in-Council.

10. The Minister of Communications, at the meeting of the Governor-in-Council at which the appeals were decided, both participated in the making of the decision and submitted to the meeting her recommendation that the decision be that the appeals be disallowed, together with evidence and argument in support of this recommendation. The submissions of the Minister were a conduit for, were based upon, or at least included evidence, opinions and recommendations from the CRTC and from officials of her Department. Neither the content of these opinions and recommendations nor of any evidence or argument submitted in support thereof has ever been communicated to the appellants (plaintiffs herein), and hence the plaintiffs have been denied an opportunity to make a reply thereto; yet the two decisions and the resultant Orders-in-Council were made on the basis of the submissions of the Minister.

11. The plaintiffs submit that the defendant Governor-in-Council, when deciding a matter on a petition pursuant to section 64 of the *National Transportation Act*, is a Federal Board, Commission or other tribunal within the meaning of section 18 of the *Federal Court Act*.

12. The plaintiffs submit that the defendant Governor-in-Council was required to decide these appeals himself and to reach these decisions by means of a procedure which is fair and in accordance with the principles of natural justice.

13. The plaintiffs submit that in the circumstances, the Governor-in-Council held no hearing in any meaningful sense of that word, and that, therefore, the decisions and Orders-in-Council made pursuant to them are nullities. Alternatively, it is submitted that if there was a hearing, the procedure employed did not result in a fair hearing, hence the decisions and orders resulting are nullities.

14. Accordingly, the plaintiffs pray for the following relief:

[1] i)

ii) In the alternative, a declaration that the procedure employed by the Governor-in-Council in these two appeals resulted in:

a) no hearing having been held, or in the alternative,

b) such hearing as was held was not a full and fair hearing, in accordance with the principles of natural justice.

iii) Such other relief as the Court deems proper.

3 Paragraph 14(ii) does not, of course, when read literally, frame a proper request for declaration. There is no declaration sought with reference to any rights or obligations allegedly arising in the parties to the proceeding. The declaration is with reference to a failure to hold a hearing, or, in any case, "a full and fair hearing" without reference to any statutory or other right or duty relating

to the parties. The declaration sought should have related to the inferentially alleged invalidity of the two Orders-in-Council issued by the Governor-in-Council in response to the petition of the respondents, and I proceed to dispose of this appeal on the basis that the prayer for relief was so framed.

4 As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt": *Ross v. Scottish Union & National Insurance Co.* [2] Here Bell Canada in its statement of defence has raised the issue of law as to the position of the Governor in Council when acting under s. 64 of the *National Transportation Act, supra*, and the power and jurisdiction of the court in relation thereto. The issue so raised requires for its disposition neither additional pleadings nor any evidence. I therefore agree with respect with the judge of first instance that it is a proper occasion for a court to respond in the opening stages of the action to such an issue as this application raises.

5 The defendants other than Bell Canada comprise the occupant of the office of the Governor General of Canada at the time of the commencement of these proceedings and the then members of the federal Cabinet, collectively described in the style of cause as the Governor in Council. I note that the term is defined in the *Interpretation Act*, R.S.C. 1970, c. I-23, s. 28 in the following way:

> "Governor in Council", or "Governor General in Council" means the Governor General of Canada, or person administering the Government of Canada for the time being, acting by and with the advice of, or by and with the advice and consent of, or in conjunction with the Queen's Privy Council for Canada.

6 The more traditional procedure has been to join only the Attorney General of Canada as a party representing the Governor in Council. Exception was taken to the particular procedure in the motion for dismissal but the learned trial judge did not find it necessary to refer to the matter because he dismissed the action; and the Federal Court of Appeal did not deal with it. Because of the disposition I shall propose, the matter does not require an answer to the second request in the appellant's application wherein the applicant asks that the claim be struck out as against all named defendants other than the Attorney General of Canada.

7 The CRTC proceedings concerned the application by Bell Canada for approval under s. 320 of the *Railway Act, supra*, of those telephone tolls proposed to be charged by Bell Canada for its services in areas including the Northwest Territories. Section 321(1) of the *Railway Act, supra*, requires that "all tolls shall be just and reasonable...". Subsection (2) prohibits "unjust discrimination" and subs. (3) authorizes the CRTC to determine "as a question of fact" whether or not there has been unjust discrimination or unreasonable preference. The *National Transportation Act, supra*, makes further provision for such hearings by the CRTC and for appeals therefrom;

and we are here principally concerned with s. 64 of that statute, as amended by R.S.C. 1970 (2nd Supp.), c. 10, s. 65 (Schedule II, Item 32). It provides as follows:

> 64. (1) The Governor in Council may at any time, in his discretion, either upon petition of any party, person or company interested, or of his own motion, and without any petition or application, vary or rescind any order, decision, rule or regulation of the Commission, whether such order or decision is made *inter partes* or otherwise, and whether such regulation is general or limited in its scope and application; and any order that the Governor in Council may make with respect thereto is binding upon the Commission and upon all parties.
>
> (2) An appeal lies from the Commission to the Federal Court of Appeal upon a question of law, or a question of jurisdiction, upon leave therefore being obtained from that Court upon application made within one month after the making of the order, decision, rule or regulation sought to be appealed from or within such further time as a judge of that Court under special circumstances allows, and upon notice to the parties and the Commission, and upon hearing such of them as appear and desire to be heard; and the costs of such application are in the discretion of that Court.

8 The foregoing statues were enacted at a time when the approval of telephone tariffs was a function of the Canadian Transport Commission and its predecessors. By the *Canadian Radio-television and Telecommunications Commission Act, supra*, ss. 14, 17 and Schedule Items 2 and 5, the CRTC was assigned these responsibilities with reference to telephones and telegraphs.

9 The two respondent organizations participated "actively throughout the hearing" (to quote from the statement of claim) in the Bell Canada application "to increase the rates charged to customers". Not being satisfied with the decision of the CRTC, the two respondents had the alternative of appealing to the Federal Court of Appeal on a question of law or jurisdiction (s. 64(2), *supra*) or of filing a petition with the Governor in Council "to set aside the relevant portion of the decision of the CRTC and to substitute its own order therefore" (to quote from para. 6 of the statement of claim). The respondents elected to follow the latter course. The record does not reveal the contents of the respondents' petition and arguments, if any, in support of their application to the Governor in Council. Paragraph 10 of the claim asserts, and I treat it for the purposes of these proceedings as factually correct, that the Governor in Council received recommendations from the Minister of Communications, together with evidence and argument in support; evidence, opinions, and recommendations from the CRTC; reports from officials of the Department of Communications; and the reply of Bell Canada to each of the respondents' petitions. The respondents did not receive from the Governor in Council the contents of the recommendations and the material described in para. 10 of the claim, *supra*, but apparently did receive a copy of the Bell Canada reply to the petition. The Governor in Council denied the petitions of the respondents before the respondents had filed their respective responses to Bell Canada. According to the allegations made in the statement of claim, the Governor in Council did not communicate to the respondents the substance

of the material received from the Minister and other sources mentioned above and did not invite and consequently did not receive the respondents' comments on such material. No oral hearing occurred in the sense of a session at which the Governor in Council heard the petitioners and the various respondents, and indeed the respondents do not insist that such a procedure is prescribed by law and do not now press for an 'oral' hearing. Before this Court the respondents' position was principally founded on the failure of the Governor in Council (a) to receive the actual petitions of the respondents and (b) to afford the respondents the opportunity to respond to the case made against them by the Minister, the departmental officials and the CRTC. To a much lesser extent the respondents objected to the lack of opportunity to answer the response by Bell Canada to the petitions, presumably because the respondents had already encountered at length the arguments and submissions of Bell Canada during the CRTC hearings and had no doubt anticipated Bell Canada's position in their respective petitions to the Governor in Council.

10 In support of these objections to the course followed by the Governor in Council the respondents submit:

> (a) that the Governor in Council acting under s. 64 is a quasi-judicial body or at least owes the respondents a duty of fairness;
>
> (b) the duty includes disclosure to the respondent of submissions received from the CRTC;
>
> (c) the respondents have the right to answer Bell Canada if it has introduced some new aspect or submission;
>
> (d) the very minimum requirement is that the actual written submissions of the petitioners (respondents) must be placed before the Council and not a summary thereof prepared by officials;
>
> (e) the Governor in Council is required by s. 64 to give notice to all "parties" even if it moves on its own initiative (as the subsection authorizes it to do) so as to give prior notice to all those who may be affected by the rules to be established by the Governor in Council.

11 I turn then to the wording of s. 64 itself. This provision finds its roots in the *Railway Act, 1868*, 31 Vict., c. 68, subss. 12(9) and 12(10), which gave to the Governor in Council the power to approve rates and tariffs for the haulage of freight by rail. In 1903 the task was given to the Board of Railway Commissioners. Section 64 assumed its present form in the *Railway Act, 1903*, 3 Edw. VII, c. 58, s. 44. All these statutes related to railway rates in the first instance and eventually were extended to cover telephone and telegraph rates. In the meantime provision had been made for telephone rates and charges in the private statutes of incorporation of the Bell Telephone Company of Canada, for example the 1892 *Bell Telephone Company of Canada Act*, 55-56 Vict., c. 67, s. 3:

> The existing rates shall not be increased without the consent of the Governor in Council.

In its present state, s. 64 creates a right of appeal on questions of "law or jurisdiction" to the Federal Court of Appeal and an unlimited or unconditional right to petition the Governor in Council to "vary or rescind" any "order, decision, rule or regulation" of the Commission. These avenues of review by their terms are quite different. The Governor in Council may vary any such order on his own initiative. The power is not limited to an order of the Commission but extends to its rules or regulations. The review by the Governor in Council is not limited to an order made by the Commission *inter partes* or to an order limited in scope. It is to be noted at once that following the grant of the right of appeal to the Court in subs. (2), there are five subsections dealing with the details of an appeal to the Court. There can be found in s. 64 nothing to qualify the freedom of action of the Governor in Council, or indeed any guidelines, procedural or substantive, for the exercise of its functions under subs. (1).

12 The substance of the question before this Court in this appeal is this: is there a duty to observe natural justice in, or at least a lesser duty of fairness incumbent on, the Governor in Council in dealing with parties such as the respondents upon their submission of a petition under s. 64(1)? It will be convenient first to consider briefly the nature of the duty to be fair in our law.

13 It has been said by Lord Reid in *Wiseman v. Borneman*[3], at p. 308:

> Natural justice requires that the procedures before any tribunal which is acting judicially shall be fair in all the circumstances.

Such a broad statement depends for its validity upon the meaning to be ascribed to "any tribunal", and to the terms of its parent statute. This Court was concerned with such matters in *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police*[4]. A probationary constable was dismissed without being told why his services were being dispensed with and without being given an oppor tunity to respond or to defend his position. In the result the majority decision of this Court required in those circumstances that the probationary constable should have been treated fairly, not arbitrarily, even though he was not entitled to all the procedural protection accorded to a full constable. The Chief Justice writing for the majority stated at p. 325:

> What rightly lies behind this emergence is the realization that the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question.

The essence of the decision is found in the Chief Justice's remarks at p. 328:

> In my opinion, the appellant should have been told why his services were no longer required and given an opportunity, whether orally or in writing as the Board might determine, to

> respond. The Board itself, I would think, would wish to be certain that it had not made a mistake in some fact or circumstance which it deemed relevant to its determination. Once it had the appellant's response, it would be for the Board to decide on what action to take, without its decision being reviewable elsewhere, always premising good faith. Such a course provides fairness to the appellant, and it is fair as well to the Board's right, as a public authority to decide, once it had the appellant's response, whether a person in his position should be allowed to continue in office to the point where his right to procedural protection was enlarged. Status in office deserves this minimal protection, however brief the period for which the office is held.

14 The House of Lords in the earlier decision of *Pearlberg v. Varty (Inspector of Taxes)* [5] , had in effect found a presumption that the rules of natural justice apply to a tribunal entrusted with judicial or quasi-judicial functions but that no such presumption arises where the body is charged with administrative or executive functions. In the latter case courts will act on the presumption that Parliament had not intended to act unfairly and will "in suitable cases" imply an obligation in the body or person to act with fairness. See Lord Pearson at p. 547. Lord Hailsham L.C., combining the idea of fairness and natural justice, put it this way at p. 540:

> The doctrine of natural justice has come in for increasing consideration in recent years and the courts generally, and your Lordships' House in particular, have, I think rightly, advanced its frontiers considerably. But at the same time they have taken an increasingly sophisticated view of what it requires in individual cases.

Tucker L.J., thirty years earlier, came closer to our situation in this appeal when he said in *Russell v. Duke of Norfolk* [6] , at p. 118:

> The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case.

15 The arena in which the broad rules of natural justice arose and the even broader rule of fairness now performs is described by Lord Denning M.R. in *Selvarajan v. Race Relations Board* [7] where His Lordship, after enumerating a number of authorities dealing with tribunals generally concerned with a *lis inter partes* in a variety of administrative fields, said at p. 19:

> In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may

> be subjected to pains or penalties, or be exposed to prosecution or proceedings or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it.

(Even in those instances the Court went on to add that such a body may adopt its own procedure, can employ staff for all preliminary work, but in the end must come to its own decision.)

16 Let it be said at the outset that the mere fact that a statutory power is vested in the Governor in Council does not mean that it is beyond review. If that body has failed to observe a condition precedent to the exercise of that power, the court can declare that such purported exercise is a nullity. In *Esquimalt & Nanaimo Railway v. Wilson* [8], for example, the Privy Council considered the position of the Lieutenant-Governor of British Columbia under the *Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1917*, S.B.C. 1917, c. 71. The effectiveness of a Crown land grant issued by order of the Lieutenant-Governor in Council was contested on the grounds that the Lieutenant-Governor in Council had no "reasonable proof" before them that the grantees had improved the lands in question or occupied them with an intention to reside thereon. The Court of Appeal found that there was no such evidence and hence declared the Order in Council to be void. The Privy Council proceeded on the basis that before the Lieutenant-Governor in Council could make the grant in question, it must determine that the statutorily prescribed conditions had been met by the applicant for the grant. As here, the allegation was made that the owners did not have "an adequate opportunity" to show that there was no factual foundation for the grant made by the Lieutenant-Governor in Council. The Privy Council found against this submission stating at p. 213 through Duff J., sitting as a member of the Board:

> The respondents were given the fullest opportunity to present before the Lieutenant-Governor in Council everything they might to urge against the view that the depositions produced in themselves constituted "reasonable proof", and they had the fullest opportunity also of supporting their contention that the depositions alone, in the absence of cross-examination, ought not to be considered sufficient, and that further time should be allowed to enable them to prepare their case. The appointed authority for dealing with the matter, it must be remembered, was the Executive Government of the Province directly answerable to the Legislature, and their Lordships agree without hesitation with the majority of the Court of Appeal in holding as they explicitly decided upon the same facts in Dunlop's case, that the Lieutenant-Governor in Council was not bound to govern himself by the rules of procedure regulating proceedings in a Court of justice.
>
> It cannot be suggested that he proceeded without any regard to the rights of the respondents and the procedure followed must be presumed, in the absence of some conclusive reason to the contrary, to have been adopted in exercise of his discretion under the statute as a proper

> mode of discharging the duty entrusted to him. His decisions taken in the exercise of that discretion are, in their Lordships' opinion, final and not reviewable in legal proceedings.

17 The Privy Council also determined in the case that factual issues, including the "reasonableness" or "sufficiency" of the evidence, were exclusively for the Lieutenant-Governor whose decision would not be reviewable by a court if there was "some evidence in support of the application" (*per* Duff J. at p. 213).

18 The Ontario Court of Appeal was concerned with similar issues in *Border Cities Press Club v. Ontario (Attorney General)* [9] . The factual differences are such that it affords no direct assistance here. The statute prescribed conditions precedent to the exercise of the powers granted by the Legislature to the Lieutenant-Governor in Council in that "sufficient cause must be shown" before the letters patent in question might be cancelled. The trial court found that an unreasonable request had been made to the applicant by the province, no hearing or opportunity was afforded the applicant, and indeed no notice of the impending cancellation of the charter was given by the Lieutenant-Governor in Council. The Court of Appeal set aside the declaration that the Order in Council was void for procedural reasons applicable to the powers of the court of the first instance and for reasons not here relevant, but in doing so stated through Pickup C.J.O. at p. 412:

> I agree with the learned Judge in Weekly Court, for the reasons stated by him, that the power conferred is conditional upon sufficient cause being shown, and that without giving the respondent an opportunity of being heard, or an opportunity to show cause why the letters patent should not be forfeited, the Lieutenant-Governor in Council would not have jurisdiction under the statute to make the order complained of. In exercising the power referred to, the Lieutenant-Governor in Council is not, in my opinion, exercising a prerogative of the Crown, but a power conferred by statute, and such a statutory power can be validly exercised only by complying with statutory provisions which are, by law, conditions precedent to the exercise of such power.

19 It may be of interest to note that in approving the observations of the court below with respect to the statutory powers granted to the Lieutenant-Governor in Council, no express approval was given to the comment by the learned Judge in Weekly Court that in performing his function under the statute the Lieutenant-Governor in Council was required to act judicially.

20 However, no failure to observe a condition precedent is alleged here. Rather it is contended that, once validly seized of the respondents' petition, the Governor in Council did not fulfill the duty to be fair implicitly imposed upon him, the argument goes, by s. 64(1) of the *National Transportation Act*. While, after *Nicholson* , *supra*, and *Martineau v. Matsqui Institution (No. 2)* (*No. 2*) [10] , (decision of this Court handed down December 13, 1979) the existence of such a duty no longer depends on classifying the power involved as "administrative" or "quasi-judicial", it is

still necessary to examine closely the statutory provision in question in order to discern whether it makes the decision-maker subject to any rules of procedural fairness.

21 Instructive in this regard is the decision of the Ontario Court of Appeal in *Davisville Investment Co. v. Toronto (City)* [11] , where judicial review of an Order in Council was sought. The applicant had unsuccessfully applied to the Ontario Municipal Board for review of an earlier Board decision. By petition the applicant sought to have the Lieutenant-Governor in Council rescind the earlier Board order and direct a public hearing by the Board "to correct the earlier denial thereof" by the Board. The statute under which the petition was filed provided that the Lieutenant-Governor in Council might confirm, vary or rescind the Board order or require the Board to hold a new hearing. Lacourcière J.A. speaking on behalf of the majority, after describing the alternative provision for appeal to the court on a question of law or jurisdiction, described the petition as "the political route to the Lieutenant-Governor in Council" and went on to state at pp. 555-56:

> The petition does not constitute a judicial appeal or review. It merely provides a mechanism for a control by the executive branch of Government applying its perception of the public interest to the facts established before the Board, plus the additional facts before the Council. The Lieutenant-Governor in Council is not concerned with matters of law and jurisdiction which are within the ambit of judicial control. But it can do what Courts will not do, namely, it can substitute its opinion on a matter of public convenience and general policy in the public interest. This is what was done by the Order in Council: if it was done without any error of law, or without defects of a jurisdictional nature, the Divisional Court had no power to interfere and properly dismissed the application before it.

At p. 557 His Lordship returns to the same point:

> Section 94 of *The Ontario Municipal Board Act* should not be construed restrictively as if it involved an inferior tribunal to which certain matters have been committed by the Legislature. I prefer to regard the power as one reserved by the legislative to the executive branch of Government acting on broad lines of policy. There is no reason to fetter and restrict the scope of the power by a narrow judicial interpretation.

22 In the *Davisville* proceedings the petition was treated as an appeal in writing and it may be noted that the respondent party filed a reply but no response thereto was made by the applicant. Blair J.A. dissented on the interpretation to be placed upon s. 94 as it related to the alternative courses open on such a petition to the Lieutenant-Governor in Council, but agreed with the majority of the court that the action of the Executive is reviewable only if the Lieutenant-Governor in Council acts outside the terms of the enabling statute.

23 It is not helpful in my view to attempt to classify the action or function by the Governor in Council (or indeed the Lieutenant-Governor in Council acting in similar circumstances) into one of

the traditional categories established in the development of administrative law. The Privy Council in the *Wilson* case, *supra*, described the function of the Lieutenant-Governor as "judicial" as did the judge of first instance in the *Border Cities Press* proceedings, *supra*. However, in my view the essence of the principle of law here operating is simply that in the exercise of a statutory power the Governor in Council, like any other person or group of persons, must keep within the law as laid down by Parliament or the Legislature. Failure to do so will call into action the supervising function of the superior court whose responsibility is to enforce the law, that is to ensure that such actions as may be authorized by statute shall be carried out in accordance with its terms, or that a public authority shall not fail to respond to a duty assigned to it by statute.

24 I turn now to a consideration of s. 64(1) in light of those principles. Clearly the Governor in Council is not limited to varying orders made *inter partes* where a *lis* existed and was determined by the Commission. The Commission is empowered by s. 321 of the *Railway Act, supra*, and the section of the CRTC *Act* already noted to approve all charges for the use of telephones of Bell Canada. In so doing the Commission determines whether the proposed tariff of tolls is just and reasonable and whether they are discriminatory. Thus the statute delegates to the CRTC the function of approving telephone service tolls with a directive as to the standards to be applied. There is thereafter a secondary delegation of the rate-fixing function by Parliament to the Governor in Council but this function only comes into play after the Commission has approved a tariff of tolls; and on the fulfillment of that condition precedent, the power arises in the Governor in Council to establish rates for telephone service by the variation of the order, decision, rule or regulation of the CRTC. While the CRTC must operate within a certain framework when rendering its decisions, Parliament has in s. 64(1) not burdened the executive branch with any standards or guidelines in the exercise of its rate review function. Neither were procedural standards imposed or even implied. That is not to say that the courts will not respond today as in the *Wilson* case *supra*, if the conditions precedent to the exercise of power so granted to the executive branch have not been observed. Such a response might also occur if, on a petition being received by the Council, no examination of its contents by the Governor in Council were undertaken. That is quite a different matter (and one with which we are not here faced) from the assertion of some principle of law that requires the Governor in Council, before discharging its duty under the section, to read either individually or *enmasse* the petition itself and all supporting material, the evidence taken before the CRTC and all the submissions and arguments advanced by the petitioner and responding parties. The very nature of the body must be taken into account in assessing the technique of review which has been adopted by the Governor in Council. The executive branch cannot be deprived of the right to resort to its staff, to departmental personnel concerned with the subject matter, and above all to the comments and advice of ministerial members of the Council who are by virtue of their office concerned with the policy issues arising by reason of the petition whether those policies be economic, political, commercial or of some other nature. Parliament might otherwise ordain, but in s. 64 no such limitation had been imposed on the Governor in Council in the adoption of the procedures for the hearing of petitions under subs. (1).

25 This conclusion is made all the more obvious by the added right in s. 64(1) that the Governor in Council may "of his motion" vary or rescind any rule or order of the Commission. This is legislative action in its purest form where the subject matter is the fixing of rates for a public utility such as a telephone system. The practicality of giving notice to "all parties", as the respondent has put it, must have some bearing on the interpretation to be placed upon s. 64(1) in these circumstances. In these proceedings the respondent challenged the rates established by the CRTC and confirmed in effect by the Governor in Council. There are many subscribers to the Bell Canada services all of whom are and will be no doubt affected to some degree by the tariff of tolls and charges authorized by the Commission and reviewed by the Governor in Council. All subscribers should arguably receive notice before the Governor in Council proceeds with its review. The concluding words of subs. (1) might be said to support this view where it is provided that:

> ...any order that the Governor in Council may make with respect thereto is binding upon the Commission and upon all parties.

I read these words as saying no more than this: if the nature of the matter before the Governor in Council under s. 64 concerns parties who have been involved in proceedings before the administrative tribunal whose decision is before the Governor in Council by virtue of a petition, all such persons, as well as the tribunal or agency itself, will be bound to give effect to the order in council issued by the Governor in Council upon a review of the petition. Different terminology to the same effect is found in predecessor statutes and I see no basis for reading into this statute any different parliamentary intent from that which I have ascribed to these words as they are found now in s. 64(1).

26 It was pointed out that in the past the Governor in Council has proceeded by way of an actual oral hearing in which the petitioner and the contending parties participated (P.C. 2166 dated 24/10/23; and P.C. 1170 dated 17/6/27). These proceedings do no more than illustrate the change in growth of our political machinery and indeed the size of the Canadian community. It was apparently possible for the national executive in those days to conduct its affairs under the *Railway Act, supra*, through meetings or hearings in which the parties appeared before some or all of the Cabinet. The population of the country was a fraction of that today. The magnitude of government operations bears no relationship to that carried on at the federal level at present. No doubt the Governor in Council could still hold oral hearings if so disposed. Even if a court had the power and authority to so direct (which I conclude it has not) it would be a very unwise and impractical judicial principle which would convert past practice into rigid, invariable administrative procedures. Even in cases mentioned above, while the order recites it to have been issued on the recommendation of the responsible Minister, there is nothing to indicate that the parties were informed of such a recommendation prior to the conduct of the hearing.

27 While it is true that a duty to observe procedural fairness, as expressed in the maxim *audi alteram partem*, need not be express (*Québec (Commission des relations ouvrières) v. Alliance des professeurs catholiques de Montréal*[12], it will not be implied in every case. It is always a question of construing the statutory scheme as a whole in order to see to what degree, if any, the legislator intended the principle to apply. It is my view that the supervisory power of s. 64, like the power in *Davisville, supra*, is vested in members of the Cabinet in order to enable them to respond to the political, economic and social concerns of the moment. Under s. 64 the Cabinet, as the executive branch of government, was exercising the power delegated by Parliament to determine the appropriate tariffs for the telephone services of Bell Canada. In so doing the Cabinet, unless otherwise directed in the enabling statute, must be free to consult all sources which Parlia ment itself might consult had it retained this function. This is clearly so in those instances where the Council acts on its own initiative as it is authorized and required to do by the same subsection. There is no indication in subs. (1) that a different interpretation comes into play upon the exercise of the right of a party to petition the Governor in Council to exercise this same delegated function or power. The wording adopted by Parliament in my view makes this clear. The Governor in Council may act "at any time". He may vary or rescind any order, decision, rule or regulation "in his discretion". The guidelines mandated by Parliament in the case of the CRTC are not repeated expressly or by implication in s. 64. The function applies to broad, quasi-legislative orders of the Commission as well as to inter-party decisions. In short, the discretion of the Governor in Council is complete provided he observes the jurisdictional boundaries of s. 64(1).

28 The procedure sanctioned by s. 64(1) has sometimes been criticized as an unjustifiable interference with the regulatory process: see *Independent Administrative Agencies*, Working Paper 25 of the Law Reform Commission of Canada (1980), at pp. 87-89. The Commission recommended that

> provisions for the final disposition by the Cabinet or a minister of appeals of any agency decisions except those requesting the equivalent of the exercise of the prerogative of mercy or a decision based on humanitarian grounds, should be abolished. (at p. 88)

Indeed it may be thought by some to be unusual and even counter-productive in an organized society that a carefully considered decision by an administrative agency, arrived at after a full public hearing in which many points of view have been advanced, should be susceptible of reversal by the Governor in Council. On the other hand, it is apparently the judgment of Parliament that this is an area inordinately sensitive to changing public policies and hence it has been reserved for the final application of such a policy by the executive branch of government. Given the interpretation of s. 64(1) which I adopt, there is no need for the Governor in Council to give reasons for his decision, to hold any kind of a hearing, or even to acknowledge the receipt of a petition. It is not the function of this Court, however, to decide whether Cabinet appeals are desirable or not. I have only to decide whether the requirements of s. 64(1) have been satisfied.

29 In reaching this conclusion concerning the procedures to be followed with reference to s. 64(1), I am assisted by the reasoning of Megarry J. in *Bates v. Lord Hailsham of St. Marylebone* [13] (cited by the majority judgment of this Court in *Nicholson* , *supra*). There the court was dealing with a challenge made to the legality of an order issued under the *Solicitors Act* abolishing a tariff of fees, on the grounds that the order should have been preceded by wider consideration by the rule enacting body. In refusing to intervene, Megarry J. stated at p. 1378:

> Let me accept that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness. Nevertheless, these considerations do not seem to me to affect the process of legislation, whether primary or delegated. Many of those affected by delegated legislation, and affected very substantially, are never consulted in the process of enacting that legislation; and yet they have no remedy ... I do not know of any implied right to be consulted or make objections, or any principle upon which the courts may enjoin the legislative process at the suit of those who contend that insufficient time for consultation and consideration has been given.

Both the *Bates* case, *supra*, and this one deal with delegated legislation, the difference being that the delegate in this case is, in effect, the executive branch of government while in the *Bates* case it was a committee of judges and solicitors constituted under s. 56 of the *Solicitors Act*. Under s. 56(2) the committee could

> make general orders prescribing and regulating in such manner as they think fit the remuneration of solicitors in respect of noncontentious business.

The Governor in Council under s. 64(1) is entitled to vary decisions on telephone tariffs already made by another body, but this difference does not strike me as material. Nor does the fact that a citizen may invoke the review procedure of s. 64(1) via petition, while no comparable right existed under the English act, constitute a valid ground of distinction. There is only one review procedure under s. 64(1) though it may be triggered in two ways, *i.e.*, by petition or by the Governor in Council's own motion. It is clear that the orders in question in *Bates* and the case at bar were legislative in nature and I adopt the reasoning of Megarry J. to the effect that no hearing is required in such cases. I realize, however, that the dividing line between legislative and administrative functions is not always easy to draw: see *Essex County Council v. Minister of Housing and Local Government* [14] .

30 The answer is not to be found in continuing the search for words that will clearly and invariably differentiate between judicial and administrative on the one hand, or administrative and legislative on the other. It may be said that the use of the fairness principle as in *Nicholson* , *supra*, will obviate the need for the distinction in instances where the tribunal or agency is discharging a function with reference to something akin to a *lis* or where the agency may be described as an

'investigating body' as in the *Selvarajan* case, *supra*. Where, however, the executive branch has been assigned a function performable in the past by the Legislature itself and where the *res* or subject matter is not an individual concern or a right unique to the petitioner or appellant, different considerations may be thought to arise. The fact that the function has been assigned as here to a tier of agencies (the CRTC in the first instance and the Governor in Council in the second) does not, in my view, alter the political science pathology of the case. In such a circumstance the Court must fall back upon the basic jurisdictional supervisory role and in so doing construe the statute to determine whether the Governor in Council has performed its functions within the boundary of the parliamentary grant and in accordance with the terms of the parliamentary mandate.

31 The precise terminology employed by Parliament in s. 64 does not reveal to me any basis for the introduction by implication of the procedural trappings associated with administrative agencies in other areas to which the principle in *Nicholson* , *supra*, was directed. The roots of that authority do not reach the area of law with which we are concerned in scanning s. 64(1).

32 As mentioned at the outset, the Federal Court of Appeal, speaking through Le Dain J., agreed with the trial division except with respect to the lack of opportunity for the respondents to respond to the reply forwarded to the Governor in Council by Bell Canada in the proceedings initiated by the petition of the respondents. Le Dain J. regarded this issue as being one of fact depending for its determination on the nature of Bell Canada's answer and the issues raised thereby, and on the reasonableness of the delay of two weeks before the issuance of the decision of the Governor in Council. His Lordship concluded:

> Since the question is essentially one of fact, one cannot say before the issue has been tried that the Statement of Claim does not disclose a reasonable cause of action.

33 For the reasons already given I am unable, with respect, to conclude that the issue of fairness arises in these proceedings on a proper construction of s. 64(1). If there were to be a distinction between rights arising with reference to submissions from government sources and rights arising with reference to the response from the rate applicant Bell Canada, more compelling reasons exist for disclosure of the intra governmental communications as the respondents were, by this stage in these lengthy proceedings, very familiar with the application made by Bell Canada and the position taken by that company before the Commission by reason of the respondents' active participation in the hearings before the CRTC. In any case, I can discern nothing in s. 64(1) to justify a variable yardstick for the application to that section of the principle of fairness according to the source of the information placed before the Governor in Council for the disposition of the respondents' petition. The basic issue is the interpretation of this statutory provision in the context of the pattern of the statute in which it is found. In my view, once the proper construction of the section is determined, it applies consistently throughout the proceedings before the Governor in Council.

34 I would therefore allow the appeal and restore the order of the trial court. As to costs, the respondent has never asked for costs and the Attorney General of Canada at the hearing in this Court placed himself in the hands of the Court. In all the circumstances of these proceedings, I would not consider this to be a case for costs and I would award no costs to any party in this Court or in any of the courts below.

Appeal allowed.

Solicitors of record:
Solicitor for the defendant, appellant: *R. Tassé*, Ottawa.
Solicitor for the plaintiffs, respondents: *Andrew J. Roman*, Toronto.

Footnotes

1 This paragraph being a prayer for issuance of writ of *certiorari* was omitted as the respondents, after the judgment of the court of first instance was issued, no longer advanced this claim. We are now concerned only with para. 14(ii) of the prayer for relief in which a declaration is sought.

2 (1920), 47 O.L.R. 308 (App. Div.).

3 (1969), [1971] A.C. 297 (U.K. H.L.).

4 (1978), [1979] 1 S.C.R. 311 (S.C.C.).

5 [1972] 1 W.L.R. 534 (U.K. H.L.).

6 (1948), [1949] 1 All E.R. 109 (Eng. C.A.).

7 (1975), [1976] 1 All E.R. 12 (Eng. C.A.).

8 (1921), [1922] 1 A.C. 202 (British Columbia P.C.).

9 (1954), [1955] 1 D.L.R. 404 (Ont. C.A.).

10 (1979), [1980] 1 S.C.R. 602 (S.C.C.).

11 (1977), 15 O.R. (2d) 553 (Ont. C.A.).

12 [1953] 2 S.C.R. 140 (S.C.C.).

13 [1972] 1 W.L.R. 1373 (Eng. Ch. Div.).

14 (1967), 66 L.G.R. 23 (Eng. Ch. Div.).

602 1980 CarswellNat 633, 1980 CarswellNat 633F, [1980] 2 F.C. 735, [1980] 2 S.C.R. 735...

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2012 ABQB 652
Alberta Court of Queen's Bench

Jackson v. Canadian National Railway

2012 CarswellAlta 2304, 2012 ABQB 652, [2013] 4 W.W.R. 311, [2013] A.W.L.D. 1421, [2013] A.W.L.D. 1599, 224 A.C.W.S. (3d) 565, 555 A.R. 1, 73 Alta. L.R. (5th) 219

Thomas Richard Jackson (Plaintiff) and Canadian National Railway and Canadian Pacific Railway (Defendants)

S.L. Martin J.

Heard: February 1-3, 7-9, 2012
Judgment: October 23, 2012
Docket: Calgary 1001-05744

Counsel: Mr. E.F.A. Merchant, Q.C., Mr. C.R. Churko, Mr. A. Tibbs for Plaintiff
Mr. R.W. Leurer, Q.C., Mr. D. Hodson, Q.C., Ms. V.M. Enweani, Mr. A.J. Stonhouse for Defendants

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Public; Restitution

APPLICATION by plaintiff to certify matter as class action; APPLICATION by defendants for summary judgment.

***S.L. Martin J.*:**

1. Introduction

1 This case involves farmers, railways and freight rates for regulated grain. The factual matrix is complex, extends over many years and involves various regulatory regimes. The Plaintiff asserts a class action on behalf of farmers alleging that the freight rates they paid unjustly enriched the Defendant railways. The Defendants say they were entitled to charge what they did and that the Plaintiff simply has no cause of action.

2 As the Case Management Justice for this action there are two distinct but related applications before me. First, Mr. Thomas Richard Jackson seeks certification of this matter as a class action. Second, the Defendants, Canadian National Railway Company ("CN") and Canadian Pacific Railway Company ("CP") (collectively, "the Railways"), apply for summary judgment dismissing the Plaintiff's Second Amended Statement of Claim.

2. The Putative Class Action and the Second Amended Statement of Claim

3 The Plaintiff seeks an order certifying this proceeding as a class action which would:

(a) describe the class as "all persons who delivered Grain to a Western Canadian Grain Delivery Point during the Class Period";

(b) appoint Mr. Jackson as the representative Plaintiff;

(c) state the nature of the claims asserted as:

> The Plaintiff claims restitution of overstated hopper car maintenance costs on the basis that the Defendants charged rates that were unfair and unreasonable in contravention of the spirit and intent of the *BIA, 1995*, *CTA, 1996*, *CTA, 2000*, and *Railways Costing Regulations*. In particular, the Defendants set tariffs and shipping rates under the Maximum Rate Scale and Maximum Revenue Entitlement without regard to actual hopper car maintenance costs;

(d) state the relief sought by the class as a personal restitutionary order and pre-judgment interest;

(e) set out the common issues for the class in a manner determined by the Court in consultation with counsel or as proposed by the Plaintiff, namely:

> (i) Between August 1, 1995 and July 31, 2007, did the Defendants charge unfair and unreasonable Grain shipping rates that were based on overstated hopper car maintenance costs and which therefore contravened the intent and policy of the *BIA, 1995*, *CTA, 1996*, *CTA, 2000*, and *Railway Costing Regulations*?
>
> (ii) If so, are class members entitled to restitution of the amount by which the Defendants' embedded hopper car maintenance costs exceeded their actual hopper car maintenance costs between August 1, 1995 and July 31, 2007? If so, can that amount be awarded as an aggregate monetary award, including on an average or proportionate basis?
>
> (iii) Are the Defendants liable to pay pre-judgment interest with respect to overstated hopper car maintenance costs? If so, in what amount?
>
> (iv) A suitable limitation period issue; and

(f) state an appropriate manner and time within which a class member may opt out as set out in a subsequently filed litigation plan.

4 The allegations contained in the Second Amended Statement of Claim are relatively straightforward. Mr. Jackson farms and resides near Killam, Alberta. Since August 1, 1995, he has delivered the grain he grows to a Western Canadian Grain Delivery Point and, he alleges, paid tariff rates established by federal legislation to the Railways for the shipment of his grain.

5 Mr. Jackson alleges that, at all material times, it was Parliament's policy that railway transportation would be provided to users at the lowest total cost; that railways would bear the actual cost of services provided to them at public expenses; and that railways would receive only fair and reasonable compensation. In particular, Mr. Jackson alleges that between August 1, 1995 and July 31, 2007, the Railways were obligated to charge fair and reasonable rates that were based on the Railways' actual hopper car maintenance costs ("Actual HCMC"), which are the costs associated with maintaining the fleet of hopper railway cars that had been provided to the Railways at public expense.

6 Mr. Jackson alleges that the Railways were required, but failed, to submit to the National Transportation Agency their Actual HCMC in 1994 and that, because the costs submitted by the Railways were overstated, the Railways charged unfair and unreasonable rates under two different legislative regimes from August 1, 1995 to July 31, 2007.

3. A Brief History of Regulated Grain Freight Rates

7 It is necessary to briefly discuss the complex historical relationship between the Railways and farmers in Western Canada, and the various regulatory regimes ("Regimes") that have governed that relationship. I am assisted in this regard by the affidavit evidence of Marian Robson, former Chairman and Chief Executive Officer for the Canadian Transportation Agency ("Agency") and Hedley Auld, Senior Marketing Manager with CN.

8 The history of the regulation of the transportation of grain within and from Western Canada goes back well over one hundred years. Prior to 1984, the rates for the movement of western Canadian grain were governed by the *Railway Act*, RSC 1985, c R-3, as repealed by SC 1996, c 10, s 185(1). Under the *Railway Act*, the Railways were allowed to charge statutory maximum rates, known as Crow Rates. By the 1960s, the Crow Rates did not come close to covering the Railways' costs associated with the transportation of Western Canadian grain, and from the 1960s to the 1980s, the Government of Canada financed a number of measures in an effort to relieve problems caused by the Railways' revenue shortfalls and growing production and export demand.

9 One of the measures taken by the Government of Canada during this time, and particularly relevant to these proceedings, was the creation of a program to purchase a large fleet of new grain hopper cars. From 1972 to 1986, the Government of Canada acquired 14,000 hopper cars, the Canadian Wheat Board ("CWB") acquired 4,000, and the Provinces of Alberta and Saskatchewan acquired 2,000. These hopper cars were supplied under various operating agreements, at no charge

to the Railways, for use in the transportation of Western Canadian grain. The Railways were responsible for all costs associated with the use of the cars, including their maintenance.

Regime 1: Annual Rate Scale under the Western Grain Transportation Act.

10 The Crow Rates were eliminated with the passage of the *Western Grain Transportation Act*, RSC 1985, c W-8, as repealed by SC 1995, c 17, s 26 ("*WGTA*") which came into force on November 23, 1983. The *WGTA* replaced the Crow Rates with a regime whereby an Annual Rate Scale would be established by the Canadian Transportation Commission ("CTC") for each crop year ("Regime 1"). The method for determining the Annual Rate Scale was set out in section 36(1) of the *WGTA*:

> 36(1) The annual rate scale in respect of a crop year shall be determined by multiplying the amount per tonne for the movement of grain over each range of distance set out in the base rate scale by the quotient obtained by dividing the estimated eligible costs of the railway companies in respect of that crop year less the CN adjustment in respect of that crop year by the base year revenues within the meaning of subsection (2), as those revenues are adjusted in accordance with the grain tonnage forecast for that crop year provided by the Administrator.

11 Section 36(1) prescribes a complex formula for the determination of freight rates. Put simply, the CTC was required to take the base rate amount, as set out in the *WGTA*, and adjust it annually to account for the estimated eligible costs of the Railways for the coming year, the amount of the CN adjustment (an amount the Government of Canada paid to CN to account for certain competitive disadvantages CN faced) and the figure to be used for base year revenues after making adjustments for the grain tonnage forecast for the coming year. In determining the estimated eligible costs of the Railways, the CTC was to consider its own estimate of volume-related costs for the movement of regulated grain and line-related variable costs for dependent branch lines, and the contribution to constant costs of the railways.

12 In addition, the *WGTA* mandated quadrennial costing reviews. Every four years, commencing in 1986, the CTC was to complete a review of and determine the volume-related variable costs of the Railways for the movement of regulated grain, and the line-related variable costs for grain-dependent branch lines. These reviews were to be conducted on the most recent calendar or crop year for which costing information was available. The 1994 Costing Review, which utilized information from 1992, was the last costing review under the *WGTA* and is of particular importance to these proceedings.

13 Pursuant to section 38(2) of the *WGTA*, in carrying out quadrennial costing reviews, the CTC was required to:

(a) take into account all costs actually incurred that were directly related to the provision of an adequate, reliable and efficient railway transportation system, that would meet future requirements for movement of grain;

(b) take into account costs of capital and adjustments deemed justified in light of the risks associated with the movement of grain;

(c) exclude costs of capital and depreciation in respect of branch line assets provided under the Prairie Branch Line Rehabilitation Program and railway cars not funded by the railway companies;

(d) reduce additional costs directly attributable to joint line movement by an amount equal to additional revenues derived by the Railways; and

(e) reduce additional costs directly attributable to the acquisition by the Railways of railway cars for the movement of grain other than box cars or hopper cars by an amount equal to additional revenues derived by the railways.

14 As the foregoing suggests, and Ms. Robson states in her Affidavit, the determination of costs and freight rates under the *WGTA* was extremely complicated. In a report entitled, "A Report on the Movement of Western Grain: Estimates of the Railway Costs and Net Revenues Incurred between 1992 and 1998 and a Review of the Railway Assessment of the Extent of Sharing of Productivity Gains with Shippers", the process undertaken by Agency was described, at 4:

...The WGTA, which required rates to be cost based, was an extremely complicated process and involved two major activities. The first activity involved determining total rail costs for the movement of western grain. These costs were derived through quadrennial costing reviews. Three costing reviews were conducted, for 1984, 1988 and 1992. The costs determined through each review were finalized about 12 to 13 months after the base year for two reasons: complete data for the base year were not available until several months after the end of the year and the reviews took about a year to carry out.

The second activity involved taking the most recent base year's costs and adjusting them to arrive at estimated eligible costs for the upcoming crop year. For the most part, the major factors driving the updates were railway inflation (which takes into account price changes for labour, fuel, material and capital inputs) and projected traffic volume. From these estimated eligible costs, annual mileage-based rates were developed. Because western grain transportation was subsidized under the WGTA, the rates per tonne were divided into shipper and federal government portions.

The main purpose of the WGTA quadrennial costing review was to ensure that prescribed rates set through the updating process were aligned with as recent an actual cost base as was

> deemed appropriate. Otherwise, prescribed rates, which were updated for inflation and the abandonment of branch lines, could fall out of line with actual railway costs, which were also influenced by changes in productivity. In effect, the costing review was a device to ensure that cumulative changes in productivity were periodically shared with shippers.

15 According to Ms. Robson, a high degree of scrutiny was applied by the Agency to the Railways' operations under the *WGTA*, and the Agency had several branches and divisions responsible for auditing the Railways' accounts. She points to the description of the Agency Financial Analysis Directorate in the Agency's 1988 Annual Report:

> This Directorate is responsible for the Uniform Classification of Accounts, the Railway Costing Regulations and their implementation in order to meet current information requirements. This includes insuring that the information provided by the railways is reliable, meaningful, useful for subsidy, freight rate and policy determinations, and meets the regulatory reporting requirements. The work of the Directorate involves the audit of railway records, depreciation rate determinations, the investigation of the railways' working capital requirements, and cost of capital determinations. The Directorate also analyses the railways' costing methodology and computerized costing systems; and is responsible for the determination of price indices used in the WGTA annual rate scale, and the determination of western branch lines designated as grain dependant...
>
> The Directorate monitors actual and planned railway investment and maintenance expenditures for grain dependent lines, the results of which are reported to the Minister of Transport.
>
> A major focus of activity of the Directorate is the quadrennial costing review pursuant to s.38 of the *Western Grain Transportation Act*.

16 Simply put, under Regime 1, the Agency established an Annual Rate Scale for the movement of regulated grain. It did so by determining, on a quadrennial basis, the Railways' costs associated with the transportation of regulated grain, and on an annual basis making adjustments to those base costs on the basis of its own estimates. Not all of the costs associated with the shipping of regulated grain would be borne by shippers; instead Regime 1 incorporated a direct government subsidy to the Railways known as the "Crow Benefit".

17 Because the annual adjustments under section 36(1) of the *WGTA* did not account for productivity gains by the Railways, any efficiencies realized by the Railways in the four years between quadrennial costing reviews would accrue solely to the Railways, and would not be shared by shippers.

18 It must be noted that Mr. Jackson does not seek to recover any excess payments made to the Railways under Regime 1. Nevertheless, some understanding of Regime 1 is important in

these proceedings because it establishes context for the two Regimes that followed, and because it mandated the 1992 Costing Review, which Mr. Jackson alleges would play some role in those Regimes.

Regime 2: Maximum Rate Scales under the Canadian Transportation Act

19 In 1995, the Government of Canada announced that it would cut transportation subsidies in its efforts to reduce the federal deficit. Subsidies to the Railways were a significant part of Regime 1 under the *WGTA*, and so pursuant to the *Budget Implementation Act, 1995*, SC 1995, c 17 ("*BIA, 1995*"), the *WGTA* was repealed and the *National Transportation Act, 1987*, RSC 1985, c 28 (3rd Supp), as repealed by SC 1996, c 10, s 183) ("*NTA, 1987*") amended to add provisions related to the transportation of regulated grain. In 1996, the National Transportation Agency ("NTA"), which was created under the *NTA 1987*, was continued as the Agency and the *NTA 1987* consolidated with the *Railway Act* to form the *Canada Transportation Act*, SC 1996, c 10 ("*CTA*"). A Maximum Rate Scale ("MRS") for the 1995 - 1996 crop year was set out in the *BIA, 1995*. The MRS for 1996-1997 was set by the NTA, and the MRS for 1997-1998 to 2000-2001 was set by the Agency.

20 In essence, beginning in 1995, federal subsidies to the Railways were eliminated and the Annual Rate Scale system under the *WGTA* was replaced by the MRS. The determination of the Maximum Rate Scale, like the determination of the Annual Rate Scale before it, was not a simple exercise. The MRS was determined by multiplying the rates for each range of distance set out in the Scale for the 1995-96 crop year by the Freight Rate Multiplier ("FRM") which effectively adjusted the rates for inflation, and reduced the maximum rates to take into account the abandonment of any grain dependent branch lines. The FRM itself was the product of a complex formula incorporating the volume-related composite price index ("VRCPI") for the 1994-1995 crop year and, as determined by the Agency, for the crop year in determination. The purpose of the VRCPI was to forecast changes in the Railways' expenses associated with the transportation of regulated grain including labour, fuel, materials, leased railway cars, and other capital components. The Agency based the VRCPI for any crop year on information provided by stakeholders, private forecasters, other government departments and agencies, and the Agency's own research.

21 In January 1996, the Agency decided that it would include consultations with various stakeholders, including the Railways, grain companies and producer representatives, in the process of determining maximum freight rates. In early March, the Agency would invite these stakeholders to review confidential forecasts for VRCPI components prepared by the Agency and the Railways and then invite them to submit their views in writing or in consultation sessions. Once this process was complete, the Agency would establish the MRS for the coming year, which was then used by the Railways in developing the rates that they would charge for the movement of regulated grain. The Railways could and sometimes did offer incentive rates to shippers by providing discounts for large shipments. These incentive rates were not required to be approved by the Agency.

22 It is important to note that with the repeal of the *WGTA*, the Government of Canada eliminated quadrennial costing reviews. Under the new regime, the benefit of increased railway efficiencies would not be periodically shared with grain shippers, as it was before.

23 Section 155 of the *CTA* required the Minister of Transportation to conduct a review of the effect of the *CTA* on the efficiency of the transportation of regulated grain and the extent of the sharing of efficiency gains between grain shippers and the Railways. In December 1997, Supreme Court Justice Willard Estey was appointed to undertake a review of the system. In December 1998, Justice Estey produced a report with 15 recommendations for the reform of the grain transport system, including a recommendation to replace the MRS with a more flexible pricing system. Arthur Kroeger, a former Deputy Minister of Transport, was appointed in May 1999 to develop a system based on the Estey Report's recommendations.

24 A number of parties suggested that a formal railway costing review should be conducted in connection with the Estey Report and Mr. Kroeger's work, but then Minister of Transport David Collenette did not order one, on the basis that a costing review would take too much time and that the repeal of the *WGTA* had eliminated statutory authority for such a review. Instead, Mr. Kroeger asked the Agency to provide an estimate of the change in the Railways' costs since the 1992 Costing Review, and the Agency's assessment of the extent to which productivity gains had been shared with shippers in the interim. In September 1999 Mr. Kroeger recommended the replacement of the MRS with a cap on the Railways' revenues for the transport of regulated grain, and that the Railways' revenues be reduced by 12% from 1998 revenues to account for productivity gains made by the Railways since 1992.

Regime 3: Maximum Revenue Entitlement

25 Following the Estey Report and Mr. Kroeger's review and recommendations, the Government of Canada announced major changes to the *CTA* in May 2000. On August 1, 2000 the MRS was effectively replaced by the Maximum Revenue Entitlement ("MRE") regime that exists to this day. Instead of the 12% reduction in railway revenues associated with the transport of regulated grain, Parliament imposed an 18% reduction.

26 Under the MRE regime, the Railways are required to publish tariffs that include a single car rate from every grain delivery point. The Railways are permitted to set the rates themselves. Rates may vary in response to market conditions, including the length of haul, service requirements for different commodities shipped, and time of year. However, while under this regime the Railways were permitted, for the first time in Canadian history, to establish their own rates for the shipment of regulated grain, so long as each Railway's revenues earned from the shipment of that grain do not exceed the Railway's MRE for that crop year. If a Railway's revenues exceed the MRE, then the Railway is required to pay out the excess plus penalties.

27 The formula for determining a Railway's MRE is set out in section 51 of the *CTA*:

> 151. (1) A prescribed railway company's maximum revenue entitlement for the movement of grain in a crop year is the amount determined by the Agency in accordance with the formula
>
> [A/B + ((C - D) × $0.022)] × E × F
>
> where
>
> A is the company's revenues for the movement of grain in the base year;
>
> B is the number of tonnes of grain involved in the company's movement of grain in the base year;
>
> C is the number of miles of the company's average length of haul for the movement of grain in that crop year as determined by the Agency;
>
> D is the number of miles of the company's average length of haul for the movement of grain in the base year;
>
> E is the number of tonnes of grain involved in the company's movement of grain in the crop year as determined by the Agency; and
>
> F is the volume-related composite price index as determined by the Agency.

28 Parliament sets out the base year figures for A, B, C and D in subsections 151(2) and 151(3) of the *CTA*. The Agency is required to determine the amount of grain the railways transport in a given year, and must also continue to conduct the complex VRCPI determination. It is also the Agency's responsibility to assess the Railways' revenues and determine if they exceed the MRE for a given year.

29 The process for determining VRCPI remains a consultative one, as described in the Agency *Decision No. 207-R-2008* CarswellNat 4975:

> The development of the volume-related composite price index for 2007-2008 required detailed submissions of historical price information of railway inputs (labour, fuel, material and capital) from the prescribed railway companies... The submitted information as reviewed and verified by Agency staff. In addition, the railway companies and Agency staff developed forecasts for future changes in the price of railway inputs. The historical and forecasted information was summarized in an Agency report and shared with grain industry participants for consultation purposes. Consultation included participants from producer organizations, grain companies, railway companies, and federal, provincial and municipal governments.

30 Under section 150 of the *CTA*, the determination of the Railways' revenues from the transportation of regulation grain is to be made by the Agency no later than December 31 of the following crop year. The way in which the Agency does this was described in its Decision No. 529-R-2009, at para 21:

> Railway company records relating to western grain revenue were audited by Agency staff. Initial freight revenue, including payments to other railway companies involved in the carriage of grain, were submitted by CN and CP on a per movement basis. Both were verified against company accounting records and source documents. Numerous onsite visits were also made to CN and CP offices to ensure that all western grain revenue was captured and to determine whether revenue exclusions or reductions were appropriate and accurate.

4. Hopper Car Maintenance Costs and the Hopper Car Decision

31 As noted above, between 1972 and 1986, the Government of Canada acquired some 14,000 hopper cars and provided them, under various operating agreements, to the Railways for the transportation of regulated grain, at no charge. The Railways were responsible for the maintenance of the hopper car fleet, and the associated costs were included in the costing process under the *WGTA*.

32 Along with the replacement of the Annual Rate Scale with the MRS in 1995, the Government of Canada began investigating the potential disposition of its large hopper car fleet. In the following years a number of proposals were considered, including the purchase of the hopper car fleet by the Railways and by groups representing western farmers. It is clear that the fact that hopper car maintenance costs were effectively "embedded" in the MRS was a live issue early on in the process of determining what to do with the hopper car fleet. In May 30, 1996 submissions to the House of Commons Standing Committee on Agriculture, Art Macklin, a member of the Advisory Committee to the Canadian Wheat Board, indicated that the Railways' current annual maintenance costs of $4000 per car per year could probably be reduced by half.

33 Though a sale by the Government of Canada of its hopper car fleet was essentially anticipated in the *BIA, 1995*, no sale proceeded and the matter was put on hold pending the outcome of the Estey Report. Meanwhile, the matter of hopper car maintenance costs embedded in the MRS remained a bone of contention. The National Farmers Union raised the issue in its submissions to Justice Estey, citing a "$3000-per-car discrepancy" between the amounts for hopper car maintenance embedded in the MRS and the amounts spent on an annual basis by commercial leasing companies.

34 Beyond a general comment in the Estey Report to the effect that a disposal of the hopper car fleet for fair market value conditional upon the cars remaining available to the Western Canada grain industry would be in the interest of Canadian grain transportation, the Estey Report made

no formal recommendation with regard to the disposal of the hopper car fleet or hopper car maintenance costs. In the following years, Transport Canada continued to study and to explore options relating to the disposal of the hopper car fleet. In the event of a sale of the hopper cars to a third party, hopper car maintenance costs would no longer be the Railways' responsibility and so in 2004, the Agency was asked to determine the amount embedded in the MRE for hopper car maintenance in the 2003-2004 crop year. The Agency determined that, at as of that time, the amount was some $4,329 per hopper car per year. The Farmer Rail Car Coalition ("FRCC"), a group comprised of a number of Western Canada farm groups that were exploring the purchase of the hopper cars itself, responded by pointing out that the $4,329 was significantly more than its own estimate of hopper car maintenance costs of $1,500 per year. An Agency study in 2005 indicated that the Agency's estimate of actual annual maintenance costs for the hopper car fleet in 2004 was $1,873 per car.

35 By 2005, it appears that the Government of Canada was close to an agreement with the FRCC that would see the transfer of the hopper car fleet to the FRCC, with an adjustment to the Railways' MRE to reflect the fact that they would no longer be responsible for hopper car maintenance costs. An agreement in principle was reached and announced on November 24, 2005, but on May 4, 2006, Transport Canada announced that the Government of Canada would no longer be proceeding with the sale. At the same time, there was a recognition that without the transfer of the hopper car fleet and the corresponding adjustment to the Railways' MRE, the disparity between "embedded" and actual hopper car maintenance costs would persist. As a result, the Government of Canada announced the introduction of *An Act to Amend the Canada Transportation Act and the Railway Safety Act and to Make Consequential Amendments to Other Acts*, 1st Sess, 39th Parl, 2007, assented to 22 June 2007) ("Bill C-11"), which would make an adjustment to the VRCPI to better reflect actual hopper car maintenance costs. Clause 57 of Bill C-11 provided:

> 57. Despite subsection 151(5) of the *Canada Transportation Act*, the Canadian Transportation Agency shall, once only, on request of the Minister of Transport and on the date set by the Agency, adjust the volume-related composite price index to reflect the costs incurred by the prescribed railway companies, as defined in section 147 of that Act, for the maintenance of hopper cars used for the movement of grain, as defined in section 147 of that Act.

36 Once Bill C-11 received Royal Assent, the Agency was immediately tasked with determining the adjustment to the VRCPI mandated by Clause 57. The Agency released a consultation document in May 2007, setting out its proposed methodology for determining the adjustment and a number of issues for discussion with stakeholders. In *Canadian National Railway v. Canadian Transportation Agency*, 2008 FCA 363 (F.C.A.), leave to appeal to SCC refused, [2009] S.C.C.A. No. 33 (S.C.C.), (the "Hopper Car Appeal") it was noted at para 43 that this consultation involved approximately 30 organizations.

37 On February 19, 2008, the Agency released *Decision No. 67-R-2008* [2008 CarswellNat 4923 (Can. Transport. Agency)] (the "Hopper Car Decision"). The purpose of the Hopper Car Decision was to implement the direction contained in Clause 57, which was described at paras 3-5:

> Clause 57 provides that the Agency must adjust the volume-related composite price index. The adjustment is not an adjustment at large. It is specifically the adjustment that is to reflect costs incurred by the Canadian National Railway Company (CN) and the Canadian Pacific Railway Company (CP) and only for the maintenance of hopper cars used for the movement of regulated grain.
>
> This new adjustment reflects Parliament's acceptance that since 1992, and largely due to improved railway company operating efficiencies, the railway companies' costs for moving statutory grains have decreased significantly. This downward trend was in fact first recognized in the year 2000 when the CTA was changed to reflect revenue regulation as opposed to direct rate regulation.
>
> The policy underpinning Clause 57 is that the railway companies' costs for the maintenance of hopper cars, which are a significant cost component in the movement of grain, have declined to the point that the overall integrity of the Revenue Cap Program is now in doubt. That is, as a regulatory system that is cost based, at least in part, there are historic operating costs in the system that the railway companies are no longer incurring. There is widespread recognition that these historic costs are significant and there is a broad-based view that they ought to be removed from the Revenue Cap formula to partly restore the balance between the interests of the railway companies, and shippers and producers.

38 The scale of the discrepancy arising from actual versus embedded hopper car maintenance costs under the MRE regime was described at para 9:

> It is estimated that during the first seven years under the Revenue Cap Program (i.e., from crop year 2000-2001 to crop year 2006-2007) the railway companies received more than $550 million for hopper car maintenance costs while incurring less than $250 million for this maintenance. Thus, in the period, the railway companies have received at least $300 million more than they have spent on hopper car maintenance, and this has been paid by Prairie grain producers. Moreover, the difference between the amount the railway companies receive under the Revenue Cap Program and what they incur as hopper car maintenance costs has been growing at an increasing rate.

39 The purpose of the Clause 57 adjustment was described at paras 11-12:

> ...If the cap is higher than it should be, due to the overstated historical costs, Parliament has directed the Agency to reduce it to partly restore the integrity of the Revenue Cap Program.

> Simply put, if the historical maintenance costs are too high, producers are paying too much to shippers who are paying too much to the railway companies. Parliament has directed that this should not be the case for hopper car maintenance costs included, or embedded, in the Revenue Caps.
>
> While Parliament has declared that a re-balancing is necessary, it has instructed the Agency to determine what re-balancing is required and how and when it is to be done. The only limit is that the adjustment must be undertaken "once only". This is to be achieved by adjusting the volume-related composite price index to better reflect costs for the maintenance of hopper cars used for the movement of grain. This determination is separate from the yearly Revenue Cap determination exercise which includes many costs, in addition to those related to hopper cars.

40 Not surprisingly, the Agency's task in determining the amount of hopper car maintenance costs that were embedded in the Railways' MRE was a highly complicated one. It first had to determine the applicable 1992 total for hopper car maintenance costs, since 1992 was the last time a formal cost review had been conducted. That figure, ultimately determined to be $140.41 million, was then adjusted to reflect the differences in the amount and distance of grain moved between 1992 and 2007-2008, and then further adjusted for inflation and productivity gains. In the end, the Agency determined the amount of embedded hopper car maintenance costs in the Railways' MRE to be $105.1 million for the 2007-2008 crop year. The Agency was then required to determine the actual hopper car maintenance costs for 2007-2008, which it did by relying upon costing data provided by the Railways for the period between 2004 and 2006 and adjusting for inflation and productivity gains. Ultimately, the Agency concluded that the actual hopper car maintenance cost for 2007-2008 was $32.9 million.

41 At para 177, the Agency concluded:

> The amount of "actual" hopper car maintenance costs relating to crop year 2007-2008 and reflecting the above Agency findings, totals $32.9 million. It follows that the difference between the amount of "embedded" and "actual" hopper car maintenance costs for crop year 2007-2008 is $72.2 million.

This conclusion, and what it represents when considered over the duration of the MRS and MRE regimes, is at the heart of this action. Though it speaks only to the difference between embedded and actual costs in the 2007-2008 crop year, it is clear that over the years the legislative schemes had incorporated into the Railways' costs an amount for hopper car maintenance that bore no relationship to reality.

42 To remedy the significant gulf between actual and embedded hopper car maintenance costs, the Agency was empowered only to make a one-time adjustment to the VRCPI, which it did by reducing that number to 1.0639, translating to a reduction, on average, of $2.59 per tonne of grain

shipped in the 2007-2008 crop year, on the basis of a forecast of 27.85 million tonnes. The effect was to remove $72.2 million from the Railways' 2007-2008 MREs, and further to remove this amount, plus adjustments for inflation, from the MREs in all subsequent years. The adjustment made as a result of Clause 57 and the Hopper Car Decision does not address the imbalance between actual and embedded hopper car maintenance costs between 1992 and 2007.

5. The Sale and Shipment of Grain in Western Canada

43 It is important to understand how Western Canadian grain is brought to market and sold. For the purpose of determining which crops would be covered by the statutory regime described above, the *WGTA* defined "grain" as including 56 different types of crops and products. Under the *BIA, 1995* and with the creation of the NTA, the list was expanded to 58 products. These include wheat and barley, which during the relevant period were subject to the CWB's marketing monopoly, as well as a significant number of grains such as corn, lentils, flax, oats and canola, as well as processed products like flour, animal feed, barley meal and canola oil, which were not subject to the CWB's monopoly. The CWB marketing monopoly covered wheat and barley grown in Western Canada, whether for human consumption or for shipment interprovincially or for export.

44 In the case of grains subject to the CWB monopoly, Western Canadian farmers were required to sell their crops to the CWB. A number of Grain Handling Companies ("GHCs") acted as agents for the CWB in purchasing grain from producers, and then storing, handling, and blending the grain, and arranging for the shipment of the grain on the CWB's behalf. Producers were free to sell their grain to any GHC and to negotiate the terms of sale. GHCs acting as agents for the CWB were required by law to deduct a "freight consideration rate" ("FCR fee") from the purchase price paid by the GHC for the grain. The operation of the FCR fee is set out in section 32 of the *Canadian Wheat Board Act*, RSC 1985, c C-24, as repealed by SC 2011, c 25, s 39:

> 32. (1) The Corporation shall undertake the marketing of wheat produced in the designated area in interprovincial and export trade and for that purpose shall
>
> . . .
>
> (b) pay to producers selling and delivering wheat produced in the designated area to the Corporation, at the time of delivery or at any time thereafter as may be agreed on, a sum certain per tonne basis in storage at a pooling point to be fixed from time to time
>
> (i) by regulation of the Governor in Council in respect of wheat of a base grade to be prescribed in those regulations, and
>
> (ii) by the Corporation, with the approval of the Governor in Council, in respect of each other grade of wheat;

> (b.1) deduct from the sum certain referred to in paragraph (b) the amount per tonne determined under subsection (2.1) for the delivery point of the wheat to the Corporation;
>
> . . .
>
> (2.1) For the purpose of paragraph (1)(b.1), the Corporation shall, with the approval of the Governor in Council, establish for each delivery point within the designated area an amount that, in the opinion of the Corporation, fairly represents the difference in the cost of transporting wheat from that point as compared to other delivery points.

45 The FCR fee was calculated by the CWB based on the single car rate for the movement of grain from any delivery point to either Thunder Bay or Vancouver. The fee is therefore the same for all producers who deliver grain to a particular delivery point. The FCR fee is shown on a "cash ticket" or "grain ticket" provided to the producer, but it is important to note that it does not directly reflect the actual cost of freight via the Railways. The FCR fee is the same regardless of whether the grain is ultimately transported on a regulated basis or not.

46 In the case of grain not subject to the CWB monopoly, producers have the right to sell their grain to any GHC or to any other purchaser of their choice. The purchase price is the result of negotiation between producer and GHC and is therefore subject to a variety of factors for both the producer and the purchaser. However, as Mr. Gorst, who is a former General Manager of the GHC Agricore, indicated in his Affidavit, GHCs would not deduct anticipated transportation costs, whether for regulated rail transportation, or otherwise, from the price paid to a producer, nor would the producer make a payment to the GHC for the shipment of grain. Instead, transportation costs, broadly speaking, would have been a factor taken into account by the GHC in determining the purchase price. Those transportation costs might be the costs the GHC could anticipate it would incur if it shipped the grain via regulated movement, or not. At the time of purchase, it is possible that the GHC would not know whether the grain would be shipped via regulated movement or not.

47 To put the matter simply, subject to one exception the carriage of grain produced in Western Canada is paid for by GHCs. While the cost of carriage is surely a factor in determining the price paid by GHCs and the CWB to Western Canadian producers, those producers do not pay the Railways directly for the shipment of regulated grain.

48 The exception is grain shipped in producer cars. Under the *Canada Grain Act*, RSC 1985, c G-10, a producer or group of producers are entitled to order rail cars from the Canadian Grain Commission. The grain car is then loaded directly by the producer or group of producers for shipment to another location. However, grain shipped by producer car does not form part of Mr. Jackson's claim.

49 Once a GHC has purchased and obtained title to grain (whether as agents for the CWB or not), there are typically three modes of carriage a GHC might employ: transportation by truck or

other non-rail mode; non-regulated rail movement (ie. into the United States or interprovincially); and regulated rail movement. A GHC opting to ship by way of regulated movement may negotiate a price for the shipment with the Railways, subject to the limits imposed upon the Railways by the statutory regime. The rate charged by the Railways may be different from the FCR fee deducted by the CWB, or the rates set out in the MRS, or the Railways' single car tariff rates, for a variety of reasons, but the most significant is that reduced or incentive rates may be offered by the Railways, often for large volume shipments. It is Mr. Gorst's evidence that the value of these reduced rates is significant and may apply to as much as 80% of the movements of regulated grain.

50 There are additional complexities, as described by Mr. Gorst. Once delivered to a GHC, a producer's grain will be commingled with grain delivered by other producers. Where it goes from there, and therefore whether the transportation of the grain is regulated or not, will depend upon a wide variety of factors, including the type of grain, the grade of the grain, the location of the producer, available space and inventory at the GHC facility, the availability of incentive or reduced shipping rates, the date of delivery, and the availability of rail cars.

6. The Certification Application

51 The relevant portions of section 5 of the *Class Proceedings Act*, SA 2003, c C-16.5 ("*CPA*") provide:

> 5(1) In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a person eligible to be appointed as a representative plaintiff who, in the opinion of the Court,
>
> (i) will fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.

5(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the Court may consider any matter that the Court considers relevant to making that determination, but in making that determination the Court must consider at least the following:

(a) whether questions of fact or law common to the prospective class members predominate over any questions affecting only individual prospective class members;

(b) whether a significant number of the prospective class members have a valid interest in individually controlling the prosecution of separate actions;

(c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

(d) whether other means of resolving the claims are less practical or less efficient;

(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

5(3) Where the Court is satisfied as to each of the matters referred to in subsection (1)(a) to (e), the Court is to certify the proceeding as a class proceeding.

5(4) The Court may not certify a proceeding as a class proceeding unless the Court is satisfied as to each of the matters referred to in subsection (1)(a) to (e).

(a) Reasonable Cause of Action

52 Before describing the issues for trial as they are now framed in the Plaintiff's Second Amended Statement of Claim, it is worthwhile, in light of the changing allegations, to mention what is not being alleged. The Plaintiff no longer alleges that the 1994 Costing Review was faulty, or that the determination of HCMC at that time was improperly inflated. The Plaintiff does not allege that the Railways charged more than the tariffs under the MRS allowed, nor does he allege that the Railways exceeded their MREs.

53 Instead, the Plaintiff now contends that at all times during the relevant period the Railways were obligated to provide transportation to users at the lowest possible cost; that the Railways were to bear the actual cost of services provided to them at public expense; and that the Railways would receive only fair and reasonable compensation for shipping grain. The crux of the Plaintiff's allegations is contained in paragraph 7 of the Second Amended Statement of Claim, wherein the Plaintiff pleads "The policy of the Legislation (defined in the Statement of Claim as the *BIA, 1995*, *CTA, 1996*, *CTA, 2000* and the *Railways Costing Regulations*) was that the MRS and MRE were

to be "maximum" amounts, not amounts to which the Defendants had an "entitlement" without regard to underlying decreased operating costs."

54 In particular, the Plaintiff contends that, in repealing the *WGTA* and the requirement for quadrennial costing reviews, it was Parliament's intention that the Railways would pass on or share HCMC reductions with producers by way of lower freight rates. Instead, by charging rates and earning revenues at "the ceiling" of the MRS and MRE, the Railways earned more than Parliament intended. The relief sought is restitution for unjust enrichment.

55 The test for unjust enrichment is set out in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 (S.C.C.) at para 30:

> As a general matter, the test for unjust enrichment is well established in Canada. The cause of action has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment ...

56 The test under section 5(1)(a) of the *CPA* requires the Court to accept that the material facts pleaded in the Statement of Claim are true, and the Court may deny certification on the basis that the Statement of Claim fails to disclose a cause of action, only if it is plain, obvious and beyond a reasonable doubt that the plaintiff cannot succeed: *Elder Advocates of Alberta Society v. Alberta*, [2011] 2 S.C.R. 261 (S.C.C.) at para 20. The test is essentially the same as whether pleadings should be struck pursuant to an application under the former Rule 129(1)(a) of the Alberta *Rules of Court*: whether it is plain and obvious that there is no cause of action: *Alberta Municipal Retired Police Officers' Mutual Benefit Society v. Alberta*, 2010 ABQB 458 (Alta. Q.B.). While the Court must accept that the material facts pleaded are true, those facts must be clearly pleaded and a plaintiff may not rely upon mere speculation.

57 Section 5 of the *CTA* is entitled "National Transportation Policy". It is central to the Plaintiff's argument that, in charging maximum rates, the Railways breached the policies underlying the specific provisions of the *CTA*. From 1996 though June, 2007, ie. during the course of the Class Period, section 5 provided:

> 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,

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

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

58 Section 5 of the *CTA* is a "purpose statement", as described in Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed (Vancouver: Butterworths Canada Ltd., 1994) at 263-264:

> ...A purpose statement is a provision set out in the body of legislation that declares the principles or policies the legislation is meant to implement or the objectives it is meant to achieve. Usually purpose statements are found at the beginning of an Act or the portion of the Act to which they relate. Some are explicit and begin with the words "The purposes of this Act are..." or "It is hereby declared that...". Others simply recite the principles or policies that the legislature wishes to declare without introductory fanfare...
>
> Like preambles, purpose statements reveal the purpose of legislation and they are also an important source of legislative values. Unlike preambles, they come after the enacting clause of the statute and are part of what is enacted into law. This makes them binding in the sense that they cannot be contradicted by courts; they carry the authority and the weight of duly enacted law. In the absence of specific legislative direction, however, it is still up to courts to determine what use should be made of the purposes or values set out in these statements.
>
> ...Purpose statements play an important role in modern regulatory legislation. Such legislation establishes a general framework within which powers are conferred to achieve particular goals or to give effect to particular policies. Purpose statements expressly set out these policies and goals...
>
> In some cases purpose statements point in a single direction and guide interpreters toward a particular outcome...
>
> . . .
>
> ...[t]he declarations set out in a purpose statement may inform judicial understanding of the Act as a whole and guide interpretation in a particular direction.
>
> Not all purpose statements establish a unified and coherent philosophy. Sometimes a purpose statement sets out a number of competing principles or policies which interpreters are to weigh and balance in applying the legislation to particular cases.

59 The purpose and effect of section 5 of the *CTA* was described by the Federal Court of Appeal in *Ferroequus Railway v. Canadian National Railway*, 2003 FCA 454, [2004] 2 F.C.R. 42 (F.C.A.) at paras 21-22:

> Second, it is common ground that the factors to which the Agency must have regard when determining whether the grant of running rights is in the public interest are contained in the National Transportation Policy. This Policy both informs and, because of its statutory base, imposes a legal limitation on, the Agency's exercise of discretion.

> However, since the Policy expresses the often competing considerations that the Agency must balance when making a particular decision, it inevitably operates at a level of some generality and does no more than guide and structure the Agency's exercise of discretion in any given fact situation. Thus, it imposes a relatively soft legal limit on the Agency's exercise of power, in the sense that it will rarely dictate a particular result in any particular case.

60 Similarly, in *Canadian National Railway v. Moffatt*, 2001 FCA 327, [2002] 2 F.C. 249 (Fed. C.A.), the purpose of section 5 was described at para 27:

> However, section 5 is not a jurisdiction-conferring provision. While not minimizing its importance, I believe that section 5 is a declaratory provision which states the objectives of Canada's National Transportation Policy. Those objectives are implemented by the regulatory provisions of the CTA and, in the currently largely deregulated environment, by the absence of regulatory provisions. Section 5 does not, itself, confer on the Agency the jurisdiction it assumed in this case. If it were construed to do so, then presumably any legal question could also be brought before the Agency for determination.

61 The Plaintiff, in his Brief of Law in respect of Certification, characterizes the National Transportation Policy embodied in section 5 as follows:

> (a) transportation services would be provided at the lowest total cost to serve the needs of shippers;
>
> (b) carriers "as far as is practicable" were to bear "a fair proportion of the real costs" of the resources and services provided to them at public expense;
>
> (c) each carrier "as far as is practicable" was to receive only "fair and reasonable compensation" for the services it was to provide.

62 This is, at best, a gross simplification of objectives set out in the National Transportation Policy. The National Transportation Policy does not state that any particular form of transportation must be provided at the lowest total cost, but that a safe, economic, efficient and adequate transportation network should make use of all available modes of transportation at the lowest total cost. While the National Transportation Policy does provide that carriers "as far as practicable" are to bear a fair proportion of the real costs of resources provided to them at public expense, and to receive fair and reasonable compensation for the services they would provide, these broad statements of policy must be read in the context of the entire policy, which also emphasizes the importance of competition, market forces, and the economic viability of each mode of transportation.

63 The National Transportation Policy sets out a number of competing principles and is intended to guide the decisions of the Agency. It is, per Saxton J.A. in *VIA Rail Canada Inc. v. Canadian*

Transportation Agency, 2005 FCA 79, [2005] 4 F.C.R. 473 (F.C.A.) at para 39, "...polycentric, meaning that it requires the Agency to balance competing principles". It does not establish a specific duty on the part of the Railways to charge rates below those mandated by the Agency to reflect decreasing HCMC.

64 Nor can the duty asserted by the Plaintiff be located in the express provisions of the *CTA* or its predecessor legislation. There is no express provision in the *CTA* mandating the adjustment of rates to account for decreased HCMC or indeed any other efficiency realized by the Railways. The elimination of the Costing Reviews mandated under the *WGTA* suggests, instead, an intention to move toward a less regulated regime and increasing freedom on the part of the Railways to establish freight rates. Indeed, the proposition that the Railways are obligated to charge rates based upon their own assessment of what is fair and reasonable, incorporating decreasing HCMC, and independent of the rates mandated in the legislation itself is inconsistent with both the MRS and MRE statutory regimes. An obligation on the part of the Railways to charge lower rates reflecting decreasing HCMC would render the MRS under Regime 2 unnecessary, since the maximum rate would be determined by an ongoing assessment of costs, not the MRS itself. Similarly, if the Railways are entitled to charge rates only in accordance with an assessment of costs, the establishment of MREs becomes a pointless exercise. There would be, as the Railways contend, no point to the Agency's annual VRCPI determinations or to the penalties for exceeding the MRE.

65 Finally, and perhaps most compellingly, it is impossible to square the Plaintiff's interpretation of the National Transportation Policy with Bill C-11 and the Hopper Car Decision itself. Had the Railways been under an obligation to charge rates based upon actual HCMC, there would have been no need for Clause 57, which directed the Agency to make a one-time only adjustment to the VRCPI to account for decreasing HCMC. Parliament's response to the proposition that the Railways' revenue entitlements were distorted by decreased HCMC was to mandate a one-time adjustment to the VRCPI, and it presumably would have mindful of the objectives it established in the National Transportation Policy when it did so.

66 In short, there is no obligation under the applicable legislation for the Railways to charge freight rates for regulated grain that are reflective of decreases over time in HCMC. The *CTA* is a comprehensive legislative regime under which the Agency is empowered to make certain determinations in regard to freight rates in accordance with the broad objectives set out in the National Transportation Policy. The regulatory regime effectively supplants any common law obligation on the part of Railways with regard to freight rates, and replaces it with an arrangement whereby the determination of appropriate maximum rates and railway revenues has been made by Parliament and the Agency. It is worth reiterating that the Plaintiff no longer contends that the Railways have charged rates or earned revenues in excess of the maximums established by Parliament and the Agency.

67 In the absence of a violation of the statute, the decisions cited by the Plaintiff in support of the proposition that restitution lies for benefits obtained in breach of the statutes of Canada are distinguishable. The Plaintiff points to *Elder Advocates*, wherein the Supreme Court allowed certification to proceed where the plaintiff alleged that the Government of Alberta had wrongfully inflated accommodation charges levied to elderly patients to subsidize medical expenses. In that case, however, the regulation under which the charges were levied was the subject of a Charter claim and, in the view of the Alberta Court of Appeal, it was arguable that the legislative scheme on the whole "...does not countenance the use of a charge for accommodation and meals for anything other than accommodation and meals." (2009 ABCA 403 (Alta. C.A.) at para 63). In the case at bar, the rates charged and revenues earned by the Railways were specifically allowed by Parliament and the Agency.

68 In *Apotex Inc. v. Abbott Laboratories Ltd.*, 2011 ONSC 3988 (Ont. S.C.J.), upon which the Plaintiff also relies, Swinton J. held that it was not plain and obvious that an unjust enrichment claim would fail where the defendant pharmaceutical manufacturer had initiated patent proceedings that, by virtue of the relevant legislation, prevented the plaintiff from manufacturing its own generic drug for a period of 24 months. Swinton J. concluded at para 18 that the matter could proceed because it was not plain and obvious that the legislation comprised a complete code. Swinton J. drew a contrast with the decision of the Supreme Court of Canada in *Gladstone v. Canada (Attorney General)*, [2005] 1 S.C.R. 325 (S.C.C.). In *Gladstone*, the issue was whether the Government of Canada was obligated to pay interest after it seized fish from the plaintiffs, sold the fish, and then determined to return the proceeds of the sale to the plaintiffs. Major J. concluded, at paras 16-18:

> An additional submission by the respondents was that the Crown was unjustly enriched by its retention of the proceeds during the time of seizure. This argument also fails. The test for unjust enrichment has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and, (3) an absence of juristic reason for the enrichment...
>
> Assuming it can be established that there has been an enrichment of the Crown and a corresponding deprivation of the respondents, the element of "juristic reason" poses an unsurmountable hurdle in this appeal. The seizure, sale, and payment of the proceeds were lawfully carried out pursuant to the Act. The respondents rely upon *Manitoba v. Air Canada* (1978), 86 D.L.R. (3d) 631 (Man. C.A.), aff'd [1980] 2 S.C.R. 303, to support their claim that the Crown is not immune from the obligation to pay interest, even if the relevant legislation is silent on the matter. However, in my opinion, *Air Canada* is of no assistance because the issue in that case turned upon whether there was a lack of constitutional authority. There, the Crown collected taxes pursuant to an act that was *ultra vires* the province. This lack of legislative competence was central to that decision. This is not the case here. The constitutional authority of Parliament to enact the provisions of the *Fisheries Act* in question was not challenged.

The operation of the statutory provisions provides a "juristic reason" barring recovery...

69 The *CTA* and its predecessor legislation comprised an extensive and complete statutory regime governing the rates charged by the Railways in respect of the shipment of regulated grain. The operation of the statutory provisions and the charging of the rates and earning of revenues allowed under that legislative scheme provides a juristic reason barring restitution for unjust enrichment. While I agree with the Plaintiff that restitution is a flexible remedy and its ongoing evolution should not be unduly restrained, I cannot agree that it should extend to recovery of profits made in compliance with the terms of a regulatory regime.

(b) Identifiable Class of 2 or More Persons

70 The Class proposed by the Plaintiff is "[a]ll persons who delivered Grain (ie. Regulated Grain) to a Western Grain Delivery Point (an Elevator in Canada west of Armstrong, Ontario) between August 1, 1995 and July 31, 2007." The Railways' objection to this class definition is twofold. First, the Railways submit that certification of the class on the basis of delivery would involve an examination of each and every delivery of grain against each and every facility to which grain may be delivered, an extremely large and complex undertaking. Second, the Railways contend that the proposed class would necessarily include persons who would have no colourable claim against either of the Railways. This is because the proposed class would include all producers who delivered grain to an elevator, regardless of whether it was processed or moved as whole grain; moved by rail or by some other means; transported by regulated movement or not; and whether the rate paid by the shipper was or was not influenced by the alleged breach of the obligation to charge a rate based on actual HCMC.

71 An identifiable class is one which is capable of clear definition. The definition must state objective criteria by which class members can be identified, and those criteria must bear a rational relationship to the common issues asserted by the class members, but they must not depend upon the outcome of the litigation. While it is not necessary for each class member to be known, the criteria must not be such that the class is unbounded. A class should not be unnecessarily broad or narrow.

72 For the purpose of determining whether the proposed class meets the required criteria, it is helpful to assume that the Plaintiff has pleaded a valid cause of action. The question is, if we are to assume that the Railways unjustly inflated the rates they charged for the shipment of regulated grain, would the Railways' objections to the proposed class definition warrant a refusal to certify the claim?

73 The crux of the dispute between the parties on this point is well illustrated by their reliance upon different parts of the Alberta Court of Appeal decision in *Windsor v. Canadian Pacific Railway*, 2007 ABCA 294 (Alta. C.A.). The Railways point to that decision, at para 19:

> A class definition should not be overly broad and should not include persons who have no claim against the defendants. The plaintiff must establish that the class could not be defined more narrowly without arbitrarily excluding persons with claims similar to those asserted on behalf of the proposed class.

The Plaintiff relies upon para 24:

> While it is desirable to have as many of the potential claimants in the class as possible, the law does not require perfection, so long as the class is identifiable. As the Court said in *Hollick*, "While the appellant has not named every member of the class, it is clear that the class is bounded (that is, not unlimited)." The pursuit of a definition of the class that would include every possible claimant, but exclude every non-claimant, is likely to result in a merit based and, therefore, inappropriate definition...

74 A lengthy discussion of the issues that arise from attempting to ensure that a class is not overly broad without resorting to merits-based criteria is contained in *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2005), 78 O.R. (3d) 98 (Ont. S.C.J.); aff'd (2008), 54 C.P.C. (6th) 167 (Ont. Div. Ct.). In that case, certification was rejected because all of the proposed definitions were unacceptably merit-based. However, in the course of coming to that conclusion Cullity J. held, at paras 11-12:

> It is argued that a proposed class that contains persons who will not have valid claims is unacceptably over-inclusive, while a class that "arbitrarily" excludes persons who have — or may have — valid claims is under-inclusive. I adhere to the view I have expressed in other cases that neither of the suggested restrictive rules is supported by the following passage from the reasons of the Chief Justice in Hollick, at paras. 20-21, that is commonly relied on as authority for each of them:
>
> > It falls to the putative representative to show the class is defined sufficiently narrowly.
> >
> > The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad — that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended...
>
> I understand that passage to accept a concept of over-inclusiveness confined to cases where more narrow class definitions would be possible without arbitrarily excluding persons who share the same interest in the resolution of the common issues. I do not understand it to imply that a plaintiff cannot choose — arbitrarily or otherwise — the persons whom he,

> or she, wishes to represent, or that the only class proceedings permissible are those where the class contains everyone with the same interest. Rather than supporting either of the suggested rules of class definition, it seems to me that the Chief Justice was recognizing that an "over-inclusive" class contemplated by the first of those rules is permitted if a more narrow definition would arbitrarily exclude persons whose claims the plaintiff wishes to enforce. A class may be over-inclusive if necessary but not necessarily over-inclusive.

75 The Railways point to *Cuff v. Canadian National Railway*, 2007 ABQB 761 (Alta. Q.B.), wherein Belzil J. held at para 38 that "...it surely is a requirement that all class members be able to advance at least one cause of action." It is worth pointing out that Belzil J. made that determination in the course of his consideration of the merits of the causes of action pleaded, and after concluding that the proposed class definition was acceptable. It is clear from the authorities that the possibility that some members of the class might not have a claim is not, in and of itself, a disqualifying factor. This was clearly recognized by Rooke J. (as he then was) in *Windsor* at para 91: "[i]n my opinion, the identifiable class requirement is a low threshold issue. Overinclusion, under-inclusion, or both, are not fatal as long as they are not illogical or arbitrary."

76 Both sides acknowledge the essential impossibility of determining how every delivery of Grain to a Western Grain Delivery Point was ultimately shipped. But this is not a case, such as *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Ont. Gen. Div.), wherein it is immediately clear that the proposed definition contains an identifiable group of people who would have no claim. In my view it is much more analogous to *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 (B.C. C.A.) , leave to appeal to SCC refused [2010] S.C.C.A. No. 32 (S.C.C.). The allegation in that case was that the defendants had acted as a cartel, artificially increasing the price of a computer memory chip. The proposed class of plaintiffs consisted of indirect purchasers, ie. individuals who bought computers containing the memory chip at issue, but who did not purchase the chips directly from the defendants. The obviously complex and varied means by which the memory chips had been sold to manufacturers, incorporated into a range of different devices, then sold to wholesalers, to retailers, and to the public, rendered the determination of liability to individual computer purchasers a difficult and ultimately somewhat speculative endeavour. Nevertheless, the Court concluded, in part on the basis of expert evidence to the effect that it would be difficult but possible through statistical analysis to establish the cost of the defendants' wrongful conduct to members of the class, that the claim should be certified.

77 The Railways distinguish *Pro-Sys Consultants* on the basis that there, at least, all members of the class had purchased the memory chip at issue. Here, they contend, it is not possible to determine whether any individual farmer delivering Grain to a Western Grain Delivery Point had his or her product transported via regulated shipment. I appreciate the distinction and the case at bar may reflect the outer limit of what is acceptable in terms of the potential overbreadth of the class. Nevertheless, the test requires an identifiable class and rational connection between the class and the common issues. The standard is low enough to admit of the possibility that the class definition

will encompass individuals who may not have a claim. In my view, if one is to assume that the freight rates charged for the shipment of regulated grain were unjustly inflated by the Railways, the proposed class definition is sufficiently limited and rationally connected to the common issues. This is not to say, however, that the issues proposed by the Plaintiff are sufficiently common to meet the next part of the test.

(c) Common Issues

78 As with the determination of the appropriate class definition, the assessment of whether the claims of the proposed class members raise a common issue is complicated due to the conclusion that the pleadings themselves do not raise a viable cause of action. It is necessary to assume, in this analysis, that I am wrong in this conclusion and that the Railways could be found to have breached a duty to charge freight rates for the transportation of regulated grain on the basis of Actual HCMC.

79 The Plaintiff proposes the following common issues:

> (a) Between August 1, 1995 and July 1, 2007, did the Defendants charge grain shipping rates that were based on Overstated HCMC and which were therefore contrary to the intent and policy of the *BIA, 1995*, *CTA, 1996*, *CTA, 2000*, and *Railway Costing Regulations*?
>
> (b) If so, are class members entitled to restitution of the amount by which the Defendants' Embedded HCMC exceeded their Actual HCMC between August 1, 1995, and July 31, 2007? If so, can that amount be awarded as an aggregate monetary award, including on an average or proportionate basis? and
>
> (c) Are the Defendants liable to pay pre-judgment interest with respect of Overstated HCMC? If so, in what amount?

80 The first common issue raises two questions: one is factual, the second a question of interpretation. The latter, which is whether grain shipping rates which did not exceed the amounts allowed under the MRS and MRE regimes were nevertheless contrary to Parliament's intent and policy, is essentially the issue that I have determined does not form the basis of a valid cause of action.

81 The factual question, which is framed as whether the Railways charged grain shipping rates based on "overstated HCMC", must be considered in light of the changing nature of the Plaintiff's claim. As I understand it, the Plaintiff no longer alleges that the Railways wrongfully overstated HCMC in the 1994 Costing Review. So the factual inquiry is better framed as whether the Railways charged grain shipping rates based on "embedded" HCMC, which then leads to the legal inquiry into whether those rates were contrary to Parliament's intent.

82 The common issue requirement was described by McLachlin C.J.C. in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 (S.C.C.) at para 39:

> Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated *vis-à-vis* the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.

83 The questions of class definition and common issues are closely connected and in the course of argument and analysis, the questions can become confused. To be clear, when considering whether a class action should be certified under section 5(1)(b), the essential question is whether the proposed class definition itself is objectively determinable and rationally connected to the matters at issue in the action. An affirmative answer to that question does not resolve the question of whether the issues identified by the plaintiff are sufficiently common across the class.

84 At this stage, it is important to reiterate a number of facts concerning the sale and shipment of grain in Western Canada. Grain producers do not pay the Railways directly for the shipment of grain. Nor do they pay grain handlers for the shipment of grain. Instead, at all relevant times, grain producers would sell their grain to either the CWB or to grain handlers, who then paid the Railways, if the grain was shipped by rail, for shipping. Grain sold to the CWB was subject to the FCR fee regardless of whether it was ultimately shipped via regulated rail movement or not, and the FCR fee itself was not determined solely on the basis of the Railways' rates, nor on the basis of what the CWB actually paid to ship the grain (by rail or otherwise). Farmers who sold grain directly to grain handlers could expect that the grain handlers' shipping costs would be factored into the purchase price, but again there was no way for the farmer to know whether the grain would be shipped by rail, or if it was, by regulated movement, and if it was, whether the grain handler had the benefit of one of the reduced rates frequently offered by the Railways. As the Railways point out, what is known is that the freight rates charged by the Railways under the MRS and MRE regimes were not experienced by farmers in common. Freight rates were charged pursuant to individual contracts between the Railways and specific shippers, and varied significantly as a result of competition in particular markets and capacity. The amount that an individual farmer

may have seen notionally "deducted" by a shipper from the purchase price for a delivery of grain may have borne no relationship to regulated freight rates at all. This is not merely an issue of the assessment of damages; because of the commingling of grain on delivery and the uncertainties inherent in the transportation system, it is in fact not possible to determine that the purchase price paid to any particular producer would have incorporated an element of embedded HCMC. This is a liability issue.

85 The Plaintiff contends that the potential for an award of aggregated damages effectively overcomes the liability obstacles posed by the indirect connection between grain producers and Railways and the uncertainties arising out of the different means by which grain could be shipped. Section 30 of the *CPA* provides:

> 30(1) The Court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members or subclass members and may give judgment accordingly if
>
> (a) monetary relief is claimed on behalf of some or all class members or subclass members,
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members or subclass members can, in the opinion of the Court, reasonably be determined without proof by individual class members or subclass members.
>
> (2) Before making an order under subsection (1), the Court is to provide the defendant with an opportunity to make submissions to the Court in respect of any matter touching on the proposed order, including, without limitation,
>
> (a) submissions that contest the merits or amount of an award under subsection (1), and
>
> (b) submissions that individual proof of monetary relief is required due to the individual nature of the relief.

86 The Ontario Court of Appeal considered a somewhat similar set of circumstances in *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (Ont. C.A.) , leave to appeal to SCC refused, [2003] S.C.C.A. No. 106 (S.C.C.). In that case, it was alleged that the defendants had engaged in a price-fixing scheme in relation to colour brick and paving stones that inflated the cost of new homes. The motions judge certified the class proceeding, but both the Divisional Court and the Court of Appeal concluded that the indirect nature of the relationship between the cost of the bricks and the purchase price of homes posed an insurmountable hurdle. At paras 30-31, Feldman J.A. held:

> In my view, with respect, the motion judge erred by relying on the expert evidence filed by the appellants as the basis for the certification order... The expert's models are based on the assumption of a full pass-through of the price increase of the iron oxide to the homebuyers. However, it is that assumption that is the very issue that the court must be satisfied is provable by some method on a class-wide basis before the common issue can be certified as such.
>
> The motion judge relied on the opinion of the appellants' expert that "there would be a measurable price impact upon the ultimate consumer of the building products containing the iron oxide pigment". However, the fact that any price impact may be "measurable" goes only to the issue of how the damages can be calculated and distributed, not whether the inflated price charged to the direct buyers of the product was passed through to all of the ultimate consumers. The issue of whether there would be a price impact on all ultimate consumers of iron oxide coloured products, i.e., a pass-through to the class members of the inflated price charged by the respondents to their direct buyers, was what the expert assumed, but he did not indicate a method for proving, or even testing that assumption.

87 The Plaintiff relies upon the decision of the Ontario Court of Appeal in *Markson v. MBNA Canada Bank*, 2007 ONCA 334 (Ont. C.A.), leave to appeal to SCC refused, [2007] S.C.C.A. No. 346 (S.C.C.). In that case, it was alleged that the defendant had charged interest to credit card holders who had obtained cash advances in excess of rates allowed under section 347 of the *Criminal Code*, RSC 1985, c C-46. The motions judge and the Divisional Court declined to certify the proceedings in part because the issue of liability would turn on a vast number of individual assessments in respect of individual cardholders. Rosenberg J.A. disagreed, holding at para 44 that the class could be certified where "there is a reasonable likelihood that the preconditions in section 24(1) of the *Ontario Act* (which is identical to s.30(1) of the *CPA*) would be satisfied and an aggregate assessment made if the plaintiffs are otherwise successful at a trial for common issues". He further held, at para 48:

> Section 24(3) provides, in part, that, "In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award." The subsection therefore contemplates that an aggregate award will be appropriate notwithstanding that identifying the individual class members entitled to damages and determining the amount cannot be done except on a case-by-case basis, which may be impractical or inefficient. Condition (b) must be interpreted accordingly. *In my view, condition (b) is satisfied where potential liability can be established on a class-wide basis, but entitlement to monetary relief may depend on individual assessments*. Or, in the words of s. 24(1)(b), where the only questions of fact or law that remain to be determined concern assessment of monetary relief.
>
> (Emphasis added).

88 The Plaintiff also relies upon *Pro-Sys Consultants* which, inasmuch as it deal with a claim in restitution to recover amounts indirectly paid to the defendants, bears some similarity to circumstances in the case at bar. In *Pro-Sys Consultants*, the motions judge relied upon *Chadha* in support of the proposition that the aggregation provisions are for the purpose of distributing damages, and could not be relied upon where liability could not otherwise be established on a class-wide basis. The Court of Appeal allowed certification because there was evidence that a statistical analysis would allow for the determination of whether the purchase price paid by any individual plaintiff was impacted by the defendants' wrongful conduct. In this regard, *Pro-Sys Consultants* is distinguishable from *Chadha*, wherein Feldman J.A. noted, at para 52:

> In my view, the motion judge erred in finding that liability could be proved as a common issue in this case. The evidence presented by the appellants on the motion does not satisfy the requirement prescribed by the Supreme Court in Hollick of providing sufficient evidence to support certification. The evidence of the appellants' expert assumes the pass-through of the illegal price increase, but does not suggest a methodology for proving it or for dealing with the variables that affect the end price of real property at any particular point in time. The motion judge focused on the expert's opinion that the loss could be measured, rather than on how any such loss could first be established on a class-wide basis.

89 The problem confronted by the Plaintiff in the case at bar is essentially identical to that faced by the plaintiffs in *Chadha*. John Edsforth, an expert in transportation economics, provided an Affidavit setting out his methodology and conclusion that "...for the crop years 1994-1995 through 2006-2007 the aggregate amount by which the statutory grain regulatory methodologies over-stated the revenue cap because of freight car costs was $577 million, or $1.66 per tonne." Jim Riegle, a former employee of the CTA with a thorough knowledge of the Western grain industry and the economics of hopper car maintenance, provided a report setting out a methodology by which an aggregate award of damages may be distributed. Neither demonstrates how liability can be determined on a class-wide basis.

(d) Preferable Procedure

90 Under section 5(2) of the *CPA*, the Court is required to consider five factors in determining whether a class action is the preferable procedure for the fair and efficient resolution of the common issues: (1) whether the common issues predominate over individual issues; (2) whether individual members have a valid interest in pursuing separate actions; (3) whether any of the claims are or have been the subject of other proceedings; (4) whether other means of resolving the claims are less practical or efficient; and (5) whether the administration of the class proceeding would create undue difficulty. The Court is required to take a purposive approach to the interpretation of these factors, testing them against the objectives of the *CPA*.

Predominance of Common Issues

91 The Plaintiff contends that, because the question is whether the Railways charged rates on a class wide basis that were unfair and unreasonable, individual inquiries into how much each particular class member was wrongfully charged for the transportation of grain will not be necessary. The Plaintiff points to the potential for an aggregate monetary award in this regard. In the alternative, he contends that a predominance of individual issues alone is not dispositive of the issue: *L. (T.) v. Alberta (Director of Child Welfare)*, 2009 ABCA 182 (Alta. C.A.), at para 25.

92 The Railways contend that the common issues in this claim would be overwhelmed by individual issues. They point out that any particular member of the class will only have a cause of action in the event he or she can establish that, at the time of the sale of grain to the GHC or to the CWB, the rate paid by the GHC or the CWB was influenced by the alleged breach of duty and that the overcharge was then passed on in the form of a lower price by the GHC or CWB to the individual grain producer. The number of grain producers who are potentially members of the class ranges from an estimated 115,000 to 142,000, making multiple deliveries to thousands of different delivery points. Reiterating the argument in respect of common issues, the Railways point out that answering the question of whether the Railways charged rates that unjustly incorporated excessive amounts for HCMC will not answer the question of liability in respect of any particular delivery of grain and therefore each individual class member will be required to demonstrate that the purchase price of their grain was affected by excessive rates charged by the Railways to the GHCs. Complicating the matter further, the Railways point out that the existence of individual defences, such as limitations.

93 It follows from my conclusion with respect to the absence of appropriately dispositive common issues that the individual determinations of liability required would be significant and in my view would overwhelm the common issues. It is appropriate at this stage to consider the further effect of the Railways' limitations defences.

94 This action was commenced on April 16, 2010, and it relates to transactions occurring prior to April 16, 2008. As the Railways' point out, per section 3(1)(a) of the *Limitations Act*, RSA 2000, c L-12, the claim is *prima facie* statute-barred, unless it can be established that members of the proposed class did not know or ought to know of the existence of a claim. The issue here is not whether the Railways' limitations defence would ultimately prevail, but whether the existence of a *bona fide* limitations defence, in the context of this claim, further raises the spectre of individual issues overwhelming common ones. The Plaintiff points out that the existence of individual limitations defences is not necessarily dispositive. For example, in *Kristal Inc. v. Nicholl & Akers*, 2006 ABQB 168 (Alta. Q.B.), rev'd (on other grounds): 2007 ABCA 162 (Alta. C.A.), this Court concluded, at para 126:

> The presence of a triable limitation defence may challenge the bifurcated process because it superimposes individual determinations on an issue which, if resolved in favour of the

> Defendants, operates as a defence providing immunity. It may require the discovery of class members. It is possible that it will create individual inquiries, but this is not a case like *Mouhteros* where, at para. 31, the court stated that "what common issues there may be are completely subsumed by the plethora of individual issues, which would necessitate individual trial for virtually each class member". In this case, the limitations issue may play a role in the ultimate determination of liability; however, given the common elements in the circumstances of this case, I am of the view that it plays a less significant role in comparison with the resolution of the common issues.

95 There is, however, considerable authority for the proposition that where a limitations defence raises the prospect that the application of the principle of discoverability will require individual inquiries of a each member of the class, the individual issues may be found to dominate and therefore function as a bar to certification: *Daniels v. Canada (Attorney General)*, 2003 SKQB 58 (Sask. Q.B.), leave to appeal to SCC refused [2003] S.C.C.A. No. 223 (S.C.C.); *Buffalo v. Samson Cree Nation*, 2008 FC 1308 (F.C.), aff'd 2010 FCA 165 (F.C.A.); *Alberta Municipal Retired Police Officers' Mutual Benefit Society v. Alberta*, 2010 ABQB 458 (Alta. Q.B.). In *Knight v. Imperial Tobacco Canada Ltd.*, 2005 BCSC 172 (B.C. S.C.), aff'd 2009 BCCA 541 (B.C. C.A.), and in *Graham v. Imperial Parking Canada Corp.*, 2010 ONSC 6217 (Ont. S.C.J.), aff'd 2011 ONSC 991 (Ont. Div. Ct.), the courts amended class definitions to exclude those class members whose claims arose outside of the limitation periods, but this approach is not available here, where all of the claims fall outside the 2-year period in Alberta's *Limitations Act*. The discoverability issue applies to every member of the class and, as I have noted above, the potential scope of that class is vast.

96 With respect to the limitation issue, it is my conclusion that an individual inquiry of each class member would be necessary to determine liability. As such, and taken together with the individual issues raised by the manner in which grain is sold and transported in Western Canada, and the difficult issue of whether the Railways' freight rates are passed on the grain producers in respect of each sale, individual issues would vastly predominate and a class proceeding would not therefore be the preferable procedure.

Controlling Proceedings and Other Proceedings

97 I agree with the Plaintiff that there is no evidence that any other prospective class members have demonstrated a valid interest in individually controlling the prosecution of separate actions. I further agree that, while there appear to be claims advanced in the Province of Saskatchewan, there is no advantage asserted to proceeding there.

Other Means of Resolving the Claim

98 Whether other means of resolving the claim would be less practical or less efficient will, in many cases, be closely connected to the question of whether individual issues predominate. In the

case at bar, resolving the proposed common issues will not resolve the key issue of liability to class members and therefore it is unlikely to prove significantly more efficient than individual trials.

Administration of the Class Proceeding

99 In *Kristal Inc.*, this Court held, at para 130:

> The CPA specifically contemplates resolution of both common and individual issues. S. 12 outlines the stages of class proceedings and provides that common issues are to be determined together and individual issues are to be determined according to ss. 28 and 29. The Court may give separate judgment in respect of these different sets of issues. In light of this, I do not see how the administration of a class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

100 The Railways contend that the issue is closely connected to the questions of whether the claim as pleaded raises a valid cause of action and whether individual issues predominate. The issue here is whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means. It is difficult to envision a circumstance where (as here) individual issues vastly predominate common ones, and yet a proposed class proceeding passes this hurdle. Moreover the preferability analysis at this stage should take account of the whole range of alternatives to a class proceeding, including test cases, consolidation, and joinder. In view of the range of individual issues arising out of the different jurisdictions, issues of discoverability, different delivery points and the different ways in which producers sold grain for shipment, in my view the administration of this class action would create greater difficulties than if various producers' or groups of producers' claims were to proceed separately.

Other Factors

101 The factors enumerated in section 5(2)(a) through (e) of the *CPA* are not exclusive and the Court may also consider any other relevant matter in determining whether a class proceeding is the preferable procedure. At this stage it is appropriate to also consider whether the class proceeding on the whole would advance the principles of judicial economy, access to justice and behaviour modification.

102 In view of the highly complex nature of the liability claims and the potential availability of individual limitation defences to a vast number of claims, it is my view that the proposed class action would not advance the principle of judicial economy and access to justice.

103 With respect to behaviour modification, it is worth pointing out that the Railways operate within a highly regulated environment. A number of authorities noted that a class proceeding may not be the ideal means of advancing the objective of behaviour modification where there is an

existing regulatory regime that may more adequately serve that function: see *Chadha* at para 62; *Penney v. Bell Canada*, 2010 ONSC 2801 (Ont. S.C.J.) at para 190. This is particularly compelling where, as here, the relevant authorities (Parliament and the Agency) have already taken remedial action in the form of Clause 57 and the Hopper Car decision, to address the very conduct the Plaintiff complains of. In my view, therefore, a class proceeding is not the appropriate means by which behaviour modification may be advanced.

(e) Adequate Representative Plaintiff

104 The requirements for an adequate representative plaintiff are set out in section 5(1)(e). In argument, the Railways have emphasized the evidentiary difficulties confronted by Mr. Jackson in establishing that he has a cause of action and in meeting the Railways' limitations defences. As I have noted above, these are likely to apply to all members of the class and are therefore more appropriately addressed elsewhere. In my view, a determination of Mr. Jackson's fitness as class representative should focus upon the factors set out in the *CPA*. These are whether he would fairly and adequately represent the interests of the class; has produced a plan for the proceeding that sets out a workable method; and that he does not have, in respect of the common issues, an interest that is in conflict with the interests of the other prospective class members.

105 The Railways have not produced any evidence that would suggest that Mr. Jackson would not fairly and adequately represent the interests of the class. They argue that he has not been well informed in the course of the litigation to date but I do not find their complaints in this regard to be fatal. Mr. Jackson is undoubtedly a member of the class as defined. There is no evidence of a potential conflict of interest with other prospective class members.

106 This leaves for consideration the issue of whether Mr. Jackson has produced an adequate plan workable method for these proceedings. The necessary elements of a working plan were set out by Topolniski J. in *Paron v. Alberta (Minister of Environmental Protection)*, 2006 ABQB 375 (Alta. Q.B.), at para 130:

> (i) the steps that are going to be taken to identify necessary witnesses and to locate them and gather their evidence;
>
> (ii) the collection of relevant documents from members of the class as well as others;
>
> (iii) the exchange and management of documents produced by all parties;
>
> (iv) ongoing reporting to the class;
>
> (v) mechanisms for responding to inquiries from class members;
>
> (vi) whether the discovery of individual class members is likely and, if so, the intended process for conducting those discoveries.

107 The Plaintiff's First Proposed Workable Method does not set out the steps that are going to be taken to identify necessary witnesses, and to collect relevant documents. However, contrary to the Railways' assertions, there is some provision for the exchange and management of documents, notice, reporting and responding to members of the class and discovery.

108 There are defects in the Plaintiff's First Proposed Workable Method that in my view would have to be remedied in short order if this matter were to proceed to certification. However, those defects are not in and of themselves sufficient to warrant a refusal to certify this proceeding.

109 In conclusion, Mr. Jackson has satisfied the requirements of section 5(1)(e) and would be an appropriate representative plaintiff.

Conclusion on Certification

110 The Second Amended Statement of Claim fails to disclose a reasonable cause of action and therefore the Plaintiff's application for certification is denied. Furthermore, it is clear that given the complexities that arise from the question of whether the Railways' freight rates, based in part on allegedly inflated HCMC, were passed through to the producers of grain in the form of lower purchase prices, and from the limitations defences available to the Railways, individual issues would vastly overwhelm common ones and I would further deny certification on this basis.

7. The Summary Judgment Application

111 The test for summary judgment is different from the test for certification. Typically, it is evidence-based, and requires consideration of different factors and the merits of the claim put forward by the representative Plaintiff. Rule 7.3 of the *Alberta Rules of Court* provides:

> 7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:
>
> (a) there is no defence to a claim or part of it;
>
> (b) there is no merit to a claim or part of it;
>
> (c) the only real issue is the amount to be awarded.
>
> (2) The application must be supported by an affidavit swearing positively that one or more of the grounds described in subrule (1) have been met or by other evidence to the effect that the grounds have been met.
>
> (3) If the application is successful the Court may, with respect to all or part of a claim, and whether or not the claim is for a single and undivided debt, do one or more of the following:

> (a) dismiss one or more claims in the action or give judgment for or in respect of all or part of the claim or for a lesser amount;
>
> (b) if the only real issue to be tried is the amount of the award, determine the amount or refer the amount for determination by a referee;
>
> (c) if judgment is given for part of a claim, refer the balance of the claim to trial or for determination by a referee, as the circumstances require.

112 In determining whether a claim has no merit under Rule 7.3(1)(b), the test to be applied was set out by the Supreme Court of Canada in *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2008 SCC 14, [2008] 1 S.C.R. 372 (S.C.C.) at para 11:

> The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial"... The defendant must prove this; it cannot rely on mere allegations or the pleadings... If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal... Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried... The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts...

113 The Plaintiff has placed considerable reliance upon the decision of the Ontario Court of Appeal in *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764 (Ont. C.A.). In *Combined Air*, the Court considered the effect of recent amendments to the summary judgment rules in the Province of Ontario. The amendments were intended to expand the limits that Ontario jurisprudence had placed on a judge's power to assess the evidence in determining whether there is a genuine issue for trial. Under the amended Rule 20, judges in Ontario would be able to weigh the evidence, evaluate the credibility of a deponent and draw inferences from the evidence. Judges would also be able to order that oral evidence be presented.

114 In considering the proper application of the amended Rule, the Court held, at paras 50-51:

> In deciding if these powers should be used to weed out a claim as having no chance of success or be used to resolve all or part of an action, the motion judge must ask the following question: can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?
>
> We think this "full appreciation test" provides a useful benchmark for deciding whether or not a trial is required in the interest of justice. In cases that call for multiple findings of fact on the basis of conflicting evidence emanating from a number of witnesses and found in a voluminous record, a summary judgment motion cannot serve as an adequate substitute for

> the trial process. Generally speaking, in those cases, the motion judge simply cannot achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Accordingly, the full appreciation test is not met and the "interest of justice" requires a trial.

115 The Plaintiff contends that the effect of *Combined Air* is that there must be no other evidence that is not before the Court that could shed light on the issues before the Court may grant summary judgment, and further that a defendant's onus is much higher and the plaintiff's much lower when summary judgment is sought prior to the completion of document discovery and questioning. With respect, this is neither the law with respect to summary judgment in Alberta nor, in my view, the proper interpretation of *Combined Air*. It is important to note that the Court in *Combined Air* was considering the newly expanded powers of Chamber Judges hearing summary judgment applications under a rule that is significantly different from Rule 7.3(1). At para 56, the Court made it clear that the evidentiary obligations described in *Lameman* continued to apply, and though the Court did suggest, at para 57, that it may be more difficult to determine that a matter is suitable for summary disposition early in the litigation process (ie. prior to discovery), it did not suggest that a different onus applied. In any event, I agree with the Railways that the essence of the "full appreciation test", as described in para 74 of *Combined Air*, is:

> ...whether [the motions judge] can achieve the full appreciation of the evidence and issues that is required to make dispositive findings on the basis of the motion record... or if the attributes of the trial process require that these powers only be exercised at trial.

116 In essence, the full appreciation test requires a judge to be certain that she can dispose of the issue given the motion record. It does not require the judge to refuse an application for summary judgment on speculation that there might be some other evidence that could shed light on the issues. The Court in *Lameman* pointed out, at para 19:

> We add this. In the Court of Appeal and here, the case for the plaintiffs was put forward, not only on the basis of evidence actually adduced on the summary judgment motion, but on suggestions of evidence that might be adduced, or amendments that might be made, if the matter were to go to trial. A summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale of the rule. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future...

117 Similarly, in *Combined Air* the Court held, at para 56: "[o]n a motion for summary judgment, a party is not 'entitled to sit back and rely on the possibility that more favourable facts may develop at trial'".

118 In Alberta, the test remains as described in *Murphy Oil Co. v. Predator Corp.*, 2006 ABCA 69 (Alta. C.A.) at para 25:

> The analysis of a summary judgment application is performed in two stages. In the first, the moving party must adduce evidence to show that there is no genuine issue for trial. Once the moving party has met that burden, the responding party may adduce evidence to persuade the court that there remains a genuine issue to be tried. It may choose to adduce no evidence, but then bears the risk that the judge will decide that the evidence adduced by the moving party has established that there is no genuine issue to be tried.

119 In *Tottrup v. Clearwater (Municipal District) No. 99*, 2006 ABCA 380 (Alta. C.A.), the Alberta Court of Appeal described two different categories of summary judgment applications, at paras 10-11:

> Applications for summary judgment or summary dismissal can take many forms. In some cases the application is simply based on the factual merits of the case. In other words, the applicant argues that it can prove its case on the facts without a trial...
>
> There are, however, other types of summary judgment applications. In some cases the facts are clear and undisputed. The ultimate outcome of the case may depend on the interpretation of some statute or document, or on some other issue of law that arises from undisputed facts. In such cases the test for summary judgment is not whether the issue of law is "beyond doubt", but whether the issue of law can fairly be decided on the record before the court. If the legal issue is unsettled or complex or intertwined with the facts, it is sometimes necessary to have a full trial to provide a proper foundation for the decision. In other cases it is possible to decide the question of law summarily...

(a) Cause of Action in Restitution

120 It follows from my conclusion in respect of the cause of action, in the course of the certification analysis above, that this application for summary judgment falls into the second category described in *Tottrup*. That is, this is a case in which the facts are largely clear and undisputed, and the ultimate outcome depends upon the interpretation of a statute. The statute is the *CTA*.

121 It is worth pointing out the extent to which Parliament addressed the minutiae when it repealed the *WGTA* in favour of the *NTA* and then the *CTA*. The MRS for the 1995 - 1996 crop year was expressly set by Parliament in the *BIA, 1995*. It was thereafter set by the Agency, using the baseline figures set by Parliament and then applying the Freight Rate Multiplier, a complex formula expressly set out in the *CTA*. This was legislated arithmetic.

122 The Plaintiff contends that, while the freight rates were properly set in accordance with Parliament's instructions as embodied in the *CTA*, the Railways breached the "spirit" of the legislation in charging to the maximum of their entitlements. But there is no better indication

of the spirit of the *CTA*, as regards freight rates for regulated grain, than the actual numbers and complex mathematical formula Parliament chose to include in the legislation. The Plaintiff contends that, notwithstanding the Railways' compliance with the letter of the legislation (insofar as the Plaintiff no longer contends that the Railways charged rates or earned revenues in excess of the maximum allowed under the *CTA*) the Railways nevertheless breached the spirit because they charged and earned those "maximums". But there are a number of problems with this suggestion that compliance with the letter of the letter of the legislation is nevertheless a violation of its spirit.

123 First, and contrary to the Plaintiff's contention, the *CTA* and the National Transportation Policy it contains at section 5 do not raise a complex issue of statutory interpretation. It is clear from the provisions of the *CTA* that section 5 is intended as a purpose statement in respect of transportation in Canada, and the provisions governing freight rates for regulated grain must be interpreted as having been made in furtherance of the broad objectives set out therein. The conflict between "spirit" and "letter" of the legislation does not exist. Second, the Plaintiff's interpretation of the interaction between the National Transportation Policy and the provisions setting out MRS and MREs would essentially render the latter meaningless, because notwithstanding those provisions, the Railways would always have been required to charge what is "fair". This would place the Railways in the impossible position of having to incorporate an element of fairness into every rate they charged. Moreover, under the Plaintiff's interpretation, there would be no reason to limit this element of fairness to hopper car maintenance costs; assuming section 5 of the *CTA* requires Railways to charge only rates that are "fair and reasonable", one would be forced to conclude that efficiencies in fuel consumption or labour costs would also have to be incorporated into the Railways' rates. This cannot have been what Parliament intended when it eliminated costing reviews with the repeal of the *WGTA*.

124 The Plaintiff contends that the law of restitution is developing and though his claim may in some senses be novel, it would be inappropriate to grant summary judgment so as to rigidly limit the categories of restitution. I agree that the courts must remain open to a careful consideration of new categories of restitution, but I am not prepared to go so far as to expand the category of unjust enrichment to encompass the charging of rates or earning of revenues in compliance with the letter but not the claimed "spirit" of legislation, even if I were to have concluded that there is a conflict between those two things in the *CTA*. The principle that there must be no juristic reason for the enrichment is well entrenched and not in my view open to challenge. I can think of few more compelling examples of juristic reason than in the case at bar, where it is conceded that the Railways have charged freight rates and earned revenues that were at all times in compliance with the clearly legislated arithmetic set out in the *CTA*. On this basis I grant the Railways' application for summary judgment.

(b) Limitations

125 Section 3 of the *Limitations Act* provides:

> 3(1) Subject to section 11, if a claimant does not seek a remedial order within
>
> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
>
> (i) that the injury for which the claimant seeks a remedial order had occurred,
>
> (ii) that the injury was attributable to conduct of the defendant, and
>
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
>
> or
>
> (b) 10 years after the claim arose,
>
> whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

126 The Plaintiff's claim is for restitution for amounts he alleges the Railways wrongfully charged him from between August 1, 1995 and July 31, 2007. The Plaintiff's initial Statement of Claim was issued on April 16, 2010. The Railways argue that the various provisions of the *Limitations Act* operate so as to bar the entirety of the Plaintiff's claim. The Plaintiff contends that summary judgment is not available where a limitation period is in issue and, in any event and for a variety of reasons, the provisions of the Alberta *Limitations Act* do not operate so as to bar this claim.

127 Contrary to the Plaintiff's submissions, it is clear to me that summary judgment is available on the basis of limitations: *Borchers v. Kulak*, 2009 ABQB 457 (Alta. Q.B.) at para 36; *Edwards v. Fisher*, 2010 ABQB 594 (Alta. Q.B.) at para 19. Furthermore, I do not agree with the Plaintiff's contention that, because this claim is brought in restitution, there has been no harm or injury that would trigger the limitation period. To accept this proposition would be to accept that the *Limitations Act* does not apply to all claims arising out of unjust enrichment. I agree with the Railways that because the *Limitations Act* defines "injury" to include "breach of duty", the alleged failure to charge "fair and reasonable" rates constitutes the breach that triggers the limitation period.

128 The Plaintiff argues that the Railways' application for summary judgment is based upon an "assumption" that this class action was issued on April 16, 2010, when it was filed in the Court of Queen's Bench of Alberta, whereas a parallel action (the "Wallace Claim") was filed in Saskatchewan on December 17, 2008, and to the extent that any limitation period applies it should be the longest one possible (ie. ten years from the filing in Saskatchewan). I agree with the Railways that, for the purpose of summary judgment in respect of this action, which has been

brought by Mr. Jackson and issued out of the Court of Queen's Bench of Alberta on April 16, 2010, the Alberta *Limitations Act* applies.

129 The Plaintiff further contends that, even if the *Limitations Act* applies, the limitation period was effectively "tolled" as a result of the filing of the Wallace Claim in Saskatchewan. He relies upon section 40(1) of the *CPA*, which provides:

> 40(1) Subject to subsection (3), any limitation period applicable to a cause of action asserted in a proceeding, whether or not the proceeding is ultimately certified, is suspended in favour of a person if another proceeding is commenced and it is reasonable for the person to assume that he or she is a class member or subclass member for the purposes of that other proceeding.

130 While any interjurisdictional aspects of this provision raise interesting issues, the fact is that Mr. Jackson was questioned on his Affidavit of August 11, 2010. In the course of that questioning, he acknowledged that he was unaware of any other claims brought in respect of freight rates, including the Wallace Claim. The purpose of the tolling provision in section 40(1) of the *CPA* is to protect potential members of the putative class who may, operating under the knowledge of a proceeding and the assumption that their rights are being pursued, decline to take individual action. Being unaware of the Wallace Claim, the Plaintiff cannot be said to have assumed that he was a member of the class in that claims and delayed bringing action as a result.

131 By operation of s. 3(1)(b) of the Alberta *Limitations Act*, any portion of the Plaintiff's claim that arose prior to April 16, 2000 is therefore barred.

132 The remainder of the Plaintiff's claim covers the period from April 16, 2000 to July 31, 2007, nearly three years prior to filing. It is therefore necessary to determine whether the Plaintiff knew, or ought to have known, of the existence of a claim two years prior to April 16, 2010.

133 The Plaintiff contends that a significant factual debate exists as to when reasonable producers ought to have known of the existence of the claim. He points out that even the Railways did not appreciate the full scope of the disparity between actual and embedded HCMC over the period covered by his claim, and it is clear from the affidavits of Mr. Ekbote and Ms. Robson that CP, in particular, did not track its actual HCMC during the relevant period. This is not particularly surprising given the Railways' belief that the legislatively mandated Rate Scales and revenue entitlements were what governed the freight rates they charged, not "fairness" as informed (in part) by HCMC.

134 It is nevertheless clear to me that the issue of HCMC and its relationship to the freight rates charged by the Railways was notorious among the farming community in Canada. The Plaintiff contends that it was the Hopper Car Appeal, affirming the Agency's "discovery" of the disparity between actual and embedded HCMC, that was the triggering event that would have led the Plaintiff to have sufficient knowledge of the claim. But the Hopper Car Decision and

the Hopper Car Appeal did not come out of nowhere; indeed, they could not have occurred without Clause 57 of Bill C-11, which was passed by Parliament with the express aim of adjusting freight rates to account for decreased HCMC. As Mr. Auld points out in his Affidavit, disparities between embedded and Actual HCMC were testified to before the Standing Senate Committee on Agriculture and Forestry, and the House of Commons Standing Committee on Agriculture and Agri-Food as early as 1996. The National Farmers Union raised the issue in its submissions to Justice Estey in 1998. Statements were made by the Farmer Rail Car Coalition in the industry publication Western Producer in December 2002, January 2003 and March 2003, about the disparity between actual maintenance costs and those embedded in the freight rates.

135 In his Affidavit of August 11, 2010, the Plaintiff swears that he has "always taken an interest in what is sometimes referred to as 'farm politics', and which includes issues relating to the cost of transporting grain, and the relationship between farmers and railroad companies." In questioning, he acknowledged that the "disassociation between the formula for calculating revenues and maintenance costs associated with the hopper cars... was a matter of common understanding in the agricultural community" for some time. In view of the notorious nature of the issue and the Plaintiff's interests and active involvement in the farming community, in my view the essential nature of this claim, which is that the Railways, in violation of the spirit of the *CTA* and the National Transportation Policy therein, charged excessive freight rates that incorporated embedded rather than actual HCMC, was knowable long before April 16, 2008. I would therefore also grant the Railways' application for summary judgment on the basis of the expiry of the limitation periods contained in subsection 3(1)(a) and (b) of the *Limitations Act*.

Conclusion

136 The Plaintiff's application for certification is denied.

137 The Defendants' application for summary judgment is granted.

138 The parties may speak to costs.

Plaintiff's application dismissed; defendants' application granted.

1999 CarswellNat 211
Federal Court of Canada — Appeal Division

Krause v. Canada

1999 CarswellNat 1850, 1999 CarswellNat 211, [1999] 2 F.C. 476, [1999] F.C.J. No. 179, 160 F.T.R. 214 (note), 19 C.C.P.B. 183, 236 N.R. 317, 86 A.C.W.S. (3d) 4

In the matter of an application, pursuant to sections 18(1) and 18.1 of the Federal Court Act, R.S.C. 1985, c. F-7, as amended

William Krause and Pierre Després in their personal capacities and in their capacities as members of the Executive of the Social Science Employees' Association, Edward Halayko and Helen Rapp in their personal capacities and their capacities as members of the Executive of the Armed Forces Pensioners'/Annuitants' Association of Canada, Luc Pomerleau et Line Niquet en leur nom personnel et en leur qualité de membres de l'exécutif du Syndicat canadien des employés professionnels et techniques, and Wayne C. Foy and in his personal capacity and in his capacity as a member of the Executive of the Aircraft Operations Group Association, Appellants (Applicants) and Her Majesty The Queen in Right of Canada, Respondent (Respondent)

Stone, Linden, Sexton JJ.A.

Heard: January 19, 1999
Judgment: February 8, 1999 *
Docket: A-135-98

Proceedings: reversing (1998), 143 F.T.R. 143, 18 C.C.P.B. 19 (Federal Court of Canada — Appeal Division)

Counsel: *Mr. Peter Englemann*, for the Appellant.
Mr. Edward R. Sojonky, Q.C., and *Mr. Jan Brongers*, for the Respondent.

Subject: Corporate and Commercial

APPEAL by applicant from order in judgment, reported at (1998), 18 C.C.P.B. 19, 143 F.T.R. 143, granting respondent's motion to strike originating notice of motion.

The judgment of the court was delivered by *Stone J.A.*:

1 This appeal is from an order of the Trial Division of February 25, 1998 granting the respondent's motion to strike the appellants' originating notice of motion and dismissing the appellants' cross-motion for an extension of time.

2 The originating notice of motion, filed pursuant to sections 18 and 18.1 of the *Federal Court Act* on November 13, 1997, requested relief in the nature of *mandamus*, prohibition and declaration. Its objectives are threefold. First, to compel the respondent to credit the Public Service Superannuation Account and the Canadian Forces Superannuation Account as continued by the *Public Service Superannuation Act* [1] (the "*PSSA*") and the *Canadian Forces Superannuation Act* [2] (the "*CFSA*"), respectively, "with any and all amounts required to be credited" to these accounts and to maintain such amounts to the credits of these accounts pursuant to subsection 44(1) of the *PSSA* and subsection 55(1) of the *CFSA*. Secondly, to prohibit the respondent from debiting these accounts, applying any portion of the amounts credited or required to be credited to other budgetary expenditures or to the national debt or otherwise reducing the amounts credited or required to be credited to both of these accounts. Thirdly, to have declared as contrary to subsection 44(1) of the *PSSA* and subsection 55(1) of the *CFSA* the use by the respondent of the "Allowance for Pension Adjustment Account" to debit or reduce the amounts which have been credited or required to be credited to both accounts or to apply any portion of the amount credited or required to be credited to other budgetary expenditures or to the national debt.

3 Subsections 44(1) of the *PSSA* and 55(1) of the *CFSA* read:

> **44**.(1) There shall be credited to the Superannuation Account in each fiscal year
>
> (*a*) in respect of every month, an amount equal to the total of
>
> (i) an amount matching the total amount estimated by the Minister to have been paid into the Account during the month by way of contributions in respect of current service other than current service with any Public Service corporation or other corporation as defined in section 37, and
>
> (ii) such additional amount as is determined by the Minister to be required to provide for the cost of the benefits that have accrued in respect of that month in relation to current service and that will become chargeable against the Account;
>
> (*b*) in respect of every month, such amount in relation to the total amount paid into the Account during the preceding month by way of contributions in respect of past service as is determined by the Minister; and
>
> (*c*) an amount representing interest on the balance from time to time to the credit of the Account, calculated in such manner and at such rates and credited at such times as the regulations provide, but the rate for any quarter in a fiscal year shall be at least equal

to the rate that would be determined for that quarter using the method set out in section 46 of the *Public Service Superannuation Regulations*, as that section read on March 31, 1991.

55.(1) There shall be credited to the Superannuation Account in each fiscal year

(*a*) in respect of every month, an amount equal to the amount estimated by the President of the Treasury board to be required to provide for the cost of the benefits that have accrued in respect of that month and that will become chargeable against the Account; and

(*b*) an amount representing interest on the balance from time to time to the credit of the Account, calculated in such manner and at such rates and credited at such times as the regulations provide, but the rate for any quarter in a fiscal year shall be at least equal to the rate that would be determined for that quarter using the method set out in section 36 of the *Canadian Forces Superannuation Regulations*, as that section read on March 31, 1991.

44.(1) Lors de chaque exercice, sont portés au crédit du compte de pension de retraite:

a) pour chaque mois, un montant égal à la somme des montants suivants:

(i) le montant correspondant à la somme globale que le ministre estime avoir été versée au compte au cours du mois sous la forme de contributions à l'égard du service en cours autre que le service en cours auprès d'un organisme de la fonction publique ou autre organisme défini à l'article 37,

(ii) le montant additionnel qui, selon le ministre, est nécessaire pour couvrir le coût des prestations acquises pour ce mois relativement au service en cours et qui deviendront imputables au compte;

b) pour chaque mois, le montant que le ministre détermine en fonction de la somme globale versée au compte pendant le mois précédent sous forme de contributions à l'égard d'un service passé;

c) le montant qui représente l'intérêt sur le solde figurant au crédit du compte, calculé de la manière et selon les taux et porté au crédit aux moments fixés par règlements. Toutefois, le taux applicable à un trimestre donné au cours d'un exercice doit être au moins égal à celui qui serait obtenu pour le même trimestre par la méthode de calcul prévue à l'article 46 du *Règlement sur la pension de la fonction publique*, dans sa version du 31 mars 1991.

55.(1) Lors de chaque exercice, sont portés au crédit du compte de pension de retraite:

a) pour chaque mois, le montant que le président du Conseil du Trésor estime nécessaire pour couvrir le coût des prestations acquises pour ce mois et qui deviendront imputables au compte;

b) le montant qui représente l'intérêt sur le solde figurant au crédit du compte, calculé de la manière et selon les taux et porté au crédit aux moments que peuvent fixer les règlements. Toutefois, le taux applicable à un trimestre donné au cours d'un exercice doit être au moins égal à celui qui serait obtenu pour le même trimestre par la méthode de calcul prévue à l'article 36 du *Règlement sur la pension de retraite des Forces canadiennes*, dans sa version du 31 mars 1991.

4 The individual appellants and members of the appellant associations are either contributors to or beneficiaries of the pension plans created and maintained pursuant to the *PSSA* and the *CFSA*.

5 The grounds on which the application for judicial review is based are as follows: [3]

1. section 44(1) and other sections of the *PSSA* impose a mandatory duty on the Respondent to credit certain amounts to the PS Superannuation Account and to maintain those amounts to the credit of the PS Superannuation Account;

2. the Respondent has failed or refused to credit those amounts, has failed or refused to maintain those amounts to the credit of the PS Superannuation Account, has applied (a) portion(s) of the amount credited or required to be credited to the PS Superannuation Account to other budgetary expenditures or to the national debt and/or has debited or reduced the PS Superannuation Account in a manner not authorized by law;

3. this has been accomplished primarily through the use of the "Allowance for Pension Adjustment Account" or other similarly named accounts to debit or to reduce the PS Superannuation Account or to apply a portion of the amount credited or required to be credited to the PS Superannuation Account to other budgetary expenditures or to the national debt;

4. section 55(1) and other sections of the *Canaidian Forces Superannuation Act* impose a mandatory duty on the Respondent to credit certain amounts to the CF Superannuation Account and to maintain those accounts to the credit of the CF Superannuation Account;

5. the Respondent has failed or refused to credit those amounts, has failed or refused to maintain those amounts to the credit of the CF Superannuation Account, has applied (a) portion(s) of the amount credited or required to be credited to the CF Superannuation Account to other budgetary expenditures or to the national debt and/or has debited the CF Account in a manner not authorized by law;

> 6. this has been accomplished primarily through the use of the "Allowance for Pension Adjustment Account" or other similarly named accounts to debit or to reduce the CF Superannuation Account or to apply a portion of the amount credited or required to be credited to the CF Superannuation Account to other budgetary expenditures or to the national debt.

6 The principal complaint in issue is that in each fiscal year beginning with the 1993-94 fiscal year, the responsible Ministers have failed to credit each of the pension accounts with the full amounts required to be credited pursuant to subsections 44(1) of the *PSSA* and 55(1) of the *CFSA*, respectively. The appellants assert that in each of those years a portion of the surpluses standing in the accounts has been improperly amortized over a period of several years through the use of the Allowance for Pension Adjustment Account and that these actions are ongoing and are in violation of the Ministers' duties imposed by those subsections.

7 The learned Motions Judge noted, at page 6 of her reasons, that a "surplus occurs when the balances of the accounts are in excess of the obligation or liability for future employee pension benefits determined through actuarial calculations." She further noted that the accounting procedures which were implemented by the respondent in the 1993-94 fiscal year were recommended by the Canadian Institute of Chartered Accountants in 1988 and had their genesis in the respondent's decision in the 1989-90 fiscal year to put that body's recommendations into effect and to establish the adjustment account pursuant to paragraph 64(2)(*d*) of the *Financial Administration Act*.[4] It is not disputed that portions of the surpluses in the two pension accounts were for the first time amortized in the manner recommended in the 1993-94 fiscal year.

8 Concern with this accounting treatment of the amounts required to be credited in the 1993-94 fiscal year was conveyed to the responsible Minister in 1995 by way of an exchange of correspondence between the appellant Krause and the President of the Treasury Board. In the Minister's letter to Mr. Krause of May 18, 1995, he stated at pages 1-2:[5]

> There are two particular items in the accounting recommendations of which you should be aware. First, for defined benefit pension plans, there is a requirement to use the "government's best estimate" for the economic and demographic assumptions employed to establish pension liabilities and therefore the financial position of its pension plans, i.e. the difference between the pension plan assets and liabilities. Second, any year to year change in the financial position of a government's pension plans must be amortized over the expected average remaining service life of employees (EARSL). An improvement in a plan's financial position is amortized as an expenditure reduction for the government, while a worsening of the financial position of a plan is amortized as an increase in the government's expenditures.
>
> It should be noted that these amortizations do not affect the actual amounts recorded in a pension fund. Rather, the intent of the accounting standards is to report the realistic liabilities

for a pension plan based on its existing terms and conditions and to smooth out the effect of annual fluctuations in the financial position of a pension plan on the government's financial statements, i.e., the effect on the expenditures of a government. In addition, the recorded pension liability in a government's financial statements is intended to be gradually brought in line with the estimated actuarial pension liability.

9 The respondent's motion to strike of December 23, 1997, was based primarily on the ground that the originating notice of motion was filed beyond the thirty day time limit specified in subsection 18.1(2) of the *Federal Court Act*. Other procedural defects were also alleged including a failure to set out the date and details of the decision, order or other matter in controversy as required by former Rule 1602 and to join the proper persons as respondents. Faced with that motion, the appellants proceeded to file the cross-motion seeking, *inter alia*, permission to bring the application for judicial review outside of the time period specified in subsection 18.1(2), to have the judicial review application treated and proceeded with as an action pursuant to subsection 18.4(2) and to amend the style of cause by substituting the President of the Treasury Board and the Minister of Finance as respondents.

10 The Motions Judge rejected the appellants' argument that the originating notice of motion was filed within time. She determined that the initial "decision" to amortize the surpluses was taken in the 1989-90 fiscal year, and that even if the practice of amortizing surpluses in each fiscal year constituted a "decision" such practice commenced in the 1993-94 fiscal year and any subsequent amortization of portions of the surpluses flowed from that decision. On this analysis she concluded that the originating notice of motion was filed well beyond the thirty day time limit in subsection 18.1(2). The appellants submit that the Motions Judge erred in so concluding.

11 The appellants submit that the actions sought to be reached by way of *mandamus*, prohibition and declaration are not "decisions" within the meaning of subsection 18.1(2). They further contend that if the subsection applies there was not here a single decision but rather a series of annual decisions reflective of the ongoing policy or practice of the respondent over time. Finally, they urge in any event that the decisions to amortize portions of the surpluses in the 1996-97 fiscal year were attacked within time.

12 I shall deal with these various arguments together.

13 If, of course, the appellants are correct that the actions sought to be challenged in the originating notice of motion are not "decisions," then clearly that notice of motion was not filed out of time. This argument calls for some examination of section 18 and subsection 18.1(1)-(3) of the *Federal Court Act* which read:

18.(1) Subject to section 28, the Trial Division has exclusive original jurisdiction

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

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

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

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

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

(2) An application for judicial review in respect of a decision or order of a federal board, commission or other tribunal shall be made within thirty days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected thereby, or within such further time as a judge of the Trial Division may, either before or after the expiration of those thirty days, fix or allow.

(3) On an application for judicial review, the Trial Division may

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

(*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

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

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

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

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

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

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

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

(3) Sur présentation d'une demande de contrôle judiciaire, la Section de première instance peut:

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

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

14 I shall begin by examining the appellants' submission that given the relief they seek to obtain in the originating document, the time bar laid down in subsection 18.1(2) has no application despite the fact that the Ministers in question may have decided as early as the 1989-90 fiscal year to account for any future surpluses in the two pension accounts in the manner that was recommended by the Canadian Institute of Chartered Accountants in 1988.

15 Before taking up the appellants' argument that the time bar in subsection 18.1(2) does not apply in the present case, I wish to offer a few observations on the historical roles served by the extraordinary remedies that are made available under section 18 of the *Federal Court Act*.

16 The common law courts developed the ancient writs of *mandamus, certiorari*, and prohibition to restrain the abuse or misuse of power. As early as 1762, Lord Mansfield was of the view that *mandamus* ought to be "used upon all occasions where the law has established no specific remedy

and where in justice and good government there ought to be one." [6] Almost one hundred years later Baron Martin saw it as the duty of the courts "to be vigilant" to apply the remedy of *mandamus* "in every case to which, by any reasonable construction, it can be made applicable." [7] Nowadays the remedy is commonly used to enforce the performance of public duties by public authorities of all kind. [8] Very recently, in *Inland Revenue Commissioners v. National Federation of Self-Employed & Small Businesses Ltd.* [9], Lord Diplock, commenting upon the decision of Lord Denning M.R. in *R. v. Greater London Council*, [1976] 3 All E.R. 184 (Eng. C.A.), stated:

> I agree in substance with what Lord Denning M.R. said, at p. 559, though in language more eloquent than it would be my normal style to use:
>
> > I regard it as a matter of high constitutional principle that if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and the court *in their discretion* can grant whatever remedy is appropriate. (The italics in this quotation are my own.)
>
> The reference here is to flagrant and serious breaches of the law by persons and authorities exercising governmental functions which are continuing unchecked.

17 The design of prohibition, on the other hand, is preventative rather than corrective. [10] It affords a measure of judicial supervision not only of inferior tribunals but of administrative authorities generally. Specifically it is available "to prohibit administrative authorities from exceeding their powers or misusing them." [11] Indeed, prohibition has been granted to supervise the exercise of statutory power by such authorities including an *act* as distinct from a legal decision or determination, and a preliminary decision leading to a decision that affects rights even though the preliminary decision does not immediately do so. [12]

18 Declaratory relief is available, *inter alia*, to determine whether a statute applies in a particular case. It has been stated that: [13]

> In administrative law the great merit of the declaration is that it is an efficient remedy against ultra vires action by governmental authorities of all kinds, including ministers and servants of the Crown, and, in its latest development, the Crown itself. If the Court will declare that some action, either taken or proposed, is unauthorized by law, that concludes the point as between the plaintiff and the authority. If then his property is taken, he has his ordinary legal remedies; if an order is made against him, he can ignore it with impunity; if he has been dismissed from an office, he can insist that he still holds it. All these results flow from the mere fact that the rights of the parties have been declared. This is a particularly suitable way to settle

disputes with government authorities, since it involves no immediate threat of compulsion, yet is none the less effective.

19 All of these remedies are, of course, discretionary. They will be denied, for example, where there has been unreasonable delay. [14] Moreover, an applicant must possess a sufficient interest in the subject matter of the dispute as not to be seen as a mere busybody.

20 I now turn to the appellants' primary argument. It is that although by subsection 18(3) of the *Federal Court Act* a person seeking any of the extraordinary remedies available under subsections 18(1) and (2) may do so "only on an application for judicial review made under section 18.1," the appellants are not prevented from doing so beyond the thirty day time limit specified in subsection 18.1(2) for the simple reason that this time limit applies only where an application for judicial review is "in respect of a decision or order." The appellants submit that nowhere in the originating document do they seek to attack any "decision" of the respective Ministers but, rather, to compel performance of public duties, prevent continued failure to perform such duties and declare the use of the Allowance for Pension Adjustment Account by the Ministers to be contrary to subsections 44(1) of the *PSSA* and 55(1) of the *CFSA*.

21 The appellants point out that the drafters of section 18.1 employed language elsewhere in its text which, in their submission, is designed to accommodate an application for both a section 18 remedy *per se* and such other remedy as is provided for in subsection 18.1(3). Thus in subsection 18.1(1), the words "anyone directly affected by the matter in respect of which relief is sought" appear. The Motions Judge was of the view that the word "matter" as repeated in former Rule 1602 is "reflective of the necessity to find a word to cover a variety of administrative actions." I respectfully agree. Further support for that view was expressed after Bill C-38 which proposed this change was adopted, but before it came into force. [15] Indeed, it seems to me that the word "matter" does embrace not only a "decision or order" but any matter in respect of which a remedy may be available under section 18 of the *Federal Court Act*.

22 The appellants also point to language employed in subsection 18.1(3) as again indicating that this subsection was drafted with a view to permitting the award of section 18 relief *per se* in addition to a "setting aside" or a referral back of a "decision or order." An order in the nature of *mandamus* would appear to be contemplated by paragraph 18.1(3)(*a*) whereby a federal tribunal may be ordered to "do an act or thing it has unlawfully failed or refused to do." A remedy by way of declaratory relief or prohibition would appear to be among those provided for in paragraph 18.1(3)(*b*) whenever "a decision, order, *act* or proceeding" of a federal tribunal is found to be "invalid or unlawful." [16]

23 I agree with these submissions. In my view, the time limit imposed by subsection 18.1(2) does not bar the appellants from seeking relief by way of *mandamus*, prohibition and declaration. It is true that at some point in time an internal departmental decision was taken to adopt the

1988 recommendations of the Canadian Institute of Chartered Accountants and to implement those recommendations in each fiscal year thereafter. It is not, however, this general decision that is sought to be reached by the appellants here. It is the *acts* of the responsible Ministers in implementing that decision that are now claimed to be invalid or unlawful. The duty to act in accordance with subsections 44(1) of the *PSSA* and 55(1) of the *CFSA* arose "in each fiscal year." The charge is that by acting as they have in the 1993-94 and subsequent fiscal years the Ministers have contravened the relevant provisions of the two statutes thereby failing to perform their duties, and that this conduct will continue unless the Court intervenes with a view to vindicating the rule of law. The merit of this contention can only be determined after the judicial review application is heard in the Trial Division.

24 I am satisfied that the exercise of the jurisdiction under section 18 does not depend on the existence of a "decision or order." In *Alberta Wilderness Assn. v. Canada (Minister of Fisheries & Oceans)*,[17] Hugessen J. was of the view that a remedy envisaged by that section "does not require a decision or order actually in existence as a prerequisite to its exercise." In the present case, the existence of the general decision to proceed in accordance with the recommendations of the Canadian Institute of Chartered Accountants does not, in my view, render the subsection 18.1(2) time limit applicable so as to bar the appellants from seeking relief by way of *mandamus*, prohibition and declaration. Otherwise, a person in the position of the appellants would be barred from the possibility of ever obtaining relief under section 18 solely because the alleged invalid or unlawful act stemmed from a decision to take the alleged unlawful step. That decision did not of itself result in a breach of any statutory duties. If such a breach occurred it is because of the actions taken by the responsible Minister in contravention of the relevant statutory provisions.

25 In view of the above conclusion, it is unnecessary to consider the appellants' alternative arguments including that if subsection 18.1(2) applied the application for judicial review was nevertheless brought within time, that the Motions Judge erred in refusing to extend the time or to allow the application to be treated and proceeded with as an action.

26 It is necessary, however, to consider the grounds put forward by the respondent, in her motion to strike, that the originating document was defective because it failed to identify the federal tribunal in respect of which it is made, that it improperly named Her Majesty as the respondent and that it failed to set out the date and details of the single decision, order or matter in respect of which judicial review is sought.

27 By their cross-motion, the appellants seek leave to amend the originating document by deleting the name of Her Majesty and substituting the "President of the Treasury Board" and the "Minister of Finance."

28 I agree with the respondent that the style of cause does contain a misnomer. The "President of the Treasury Board" and the "Minister of Finance" ought to have been named as respondents rather than "Her Majesty." [18]

29 I am not persuaded that the originating document is otherwise so defective that it cannot be cured by simple amendment. At the time this document was filed, former Rule 1602(4) required that it be "in respect of a single decision, order or other matter," a requirement that has since been modified by new Rule 302. Former Rule 6 invested the Court in special circumstances with authority by order to "dispense with compliance with any Rule where it is necessary in the interest of justice," a power that is largely continued in new Rule 55. It seems to me appropriate in the circumstances to dispense with the requirement by permitting the "matters" to be brought in the same proceeding. I am also of the view that the appellants have set out sufficient details of those matters in their originating notice.

30 I would allow the appeal with costs, set aside the order of the Trial Division and dismiss the motion to strike. I would also amend the style of cause by substituting "President of the Treasury Board" and "Minister of Finance" as parties respondent in the place of "Her Majesty the Queen in Right of Canada."

Appeal allowed.

Footnotes

* A corrigendum issued by the court on March 2, 1998 has been incorporated herein.

1 R.S.C. 1985, c. P-36.

2 R.S.C. 1985, c. C-17.

3 Appeal Book, Vol. 1, at pp. 34-5.

4 R.S.C. 1985, c. F-11.

5 Appeal Book, Vol. 1, at pp. 264-65.

6 *R. v. Barker* (1762), 3 Burr. 1265 (Eng. K.B.) at p. 1267.

7 *Rochester (City) v. R.* (1858), 120 E.R. 791 (Eng. Ex. Ch.).

8 W. Wade & C. Forsyth, *Administrative Law*, 7th ed. (Oxford: Clarendon Press, 1994), at p. 643.

9 (1981), [1982] A.C. 617 (U.K. H.L.) at p. 641.

10 B.J. MacKinnon, "Prohibition, Certiorari and Quo Warranto," Law Society of Upper Canada Special Lectures (1961), at p. 290.

11 W. Wade & C. Forsyth, *supra*, note 8, at p. 626.

12 *Ibid.*, at pp. 633-4.

13 *Ibid.*, at p. 593.

14 See e.g. *Broughton v. Commissioner of Stamp Duties*, [1899] A.C. 251 (New South Wales P.C.)

15 I.G. Whitehall and J.H. Smellie, "Judicial Review and Administrative Appeals - A Substantive and Procedural Overview," Canadian Bar Association Seminar on Bill C-38, Toronto, January 25, 1991 and Vancouver, February 1, 1991, at p. 14. The amending statute (S.C. 1990, c. 8) was assented to on March 29, 1990 and came into effect on February 1, 1992.

16 See Brown and Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing, 1998), at para. 2:4410 for a discussion of subsection 18.1(3).

17 (1997), 146 F.T.R. 19 (Fed. T.D.), reversed on other grounds (December 1, 1998), Doc. A-191-98 (Fed. C.A.).

18 *McCaffrey v. R.* (1992), 59 F.T.R. 12 (Fed. T.D.). See also *LeBlanc v. National Bank of Canada* (1993), [1994] 1 F.C. 81 (Fed. T.D.); *Atlantic Oil Workers Union v. Canada (Director of Investigation & Research)*, [1996] 3 F.C. 539 (Fed. T.D.).

2002 FCT 750
Federal Court of Canada — Trial Division

Larny Holdings Ltd. v. Canada (Minister of Health)

2002 CarswellNat 1689, 2002 CarswellNat 4556, 2002 FCT 750, [2003] 1 F.C. 541, 115 A.C.W.S. (3d) 354, 216 D.L.R. (4th) 230, 222 F.T.R. 29, 43 Admin. L.R. (3d) 264

Larny Holdings Limited carrying on business as Quickie Convenience Stores, Applicant and Canada (Minister of Health) and John T. Zawilinski, Manager, Tobacco Enforcement Unit, Health Canada, Respondents

Nadon J.

Heard: January 14, 2002
Judgment: July 5, 2002
Docket: T-1716-00

Counsel: *Stephen Victor* and *Jane M. Bachynski*, for applicant
R. Jeff Anderson, for respondents

Subject: Public; Corporate and Commercial; Constitutional

APPLICATION by convenience store company for judicial review of decision of Minister of Health and public servant regarding alleged "cash rebate" for purchase of tobacco products.

***Nadon J.*:**

1 This is an application for judicial review of a "direction," [1] issued by the respondent, John T. Zawilinski, acting in his capacity of Manager, Tobacco Enforcement Unit, Ontario Region, Health Protection Branch, Health Canada, received by the applicant on May 30, 2000. The direction reads a follows:

> The purpose of this letter is to inform you of Health Canada's position on cash rebates offered on the purchase of multiple packs of cigarettes or other tobacco products, in order to assist you in complying with section 29 of the *Tobacco Act*.
>
> The purpose of the *Tobacco Act* is to protect the health of Canadians, particularly youth, from the harmful effects of tobacco use. Given that promoting tobacco products is one of the main ways of influencing consumer attitudes, restricting promotion is an essential part of the Act. The Act restricts the promotion of tobacco products, including sales promotion such as cash

rebate, while allowing tobacco manufacturers and retailers sufficient leeway to exercise their freedom of commercial expression.

Health Canada has observed that some retailers offer cash rebates on the purchase of multiple units of tobacco products. For example, a retailer offers one pack of cigarettes for $4, but 3 packs for $10. Health Canada is of the view that this practice contravenes section 29 of the *Tobacco Act*.

Paragraph 29(a) states that no manufacturer or retailer shall:

- offer or provide any consideration, direct or indirect, for the purchase of a tobacco product, including a gift to a purchaser or a third party, bonus, premium, *cash rebate* or right to participate in a game, lottery or contest.

Therefore, retailers must make sure they do not offer a cash rebate on the purchase of more than one unit of tobacco product. The selling price of multiple packs of cigarettes must be the same as if the packs were sold individually, that is to say the sum of the selling price of each of the packs (e.g., $4 per pack, thus $12 for 3 packs).

Please note that the "unit" to be used in determining the base price is the intact, finished, packaged product. Thus, an unopened carton of cigarettes is one unit of tobacco product; a pack of cigarettes is also one unit of tobacco product.

Retailers are completely free to set the selling price of their tobacco products. Accordingly, the price of a carton or pack of cigarettes is at the retailer's discretion. The above-mentioned section 29 restriction applies only to cash rebates for multiple-unit sales.

Please note that as of May 1, 2000, Health Canada will be issuing warning letters to retailers who contravene this provision. Any subsequent offence may lead to prosecution.

Any retailer who contravenes section 29, is guilty of an offence and liable on summary conviction, for a first offence to a fine not exceeding $3,000 and for a subsequent offence, to a fine not exceeding $50,000. Please take the necessary steps to avoid contravening this Act.

2 It should be noted that the applicant initially filed its application before the Ontario Superior Court of Justice. However, following discussion and correspondence with the respondents, the applicant abandoned those proceedings and, on October 11, 2000, filed the present application. Leading up to the applicant abandoning its application in the Ontario Court was a letter dated August 4, 2000, sent by the respondents to the applicant, which reads in part as follows:

As I indicated in our telephone conversation on August 2, in our view, the Ontario Court has no jurisdiction to deal with this Application. The applicant is seeking relief against a person exercising powers under an Act of Parliament. By virtue of s. 18 of the *Federal Court Act*, the

Federal Court of Canada has exclusive jurisdiction to issue the relief your client is seeking. We would therefore be grateful if could abandon the Application in the Ontario Court.

3 On August 5, 2000, Blais J., with the consent of the respondents, allowed the applicant's motion for an extension of time to commence and file the present proceedings.

4 The applicant, Larny Holdings Ltd., operates as Quickie Convenience Stores in Ontario and Quebec ("Quickie") and in the course of its business sells cigarettes. At the material time, Quickie offered for sale to its customers a single pack of cigarettes for $4.31 plus tax and offered for sale a carton of cigarettes (8 packs) for $28.49 plus tax. Quickie also offered two packs ("multi-pack") of cigarettes for $7.99 plus tax.

5 Therefore, the price per cigarette pack, if bought individually, was $4.31. If a customer bought a multi-pack, the price per pack was $4.00, and if the customer purchased a carton, the price per pack was $3.56. Offering two packs of cigarettes at a per pack price slightly under the per pack price if sold individually was a pricing strategy that Quickie had used for approximately ten years. Quickie's pricing strategy was adopted in response to the highly competitive cigarette sales environment, which resulted from the introduction of self-serve gasoline stations and independent convenience stores in the Ontario market. The multi-pack offer was not offered in any pre-packaged container, wrapping or special package. The applicant simply advertised that it would sell two packs at a per pack price slightly inferior to that of an individual pack of cigarettes.

6 The respondents, the Minister of Health and John T. Zawilinski, who are responsible for the administration and enforcement of the *Tobacco Act*, S.C. 1997, c. 13 (the "TA"), are of the view that selling the multiple-pack at a price inferior to the per-pack price, if sold individually, violates the TA.

7 As a result of receiving two somewhat coercive letters from the respondents, advising it that selling the multi-packs at a reduced price was illegal, the applicant ceased the sale thereof.

8 On March 19, 2000, the Tobacco Enforcement Unit, Health Canada, delivered by way of a letter, a Notice to Establishments Selling Tobacco Products, which included the applicant. The letter stated that it was Health Canada's view that selling multiple packs of cigarettes for a per unit price inferior to that charged on the sale of single packs of cigarettes if sold individually, constituted a "cash rebate" and as such contravened s. 29 of the TA. I note, in passing, that selling a carton of 8 packs of cigarettes, at a much greater reduced price per pack, is not, according to the respondents, illegal.

9 The letter also advised the applicant and the other retailers that after May 1, 2000, Health Canada would be sending warning letters to retailers who, in their view, continued to violate s. 29 of the TA, and that any subsequent impugned conduct might lead to prosecution. The letter further stated that any retailer who contravened s. 29 of the TA was guilty of an offence and liable

on summary conviction, for a first offence, to a fine not exceeding $3,000, and for a subsequent offence, to a fine not exceeding $50,000. The letter concluded by advising retailers to "please take the necessary steps to avoid contravening the Act." This form letter was not signed nor addressed to anyone in particular.

10 On May 30, 2000, the applicant received a warning letter signed by Mr. John Zawilinski, which, *inter alia*, outlined Health Canada's position with respect to the meaning of s. 29 of the TA. The content of this letter was identical to that of the form letter sent earlier by the respondents, save for two minor changes. Firstly, the letter was addressed to the applicant personally. Secondly, the letter was signed by Mr. Zawilinski.

11 On May 30, 2000, under threat of prosecution, the applicant stopped offering the multi-pack prices. Thus, the second letter had its intended effect - at least on the applicant - i.e., convincing retailers to stop selling multi-packs for a per pack price inferior to the price of one pack sold individually, without having to lay a charge. As a result, the applicant's tobacco sales revenue has declined by 1%. Hence, the applicant has lost approximately $6,500 per week. In addition, the applicant has seen a decline in customer traffic of approximately 2,100 customers per week across its 38 locations.

12 The applicant argues that the act of sending out coercive letters threatening prosecution and fines upon conviction of up to $50,000 interfered with its internal pricing strategies. Moreover, the applicant argues that the letter is, in effect, a direction from Health Canada ordering the applicant to cease and desist from some of its marketing and pricing strategies. Thus, the applicant seeks judicial review of the letter which it characterizes as a direction. The applicant asks this Court for the following relief:

> 1. A declaration that the direction issued by Mr. Zawilinski to the applicant is invalid and/or unlawful;
>
> 2. An order quashing or setting aside the direction;
>
> 3. An interim permanent order and/or injunction prohibiting and restraining Mr. Zawilinski and Health Canada generally from restricting the pricing and sale by the applicant of multi-packs of cigarettes at a lesser or reduced per pack price when compared to the applicant's per price pack if sold on a single pack basis.

13 As appears from the above, the applicant seeks, *inter alia*, a declaration that selling multiple packs at a price inferior to that charged on the sale of single packs of cigarettes sold individually, does not constitute a "cash rebate" for the purposes of s. 29 of the TA.

14 Before addressing the merits of the application, I must address a number of jurisdictional issue raised by the respondents. The first issue arises from the respondents' submission that Mr.

Zawilinski has made no decision capable of being reviewed and that, in any event, he cannot be considered as a "federal board, commission or other tribunal" as that expression is defined in s. 2 of the *Federal Court Act*, R.S.C. 1985, c. F-7 (the "Act"). In the respondents' submission, since no legal consequences flow from Mr. Zawilinski's decision/letter, it cannot be viewed as a reviewable "decision or order" under s. 18.1 of the Act. The respondents' submission on this issue appears at paras. 6 to 9 of their Memorandum of Fact of Law, which read as follows:

> 6. Section 2 of the *Federal Court Act*, in defining "Federal Board, Commission or other Tribunal" does not contemplate every act of omission of a Minister or servant of the Crown, as being a decision of a Federal Board, Commission or other Tribunal. The decision must be made pursuant to or under authority of an Act of Parliament or there must, at the very least, be a threat of future use of such authority. That is, there must concrete legal consequences flowing from the action/decision of the board. No such consequences flow directly from the Respondent's opinion in this case [authorities omitted].
>
> 7. In addition, an activity involving the provision of a non-binding opinion as to how provisions of a statute are perceived to apply do not fall within the types of decision of a federal board, commission of other tribunal which can be open to review [authorities omitted].
>
> 8. A recommendation to charge or the laying of an information [sic] be the subject of a judicial review any more than a Minister's recommendation to the Governor in Council concerning certain proposed legislative amendments [sic] be open to review [authorities omitted].
>
> 9. The Respondents have no direct power to enforce the impugned opinion. They cannot levy any sanction, revoke a license, or otherwise directly affect the Applicant in respect in respect of what it might perceive to be a violation of s. 29 of the *Act*. The most that can be done, as discussed below, is the laying of an information to initiate a charge against the applicant. Thereafter, the prosecutor and ultimately the Court will have the final say as to whether or not there has been a contravention and the appropriate penalty to be imposed thereon.

15 For the reasons that follow, I am of the view that the respondents' position is incorrect. I begin with the remarks of Décary J.A. in *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works & Government Services)*, [1995] 2 F.C. 694 (Fed. C.A.), where, at pp. 700 to 705, he states in unequivocal terms that judicial review under s. 18 of the Act is intended to be broad in scope and "readily available" to applicants:

The phrase "powers conferred by or under an Act of Parliament" found in the definition of a "federal board, commission or other tribunal" is particularly broad and is not subject to the limitation suggested by the Minister.

. . . . .

It should be borne in mind that what is at issue here is determining whether a litigant has access to this Court's power of review in connection with a legislative provision - paragraph 18(1)(a) of the *Federal Court Act* - by which Parliament sought to make the federal government subject to the Court's superintending and reforming power. As I see it, there is no reason to try and distort the usual meaning of the words or strive to divest them of all practical meaning by resort to fine distinctions suited to constitutional analysis, which would have a sterilizing effect contrary to the intent of Parliament.

When it amended paragraph 18(1)(a) of the *Federal Court Act* in 1990 to henceforward permit judicial review of decisions made in the exercise of a royal prerogative, Parliament unquestionably made a considerable concession to the judicial power and inflicted a significant setback on the Crown as the executive power, if one may characterize making the government still further subject to the judiciary as a setback. What appears from this important amendment is that Parliament did not simply make the "federal government" in the tradition sense subject to the judiciary, *but intended that henceforth very little would be beyond the scope of judicial review*. That being so, I must say I have some difficulty giving to s. 18(1)(a) an interpretation which places Ministers beyond the scope of such review when they exercise the most everyday administrative powers of the Crown, though these are also codified by legislation and regulation.

With respect, that would be to take an outmoded view of supervision of the operations of government. The "legality" of such acts done by the government, which is the very subject of judicial review, does not depend solely on whether such acts comply with the stated requirements of legislation and regulations.

. . . . .

This liberal approach to the wording of paragraph 18(1)(a) is not new to this Court. It is readily understanding, if one only considers the litigant's viewpoint and takes account of the tendency shown by Parliament itself to make government increasingly accountable for its actions.

. . . . .

In recent years, Parliament has made a considerable effort to adapt the jurisdiction of this Court to present-day conditions and to eliminate jurisdictional problems which had significantly tarnished this Court's image. *As between an interpretation tending to make judicial review more readily available and providing a firm and uniform basis for the Court's jurisdiction and an interpretation which limits access to judicial review, carves up the Court's jurisdiction by uncertain and unworkable criteria and inevitably would lead to an avalanche of preliminary litigation, the choice is clear*. [Footnotes omitted.] [Emphasis added.]

16 Under para. 18(1)(a) of the Act, the Trial Division of this Court has jurisdiction to, *inter alia*, grant declaratory relief against any "federal board, commission or other tribunal." Section 18 of the Act must be read in conjunction with para. 18.1(3)(b), which confers on the Trial Division the following powers:

> 18.1(3) On an application for judicial review, the Trial Division may
>
> . . . . .
>
> (b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.
>
> . . . . .
>
> 18.1(3) Sur présentation d'une demande de contrôle judiciaire, la Section de première instance peut :
>
> . . . . .
>
> b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office national.

17 On a reading of the above paragraph, it is clear that not only are decisions and orders of a federal board subject to judicial review, but also all acts or proceedings thereof. The meaning of the words "decision, order, act or proceeding" of a federal board was examined by the Federal Court of Appeal in *Morneault v. Canada (Attorney General)* (2000), [2001] 1 F.C. 30 (Fed. C.A.). At issue in that case, *inter alia*, was whether findings of individual misconduct against named individuals made by the commission of inquiry into the deployment in 1992 of Canadian Forces to Somalia constituted reviewable decisions under para. 18.1(4)(d) of the Act. In addressing that issue, Stone J.A., for the Court of Appeal, opined as follows, at pp. 61 to 64:

> [40] The issue, in my view, resolves itself into one of statutory construction. It is not clear, however, that similarities in procedure by itself affords a reliable basis for concluding that the findings in issue are "decisions" reviewable under paragraph 18.1(4)(d). This Court has been called upon on many occasions to construe the phrase "decision or order . . . required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal" in section 28 of this Act as it read prior to the 1990 amendments. As has been pointed out in D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf ed. (Toronto: Canvasback Publishing, 1998), at paragraph 2:4420, note 376, "initially the Court restricted the term to "final" decisions or orders, and to those that the tribunal was expressly charged by its enabling legislation to make" but, subsequently, the scope of section 28 was "broadened to include a decision that was fully determinative of the substantive rights of the party, even though it may not be the

ultimate decision of the tribunal". Indeed, a recommendation to a Minister of the Crown by an investigative tribunal which by reasonable expectation would lead to a deportation, has been considered reviewable . . . [Authority omitted.]

[41] [. . .] I must, however, acknowledge the force of the argument the other way, that the review of findings like those in issue is available on the ground afforded by paragraph 18.1(4)(d) *despite their nature as non-binding opinions, because of the serious harm that might be caused to reputation by findings that lack support in the record*. [Emphasis added.]

[42] If a ground for granting relief is not available under that paragraph, I have the view that the findings are yet reviewable under the section. Judicial review under section 18.1 is not limited to a "decision or order". This is clear from subsection 18.1(1) which enables the Attorney General of Canada and "anyone directly affected by the matter" to seek judicial review. It is plain from the section as a while that, while a decision or order is a "matter" that may be reviewed, a "matter" other than a decision or order may also be reviewed. This Court's decision in *Krause v. Canada*, [1999] 2 F.C. 476 (C.A.) illustrates the point. It there held that an application for judicial review pursuant to section 18.1 for a remedy by way of *mandamus*, prohibition and declaration provided for in section 18 [as am. by S.C. 1990, c. 8, s. 4] of the Act were "matters" over which the Court had jurisdiction and that the Court could grant appropriate relief pursuant to paragraphs 18.1(3)(a) 18.1(3)(b). [Further authorities omitted.] I am also satisfied that the respondent is directly affected by the findings and that they are amenable to review under section 18.1. The findings are exceptionally important to the respondent because of the impact of his reputation. The Court must be in a position to determine whether, as alleged, the findings are not supported by the evidence.

[43] To be reviewable under section 18.1 a "matter" must yet emanate from "a federal board, commission or other tribunal". Such was the case in *Krause*, *supra*. The phrase "a federal board, commission or other tribunal" is defined in subsection 2(1) of the Act to mean "any body or any person having, exercising or purporting to exercise jurisdiction or power conferred by or under an Act of Parliament. In my view, the Commission falls within the scope of the definition, for it derived its mandate from the March 20, 1995 Order in Council as subsequently amended and its detailed investigatory powers and power to make findings of misconduct from the *Inquiries Act* [Authority omitted.]

18 Mr. Justice Stone's remarks in *Morneault*, *supra*, like those of Décary J.A. in *Gestion Complexe*, *supra*, are to the effect that judicial review under s. 18 of the Act must be given a broad and liberal interpretation, as a result of which a wide range of administrative actions will fall within the Court's judicial review mandate. It is also clear that judicial review is no longer restricted to decisions or orders that a decision-maker was expressly charged to make under the enabling legislation. Rather, judicial review will extend to decisions or orders that determine a party's rights, even if the decision at issue is not the ultimate decision. It also follows from the Court of Appeal's decision in *Morneault*, *supra*, that the word "matter" found in s. 18.1 of the Act

is not restricted to "decisions or orders," but encompasses any matter in regard to which a remedy might be available under s. 18 or subs. 18.1(3).

19 In *Moumdjian v. Canada (Security Intelligence Review Committee)*, [1999] 4 F.C. 624 (Fed. C.A.), Robertson J.A. concluded that a decision in the form of a recommendation or advice to a Minister or to the Governor in Council, and which was intended to be acted upon, must necessarily be reviewable "if only because the consequences which flow from a flawed decision or a flawed process are invariably of fundamental significance to those who are adversely affected by it." He then concluded, following a careful review of the relevant jurisprudence, that the expression "decision or order" had no fixed or precise meaning, but that its meaning depended upon the statutory context in which the advisory decision was made, "having regard to the effect which such decision has on the rights and liberties of those seeking judicial review."

20 I will refer to one last case on this issue. In *Markevich v. Canada*, [1999] 3 F.C. 28 (Fed. T.D.), Evans J. (as he then was), at paras. 9 to 13 (pp. 36 to 38), makes the following remarks:

> [9] The respondent made a preliminary objection to the Court's jurisdiction to entertain this proceeding. The argument was that only a "decision or order" may be the subject of an application for judicial review under section 18.1 of the *Federal Court Act*. The letter written on behalf of the Minister, which is identified in the applicant's originating notice of motion as the subject of the application for judicial review, was simply informative in nature and did not purport to determine or otherwise affect any legal rights or duties of the applicant. It was not a "decision or order", and was therefore unreviewable by this Court. Indeed, on very similar facts to those at bar, this was the conclusion reached by Teitelbaum J. in *Fuchs v. R.*, [1997] 2 C.T.C. 246 (F.C.T.D.).
>
> [10] With all respect, I do not share this rather limited view of the scope of the subject-matter of this Court's judicial review jurisdiction. The words "decision or order" are found in subsection 18.1(2) of the *Federal Court Act*, which provides that an application for judicial review of a "decision or order" must be made within 30 days after the time that the decision or order was first communicated by the decision maker. In my opinion, this subsection simply provides a limitation period within which an application for judicial review of a decision or order must normally be made. It does not say that only decisions or orders may be the subject of an application for judicial review, nor does it say that administrative action other than decisions or orders are subject to the 30-days limitation period: *Krause v. Canada*, [1999] 2 F.C. 476 (C.A.).
>
> [11] It seems to me that the permitted subject-matter of an application for judicial review is contained in subjection 18.1(3), which provides that on an application for judicial review the Trial Division may order a federal agency to do any act or thing that it has unlawfully failed or refused to do, or declare invalid or set aside and refer back, prohibit or restrain "a decision, order, *act* or proceeding of a federal board, commission or other tribunal". The words "act

> or proceeding" are clearly broad in scope and may include a diverse range of administrative action that does not amount to a "decision or order", such as subordinate legislation, reports or recommendations made pursuant to statutory powers, policy statements, guidelines and operating manuals, or any of the myriad forms that administrative action may take in the delivery by a statutory agency of a public program: see *Krause v. Canada*, *supra*.
>
> [12] However, in order to qualify as an "act or proceeding" that is subject to judicial review, the administrative action impugned must be an "act or proceeding" of a "federal board, commission or other tribunal", that is a body or person "having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament" (subsection 2(1) [as am. by S.C. 1990, c. 8, s. 1] of the *Federal Court Act*). While the letter written on the Minister's behalf to the applicant that is the subject-matter of this application for judicial review was not an act or proceeding by a federal body in the *exercise* of any statutory power, the Minister, of course, is a person *having* statutory powers under the *Income Tax Act*.
>
> [13] *Even though not taken in the exercise of a statutory power, administrative action by a person having statutory powers may be reviewable as an "act or proceeding" under paragraph 18.1(3)(b) if it affects the rights or interests of individuals. The letter in question here contained no decision made pursuant to a statutory power, nor did it explicitly purport adversely to affect any right or interes of the applicant*. However, it is a reasonable inference from both the letter, and the applicant's communications with Ms. Kara, the writer of the letter, that it signified that Revenue Canada had made a decision to try to collect the unpaid tax and intended to take measures to attempt to recover the previously "written off" tax debt. And, as is apparent from the requirements to pay that was subsequently issued, this was indeed the case. [Emphasis added.]

21 The facts in *Markevich*, *supra*, were that the applicant owed back taxes which were subsequently "written off" by Revenue Canada because there appeared to be no realistic chance of collecting the debt in the foreseeable future. As a result, his 1993 Statement of Account with Revenue Canada showed a nil balance. However, in 1998, a Ms Kara of the Richmond, B.C., Office of Revenue Canada, sent the applicant a letter advising him that he owed over $770,000 in back taxes. Ms Kara, written on behalf of the Minister, stated in her letter that Revenue Canada had decided to try to collect the unpaid taxes and intended to take measures to recover the previously "written off" debt.

22 Evans J. concluded that, notwithstanding the fact that the letter contained "no decision made pursuant to a statutory power, nor did it explicitly purport adversely to affect the rights or interests of individuals," the letter still constituted an act capable of review by this Court.

23 With the above jurisprudence in mind, I now turn to the specifics of the case before me. I agree wholeheartedly with the applicant that the respondents' direction cannot be characterized in the way that the respondents suggest, i.e., as an opinion or warning letter: (i) not issued pursuant to

any specific legislative authority, but rather as a courtesy to inform the applicant of the respondents' position as to the effect of s. 29 of the TA; (ii) from which no legal consequences flow to the applicant; (iii) a "non binding opinion" with respect to the interpretation of s. 29 of the TA; and (iv) a "recommendation" to charge the applicant with an offence under the TA.

24 The direction sent by the respondents is, in my view, coercive, in that the purpose thereof is to threaten the applicant to immediately stop selling the multi-packs, failing which a charge would be laid and criminal prosecution might be commenced. I have no doubt that what the respondents hoped for was what in fact happened, i.e., that the applicant would stop selling multi-packs so as to avoid criminal prosecution. As I have already indicated, the applicant's decision to stop selling multi-packs has resulted in financial loss.

25 I am therefore of the view that the letter sent by Mr. Zawilinski is a "decision, order, act or proceeding" and is reviewable by this Court. I also have no hesitation in concluding that in sending the direction, Mr. Zawilinski was a "federal board, commission or other tribunal" within the meaning of subs. 2(1) of the Act, which defines that expression in the following terms:

> 2.(1)
>
> . . . . .
>
> "federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*;
>
> . . . . .
>
> 2.(1)
>
> . . . . .
>
> « office fédéral » Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la *Loi constitutionnelle de 1867*.

26 In their *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing, 1998, looseleaf edition), the learned authors Donald J.M. Brown, Q.C., and The Honourable John M. Evans make, at para. 2-45, the following remarks concerning the meaning of the words "federal board, commission or other tribunal" found at subs. 2(1) of the Act:

> In the result, the *source* of a tribunal's authority, and not the *nature* of either the power exercised or the body exercising it, is the primary determinant of whether it falls within the definition. The test is simply whether the body is empowered by or under federal legislation or by an order made pursuant to a prerogative power of the federal Crown. [. . .]

Footnote 250, which also appears under para. 2-45 is also relevant:

> [250] Note that, because federal board is defined to include a body or person "*having*, exercising or purporting to exercise jurisdiction or powers conferred by or under" federal legislation, it may not be necessary to establish that the administrative action being reviewed was made in the exercise of a statutory power. [. . .]

27 I agree entirely with the view of these authors. How can it be said in the present matter that Mr. Zawilinski was not a person "having, exercising or purporting to exercise jurisdiction or powers conferred by or under" an act of Parliament? If Mr. Zawilinski was not, at the very least, purporting to exercise jurisdiction under the TA, what, one may ask, was he doing?

28 While it may be true that no provision of the TA specifically conferred authority on Mr. Zawilinski to send the letter at issue to the applicant, this does not, in my view, signify that Mr. Zawilinski was not a "federal board, commission or other tribunal." In my view, Mr. Zawilinski was, at the very least, purporting to exercise jurisdiction or powers conferred by or under the TA.

29 The respondents raise two other jurisdictional issues. Firstly, they submit that the Federal Court, Trial Division, is not the proper forum to determine the meaning of s. 29 of the TA, the proper forum being the Provincial Court, with summary conviction jurisdiction. They also argue that the application brought by the applicant is premature, in that there is no *lis* between the parties, and that until such time as the applicant is charged with an offence under the TA, the application is premature. The respondents assert that the applicant can only obtain a judicial declaration regarding the meaning of s. 29 of the TA from the court, which has jurisdiction in regard to the summary conviction process. Since no charge has been laid against the applicant, that process has yet to be commenced.

30 If the applicant followed the respondents' logic, it would have put itself to the risk and expense of criminal prosecution in order to obtain a declaration concerning the meaning of s. 29 of the TA and, more particularly, whether the sale of multi-packs constitutes a "cash rebate" under the section. In other words, the applicant would have to engage in conduct that allegedly breached the statute, wait for a charge, suffer the prejudice that would result from the charge, and then expend substantial sums of money in defending the charge. That, surely, cannot be the solution to the applicant's difficulties. As Farwell L.J. stated at pp. 420-421 in *Dyson v. Attorney General* (1910), [1911] 1 K.B. 410 (Eng. C.A.):

> Now the action asks for no declaration in respect of any penalty; the complaint is that the Legislature has entrusted to a Government department (the Commissioners of Inland Revenue) the performance of the duty of making certain specific inquiries in a specific manner from landowners and of requiring answers to be sent to themselves, and has imposed a 50 £ penalty for disobedience. The plaintiff alleges that the Commissioners have exceeded their powers by making inquiries not authorized to be made, by not giving proper time to answer, and by requiring answers to be sent to a person not authorized to receive them and to whom it is injurious to the plaintiff's interest to send them. [. . .]; it would be a blot on our system of law and procedure if there is no way by which a decision on the true limit of the power of inquisition vested in the Commissioners can be obtained by any member of the public aggrieved, without putting himself in the invidious position of being sued for a penalty. I am, however, of opinion that the Attorney-General's contention is not well founded.

31 Farwell L.J. then went on to state, at p. 424, that " . . . the Courts are the only defence of the liberty of the subject against departmental aggression." The words of Farwell L.J. appear to be quite apposite in the present matter, since the respondents' submission is that Mr. Zawilinski acted without statutory authority in sending out the directive which is at issue in these proceedings.

32 In my view, declaratory relief is the appropriate remedy in the present case. In *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.), Dickson J. (as he then was) held that in order to obtain declaratory relief, a person need only show that a legal interest or right was "in jeopardy or grave uncertainty." Mr. Justice Dickson's reasoning is as follows (p. 457):

> None of this is to deny the preventative role of the declaratory judgment. As Madame Justice Wilson points out in her judgment, Borchard, *Declaratory Judgments* (2nd ed. 1941), at p. 27, states that:
>
> > . . . no "injury" or "wrong" need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty . . .
>
> Nonetheless, the preventative function of the declaratory judgment must be based on more than mere hypothetical consequences; there must be a cognizable threat to a legal interest before the courts will entertain the use of its process as a preventive measure. As this Court stated in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, a declaration could issue to affect future rights, but not where the dispute in issue was merely speculative. . . .

33 The case before me is surely not a case where the dispute between the parties is merely speculative. There is, in my view, a real and live dispute between the parties with respect to the interpretation of s. 29 of the TA. The applicant is certainly justified, on the facts of the case, to seek a remedy from this Court without having to submit itself to a criminal prosecution.

34 The upshot of the matter is that the respondents were at liberty to lay a charge against the applicant and, hence, seek an interpretation of s. 29 of the TA from the court of summary conviction. However, the respondents did not charge the applicant, but proceeded to send coercive letters in the hope that compliance would result, without the necessity of having to lay a charge. In these circumstances, I am satisfied that this Court is a proper forum. I am also satisfied that this application for judicial review is not premature.

35 I now turn to the merits of the application. The only issue for determination is whether selling multi-packs of cigarettes at a slightly lower price per pack than if the packs were sold separately, constitutes an unlawful cash rebate under para. 29(a) of the TA. For the reasons that follow, my answer to that question is no.

36 The relevant sections of the TA are as follows:

> 2. [. . .]
>
> "tobacco product" means a product composed in whole or in part of tobacco, including tobacco leaves and any extract of tobacco leaves. It includes cigarette papers, tubes and filters but does not include any food, drug or device that contains nicotine to which the *Food and Drug Act* applies.
>
> . . . . .
>
> 4. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> (a) to protect the health of Canadians in light of conclusive evidence implicating tobacco use to the incidence of numerous debilitating and fatal diseases;
>
> (b) to protect young persons and others from inducements to use tobacco products and the consequent dependence on them;
>
> (c) to protect the health of young persons by restricting access to tobacco products; and
>
> (d) to enhance public awareness of the health hazards of using tobacco products.
>
> . . . . .
>
> 18.(1) In this Part, "promotion" means a representation about a product or service by any means, whether directly or indirectly, including any communication of information about a product or service and its price and distribution, that is likely to influence and shape attitudes, beliefs and behaviours about the product or service.
>
> . . . . .
>
> 29. No manufacturer or retailer shall

(a) offer or provide any consideration, direct or indirect, for the purchase of a tobacco product, including a gift to a purchaser or a third party, bonus, premium, *cash rebate* or right to participate in a game, lottery or contest; . . . [Emphasis added.]

. . . . .

2. [. . .]

« produit de tabac » Produit fabriqué à partir du tabac, y compris des feuilles et des extraits de celles-ci; y sont assimilés les tubes, papiers et filtres à cigarette. Sont toutefois exclus de la présente définition les aliments, drogues et instruments contenant de la nicotine régis par la *Loi sur les aliments et drogues*.

. . . . .

4. La présente loi a pour objet de s'attaquer, sur le plan législatif, à un problème qui, dans le domaine de la santé publique, est grave et d'envergure nationale et, plus particulièrement :

a) de protéger la santé des Canadiennes et Canadiens compte tenu des preuves établissant, de façon indiscutable, un lien entre l'usage du tabac et de nombreuses maladies débilitantes ou mortelles;

b) de préserver notamment les jeunes des incitations à l'usage du tabac et du tabagisme qui peut en résulter;

c) de protéger la santé des jeunes par la limitation de l'accès au tabac;

d) de mieux sensibiliser la population aux dangers que l'usage du tabac présente pour la santé.

. . . . .

18.(1) Dans la présente partie, « promotion » s'entend de la présentation, par tout moyen, d'un produit ou d'un service - y compris la communication de renseignements sur son prix ou sa distribution -, directement ou indirectement, susceptible d'influencer et de créer des attitudes, croyances ou comportements au sujet de ce produit ou service.

. . . . .

29. Il est interdit au fabricant et au détaillant

a) d'offrir ou de donner, directement ou indirectement, une contrepartie pour l'achat d'un produit du tabac, notamment un cadeau à l'acheteur ou un tiers, une prime, un *rabais* ou le droit de participer à un tirage, à une loterie ou à un concours; . . . [Le souligné est le mien.]

37 As is obvious from s. 4 of the TA, the purpose of the TA is to protect the health of Canadians and, more particularly, to protect young persons from inducement to use tobacco products and to restrict their access to these products. That is why s. 19 of the TA prohibits the promotion of

tobacco products, except as authorized by the TA or the Regulations made thereunder. Section 29, the heading of which is "Sales promotions," falls under Pt. V of the TA, entitled "Promotion."

38 The applicants argue that the sale of multi-packs does not offend the intent, purpose, primary focus or overriding objective of the TA, nor does it result in the harm for which that legislation was enacted to prevent. Rather, according to the applicant, the sale of multi-packs simply reflects its internal pricing strategy and economic decision to generate less profit, on a per-pack basis, on the sale of multiple packs of cigarettes, in response to the pricing strategies pursued by its competitors in the highly competitive environment and business of retail cigarette sales. The applicant further argues that is selling strategy does not constitute a means to promote the sale of cigarettes by influencing or shaping attitudes, beliefs and behaviours about cigarettes, as contemplated and prohibited by ss. 18 and 29 of the TA.

39 In arguing that the sale of multi-packs offends s. 29, the respondents submit that the meaning of s. 29 can be informed by the use of the word "unit" and by the apparent meaning that they have ascribed to that word. In the direction sent the applicant, the respondents took the view that a "unit" was either an unopened carton of cigarettes or a single pack of cigarettes. Thus, in the respondents' view, retailers were free to set the selling price of their tobacco products, i.e., of the "unit." Since multi-packs are not "units," they cannot be sold, according to the respondents, at a price which is inferior to the selling price of one individual pack. The respondents' position appears at paras. 52 to 54 of their Memorandum of Fact and Law, which read as follows:

> 52. In response to paragraphs 57-61, while there is no definition of the term "unit" in the Act, the interpretation put forward by the Respondents' [sic] in the impugned letters is an [sic] accord with scheme. The use of the word unit was simply illustrative.
>
> 53. Currently the reality, which is confirmed by the Applicant's own evidence and which is sufficiently notorious in any event that this Honourable Court could take judicial notice of the fact, is that cigarettes are sold either in a single package or in a carton of 8 packages.
>
> 54. Prices may be set for the carton or the package as a matter of convenience and because of the nature in which they are produced. Once, however, a carton is broken down, it becomes a compilation of 8 separate packages. There is no evidence on record that cigarette packages come in smaller cartons or mini-cartons. Consequently, the applicant is offering an incentive for a purchaser to buy more than one package of cigarettes. That is, more than one unit.

40 Unfortunately for the respondents, I see no merit in this submission. The term "unit" is nowhere defined in the TA, nor in the Regulations made thereunder. [2] The definition of "tobacco product" found in s. 2 of the TA does not include, nor refer to, the term "unit." The fact that tobacco

is generally sold in cartons or in individual packs is, in my view, of no relevance whatsoever in regard to the interpretation of para. 29(a) of the TA.

41 The only question, as I have already stated, is whether the sale of multi-packs constitutes a cash rebate under para. 29(a). In *R. c. Rothmans, Benson & Hedges* (May 3, 1996), nº Montréal 500-27-000567-919 (C.Q.), the defendant was charged as follows:

> At Montreal, in the district of Montreal, on or about the 20th of November 1990, being a distributor, illegally offered a cash rebate in exchange for the purchase of a tobacco product, namely: an offer of a cash rebate of $1.00 for each of 800 cartons of Mark Ten cigarettes, 8 packages × 25 cigarettes, King size, sold to Sue Shang Wholesale Red., thereby committing an infraction foreseen by Sections 7(2) and 18(1)(i)(a)(i) of the *Tobacco Products Control Act*, S.C. 1988, c. 20.

42 The issue before the Court was whether the method by which the defendant promoted the sale of its Mark Ten cigarettes constituted a "cash rebate" within the meaning of the *Tobacco Products Control Act*, the predecessor Act to the TA. Subsection 7(2) of that Act provided as follows:

> No person shall offer any gift or cash rebate . . . to the purchaser of a tobacco product in consideration of the purchase thereof or to any person in consideration of the furnishing of evidence of such a purchase.

43 After a careful review of the dictionary meanings of the words "rebate" and "remise" and the relevant case law, Mr. Justice Morand of the Cour du Québec concluded as follows, at p. 5:

> It appears from all of these definitions that the words "rebate" and "remise" refer to a reduction of price of a manufactured product at the moment of the purchase of this product or following its purchase. The Court can also take direction from the text of the Act where these words are written. In Section 7(2), the Legislator has indicated that it is prohibited to offer a gift or a cash rebate. It could have added "a rebate, a reductio in price", which it did not do. For the Court, the fact of selling a product at a determined price cannot constitute a cash rebate.
>
> In this case, the accused had sold to a wholesaler a quantity of cigarettes at a determined price. As the Legislator did not prohibit the sale of cigarettes nor legislate as to the manner to set prices, the accused benefited from all its rights to sell its products at a reasonable price fixed according to its choice. The fact of selling a brand of cigarettes at a price different that of another brand is not prohibited by the Legislator. *What is prohibited, is to give a gift or to give a cash rebate in exchange for the purchase of cigarettes*. In this case, there is no evidence that the wholesaler had received a gift or was offered a cash rebate following its purchase. It only paid the price set by the accused without any other reward. [Emphasis added.]

> By way of example, every week we receive at home a "Public-Sac" containing flyers from the principal grocery retailers. We find coupons therein, which, when presented at the moment of purchase of a product, shall be deducted from the total amount of the bill. This is a cash rebate offered by the manufacturer in exchange for a purchase.
>
> In the present case, there has not been a cash rebate; there has been a sale at a slightly lesser price on one brand of cigarettes, which is not prohibited by the Legislator.

44 I agree entirely with Mr. Justice Morand's reasoning and, in particular, that the promotional scheme before him did not constitute a cash rebate so as to render the defendant guilty of an infraction under subs. 7(2) of the *Tobacco Products Control Act*.

45 In my view, the sale of multi-packs by the applicant, at a reduced per-pack price, does not constitute a "cash rebate" under para. 29(a) of the TA. I agree with the submission put forward by the applicant that the sale of multi-packs is a reflection of its internal pricing strategy and economic decision as a result of which less profit, on a per-pack basis, is generated on the sale of multi-packs. The applicant's strategy, in my view, is not tantamount to promoting tobacco products, which practice is prohibited by s. 18 and para. 29(a) of the TA.

46 On my reading of para. 29(a) of the TA, I fail to understand the respondents' submission that the sale of multi-packs constitutes a cash rebate or a consideration for the purchase of tobacco products. The non-exhaustive list of examples given by Parliament in para. 29(a) of the TA is, in my view, a clear indication of what Parliament had in mind when it prohibited the giving of any consideration for the purchase of tobacco products. The list includes "a gift to a purchaser or a third party, bonus, premium, cash rebate or right to participate in a game, lottery or contest." I cannot agree that the sale of two packs of cigarettes at a price which is slightly inferior to that of two packs sold individually, falls within the same category as the examples given by Parliament. Thus, the applicant's selling strategy does not constitute either a cash rebate or a consideration of the type which Parliament had in mind when it enacted para. 29(a) of the TA.

47 It goes without saying that I have difficulty seeing how the sale of a multi-pack of cigarettes can constitute a cash rebate, if the sale of a carton does not. In both cases, the customer pays a per pack price which is inferior to the per pack price of cigarettes sold individually. Parliament clearly decided, in my view, not to address the pricing of cigarettes and, as a result, did not include pricing strategies, of the type used herein by the applicant, in the conduct which it sought to prohibit. Had it done so, the TA and, more particularly, para. 29(a) would have been worded differently.

48 In my view, the applicant, in selling multi-packs of cigarettes, did not offer or provide any consideration, direct or indirect, to its clients for the purchase of tobacco products. As a result, the applicant is entitled to the following declaration:

The sale by the applicant of multi-packs of cigarettes for a per pack price less than the price charged on the sale of single packs of cigarettes sold individually, does not constitute, under para. 29(a) of the TA, a "cash rebate" offered to customers.

The applicant shall be entitled to its costs.

Application granted.

Footnotes

1 I am using the word "direction" because that is the word which the applicant has used in its Notice of Application filed on October 11, 2000, to characterize the letter which is at issue in these proceedings. However, the respondents contest the use of the word "direction" for the letter which they sent to the applicant.

2 This is not entirely correct, since the *Tobacco Products Information Regulations*, SOR/2000-272, made pursuant to s. 33 of the TA, define the word "unit" as follows: "(a) a cigarette; (b) a cigar; (c) a tobacco stick; (d) a kretek; or (e) a bidi." The Regulations also define the word "carton" in the following terms: " . . . a package intended to be sold to consumers and that contains two or more packages of a tobacco product, other than a tube, a filter or cigarette paper."

I should also note that s. 10 of the TA prohibits the sale of cigarettes in a package containing less that 20 cigarettes.

2010 FC 806, 2010 CF 806
Federal Court

Latimer v. Canada (Attorney General)

2010 CarswellNat 2688, 2010 CarswellNat 3412, 2010 FC 806, 2010 CF 806, [2010] F.C.J. No. 970, [2011] 4 F.C.R. 88, 372 F.T.R. 110 (Eng.), 89 W.C.B. (2d) 424

Robert Latimer, Applicant and Attorney General of Canada, Respondent

Anne Mactavish J.

Heard: July 26, 2010
Judgment: August 5, 2010
Docket: T-1997-09

Counsel: Jason Gratl, for Applicant
Susanne Pereira, for Respondent

Subject: Criminal

***Anne Mactavish J.*:**

1 Robert Latimer was convicted of second degree murder in relation to the death of his profoundly disabled daughter, Tracy. He now seeks judicial review of a decision of the Appeal Division of the National Parole Board confirming the refusal of his request for expanded leave privileges reducing the number of nights each week that he is required to return to a Community Release Facility (or "halfway house").

2 The Appeal Division found that Mr. Latimer had not established the existence of "exceptional circumstances" justifying a reduction in his nightly reporting requirements, as contemplated by Chapter 4.1 of the National Parole Board's Policy Manual.

3 Mr. Latimer submits that the Appeal Division erred in law in applying the "exceptional circumstances" test to his application. According to Mr. Latimer, there is no basis for such a test under the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (*CCRA*). He further submits that requiring an offender to establish the existence of exceptional circumstances is in fact inconsistent with the express mandatory provisions of the statute.

4 For the reasons that follow, I find that Chapter 4.1 of the National Parole Board's Policy Manual unlawfully fetters the discretion of Board members as it relates to the reduction of offenders' nightly reporting requirements. Consequently, the application for judicial review will be allowed.

Background

5 Following his conviction for second degree murder in 2001, Mr. Latimer was sentenced to life imprisonment, with eligibility for full parole after 10 years.

6 The Appeal Division of the National Parole Board granted day parole to Mr. Latimer in February of 2008. He was released from prison in March of 2008 on conditions that included the requirement that he live in a halfway house, that he continue with psychological counselling, and that he not have responsibility for any severely disabled individuals.

7 Mr. Latimer initially lived in Ottawa after his release on day parole. However, in September of 2008, the Board altered the conditions of his release to allow for the transfer of his supervision to Victoria, British Columbia. Mr. Latimer had previously lived in Victoria, and had family ties in that city. The Board's decision allowed Mr. Latimer "to pursue a reintegration plan involving further vocational training to obtain certification as an electrician."

8 The conditions of Mr. Latimer's day parole currently permit him to spend two nights a week at his apartment in Victoria, while spending the remaining five nights at a halfway house. This is known as a "two and five". Mr. Latimer has also been granted periodic extended leave privileges to allow him to visit his family in Saskatchewan.

9 After 16 months in the community without incident, Mr. Latimer sought to be granted a "five and two". This would allow him to spend five nights each week at his apartment, and two nights a week at the halfway house. His application for a five and two was supported by the "Assessment for Decision" prepared by his Parole Supervisor. This assessment observed that Mr. Latimer's risk of re-offending had been judged to be "very low". The Parole Supervisor further noted that Mr. Latimer's request for a five and two was supported by the staff of the halfway house, and by Mr. Latimer's wife.

10 It was further noted that at the time of the assessment, Mr. Latimer was maintaining gainful employment doing electrical work, and was engaged in an apprenticeship program. He was scheduled to start the classroom component of his electrician's program in October of 2009, when, in addition to attending classes, he would also continue to work part-time. In addition to his employment and vocational training, Mr. Latimer maintained responsibility for the management of the family farm in Saskatchewan.

11 The Parole Supervisor also observed that Mr. Latimer had demonstrated commitment to pursuing his vocational goals, and had been compliant with the conditions of his release. The assessment noted that a five and two would assist Mr. Latimer by allowing him additional time to fulfill his responsibilities to his family, his farm and his vocational training. The additional time spent at his apartment would "further assist him to continue leading a productive and constructive lifestyle". In the view of Mr. Latimer's Parole Supervisor, not only would his risk remain manageable if he were granted a five and two, in addition, expanded leave would address the "particular and exceptional needs of this case".

12 An addendum to the assessment advised that Mr. Latimer's request for a five and two was also supported by his psychologist.

13 In August of 2009, the National Parole Board denied Mr. Latimer's application for a five and two. The Board found that while Mr. Latimer was successfully reintegrating into the community and was abiding by his release conditions, his situation did not meet the test of "exceptional circumstances" set out in Chapter 4.1 of the National Parole Board's Policy Manual.

14 The Board further observed that while Mr. Latimer's efforts were commendable, his long-distance responsibilities were "self-imposed", and that a regional transfer to be closer to his family would alleviate his concerns. The Board expressly declined to consider Mr. Latimer's submission that the "exceptional circumstances" test conflicted with other Board policies and with the provisions of the *Corrections and Conditional Release Act*.

15 The Board's decision was subsequently affirmed by the Board's Appeal Division, which noted that Chapter 4.1 of the National Parole Board's Policy Manual provided that the Board "may reduce the nightly reporting requirement so the offender is not required to report for extended periods in exceptional circumstances, when all other options have been considered and judged inappropriate and only in order to meet the particular needs of the case". The Appeal Division observed that the Board "did not have the authority to disregard NPB policy on Expanded Leave Privileges, including the test of exceptional circumstances, which allows for a less restrictive measure than the residency condition for day parole that is prescribed in law."

16 The Appeal Division held that the Board's conclusion that Mr. Latimer had not met the test of exceptional circumstances was "reasonable, well supported and consistent with the law and Board policy". The Appeal Division further found that Mr. Latimer could "choose less onerous ways to manage [his] day" and that his case was "not unlike other offenders who work hard to successfully reintegrate [into] society after a lengthy incarceration." The Appeal Division also noted the Board's finding that Mr. Latimer enjoyed "expanded leave privileges beyond the norm for other offenders and that [Mr. Latimer had] been accommodated on several occasions when requesting further leave."

Issue

17 Mr. Latimer initially characterized the issue on this application as being one of statutory interpretation. However, based upon his oral submissions, I understand the real issue to be whether the Board and the Appeal Division erred in law and fettered their discretion by applying a test of "exceptional circumstances" in assessing Mr. Latimer's request for an amendment to the conditions of his day parole.

Standard of Review

18 The parties agree that decisions of the Appeal Division will generally be reviewed against the reasonableness standard. Citing *Khosa v. Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.) and *Latham v. R.*, 2006 FC 284, 288 F.T.R. 37 (Eng.) (F.C.), the respondent says that this standard should apply in Mr. Latimer's case, submitting that the decision falls squarely within the Appeal Division's specialized area of expertise.

19 Mr. Latimer submits that the standard of review on an issue of statutory interpretation by the National Parole Board is that of correctness: *Dixon v. Canada (Attorney General)*, 2008 FC 889, 331 F.T.R. 214 (F.C.) at para. 10.

20 I agree with Mr. Latimer that the appropriate standard of review in this case is that of correctness. As discussed earlier, his arguments raise questions of procedural fairness and the unlawful fettering of discretion. The Federal Court of Appeal held in *Thamotharem v. Canada (Minister of Citizenship & Immigration)*, 2007 FCA 198, 366 N.R. 301 (F.C.A.), that such matters are reviewable on the correctness standard: at para. 33.

The Legislative Scheme

21 In order to put Mr. Latimer's arguments into context, it is first necessary to have an understanding of the legislative scheme governing decisions such as the one at issue in this case. The relevant statutory provisions are summarized below, and the full text of these provisions is attached as an appendix to this decision.

22 The *Corrections and Conditional Release Act* and Regulations constitute the framework under which the National Parole Board makes its decisions. Section 3 of the *CCRA* identifies the purpose of the federal correctional system as being "to contribute to the maintenance of a just, peaceful and safe society by carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders" and to assist in "the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community".

23 Among other responsibilities, the Board acts as an independent administrative tribunal to make determinations regarding day and full parole. Section 107 of the Act gives the Board exclusive jurisdiction and absolute discretion in this regard.

24 Parole decisions are governed by section 102 of the *CCRA*. Two criteria are identified in this section governing the granting of parole. The Board may grant parole to an offender if it is of the opinion that "the offender will not, by re-offending, present an undue risk to society before the expiration according to law of the sentence the offender is serving". In addition, the Board must be satisfied that the release of the offender on parole "will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen".

25 "Day parole" is defined by section 99 of the *CCRA* as "the authority granted to an offender by the Board ... to be at large during the offender's sentence in order to prepare the offender for full parole or statutory release, the conditions of which require the offender *to return to ... a community-based residential facility ... each night, unless otherwise authorized in writing*" [emphasis added]. The respondent describes these expanded leave privileges as "an intermediary level of liberty between normal day parole restrictions and full parole": respondent's memorandum of fact and law at para. 24.

26 Day parole is a form of conditional release and is governed by the basic principles set out in section 100 and 101 of the Act: see *Cartier c. Canada (Procureur général)*, 2002 FCA 384, 300 N.R. 362 (Fed. C.A.), at para. 13.

27 Section 100 of the *CCRA* identifies the purpose of conditional release as being "to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens".

28 Section 101 of the *CCRA* articulates the statutory principles guiding parole boards "in achieving the purpose of conditional release". It provides that the paramount consideration in the determination of any case is the protection of society: subsection 101(a). Another statutory principle guiding parole boards is that they are to make "the least restrictive determination consistent with the protection of society": subsection 101(d). Amongst other things, parole boards are directed to take all available information, including the reasons and recommendations of the sentencing judge, into account in considering whether conditional release is appropriate in a given case: subsection 101(b).

29 The legislative scheme specifically contemplates the making of policies guiding parole boards. Subsection 101(e) of the *CCRA* authorizes boards, including the National Parole Board, to "adopt and be guided by appropriate policies" and directs that Board members are to "be provided with the training necessary to implement those policies".

30 Section 151 of the Act authorizes the Executive Committee of the Board to adopt policies relating to reviews dealing with conditional release, detention and long-term supervision. Such policies are to be promulgated after such consultation with Board members as the Executive Committee considers appropriate. Board members are directed by subsection 105(5) of the *CCRA* to "exercise their functions in accordance with policies adopted pursuant to subsection 151(2)".

The National Parole Board Policy Manual

31 A Policy Manual has been adopted by the National Parole Board under the authority of section 151 of the *CCRA*. Chapter 7.2 of the Manual deals with "Residency and Day Parole Leave Privileges" and observes that the Board is responsible "for establishing the parameter of leave privileges to be associated with an approved day parole, or parole or statutory release that is subject to a residency condition". The Policy Manual goes on to note that the Board "entrusts to those who are responsible for the day-to-day supervision and care of these offenders, the manner in which the leave privileges will be implemented".

32 Chapter 7.2 identifies what will "normally" be the maximum leave privileges which will be authorized by the Board. It observes that "the institutional head, the director of the residential facility or the CSC District Director, as the case may be and in conjunction with the parole supervisor, will determine how and when the Board authorized leave privileges are to be implemented".

33 Factors to be considered in arriving at this determination include "the offender's progress in achieving the objectives of the release in relation to the correctional plan". The policy further noted that "[a]dditional leave privileges may not be granted unless approved in writing by the Board".

34 For inmates such as Mr. Latimer living in community residential facilities, the policy provides that "[l]eave privileges may be granted in accordance with the basic rules and regulations of the community residential facility, unless the Board members have indicated specifically what those leave privileges are to be as part of the release plan...".

35 The parties agree that in accordance with this section of the Manual, weekend passes may be authorized by the offender's parole supervisor or the head of the Community Release Facility. Mr. Latimer's two and five was evidently granted under this authority. However, any further reduction in his reporting requirements had to be approved in writing by the Board.

36 Chapter 4.1 of the Policy Manual deals with "expanded periods of leave" and is the provision at the heart of this proceeding. It provides that the Board may reduce the nightly reporting requirements so the offender is not required to report for extended periods of time "*in exceptional circumstances*, when all other options have been considered and judged inappropriate, and only in order to meet the particular needs of the case" [emphasis added].

37 The Manual goes on to state that "[t]he Board may consider expanded leave to be responsive to the needs of female, aboriginal, ethnic minority or special needs offenders". It is common ground that this latter provision does not apply to Mr. Latimer.

38 It will be recalled that Mr. Latimer's request for a "five and two" was turned down on the basis that he had not demonstrated the existence of exceptional circumstances justifying the granting of such a measure.

Analysis

39 It should be noted at the outset that while Mr. Latimer's application for judicial review technically relates to the decision of the Appeal Division of the National Parole Board, where, as here, the Appeal Division has affirmed the Board's decision, it is the duty of this Court to ensure that the Board's decision is lawful: see *Cartier*, above, at para. 10.

40 In addressing this question, it is first necessary to examine the law relating to the status and use of guidelines such as the Policy Manual in issue in this case.

i) The Legal Status of the National Parole Board's Policy Manual

41 As the Federal Court of Appeal observed in *Thamotharem*, above, guidelines may, in some circumstances, constitute delegated legislation having the full force of law ("hard law"). In such cases, the instrument in question cannot be characterized as an unlawful fetter on the tribunal members' exercise of discretion: see para. 65, and see *Bell Canada v. C.T.E.A.*, 2003 SCC 36, [2003] 1 S.C.R. 884 (S.C.C.) at para 35.

42 Although the Executive Committee of the National Parole Board is statutorily authorized to adopt policies relating to the granting of conditional release, including day parole, the Policy Manual in issue in this case cannot, in my view, be viewed as delegated legislation or "hard law".

43 In coming to this conclusion, the National Parole Board's Policy Manual may be contrasted with the Guidelines issued by the Canadian Human Rights Commission that were in issue before the Supreme Court in the *Bell Canada* case. These Guidelines were found by the Supreme Court to be "akin to regulations": *Bell Canada* at para. 37.

44 One factor influencing the Supreme Court's finding in *Bell Canada* that the Commission Guidelines amounted to "hard law" was the fact that, like regulations, the Commission's Guidelines were subject to the Statutory Instruments Act, R.S.C. 1985, c. S-22, and had to be published in the Canada Gazette.

45 Moreover, the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 expressly provided that Commission Guidelines were binding on members of the Canadian Human Rights Tribunal dealing

with complaints of discrimination referred to it by the Commission. While subsection 105(5) of the *CCRA* does direct members to exercise their functions in accordance with Board policies, there is no provision in the Act expressly stating that the provisions of the National Parole Board's Policy Manual are binding on Board members.

46 The Supreme Court was also influenced by the fact that the French text of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, empowered the Commission to set out its interpretation of the legislation "*par ordonnance*". According to the Supreme Court, this "leaves no doubt that the guidelines are a form of law": *Bell Canada* at para. 37, (emphasis in the original).

47 In contrast, subsection 151(2) of the *CCRA* authorizes the Executive Committee of the National Parole Board to "adopt policies" (établit des directives") relating to reviews such as that in issue in this case. It is noteworthy that in *Thamotharem*, Justice Evans held that the use of the word "*directives*" in the French text of the *Immigration and Refugee Protection Act* suggested "a less legally authoritative instrument than '*ordonnance*'": at para. 71.

48 Thus, the National Parole Board's Policy Manual is closer in nature to the Chairperson's Guidelines at issue in *Thamotharem* than it is to the Commission Guidelines at issue in *Bell Canada*. As a consequence, it is more properly characterized as a "soft law" instrument that does not have the full force of law.

49 Before leaving this point, I would note that my conclusion regarding the legal status of the Board's Policy Manual is consistent with the decision of Justice Lemieux in *Sychuk v. Canada (Attorney General)*, 2009 FC 105, 340 F.T.R. 160 (Eng.) (F.C.) at para. 11.

ii) Is the Policy Manual an Unlawful Fetter on Board Members' Discretion?

50 The next question, then, is whether Chapter 4.1 of the Policy Manual is nevertheless an unlawful fetter on Board members' discretion. In my view, it is.

51 While non-statutory guidelines or policy manuals designed to assist administrative tribunals in carrying out their mandates are appropriate, there are limits on the use that can be made of such instruments.

52 In *Ainsley Financial Corp. v. Ontario (Securities Commission)* (1994), 21 O.R. (3d) 104 (Ont. C.A.), the Ontario Court of Appeal examined the limitations on non-statutory guidelines at paragraph 14 of its reasons, articulating the following principles:

> (1) a non-statutory instrument can have no effect in the face of contradictory statutory provision or regulation;
>
> (2) a non-statutory instrument cannot pre-empt the exercise of a regulator's discretion in a particular case;

(3) a non-statutory instrument cannot impose mandatory requirements enforceable by sanction; that is, the regulator cannot issue de facto laws disguised as guidelines.

53 Similarly, in *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing, 1998), Brown and Evans observe that a guideline will be invalid "if it is inconsistent with or in conflict with a statutory provision, or if it deals with a matter outside an agency's statutory authorization, whether or not it imposes duties enforceable in the courts: at para. 15:3283.

54 I agree with the respondent that it is inarguably within the Board's discretion to determine when a deviation from the normal statutory reporting requirements will be warranted. That said, a policy stating that members may only reduce an offender's nightly reporting requirements "in exceptional circumstances", and then only when "all other options have been considered and judged inappropriate" is inconsistent with the statutory principles that Parliament has directed the National Parole Board to apply in relation to the granting of conditional release, including day parole.

55 In particular, it is inconsistent with the principle that, in achieving the purpose of conditional release, parole boards are to make the least restrictive determination consistent with the protection of society: subsection 101(d).

56 In accordance with subsection 99(1) of the *CCRA*, offenders on day parole must return to the institution in which they are housed each evening, *unless otherwise authorized in writing*. Discretion is thus conferred on the Board to authorize extended leave. The only condition imposed by section 99 of the Act is that there must be written authorization when the Board's discretion is exercised in the offender's favour in relation to the reporting requirement. That said, the Board's discretion to authorize extended periods of leave must nevertheless be exercised in a manner consistent with the principles articulated in the *CCRA*.

57 Chapter 4.1 of the National Parole Board's Policy Manual is not consistent with the provisions of the *CCRA* governing day parole. This inconsistency is demonstrated by the facts of Mr. Latimer's case.

58 The paramount consideration in the determination of any application for day parole is the protection of society: *CCRA*, subsection 101(a). Mr. Latimer has been determined to be at low risk of re-offending. There is nothing in the reasons of either the Board or the Appeal Division to suggest that the need to protect society played any role in the Board's decision to deny extended leave privileges. Indeed the Board itself noted that no concerns had been identified with respect to Mr. Latimer's behavior in the community.

59 In this regard, it is also noteworthy that the Supreme Court of Canada itself recognized that "the sentencing principles of rehabilitation, specific deterrence and protection [were] not triggered

for consideration" in Mr. Latimer's case: see *R. v. Latimer*, 2001 SCC 1, [2001] 1 S.C.R. 3 (S.C.C.) at para. 86. It will be recalled that, subsection 101(b) directs the Board take into consideration all available information relevant to the case, including the stated reasons and recommendations of the sentencing judge.

60 Thus, although the evidence before the Board indicated that a reduction in Mr. Latimer's reporting requirements would not present any real risk to public safety or adversely affect the protection of society, this was not properly taken into account by the Board, as the Board was required by Chapter 4.1 of the Policy Manual to limit its consideration to whether or not Mr. Latimer had demonstrated the existence of "exceptional circumstances" justifying a loosening of the conditions of his day parole.

61 Other relevant information before the Board included the positive recommendation in the "Assessment for Decision" carried out by Mr. Latimer's Parole Supervisor, along with the endorsement of the application by both his wife and his psychologist. While this information was referred to by the Board, it was only considered in assessing whether there were exceptional circumstances justifying a loosening of Mr. Latimer's reporting requirements, rather than in determining whether a five and two was the least restrictive measure consistent with the protection of society.

62 In assessing whether Mr. Latimer had demonstrated the existence of exceptional circumstances justifying a five and two, the Appeal Division also had regard to the fact that he could "choose less onerous ways to manage [his] day" (a statement with which Mr. Latimer does not agree). Whether or not this is the case, it is irrelevant to the question of whether loosening the conditions of Mr. Latimer's day parole was consistent with the governing principles of the *CCRA*. So too is the Appeal Division's observation that Mr. Latimer already enjoyed "expanded leave privileges beyond the norm for other offenders and that [he had] been accommodated on several occasions when requesting further leave."

63 Whether Mr. Latimer has enjoyed more or less liberty than other offenders is not the question. It is clear from the *CCRA* that in making the least restrictive determination, the Board has to carefully tailor the conditions of an offender's release having regard to all of the particular circumstances of the individual offender. How the leave privileges granted to Mr. Latimer compare to those granted to other offenders is irrelevant. Moreover, as was noted in the Assessment for Decision, the circumstances of Mr. Latimer's index offence are indeed "unique".

64 The "exceptional circumstances" test also ignores other statutorily-mandated principles. Thus no real consideration was given by the Board to whether a loosening of Mr. Latimer's reporting requirements after the successful completion of 16 months in the community would contribute to his reintegration into society (*CCRA* subsection 102(b)) or his rehabilitation (section 100).

65 For these reasons, I am satisfied that Chapter 4.1 of the Board's Policy Manual has the effect of precluding Board members from imposing the least restrictive measures consistent with the protection of the public where the particular situation of an individual offender is not deemed to be "exceptional" by the Board.

66 By limiting the ability of Board members to examine the individual merits of each case according to the relevant statutory principles identified in the *CCRA*, the Manual thus unlawfully fetters members' statutory discretion: see *Fahlman (Guardian ad litem of) v. Community Living British Columbia*, 2007 BCCA 15, 154 A.C.W.S. (3d) 958 (B.C. C.A.) at paras. 43-56; *Gregson v. Canada (National Parole Board)* (1982), [1983] 1 F.C. 573 (Fed. T.D.).

67 Before closing, there are two additional matters that require comment.

68 The first is that in addition to its inconsistency with the provisions of the *CCRA*, there is also an element of arbitrariness to Chapter 4.1 of the Policy Manual. Counsel for the respondent submitted in argument that two and five passes "further prepare offenders for eventual full parole". However, no explanation was provided as to why a two and five may be both an appropriate intermediate step in light of the unexceptional personal circumstances of an offender and consistent with the day parole provisions of the *CCRA*, whereas a "three and four", or a "four and three", or a five and two could only appropriate in "exceptional circumstances, when all other options have been considered and judged inappropriate".

69 The second point that requires comment is the respondent's argument that "[i]f public safety were the only consideration, it follows that all offenders that do not pose a risk to the public would be granted a 'six and one' parole arrangement, which constitutes the least restrictive measure of liberty without reaching full parole": respondent's memorandum of fact and law at para. 36.

70 I do not accept this argument. As is clear from the above analysis, the *CCRA* identifies a series of principles to be applied by the Board in determining the appropriate conditions to be attached to the conditional release of offenders. In addition to public safety and the least restrictive determination considerations, Board members must also take the statutory purpose of day parole into account, including the reintegration and rehabilitation of offenders.

71 That is, matters such as the nature, requirements and progress of the offender's individual rehabilitation plan and his or her track record of compliance are all part of the incremental, nuanced approach to the discretionary decision-making process prescribed by the *CCRA* and precluded by Chapter 4.1 of the National Parole Board's Policy Manual.

Conclusion

72 For these reasons, the application for judicial review is allowed, and the decision of the Appeal Division is set aside. The matter is remitted to the National Parole Board for re-determination in accordance with these reasons, without regard to the "exceptional circumstances" test set out in Chapter 4.1 of the Board's Policy Manual.

73 I note that Mr. Latimer is eligible for full parole on December 8, 2010. Accordingly, I am directing the Board to proceed with its re-determination on an expedited basis so that in the event that a positive decision is made with respect to Mr. Latimer's application for reduced reporting requirements, it may be of some practical benefit to him.

Judgment

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, with costs.

2. The matter is remitted to a differently constituted panel of the National Parole Board for re-determination on an expedited basis in accordance with these reasons, without regard to the "exceptional circumstances" test set out in Chapter 4.1 of the Board's Policy Manual.

Appendix

CORRECTIONS AND CONDITIONAL RELEASE ACT, S.C. 1992, C. 20

Purpose of correctional system

3. The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by

(a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and

(b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.

Definitions

99. (1) In this Part,

"day parole"

« *semi-liberté* »

"day parole" means the authority granted to an offender by the Board or a provincial parole board to be at large during the offender's sentence in order to prepare the offender for full parole or statutory release, the conditions of which require the offender to return to a penitentiary, a community-based residential facility or a provincial correctional facility each night, unless otherwise authorized in writing;

Purpose of conditional release

100. The purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens.

Principles guiding parole boards

101. The principles that shall guide the Board and the provincial parole boards in achieving the purpose of conditional release are

(a) that the protection of society be the paramount consideration in the determination of any case;

(b) that parole boards take into consideration all available information that is relevant to a case, including the stated reasons and recommendations of the sentencing judge, any other information from the trial or the sentencing hearing, information and assessments provided by correctional authorities, and information obtained from victims and the offender;

(c) that parole boards enhance their effectiveness and openness through the timely exchange of relevant information with other components of the criminal justice system and through communication of their policies and programs to offenders, victims and the general public;

(d) that parole boards make the least restrictive determination consistent with the protection of society;

(e) that parole boards adopt and be guided by appropriate policies and that their members be provided with the training necessary to implement those policies; and

(f) that offenders be provided with relevant information, reasons for decisions and access to the review of decisions in order to ensure a fair and understandable conditional release process.

Criteria for granting parole

102. The Board or a provincial parole board may grant parole to an offender if, in its opinion,

(a) the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and

(b) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen.

Policies

105. (5) Members of the Board shall exercise their functions in accordance with policies adopted pursuant to subsection 151(2).

Jurisdiction of Board

107. (1) Subject to this Act, the *Prisons and Reformatories Act*, the *International Transfer of Offenders Act*, the *National Defence Act*, the *Crimes Against Humanity and War Crimes Act* and the *Criminal Code*, the Board has exclusive jurisdiction and absolute discretion

(a) to grant parole to an offender;

(b) to terminate or to revoke the parole or statutory release of an offender, whether or not the offender is in custody under a warrant of apprehension issued as a result of the suspension of the parole or statutory release;

(c) to cancel a decision to grant parole to an offender, or to cancel the suspension, termination or revocation of the parole or statutory release of an offender;

(d) to review and to decide the case of an offender referred to it pursuant to section 129; and

(e) to authorize or to cancel a decision to authorize the unescorted temporary absence of an offender who is serving, in a penitentiary,

(i) a life sentence imposed as a minimum punishment or commuted from a sentence of death,

(ii) a sentence for an indeterminate period, or

(iii) a sentence for an offence set out in Schedule I or II.

[...]

Decision on Appeal

147. (1) An offender may appeal a decision of the Board to the Appeal Division on the ground that the Board, in making its decision,

(a) failed to observe a principle of fundamental justice;

(b) made an error of law;

(c) breached or failed to apply a policy adopted pursuant to subsection 151(2);

(d) based its decision on erroneous or incomplete information; or

(e) acted without jurisdiction or beyond its jurisdiction, or failed to exercise its jurisdiction.

[...]

(4) The Appeal Division, on the completion of a review of a decision appealed from, may

(a) affirm the decision;

(b) affirm the decision but order a further review of the case by the Board on a date earlier than the date otherwise provided for the next review;

(c) order a new review of the case by the Board and order the continuation of the decision pending the review; or

(d) reverse, cancel or vary the decision.

Functions

151. (2) The Executive Committee

(a) shall, after such consultation with Board members as it considers appropriate, adopt policies relating to reviews under this Part;

But du système correctionnel

3. Le système correctionnel vise à contribuer au maintien d'une société juste, vivant en paix et en sécurité, d'une part, en assurant l'exécution des peines par des mesures de garde et de surveillance sécuritaires et humaines, et d'autre part, en aidant au moyen de programmes appropriés dans les pénitenciers ou dans la collectivité, à la réadaptation des délinquants et à leur réinsertion sociale à titre de citoyens respectueux des lois.

Définitions

99. (1) Les définitions qui suivent s'appliquent à la présente partie.

« semi-liberté »

"*day parole*"

« semi-liberté » Régime de libération conditionnelle limitée accordé au délinquant, pendant qu'il purge sa peine, sous l'autorité de la Commission ou d'une commission provinciale en vue de le préparer à la libération conditionnelle totale ou à la libération d'office et dans le cadre duquel le délinquant réintègre l'établissement résidentiel communautaire, le pénitencier ou l'établissement correctionnel provincial chaque soir, à moins d'autorisation écrite contraire.

Objet

100. La mise en liberté sous condition vise à contribuer au maintien d'une société juste, paisible et sûre en favorisant, par la prise de décisions appropriées quant au moment et aux conditions de leur mise en liberté, la réadaptation et la réinsertion sociale des délinquants en tant que citoyens respectueux des lois.

Principes

101. La Commission et les commissions provinciales sont guidées dans l'exécution de leur mandat par les principes qui suivent:

a) la protection de la société est le critère déterminant dans tous les cas;

b) elles doivent tenir compte de toute l'information pertinente disponible, notamment les motifs et les recommandations du juge qui a infligé la peine, les renseignements disponibles lors du procès ou de la détermination de la peine, ceux qui ont été obtenus des victimes et des délinquants, ainsi que les renseignements et évaluations fournis par les autorités correctionnelles;

c) elles accroissent leur efficacité et leur transparence par l'échange de renseignements utiles au moment opportun avec les autres éléments du système de justice pénale d'une part, et par la communication de leurs directives d'orientation générale et programmes tant aux délinquants et aux victimes qu'au public, d'autre part;

d) le règlement des cas doit, compte tenu de la protection de la société, être le moins restrictif possible;

e) elles s'inspirent des directives d'orientation générale qui leur sont remises et leurs membres doivent recevoir la formation nécessaire à la mise en oeuvre de ces directives;

f) de manière à assurer l'équité et la clarté du processus, les autorités doivent donner aux délinquants les motifs des décisions, ainsi que tous autres renseignements pertinents, et la possibilité de les faire réviser.

Critères

102. La Commission et les commissions provinciales peuvent autoriser la libération conditionnelle si elles sont d'avis qu'une récidive du délinquant avant l'expiration légale de la

peine qu'il purge ne présentera pas un risque inacceptable pour la société et que cette libération contribuera à la protection de celle-ci en favorisant sa réinsertion sociale en tant que citoyen respectueux des lois.

Directives d'orientation générale

105. (5) Les membres exercent leurs fonctions conformément aux directives d'orientation générale établies en application du paragraphe 151(2).

Compétence

107. (1) Sous réserve de la présente loi, de la Loi sur les prisons et les maisons de correction, de la Loi sur le transfèrement international des délinquants, de la Loi sur la défense nationale, de la Loi sur les crimes contre l'humanité et les crimes de guerre et du Code criminel, la Commission a toute compétence et latitude pour:

a) accorder une libération conditionnelle;

b) mettre fin à la libération conditionnelle ou d'office, ou la révoquer que le délinquant soit ou non sous garde en exécution d'un mandat d'arrêt délivré à la suite de la suspension de sa libération conditionnelle ou d'office;

c) annuler l'octroi de la libération conditionnelle ou la suspension, la cessation ou la révocation de la libération conditionnelle ou d'office;

d) examiner les cas qui lui sont déférés en application de l'article 129 et rendre une décision à leur égard;

e) accorder une permission de sortir sans escorte, ou annuler la décision de l'accorder dans le cas du délinquant qui purge, dans un pénitencier, une peine d'emprisonnement, selon le cas:

(i) à perpétuité comme peine minimale ou à la suite de commutation de la peine de mort,

(ii) d'une durée indéterminée,

(iii) pour une infraction mentionnée à l'annexe I ou II.

[...]

Décision

147. (1) Le délinquant visé par une décision de la Commission peut interjeter appel auprès de la Section d'appel pour l'un ou plusieurs des motifs suivants:

a) la Commission a violé un principe de justice fondamentale;

b) elle a commis une erreur de droit en rendant sa décision;

c) elle a contrevenu aux directives établies aux termes du paragraphe 151(2) ou ne les a pas appliquées;

d) elle a fondé sa décision sur des renseignements erronés ou incomplets;

e) elle a agi sans compétence, outrepassé celle-ci ou omis de l'exercer.

[...]

(4) Au terme de la révision, la Section d'appel peut rendre l'une des décisions suivantes:

a) confirmer la décision visée par l'appel;

b) confirmer la décision visée par l'appel, mais ordonner un réexamen du cas avant la date normalement prévue pour le prochain examen;

c) ordonner un réexamen du cas et ordonner que la décision reste en vigueur malgré la tenue du nouvel examen;

d) infirmer ou modifier la décision visée par l'appel.

Attributions du Bureau

151. (2) Après avoir consulté les membres de la Commission de la façon qu'il estime indiquée, le Bureau établit des directives régissant les examens, réexamens ou révisions prévus à la présente partie et, à sa demande, conseille le président en ce qui touche les attributions que la présente loi et toute autre loi fédérale confèrent à la Commission ou à celui-ci; le Bureau peut également ordonner que le nombre de membres d'un comité chargé de l'examen ou du réexamen d'une catégorie de cas ou de la révision d'une décision soit supérieur au nombre réglementaire.

NATIONAL PAROLE BOARD POLICY MANUAL

4.1 Day parole

Expanded periods of leave

Before full parole eligibility, the Board may reduce the nightly reporting requirement so the offender is not required to report for extended periods in exceptional circumstances, when all other options have been considered and judged inappropriate, and only in order to meet the particular needs of the case. The Board may consider expanded leave to be responsive to the needs of female, aboriginal, ethnic minority or special needs offenders.

The Board has greater flexibility after full parole eligibility date. Board members must consider whether day parole represents the least restrictive option to protect society.

7.2 Residency and day parole leave privileges

The Board is responsible for establishing the parameter of leave privileges to be associated with an approved day parole, or parole or statutory release that is subject to a residency condition. It entrusts to those who are responsible for the day-to-day supervision and care of these offenders, the manner in which the leave privileges will be implemented.

Normally, the maximum leave privileges that will be authorized by the Board are as outlined below. Board members will specify in their decision any case specific leave privileges other than these.

The institutional head, the director of the residential facility or the CSC District Director, as the case may be and in conjunction with the parole supervisor, will determine how and when the Board authorized leave privileges are to be implemented. The determination will take into consideration the offender's progress in achieving the objectives of the release in relation to the correctional plan. Additional leave privileges may not be granted unless approved in writing by the Board.

Weekday

Setting of time limits for return to a residence on a weekday is subject to the discretion of the superintendent of the community correctional centre (CCC), the director of the community residential facility (CRF), or the responsible CSC District Director.

[...]

CSC Institutions

The District Director, Parole, in consultation with the institutional head, may implement the leave privileges within the context of the release plan approved by the Board and in relation to the general progress of the offender. As a maximum, one weekend may be granted each month; however, the first cannot be implemented until at least thirty days after the implementation of the release.

4.1 Semi-Liberte

PÉRIODES DE SORTIE PROLONGÉES

Avant la date d'admissibilité à la libération conditionnelle totale, la Commission peut, dans des circonstances exceptionnelles et lorsque toutes les autres possibilités ont été étudiées et jugées inopportunes, assouplir la règle exigeant un retour à l'établissement tous les soirs, mais ce, uniquement pour répondre aux besoins particuliers du délinquant. En effet, les membres

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de la Commission peuvent envisager d'autoriser des sorties prolongées pour répondre aux besoins de certaines catégories de délinquants comme les femmes, les Autochtones et les membres de minorités visibles, ou d'autres délinquants présentant des besoins spéciaux.

7.2 Privilèges de sortie rattachés aux assignations à résidence et à la semi-liberté

Il appartient à la Commission d'établir les paramètres des privilèges de sortie rattachés à une semi-liberté, ou à une libération conditionnelle ou d'office assortie d'une assignation à résidence. Ces paramètres laissent le soin de déterminer les modalités d'application aux personnes chargées quotidiennement de s'occuper des délinquants en liberté et de les surveiller.

Normalement, les privilèges de sortie maximums autorisés par la Commission sont ceux qui sont décrits ci-après. Si les membres de la Commission désirent accorder des privilèges de sortie particuliers à un délinquant, ils doivent le préciser dans leur décision.

Selon le cas, c'est le directeur du pénitencier, le directeur de l'établissement résidentiel ou le directeur de district du SCC qui détermine, de concert avec le surveillant de liberté conditionnelle, quand et comment les privilèges de sortie autorisés par la Commission seront appliqués. Pour ce faire, il prend en considération les progrès accomplis par le délinquant dans la réalisation des objectifs de la liberté au regard du plan correctionnel. L'octroi de privilèges de sortie supplémentaires ne peut se faire sans l'approbation écrite de la Commission.

En Semaine

Le directeur du centre correctionnel communautaire, du centre résidentiel communautaire ou du district concerné du SCC décide de l'heure à laquelle le détenu est tenu de rentrer un jour de semaine.

[...]

ÉTABLISSEMENTS DU SCC

Le directeur de district (libération conditionnelle) peut, en consultation avec le directeur d'établissement, accorder des privilèges de sortie dans le cadre du plan de libération conditionnelle approuvé par la Commission et selon les progrès réalisés par le délinquant dans l'ensemble. Une fin de semaine tout au plus peut être accordée par mois, et la première peut seulement être accordée trente jours après l'entrée en vigueur du programme de semi-liberté.

2019 CAF 83, 2019 FCA 83
Cour d'appel fédérale

Administration de pilotage des Laurentides c.
Corporation des pilotes du Saint-Laurent Central Inc.

2019 CarswellNat 1232, 2019 CAF 83, 2019 FCA 83,
306 A.C.W.S. (3d) 229, 52 Admin. L.R. (6th) 209

ADMINISTRATION DE PILOTAGE DES LAURENTIDES (appelante) et CORPORATION DES PILOTES DU SAINT-LAURENT CENTRAL INC. (intimée)

Richard Boivin, Yves de Montigny, Marianne Rivoalen, JJ.C.A.

Audience: 21 février 2019
Jugement: 16 avril 2019
Dossier: A-122-18

Procédures: affirming *Corporation des pilotes du Saint-Laurent Central inc. c. Administration de pilotage des Laurentides* (2018), 2018 CarswellNat 1747, 2018 FC 333, 2018 CarswellNat 1159, 2018 CF 333, 47 Admin. L.R. (6th) 59, Sébastien Grammond J. (F.C.)

Avocat: Patrick Girard, Patrick Desalliers, pour l'appelante
Jean Lortie, Sophie Brown, pour l'intimée

Sujet: Civil Practice and Procedure; Public

APPEAL by authority from judgment reported at *Corporation des pilotes du Saint-Laurent Central inc. c. Administration de pilotage des Laurentides* (2018), 2018 CF 333, 2018 CarswellNat 1159, 2018 FC 333, 2018 CarswellNat 1747, 47 Admin. L.R. (6th) 59 (F.C.), granting application for judicial review of decision to suspend pilots under s. 27 of *Pilotage Act*.

***Yves de Montigny, J.C.A.*:**

1 L'Administration de pilotage des Laurentides (l'Administration, ou l'appelante) en appelle d'un jugement du juge Grammond de la Cour fédérale (le juge), rendu le 23 mars 2018 accueillant la requête en contrôle judiciaire de la Corporation des pilotes du Saint-Laurent Central Inc. (la Corporation, ou l'intimée) à l'encontre de la suspension, par l'appelante, des brevets de pilotage de deux de ses membres, les capitaines Donald Morin et Michel Simard.

2 La question au coeur du présent appel est celle de savoir si l'Administration pouvait raisonnablement utiliser le pouvoir disciplinaire que lui confère la *Loi sur le pilotage*, L.R.C. (1985), c. P-14 [Loi], afin de sanctionner les pilotes dans une situation où ceux-ci auraient refusé de fournir leurs services, sans pour autant que la sécurité de la navigation ne soit mise en danger.

3 Pour les motifs qui suivent, je suis d'avis que le présent appel devrait être rejeté.

I. Contexte juridique et factuel

4 La Loi, originalement adoptée en 1971, a opéré une réforme en profondeur de l'encadrement du transport maritime au Canada. Quatre administrations régionales de pilotage ont alors été créées, soient les Administrations du Pacifique, de l'Atlantique, des Laurentides et des Grands Lacs. L'article 18 de la Loi définit en ces termes la mission de ces Administrations:

> 18. Une Administration a pour mission de mettre sur pied, de faire fonctionner, d'entretenir et de gérer, pour la sécurité de la navigation, un service de pilotage efficace dans la région décrite à l'annexe au regard de cette Administration.
>
> 18. The objects of an Authority are to establish, operate, maintain and administer in the interests of safety an efficient pilotage service within the region set out in respect of the Authority in the schedule.

5 L'Administration se voit accorder, pour mener à bien cette mission, un large pouvoir de règlementation relatif au pilotage (article 20 de la Loi), notamment celui d'établir des zones de pilotage obligatoire dans la région où elle exerce son activité, et de déterminer les conditions relatives à l'émission de brevets et de certificats de pilotage. Elle est également responsable de délivrer les brevets et certificats de pilotage qui satisfont les diverses exigences règlementaires (article 22 de la Loi). Au surplus, un pouvoir de suspension et d'annulation des brevets lui est accordé. L'alinéa 27(1)*c*) de la Loi, au coeur du présent litige, prévoit à ce sujet que:

> 27 (1) Le président de l'Administration peut suspendre un brevet ou un certificat de pilotage pour une période maximale de quinze jours lorsqu'il a des raisons de croire que son détenteur :
>
> . . .
>
> c) a été négligent dans l'exercice de ses fonctions;
>
> . . .
>
> 27 (1) The Chairperson of an Authority may suspend a licence or pilotage certificate for a period not exceeding fifteen days where the Chairperson has reason to believe that the licensed pilot or the holder of the pilotage certificate

. . .

(c) has been negligent in the duty of the licensed pilot or holder of the pilotage certificate; or

. . .

6 L'Administration a aussi pour mission de fournir elle-même le service de pilotage aux navires qui le requièrent. L'article 15 de la Loi lui accorde, à cette fin, le pouvoir d'embaucher des pilotes directement (15(1)), ou encore, lorsque la majorité des pilotes d'une région ont formé une personne morale, de conclure un contrat de service avec celle-ci (15(2)). C'est ce que l'Administration a fait en concluant un contrat de service avec la Corporation en l'espèce. Cette relation est encadrée par diverses dispositions de la Loi, notamment en ce qui a trait au renouvellement du contrat de service (15.1 et 15.2). Qui plus est, l'article 15.3 de la Loi dispose que:

15.3 Il est interdit à la personne morale qui a conclu un contrat de louage de services en vertu du paragraphe 15(2) de même qu'à ses membres ou actionnaires de refuser de fournir des services de pilotage pendant la durée de validité d'un contrat ou au cours des négociations en vue du renouvellement d'un contrat.

15.3 A body corporate with which an Authority has contracted for services under subsection 15(2) and the members and shareholders of the body corporate are prohibited from refusing to provide pilotage services while a contract for services is in effect or being negotiated.

7 Selon l'article 48.1, la personne qui contrevient à cette disposition est « passible d'une amende maximale de 10 000$ par jour au cours duquel se commet ou se poursuit l'infraction ».

8 Par ailleurs, la navigation elle-même est régie par un ensemble de normes qui se retrouvent essentiellement dans des avis aux navigateurs ou des avis à la navigation émis par la Garde côtière canadienne. L'Avis aux navigateurs 27A revêt une importance toute particulière pour les fins du présent litige. Cet Avis prescrit des règles de navigation particulières pour les navires de fort gabarit et de forte longueur dans le tronçon Québec-Montréal, et prévoit notamment qu' « [e]n tout temps les navires doivent favoriser le transit de jour dans le tronçon [entre] Québec et Montréal » (Dossier d'appel, vol. 1, à la p. 209). L'article 7 du *Règlement sur les abordages*, C.R.C., c. 1416, adopté sous l'autorité de la *Loi de 2001 sur la marine marchande du Canada*, L.C. 2001, c. 26, dispose que les pilotes doivent naviguer avec une prudence particulière lorsque la navigation peut être difficile ou dangereuse et doivent, dans cette optique, respecter les directives contenues dans les Avis à la navigation.

9 C'est dans ce contexte qu'ont pris naissance les faits à l'origine de cet appel. Le 24 novembre 2016, des représentants de l'Administration, de la Corporation, de la Garde côtière, du ministère des Transports et de l'Administration portuaire de Montréal se sont rencontrés

pour discuter des insatisfactions exprimées à l'égard des restrictions imposées par l'Avis aux navigateurs 27A. En raison de l'expérience acquise avec le passage fréquent des navires dits « post-Panamax » appartenant à l'armateur Hapag-Lloyd, les participants ont convenu qu'il serait approprié d'autoriser ces navires à transiter de nuit, dans la mesure où deux pilotes seraient à bord et que d'autres mesures de sécurité soient respectées.

10 Le 26 novembre 2016, soit deux jours après la réunion spéciale, l'un des quatre navires de l'armateur Hapag-Lloyd a profité de l'entente décrite plus haut pour poursuivre sa route entre Montréal et Québec sans devoir s'ancrer, et ce malgré l'arrivée de la nuit. Puis, le 27 novembre 2016, le président de la Corporation a écrit un courriel aux participants de la réunion pour leur exprimer ses attentes quant à la formulation des différentes composantes de l'entente du 24 novembre 2016. Il convient de reproduire ci-dessous une partie dudit courriel:

> ...nous sommes prêt[s] à aller de l'avant avec ce qui a été entendu vendredi dernier dès maintenant, nous avons déjà accepté une exception hier en fin d'après-midi afin qu'un de ces navires puisse continuer sa descente et ne pas devoir ancrer à Trois-Rivières, mais l'avis 27-A doit être modifié[], ou du moins [on doit] avoir l'assurance de la part du comité que [celui-ci] sera modifié[] afin d'inclure le double pilotage comme une condition *sine qua non*[] au passage de ces navires en amont de Québec.
>
> (Dossier d'appel, vol. 1, à la p. 216.)

11 Dans la même veine, la Corporation émettait un bulletin à l'intention de ses membres le 1 er décembre 2016, dans lequel on précisait que dès l'obtention d'une « confirmation écrite [de la règle] du double pilotage », les pilotes des navires en question pourront, après avoir « analysé [...] les circonstances, [...] continuer leur montée [de nuit] comme dans le cas de toutes les autres affectations ».

12 Le 6 décembre 2016, l'Administration a assigné les pilotes Morin et Simard au pilotage d'un navire post-Panamax de Hapag-Lloyd, le Barcelona Express, de Trois-Rivières à Montréal. En fin de matinée, un représentant de la Corporation a avisé une dirigeante de l'Administration que le Barcelona Express ne pourrait pas naviguer de nuit et devrait donc mouiller à Lanoraie.

13 Des discussions ont alors eu lieu au cours de l'après-midi afin de trouver une solution. D'un côté, l'Administration a tenté d'offrir des garanties permettant de répondre aux inquiétudes de la Corporation quant à l'officialisation de l'entente du 24 novembre 2016 et de la règle du double pilotage pour les navires post-Panamax. Elle a aussi relayé deux courriels de la Garde côtière confirmant l'intention de la Garde côtière de modifier l'Avis 27A au sujet du double pilotage, bien que la portée exacte de ces deux courriels prêtait à confusion. De l'autre, la Corporation a exigé que la règle du double pilotage soit consacrée par une modification du contrat de service. Devant l'impasse, et n'ayant pas reçu confirmation de la Corporation que l'Avis 27A avait été modifié, MM. Morin et Simard ont ancré le Barcelona Express à Lanoraie à la nuit tombante.

14 Ce n'est que le lendemain matin, à 6h45, que MM. Morin et Simard ont finalement levé l'ancre du Barcelona Express afin de poursuivre leur route, de jour, vers Montréal. Le même jour, la Garde côtière publiait l'Avis Q-1872/2016, selon lequel les navires de grande largeur sont désormais soumis au double pilotage. Le transit de nuit n'y est toutefois pas mentionné.

15 Il faudra attendre le 12 décembre 2016 pour que la « dérogation provisoire » à l'Avis 27A soit finalement émise. Celle-ci précise que le « transit de nuit est autorisé » pour les navires post-Panamax « lorsqu'ils sont en montant dans le tronçon Québec-Montréal », et que « ces navires sont soumis au double pilotage par l'Administration de pilotage des Laurentides » (Dossier d'appel, vol. 2, à la p. 318).

II. Les décisions antérieures

A. Décision de l'Administration

16 Le 7 décembre 2016, le premier dirigeant de l'Administration a suspendu les brevets de pilotage de MM. Morin et Simard, pour dix jours, sous l'autorité de l'alinéa 27(1)*c*) de la Loi.

17 Le 8 décembre 2016, le conseil d'administration de l'Administration a confirmé les suspensions mais en a réduit la durée à sept jours, comme l'y autorise le paragraphe 27(4) de la Loi. Les motifs de cette suspension sont énoncés dans les « Considérant » de la résolution adoptée par le conseil d'administration, qu'il est utile de reproduire ici:

> CONSIDÉRANT que le navire « BARCELONA EXPRESS » a été ancré et son voyage retardé pendant environ 13 heures le 6 décembre 2016;
>
> CONSIDÉRANT l'engagement constaté par écrit de l'Administration, d'assigner deux (2) pilotes à quatre (4) navires spécifiques d'Hapag-Lloyd, dont le « BARCELONA EXPRESS »;
>
> CONSIDÉRANT que les pilotes Michel Simard et Donald Morin, qui avaient la conduite du « BARCELONA EXPRESS », avaient été informés par les répartiteurs de l'Administration et par courriel, que le transit de nuit était autorisé par la Garde côtière et que cette dernière avait modifié l'avis aux navigateurs no 27A, de telle sorte que la restriction concernant la navigation de nuit du « BARCELONA EXPRESS » était levée;
>
> CONSIDÉRANT que les pilotes Michel Simard et Donald Morin ont insisté, malgré ces informations, pour que leur Corporation donne préalablement son consentement pour que le navire « BARCELONA EXPRESS » puisse poursuivre sa route de nuit;
>
> CONSIDÉRANT que la [Corporation] et ses deux (2) pilotes ont pris prétexte de la situation, malgré les engagements antérieurs de la [Corporation] et l'autorisation donnée par la Garde côtière, pour exiger comme condition à la poursuite du voyage que l'Administration accepte une modification au contrat de service en vigueur;

CONSIDÉRANT qu'une telle demande de modification du contrat de service est contraire aux articles 15.3 et 27 de la *Loi sur le pilotage*;

CONSIDÉRANT que l'arrêt du voyage du « BARCELONA EXPRESS » ne peut être justifié par des raisons de sécurité et s'appuyait plutôt sur des considérations abusives et illégales;

CONSIDÉRANT que la décision d'ancrer le navire « BARCELONA EXPRESS » sans motif pertinent, est un acte de négligence au sens du paragraphe 27(1)(c) de la *loi sur le pilotage*;

CONSIDÉRANT la suspension du brevet des pilotes Michel Simard et Donald Morin par lettre du premier dirigeant du 7 décembre 2016;

18 La Corporation a contesté cette décision par une demande en contrôle judiciaire devant la Cour fédérale, au motif que le pouvoir de suspension de l'Administration en vertu de l'alinéa 27(1)*c*) de la Loi était limité aux seuls cas où la sécurité de la navigation est mise en péril.

B. Décision de la Cour fédérale

19 Après avoir offert un aperçu du cadre législatif, résumé les faits en litige, et rejeté les moyens préliminaires de l'Administration quant à l'intérêt pour agir de la Corporation et à la théorie des « mains propres », le juge s'est attardé au mérite du dossier. Il en est venu à la conclusion que la décision de l'Administration de suspendre les brevets en vertu de l'alinéa 27(1)*c*) de la Loi était déraisonnable, compte tenu du fait qu'elle n'était pas fondée sur des considérations de sécurité, comme l'exigeait selon lui cette disposition et l'économie générale de la Loi. La suspension avait davantage pour but, de l'avis du juge, de sanctionner ce que l'Administration considérait comme le non-respect par la Corporation de ses obligations contractuelles, une question qui ne relève pas de la discipline au sens où l'entend la Loi.

20 Le juge a également rejeté l'argument de l'Administration voulant que son pouvoir disciplinaire doive être étendu à une violation de l'article 15.3 de la Loi, lequel interdit le refus de service. À son avis, il serait déraisonnable d'étendre ainsi le pouvoir disciplinaire de l'Administration, dans la mesure où le pouvoir disciplinaire prévu aux articles 27 à 29 de la Loi ne vise pas des questions contractuelles ni des questions de rapports collectifs de travail. Permettre à l'Administration de sanctionner des violations de l'article 15.3 de la Loi de par son pouvoir de suspension reviendrait selon le juge à lui permettre de se faire justice à elle-même, et de décider unilatéralement de la portée des obligations contractuelles de la Corporation. Seul un tiers neutre, arbitre ou juge, peut statuer sur les recours contractuels que peut avoir l'Administration.

21 Le juge a donc accueilli la demande de contrôle judiciaire de la Corporation et annulé les deux suspensions. C'est cette décision qui fait l'objet du présent appel.

III. Questions en litige

22 La question de fond sur laquelle porte le présent appel est celle de savoir si le juge a erré en concluant que la décision de l'Administration de suspendre les pilotes en vertu de l'alinéa 27(1)*c*) de la Loi était déraisonnable. Pour répondre à cette interrogation, il faut nécessairement se pencher sur la portée de cette disposition, et plus particulièrement sur la question de savoir si l'Administration peut se prévaloir de ce pouvoir pour sanctionner un comportement ou un geste qui ne met pas en péril la sécurité de la navigation.

23 L'appelante soutient également que le juge a erré en ne faisant pas droit aux moyens préliminaires qu'elle avait soulevés devant lui, à savoir que la Corporation n'a pas l'intérêt juridique requis pour demander le contrôle judiciaire des suspensions et n'a pas les « mains propres ». Je traiterai de ces deux motifs d'appel avant d'aborder la question de fond.

24 Avant d'aller plus loin, il importe de dire quelques mots relativement au caractère théorique du présent litige. Bien que cette question n'ait pas été soulevée par les parties et n'ait pas été débattue en Cour fédérale, il n'en demeure pas moins que la suspension des brevets imposée par l'appelante a pris fin depuis longtemps; en conséquence, la demande de contrôle judiciaire semble à première vue avoir perdu tout intérêt et être sans objet.

25 Dans l'arrêt *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (S.C.C.) [*Borowski*], la Cour suprême a indiqué qu'une cour a toujours le pouvoir discrétionnaire d'entendre une affaire qui est devenue théorique du fait que la source du litige entre les parties n'existe plus. Les facteurs pertinents dont il faut tenir compte dans l'exercice de ce pouvoir discrétionnaire sont étroitement liés aux motifs qui sous-tendent la pratique de ne pas trancher des débats théoriques. Puisque la capacité des tribunaux de trancher des litiges prend sa source dans le système contradictoire, il devra en premier lieu subsister un débat contradictoire entre les parties malgré la disparition du litige original.

26 La nécessité d'économiser des ressources judiciaires limitées requiert également que l'on n'entende uniquement des affaires où une décision de la cour aura des effets réels sur les droits des parties. À ce chapitre, le juge Sopinka, s'exprimant au nom de la Cour suprême dans l'arrêt *Borowsky*, écrivait:

> ...[I]l peut être justifié de consacrer des ressources judiciaires à des causes théoriques qui sont de nature répétitive et de courte durée. Pour garantir que sera soumise aux tribunaux une question importante qui, prise isolément, pourrait échapper à l'examen judiciaire, on peut décider de ne pas appliquer strictement la doctrine du caractère théorique (...) Le simple fait ... que la même question puisse se présenter de nouveau, et même fréquemment, ne justifie pas à lui seul l'audition de l'appel s'il est devenu théorique. Il est préférable d'attendre et de trancher la question dans un véritable contexte contradictoire, à moins qu'il ressorte des circonstances que le différend aura toujours disparu avant d'être résolu. [Soulignements ajoutés.]

(*Borowsky* à la p. 360.)

27 C'est précisément la situation dans laquelle se trouvait la Cour fédérale en l'espèce. En vertu de l'article 27 de la Loi, l'Administration ne peut suspendre un brevet de pilotage que pour une période maximale de quinze jours. Il est donc raisonnable de penser que la contestation d'une telle suspension sera toujours devenue théorique lorsqu'elle sera entendue par un juge dans le cadre d'une demande en contrôle judiciaire. Le refus d'entendre la demande sur cette base aurait donc pour effet, à toutes fins pratiques, d'immuniser l'exercice de ce pouvoir par l'Administration de toute forme de contrôle judiciaire. Compte tenu du fait que les parties continuent au surplus de défendre des positions diamétralement opposées sur la question en litige, et qu'il y a donc un débat contradictoire tant devant la Cour fédérale que devant notre Cour, je suis d'avis qu'il y a lieu d'exercer notre pouvoir discrétionnaire et de trancher la question malgré son caractère théorique.

IV. Norme de contrôle

28 En appel d'une décision de la Cour fédérale statuant sur une demande de contrôle judiciaire, cette Cour doit se demander si le juge a bien identifié la norme de contrôle et l'a appliquée correctement (*Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 (S.C.C.) au para. 45 [*Agraira*]). En d'autres termes, une cour d'appel doit se mettre à la place du juge de première instance et examiner *de novo* la décision administrative faisant l'objet de la demande de contrôle judiciaire, plutôt que de relever les erreurs qu'aurait pu commettre la cour de révision (*Hoang v. Canada (Attorney General)*, 2017 CAF 63, [2017] F.C.J. No. 321 (F.C.A.) au para. 26; *Agraira* au para. 45; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23 (S.C.C.) au para. 247).

29 En revanche, les décisions de nature discrétionnaire prises par la Cour fédérale qui ne découlent pas de son pouvoir de surveillance sont soumises à la norme de contrôle énoncée par la Cour suprême dans l'arrêt *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.). Il en va ainsi des décisions prises par le juge relativement aux objections préliminaires soulevées par l'appelante, à savoir l'absence d'intérêt pour agir et l'objection fondée sur la conduite fautive des deux pilotes et de la Corporation (voir *Budlakoti v. Canada (Minister of Citizenship and Immigration)*, 2015 CAF 139, [2015] F.C.J. No. 697 (F.C.A.) aux paras. 37-39, autorisation de pourvoi à la C.S.C. refusée, 36591 [2016 CarswellNat 124 (S.C.C.)] (28 janvier 2016); *Canada (Attorney General) v. Long Plain First Nation*, 2015 CAF 177, [2015] F.C.J. No. 961 (F.C.A.) au para. 88). Pour que la Cour puisse intervenir à cet égard, l'appelante doit donc démontrer que le juge a commis soit une erreur sur une question de droit isolable soit une erreur manifeste et dominante sur une question de fait ou une question mixte.

V. Analyse

A. L'intérêt pour agir

30 L'appelante soutient que la demande de contrôle judiciaire aurait dû être rejetée au seul motif que l'intimée ne possédait pas l'intérêt pour agir en l'espèce, celle-ci n'ayant aucun intérêt distinct de ceux de ses membres pris individuellement. Elle plaide également que le juge a erré en s'appuyant sur la doctrine de la qualité pour agir, dans la mesure où cet argument n'avait même pas été plaidé par l'intimée. Qui plus est, seul le législateur peut reconnaître à quelqu'un la qualité pour agir en justice au nom d'autrui; or en l'espèce, ni la Loi ni le contrat de service ne confère cette qualité à l'intimée.

31 L'article 18.1 de la *Loi sur les Cours fédérales*, L.R.C. (1985), c. F-7 [*LCF*] dispose qu'une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par « quiconque est directement touché par l'objet de la demande ». Selon la jurisprudence qui s'est développée autour de cette exigence, un requérant ne pourra se dire « directement touché » que si la décision contestée l'affecte dans ses droits, lui impose une obligation ou lui porte préjudice (voir notamment *Rothmans of Pall Mall Canada Ltd. v. Minister of National Revenue*, [1976] F.C.J. No. 59, [1976] 2 F.C. 500 (Fed. C.A.); *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 CAF 116, [2009] F.C.J. No. 449 (F.C.A.), autorisation de pourvoi à la C.S.C. refusée, 33208 [2009 CarswellNat 3243 (S.C.C.)] (22 octobre 2009); *League for Human Rights of B'Nai Brith Canada v. R.*, 2010 CAF 307, [2010] F.C.J. No. 1424 (F.C.A.) au para. 58; *Bernard v. Close*, 2017 CAF 52, [2017] F.C.J. No. 275 (F.C.A.) au para. 2 [*Bernard*], autorisation de pourvoi à la C.S.C. refusée, 37575 [2017 CarswellNat 3980 (S.C.C.)] (24 août 2017)).

32 Ceci étant dit, l'article 18.1 de la *LCF* a été interprété avec souplesse, de façon à ce que la Cour puisse exercer une certaine discrétion et reconnaître l'intérêt requis lorsque les circonstances le justifient (*Friends of the Island Inc. v. Canada (Minister of Public Works)*, [1993] 2 F.C. 229, [1993] F.C.J. No. 233 (Fed. T.D.) aux paras. 79-80, inf. pour d'autres motifs par (1995), 185 N.R. 48 (Fed. C.A.); voir, aussi, Thomas A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986) aux pp. 163-164; *Canadian Telecommunications Union v. C.B.R.T. & G.W.* (1981), [1982] 1 F.C. 603 (Fed. C.A.)). Comme cette Cour l'a rappelé dans l'arrêt *Teva Canada Ltd. v. Canada (Minister of Health)*, 2012 CAF 106, [2012] F.C.J. No. 398 (F.C.A.) l'exigence de l'intérêt pour agir doit s'interpréter en tenant compte des objectifs de la *LCF*, notamment la justice, l'équité, l'utilité, l'ordre, l'efficacité et la réduction au minimum des frais, des retards et du gaspillage, et non de manière à constituer un piège (au para. 55).

33 Dans le cas présent, je suis prêt à considérer que la Corporation a un intérêt distinct de celui des deux pilotes qui ont fait l'objet d'une sanction disciplinaire. J'en arrive à cette conclusion non pas tant parce que la suspension de certains pilotes pourrait avoir un impact sur la capacité de la Corporation de remplir ses obligations, un argument qui me paraît purement spéculatif et qui n'est pas étayé par la preuve, mais bien plutôt parce que l'Administration invoque non seulement les agissements des deux pilotes mais également ceux de la Corporation elle-même dans ses motifs de suspension.

34 Dans la lettre du 7 janvier 2016 envoyée aux deux pilotes, le premier dirigeant de l'Administration met directement en cause la Corporation. En effet, il lie la décision d'ancrer le navire Barcelona Express au désir des pilotes et de la Corporation de faire pressions sur l'Administration pour obtenir des modifications au contrat de service. Le rôle de la Corporation dans les agissements reprochés aux pilotes est relevé de façon encore plus explicite dans la lettre du 9 décembre 2016, qui confirme la suspension des pilotes par le conseil de l'Administration:

> La levée de cette restriction des voyages de nuit a également été portée à l'attention de la Corporation des pilotes du Saint-Laurent central Inc. dont vous êtes membre. Cette Corporation imposait cependant, comme condition au transit de nuit du « BARCELONA EXPRESS », que notre Administration accepte une modification à notre contrat de service en vigueur. Une telle demande était abusive et illégale. Elle ne pouvait d'aucune façon justifier l'arrêt des services au navire qui était alors sous votre conduite. Vous avez néanmoins insisté pour que ce soit votre Corporation seulement qui autorise la poursuite du voyage. Votre décision d'ancrer le navire, vu l'absence de consentement de votre Corporation et malgré la levée de toute restriction de transit de nuit par l'Administration et la Garde côtière canadienne, constitue clairement une négligence dans l'exercice de vos fonctions.
>
> (Dossier d'appel, vol. 2, aux pp. 384-385, et vol. 3, aux pp. 502-503.)

35 À la lecture de cet extrait de la décision contestée, il ne fait nul doute que la Corporation a un intérêt réel et distinct de celui des pilotes. Si la Corporation n'est pas directement affectée dans ses droits, il est évident que la décision contestée lui porte préjudice en alléguant que la demande de modification du contrat de service comme condition au transit de nuit était illégale et abusive. Nous sommes très loin d'une situation comme celle, par exemple, de l'arrêt *Bernard*, où la demanderesse s'était vu refuser l'intérêt pour agir parce qu'elle n'était pas membre du syndicat en cause devant l'arbitre, et qu'elle n'avait aucun lien avec les auteurs des griefs. Compte tenu de ces circonstances, je n'ai aucune hésitation à conclure que le juge n'a pas commis d'erreur manifeste et dominante dans l'exercice de sa discrétion en reconnaissant l'intérêt pour agir à la Corporation.

36 De façon subsidiaire, je suis également d'avis que la Corporation avait la qualité pour agir au nom des deux pilotes sanctionnés. Tel que le mentionne le juge aux paragraphes [38] et suivants de ses motifs, le législateur a explicitement reconnu au paragraphe 15(2) de la Loi le droit exclusif de la Corporation de conclure un contrat de service avec l'Administration, et donc de représenter ses membres non seulement au moment de la négociation de ce contrat mais également dans le cadre de son exécution. Le contrat de service reprend d'ailleurs ce principe d'exclusivité de la représentation à son article 3.01 (Dossier d'appel, vol. 1, à la p. 84.). Ce contrat témoigne, comme le note avec raison le juge au paragraphe [39] de ses motifs, « d'un régime qui existait lors de l'entrée en vigueur de la Loi et que le Parlement a voulu maintenir ». Il découle de ce qui précède que la Corporation est habilitée à représenter ses membres, comme un syndicat, dans tout litige relatif à la prestation de service opposant un pilote et l'Administration.

37 Le contrat de louage de services va plus loin encore à cet égard. L'article 15.02, qui se retrouve dans la section intitulée « Dispositions générales », énonce en effet ce qui suit:

> Dans tout litige impliquant un pilote et l'Administration, la Corporation peut de plein droit intervenir pour prendre fait et cause en faveur du pilote.
>
> (Dossier d'appel, vol. 1, à la p. 96.)

38 Quant à l'article 16.03, qui se retrouve dans la section « Procédures disciplinaires ou judiciaires », il prévoit que l'Administration doit transmettre à la Corporation tout rapport sur la conduite d'un pilote qui le rend passible de mesures disciplinaires, et ce avant la prise de toute telle mesure (Dossier d'appel, vol. 1, à la p. 98). Cette disposition ajoute que la Corporation et le pilote ont dix jours ouvrables pour répondre aux allégations contenues dans ce rapport.

39 Au vu de la Loi et du contrat de service, il m'apparaît clair que la Corporation s'est vue explicitement reconnaître la qualité pour agir au nom de ses pilotes, tant dans le cadre d'un litige relevant du contrat de services que dans le contexte d'une sanction disciplinaire. S'il en va ainsi, c'est parce que l'Administration joue un double rôle, agissant tant comme pourvoyeur de service que comme autorité réglementaire. Il est indéniable, au surplus, que la Corporation n'agit pas sans le consentement des deux pilotes, ces derniers ayant déposé des affidavits et s'étant soumis à des interrogatoires au préalable dans le cadre de la demande de contrôle judiciaire présentée par la Corporation.

40 La Corporation avait donc non seulement l'intérêt pour agir en son nom propre, mais également la qualité pour représenter les deux pilotes dont les brevets de pilotage ont été suspendus.

B. La doctrine des « mains propres »

41 L'appelante soutient que le juge a erré en n'appliquant pas la théorie des mains propres, suivant laquelle une cour peut refuser d'exercer son pouvoir discrétionnaire d'entendre le pourvoi en contrôle judiciaire si la partie demanderesse a agi illégalement, a fait preuve de mauvaise foi, ou a manqué de transparence. Le reproche que formulait l'appelante à l'encontre de la Corporation était d'avoir requis que la lettre d'entente jointe au contrat de service soit modifiée de façon à garantir le double pilotage de tous les navires post-Panamax, à défaut de quoi le Barcelona Express serait ancré. De l'avis de l'appelante, cette dernière exigence constituait une violation flagrante de l'article 15.3 de la Loi, une question sur laquelle il était possible de se prononcer sans analyser le fond du litige, contrairement à ce qu'a décidé le juge. Selon elle, le véritable débat de fond portait plutôt sur la question de savoir si les pilotes étaient justifiés d'ancrer le navire la nuit en raison de l'absence de modification formelle de l'Avis 27A.

42 L'appelante ne m'a pas convaincu que le juge a commis une erreur de droit isolable ou une erreur manifeste et déterminante en exerçant sa discrétion sur cette question. D'une part, il appert

des lettres envoyées aux deux pilotes les 7 et du 9 décembre 2016 que le fait d'avoir requis une modification au contrat de service constituait précisément un motif de suspension (Dossier d'appel, vol. 3, aux pp. 498 et 501). Or, la Corporation a contesté fermement, tout au long du procès, qu'une telle demande constituait une violation de l'article 15.3 de la Loi. Dans ces circonstances, le juge a eu raison de conclure, au paragraphe [55] de ses motifs, que « les actes reprochés à la Corporation et leur qualification juridique sont précisément ce sur quoi les parties ont lié la contestation principale ». Une mésentente sur le fond du litige ne peut fonder l'application de la théorie des mains propres.

43 Je note par ailleurs que la Corporation insistait pour que l'Avis 27A soit modifié de façon à ce qu'il soit précisé non seulement que le transit de nuit des navires de type post-Panamax est autorisé, mais également que ces navires sont soumis au double pilotage. Il ressort en effet de la preuve que ces deux questions étaient intimement liées tout au long des échanges qui ont eu lieu entre les deux parties suite à la réunion du 24 novembre 2016. Dans un courriel envoyé le 27 novembre 2016 aux participants de ladite réunion, le président de la Corporation écrit d'ailleurs ce qui suit:

> Lors de notre dernière réunion, nous avons convenu de soumettre les 4 navires de Hapag Lloyd, soit les Detroit, Livorno, Genoa et Barcelona Express aux mêmes conditions que les navires de forte longueur.
>
> Ce que cela entraîne comme principal changement est que ces navires pourront continuer leurs montées vers Montréal et ce même si une partie, ou à la limite, l'entièreté de leur montée se produit de noirceur.
>
> [...]
>
> La prémisse de base qui a été discutée lors de la même réunion est que tous les navires de forts gabarits (post-panamax, plus de 32,50 m de large) sont soumis au double pilotage.
>
> Nous avons discuté que cela devait être écrit quelque part et l'idée de l'inscrire à l'avis 27-A a été accepté.
>
> (Dossier d'appel, vol. 1, à la p. 216.)

44 Par conséquent, en supposant même que le véritable objet du litige consiste à déterminer si les pilotes étaient justifiés d'ancrer le navire en raison de l'absence de modification formelle de l'Avis 27A, comme le soutient l'appelante, il m'apparaît clair que la question du double pilotage était au coeur du litige au même titre que le transit de nuit. Le juge pouvait donc raisonnablement conclure qu'il ne pouvait se prononcer sur la prétendue violation de l'article 15.3 de la Loi sans analyser le fond du litige entre les deux parties.

C. Raisonnabilité de la suspension

45 L'appelante soutient que le juge a identifié la bonne norme de contrôle en l'espèce, soit celle de la raisonnabilité, mais qu'il a plutôt appliqué la norme de la décision correcte en ne faisant preuve d'aucune déférence à l'égard de son interprétation de l'article 27 de la Loi. Au soutien de son interprétation à l'effet que la négligence dont il est question à l'alinéa 27(1)*c*) de la Loi ne se limite pas aux questions de sécurité, l'appelante fait valoir que l'efficacité est également un objectif important visé par le législateur, que le texte même de l'article 27 réfère à toutes sortes de conduites généralement inacceptables, non professionnelles ou par ailleurs interdites par la Loi ou la réglementation, que la notion même de négligence doit être interprétée dans son sens large, et que l'existence d'une possible sanction pénale pour le refus de service ne s'oppose aucunement à ce qu'une suspension de brevet soit également ordonnée.

46 Ces arguments ne me paraissent pas fondés, et j'estime que le juge a eu raison de les rejeter. Il ne me paraît pas faire de doute que l'objet principal de la Loi et la mission principale de l'Administration est celle d'assurer la sécurité de la navigation. Le libellé de l'article 18 révèle on ne peut plus clairement que la mise en place d'un système de pilotage efficace vise précisément l'atteinte de cet objectif. Il convient de reprendre ici le texte de cette disposition:

> 18. Une Administration a pour mission de mettre sur pied, de faire fonctionner, d'entretenir et de gérer, pour la sécurité de la navigation, un service de pilotage efficace dans la région décrite à l'annexe au regard de cette Administration.
>
> 18. The objects of an Authority are to establish, operate, maintain and administer in the interests of safety an efficient pilotage service within the region set out in respect of the Authority in the schedule.

47 Loin d'être une finalité au même titre que la sécurité, l'efficacité n'en est qu'une composante. Cette finalité s'accorde d'ailleurs avec la preuve extrinsèque déposée par l'intimée, notamment le Rapport de la Commission royale d'enquête sur le pilotage (Cahier conjoint des lois, règlements, jurisprudence et doctrine (Cahier conjoint), onglet 59, à la p. 519) ainsi que des débats parlementaires ayant entouré l'adoption de la Loi (Cahier conjoint, onglet 62, à la p. 5990; onglet 63, à la p. 1207).

48 L'appelante a fait valoir que les lois et la réglementation antérieures prévoyaient expressément le pouvoir pour l'Administration de suspendre le brevet d'un pilote en cas de refus ou de retard de celui-ci d'assurer la conduite d'un navire (voir *Acte concernant le pilotage*, 1873, 36 Victoria, c. 54, art. 70; *Loi concernant la marine marchande au Canada*, S.R.C. 1906, c. 113, art 550g); *Loi concernant la marine marchande au Canada*, S.R.C. 1927, c. 186, art. 530g); *Loi concernant la marine marchande*, S.R.C. 1934, c. 44, art 361(1)(*h*); *Loi concernant la marine marchande*, S.R.C. 1952, c. 29, art. 329(f); *Loi concernant la marine marchande*, S.R.C. 1970, c. S-9, art. 314(f); *Règlement général de la circonscription de pilotage de Montréal*, C.P. 1961-1475, Gaz. C. 1961.II.1597). Il n'y a aucune raison de croire, selon l'appelante, que le législateur a

voulu supprimer ce pouvoir en adoptant ce qui est maintenant l'alinéa 27(1)*c*) de la Loi. Selon ce raisonnement, la disposition actuelle ne serait que la consolidation des pouvoirs confiés à l'Administration depuis 1873.

49 Il me semble au contraire que le libellé différent du pouvoir de suspension des brevets retenu par le législateur en 1971 témoigne d'une volonté de restreindre ce pouvoir aux seuls cas mentionnés dans cette nouvelle disposition. Il est important de se rappeler, au surplus, que le régime de négociation collective du paragraphe 15(2) de la Loi, lequel se concilie mal avec l'interprétation que l'appelante fait de l'alinéa 27(1)*c*) de la Loi, n'existait tout simplement pas sous les anciennes lois.

50 Dans la mesure où le pouvoir de réglementation de l'Administration ne peut être exercé que dans l'optique d'assurer la sécurité de la navigation (*Pacific Pilotage Authority v. Alaska Trainship Corp.*, [1981] 1 S.C.R. 261 (S.C.C.) aux pp. 268-269), et non pour des considérations économiques (*Pacific Pilotage Authority v. Alaska Trainship Corp.* (1979), [1980] 2 F.C. 54 (Fed. C.A.) aux pp. 76-77, il me semble que le juge était bien fondé d'appliquer le même raisonnement, par analogie, au pouvoir de celle-ci de suspendre un brevet. Comme le note le juge au paragraphe [64] de ses motifs, il est entièrement « logique que le régime disciplinaire de l'article 27 doive lui aussi se rapporter à cet objectif fondamental [...] qu'est la promotion de la sécurité maritime ».

51 Quant à l'argument de l'appelante à l'effet que l'article 27 de la Loi va bien au-delà des simples conditions de sécurité et vise au contraire des conduites inacceptables ou non professionnelles, c'est à bon droit que le juge l'a rejeté. Il est vrai que certains motifs de suspension paraissent à première vue avoir un lien plus ténu avec la sécurité de la navigation, comme par exemple le fait pour un pilote d'avoir la conduite d'un navire alors que son permis est suspendu (alinéa 27(1)*a*) de la Loi), ou de ne pas remplir les conditions exigées du détenteur de brevet (alinéa 27(1)*d*) de la Loi). Il n'en demeure pas moins, comme le souligne le juge, que toutes les conditions s'inscrivent dans le cadre d'un régime dont l'objectif ultime est d'assurer la sécurité de la navigation (Décision au para. 66). « Si le législateur a jugé qu'il était nécessaire de mettre en place un régime de permis pour assurer la réalisation de cet objectif », écrit à bon droit le juge, « il va de soi que des infractions peuvent être créées pour assurer l'intégrité de ce régime » (*Ibid.*). Je souscris entièrement à ce raisonnement.

52 Ayant déterminé, sur la base d'une admission à cet effet de l'un des dirigeants de l'Administration (Dossier d'appel, vol. 4, à la p. 752) et de la résolution adoptée le 8 décembre 2016 (Dossier d'appel, vol. 4, à la p. 698), que les gestes reprochés aux capitaines Morin et Simard n'avaient pas mis en danger la sécurité de la navigation, le juge a conclu que l'appelante avait sanctionné ceux-ci pour des motifs étrangers aux objectifs du régime des articles 27 à 29 de la Loi. Ce faisant, le juge a bien appliqué la norme de la décision raisonnable, soit celle qu'il avait préalablement considérée être la norme pertinente dans les circonstances. Contrairement à ce que soutient l'appelante, la décision de l'Administration ne faisait pas partie des issues possibles acceptables qui peuvent se justifier au regard des faits et du droit, et ce malgré toute la déférence

étant due à ce genre de détermination. Tel que le notent les auteurs Brown et Evans, « [w]hether express or implied, the purposes and objects of a statute prescribe the limits of the legal authority of a decision-maker exercising discretionary power, even when the power is conferred in subjective terms » (Donald J.M. Brown et John M. Evans, *Judicial Review of Administrative Action in Canada*, feuilles mobiles, Toronto: Thomson Reuters Canada Limited, 2017, à la p. 15:2241).

53 Enfin, je suis tout à fait d'accord avec l'analyse que fait le juge des deux missions distinctes de l'Administration, à savoir celle d'assurer la sécurité de la navigation notamment par un régime d'attribution de brevets et de certificats de pilotage, et celle qui consiste à offrir elle-même les services de pilotage. Les pouvoirs de sanction de l'Administration lorsqu'elle agit dans le cadre de cette dernière mission sont nécessairement plus étendus que ceux qu'elle exerce sous l'autorité des articles 27 à 29 de la Loi, qui peuvent être assimilés à un régime de discipline professionnelle visant à maintenir la sécurité et la protection du public. Lorsqu'elle agit comme employeur ou dans le cadre de la relation contractuelle qui la lie avec la Corporation, il est tout à fait indiqué que l'Administration ne puisse être juge et partie et doive s'en remettre à un tiers (juge ou arbitre) pour trancher les différends qui peuvent surgir dans la prestation des services rendus par les pilotes. C'est d'ailleurs la voie qui avait été privilégiée dans l'arrêt *Administration de pilotage des Laurentides v. Corp. des pilotes du Saint-Laurent central inc.*, 2015 CAF 295, [2015] F.C.J. No. 1495 (F.C.A.).

54 Par conséquent, en supposant même que la décision prise par les pilotes d'ancrer le Barcelona Express pour la nuit puisse être assimilée à un refus de service (ce que nie avec vigueur la Corporation, laquelle soutient plutôt que cette décision a été prise uniquement pour se conformer à la réglementation toujours en vigueur le 6 décembre 2016), elle ne saurait équivaloir à de la négligence au sens de l'alinéa 27(1)*c*) de la Loi. Comme le note le juge, c'est vers l'arbitrage que devait se tourner l'Administration si elle estimait que la Corporation ne respectait pas ses obligations, tel que l'y autorisait l'article 17 du Contrat de services (Dossier d'appel, vol. 2, à la p. 98). Une situation urgente aurait également pu faire l'objet d'une demande d'injonction interlocutoire devant les tribunaux. Le pouvoir disciplinaire prévu à l'article 27, que le législateur a pris soin de circonscrire à certaines dispositions spécifiques de la Loi, n'était pas le mécanisme approprié pour faire face à ce genre de circonstances. C'est donc à bon droit que le juge a conclu que la décision de l'Administration était également déraisonnable à ce chapitre.

VI. Conclusion

55 Pour tous les motifs qui précèdent, je suis donc d'avis que l'appel devrait être rejeté, avec dépens.

***Richard Boivin, J.C.A.*:**

Je suis d'accord.

***Marianne Rivoalen, J.C.A.*:**

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Je suis d'accord.

Appeal dismissed.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20141023

Docket: A-357-14

Citation: 2014 FCA 239

Present: **WEBB J.A.**

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

And

CANADA TRANSPORTATION AGENCY

Respondent

REASONS FOR ORDER

WEBB J.A.

[1] The respondent has brought a motion to determine the content of the appeal book in this matter because the respondent wants to include a document and the appellant objects to the inclusion of this document. The document in question is the "Annotated Dispute Adjudication Rules" (Annotation) and the version that the respondent is seeking to include in the appeal book, based on the submissions of counsel for the respondent, is the version that was amended and

published on the respondent's website on or around August 22, 2014 (paragraph 17 of the respondent's written representations).

[2] The appellant has, with leave, appealed to this Court from the *Canadian Transportation Dispute Adjudication Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)* (Dispute Adjudication Rules) made by the respondent. In particular, the appellant is asking that paragraphs 41(2)(b), 41(2)(c), and 41(2)(d) of these Dispute Adjudication Rules be quashed as being *ultra vires* the powers of the respondent or "invalid because they are unreasonable and establish inherently unfair procedures that are inconsistent with the intent of Parliament in establishing the Agency" (appellant's notice of appeal, paragraphs (i) and (ii)). Although couched in different terms, it appears that essentially the appellant is questioning the authority of the respondent to make the Dispute Adjudication Rules in question.

[3] The right of appeal to this Court is granted by section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10:

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

[4] Therefore, appeals only lie on questions of law or jurisdiction. In this case the legal issue is essentially related to the authority of the respondent to make the Dispute Adjudication Rules in question. As a preliminary matter, it is difficult to discern how a document (the Annotation):

(a) purportedly created by the respondent to explain or clarify the Dispute Adjudication Rules;

(b) amended and published on its website over two months after the Dispute Adjudication Rules were adopted; and

(c) which, as part of the disclaimer at the beginning thereof, includes the statement that:

"This document is a reference tool only. It is not a substitute for legal advice and ***has no official sanction***" (emphasis added)

would assist in determining whether as a matter of law the respondent had the authority to adopt the Dispute Adjudication Rules in question.

[5] As noted by the respondent there was no prior hearing in this matter and therefore there were no documents that had been previously introduced before a tribunal or a court. The respondent is requesting that either this Court determine under Rule 343 of the *Federal Courts Rules* that the Annotation should be included as part of the appeal book, or that this Court grant leave under Rule 351 of the *Federal Courts Rules* to include the Annotation as new evidence.

[6] Since there was no prior hearing, the only facts submitted to any tribunal or court related to the Annotation will be those as submitted as part of this motion. In its motion record the respondent submitted an affidavit of Alexei Baturin. However, there is no mention of the Annotation in this affidavit.

[7] The written submissions of counsel for the respondent include the following:

> 12. The Dispute Adjudication Rules that are the subject of this appeal came into force on June 4, 2014. On that date, the Agency published the Annotation on its website.
>
> 13. The Annotation was designed, as its introduction states, as a companion document to the Dispute Adjudication Rules, with the intention of providing explanations and clarifications of the Rules for those unfamiliar with the Agency and its processes.
>
> 14. The Annotation was prepared by Agency staff and was approved for publication by the Agency's Chair and Chief Executive Officer. The document is intended as a soft law instrument to provide guidance on the Agency's procedures but is not intended to fetter the Agency's discretion in the adjudicative decision-making process.
>
> 15. The Annotation is also intended to be an evergreen document, to be updated as needed.
>
> 16. Having received comments from the appellant respecting concerns about the Agency's procedures under the new Dispute Adjudication Rules, the Agency amended its Annotation on or around August 22, 2014, to address the following issues:
>
> a. The Agency's continued commitment to providing reasons for its decisions;

b. The possibility of requesting an opportunity to respond to a request to intervene in dispute proceedings before the Agency;

c. The possibility of requesting an opportunity to conduct a cross-examination on affidavit; and

d. The possibility of proceeding by way of oral hearing.

[8] There are a number of facts related to the creation and amendment of the Annotation in these written submissions. In dissenting reasons in *R. v. Schwartz,* [1988] 2 S.C.R. 443, Dickson C.J. (as he then was) stated certain general principles. There is no indication that the majority of the Justices of the Supreme Court of Canada disagreed with the general principles as expressed by Dickson C.J. In his reasons, Dickson C.J. stated that:

> 59 One of the hallmarks of the common law of evidence is that it relies on witnesses as the means by which evidence is produced in court. As a general rule, nothing can be admitted as evidence before the court unless it is vouched for viva voce by a witness. Even real evidence, which exists independently of any statement by any witness, cannot be considered by the court unless a witness identifies it and establishes its connection to the events under consideration. Unlike other legal systems, the common law does not usually provide for self-authenticating documentary evidence.
>
> 60 Parliament has provided several statutory exceptions to the hearsay rule for documents, but it less frequently makes exception to the requirement that a witness vouch for a document. For example, the *Canada Evidence Act* provides for the admission of financial and business records as evidence of the statements they contain, but it is still necessary for a witness to explain to the court how the records were made before the court can conclude that the documents can be admitted under the statutory provisions (see ss. 29(2) and 30(6)). Those explanations can be made by the witness by affidavit, but it is still necessary to have a witness....

[9] Facts are to be introduced by a witness, not as part of the written representations of counsel. Once introduced, counsel can refer to the facts. However, it does not seem to me that it is appropriate for counsel to refer to facts that have not been introduced by any witness, unless a Judge could take judicial notice of such facts. There was no suggestion by counsel in the written submissions submitted as part of the respondent's motion record that a Judge could (or should) take judicial notice of the alleged facts as set out in the paragraphs referred to above.

[10] In response to the written submission of the appellant, the respondent submitted a reply and included an affidavit of Mary Catharine Murphy. Rule 369(3) of the *Federal Courts Rules* provides that:

(3) A moving party may serve and file written representations in reply within four days after being served with a respondent's record under subsection (2).	(3) Le requérant peut signifier et déposer des prétentions écrites en réponse au dossier de réponse dans les quatre jours après en avoir reçu signification.

[11] The reply is to contain written representations only – not another affidavit. The appropriate manner in which the facts should have been introduced by the respondent was in the affidavit that was submitted as part of the respondent's record – not in the written submissions of counsel for the respondent or in an affidavit included with the reply.

[12] In the reply submissions, counsel for the respondent indicated that "since the Annotation is an Agency document that is prominently displayed on the home page of its Government website and is available to any member of the public, evidence of its existence by way of

affidavit is unnecessary". No authority for this proposition was provided. The reference to the document being available to any member of the public could suggest that perhaps the respondent is arguing that a Judge could take judicial notice of the existence of the Annotation. However, since this argument was not raised by counsel, I will not address it. In any event, it appears that the respondent is attempting to introduce the Annotation for what it says about the Rules in question, not simply to show that it exists.

[13] Therefore, none of the facts that the respondent has attempted to introduce in the written representations of counsel or in the affidavit included in the reply will be considered in this motion.

[14] As a result, the only facts submitted by the respondent that are properly part of this motion are the facts as set out in the affidavit of Alexei Baturin. Since there is no reference to the Annotation in this affidavit, there is no witness to introduce this document and the result is that the respondent is attempting to include in the appeal book a document without any facts related to the document.

[15] As a result the Annotation is not to be included in the appeal book, whether it is considered as existing evidence or new evidence under Rule 351 of the *Federal Courts Rules*.

[16] The respondent's motion to include the Annotation in the appeal book is dismissed. Since the appellant did not ask for costs, no costs are awarded.

"Wyman W. Webb"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-357-14
STYLE OF CAUSE:	DR. GÁBOR LUKÁCS v. CANADA TRANSPORTATION AGENCY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	WEBB J.A.
DATED:	OCTOBER 23, 2014

WRITTEN REPRESENTATIONS BY:

Self-represented	FOR THE APPELLANT
Barbara Cuber	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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

2015 CAF 140, 2015 FCA 140
Federal Court of Appeal

Lukács v. Canadian Transportation Agency

2015 CarswellNat 1893, 2015 CarswellNat 9218, 2015 CAF 140, 2015 FCA 140, 253 A.C.W.S. (3d) 751, 386 D.L.R. (4th) 163, 473 N.R. 263, 88 Admin. L.R. (5th) 24

Dr. Gábor Lukács, Applicant and Canadian Transportation Agency et al., Respondents and The Privacy Commissioner of Canada, Intervener and The Attorney General of Canada, Intervener

C. Michael Ryer, D.G. Near, Richard Boivin JJ.A.

Heard: March 17, 2015
Judgment: June 5, 2015
Docket: A-218-14

Counsel: Dr. Gábor Lukács, for himself
Allan Matte, for Respondent
Jennifer Seligy, Steven J. Welchner, for Intervener
Melissa Chan, for Attorney General of Canada

***C. Michael Ryer J.A.*:**

1 Dr. Gábor Lukács is a Canadian air passenger rights advocate. He brings this application for judicial review of a decision of the Canadian Transportation Agency (the "Agency") to refuse his request for an unredacted copy of the materials that the Agency placed on its public record in a dispute resolution proceeding between Air Canada and a family whose flight from Vancouver to Cancun had been delayed (the "Cancun Matter").

2 The Agency is constituted under the *Canada Transportation Act*, S.C. 1996, c.10 (the "CTA"). The jurisdiction of the Agency is broad, encompassing economic regulatory matters in relation to air, rail and marine transportation in Canada, and adjudicative decision-making in respect of disputes that arise in areas under its jurisdiction.

3 When engaged in adjudicative dispute resolution, the Agency acts in a quasi-judicial capacity, functioning in many respects like a court of law, and members of the Agency, as defined in section 6 of the CTA, function like judges, in many respects.

4 Adjudicative proceedings before a court of law are subject to the open court principle, which generally requires that such proceedings, the materials in the record before the court and the resulting decision must be open and available for public scrutiny, except to the extent that the court otherwise orders.

5 These rights of access to court proceedings, documents and decisions are grounded in common law, as an element of the rule of law, and in the Constitution, as an element of the protection accorded to free expression by s.2(*b*) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c. 11 (the "*Charter*").

6 Court-sanctioned limitations on the rights arising from the open court principle are often imposed under the procedural rules applicable to the court. In the context of the *Charter*, the appropriateness of requested limitations to the open court principle are determined under a judge-made test requiring the court to consider whether the salutary effects of the requested limitation on the administration of justice outweighs the deleterious effects of that limitation.

7 In responding to Dr. Lukács' request for the materials on its public record in the Cancun Matter, the Agency acknowledged that it was subject to the open court principle. However, the Agency asserted that, unlike courts of law, the application of that principle to the Agency's public record was circumscribed by the provisions of the *Privacy Act*, R.S.C., 1985, c. P-21 (the *"Privacy Act"*). Thus, before providing the materials to Dr. Lukács, one of the Agency's administrative employees removed portions of them that she determined to contain personal information ("Personal Information"), as defined in section 3 of the *Privacy Act*.

8 The Agency refused Dr. Lukács' further request for a copy of the unredacted material on its public record, asserting that subsection 8(1) of the *Privacy Act* prevented it from disclosing Personal Information under its control.

9 Dr. Lukács brought this application for judicial review challenging the Agency's refusal to provide the unredacted materials on a number of bases. Among his arguments, he asserted that because the requested materials had been placed on the Agency's public record ("Public Record") in accordance with subsection 23(1) of the *Canadian Transportation Agency General Rules*, SOR/2005-35 (the "Old Rules"), all of those materials — in an unredacted form — were publicly available ("Publicly Available") within the meaning of subsection 69(2) of the *Privacy Act*, and, as such, the prohibition on disclosure in subsection 8(1) of the *Privacy Act* does not apply to his request.

10 In my view, this argument is persuasive and, accordingly, the Agency's refusal to provide an unredacted copy of the requested materials to Dr. Lukács is impermissible.

I. Background

11 The Agency's decision in the Cancun Matter (Decision 55-C-A-2014) dealt with a claim for compensation for denied boarding and costs from flight delays that was made by a family in relation to a flight from Vancouver to Cancun, Mexico.

12 On February 14, 2014, Dr. Lukács made a request to the Secretary of the Agency for a copy of all of the public documents that were filed with the Agency in the Cancun Matter.

13 On February 24, 2014, Ms. Patrice Bellerose, a staff employee of the Agency, sent an email to Dr. Lukács indicating that the Agency would provide the Public Record as soon as they could do so.

14 On March 19, 2014, Ms. Bellerose sent an email to Dr. Lukács that contained a copy of the materials that had been filed, but portions of those materials were redacted.

15 Ms. Bellerose made the redactions on the basis that section 8 of the *Privacy Act* prevented the Agency from disclosing what she determined to be Personal Information contained in the materials that the Agency placed on its Public Record. Importantly, none of the materials filed in the Cancun Matter was subject to a confidentiality order, which the Agency was empowered to make, pursuant to subsections 23(4) to (9) of the Old Rules, upon request from any person who files a document in any given proceeding.

16 On March 24, 2014, Dr. Lukács wrote to the Secretary of the Agency requesting "unredacted copies of all documents in File No. M4120-3/13-05726 with respect to which no confidentiality order was made by a member of the Agency."

17 On March 26, 2014, Mr. Geoffrey C. Hare, Chairperson and CEO of the Agency, wrote to Dr. Lukács and, without specifically so stating, refused (the "Refusal") to accede to Dr. Lukács' request for unredacted copies of the materials (the "Unredacted Materials") in the Cancun Matter.

18 On April 22, 2014, Dr. Lukács brought this application for judicial review in respect of the Agency's practice of limiting public access to Personal Information in documents filed in the Agency's adjudicative proceedings, specifically challenging the refusal of the Agency to provide him with the Unredacted Materials.

19 The relief sought by Dr. Lukács is as follows:

> 1. a declaration that adjudicative proceedings before the Canadian Transportation Agency are subject to the constitutionally protected open-court principle;

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2. a declaration that all information, including but not limited to documents and submissions, provided to the Canadian Transportation Agency in the course of adjudicative proceedings are part of the public record in their entirety, unless confidentiality was sought and granted in accordance with the Agency's *General Rules*;

3. a declaration that members of the public are now entitled to view all information, including but not limited to documents and submissions, provided to the Canadian Transportation Agency in the course of adjudicative proceedings, unless confidentiality was sought and granted in accordance with the Agency's *General Rules*;

4. a declaration that information provided to the Canadian Transportation Agency in the course of adjudicative proceedings fall within the exceptions of subsections 69(2) and/or 8(2)(*b*) and/or 8(2)(*m*) of the *Privacy Act*, R.S.C. 1985, c. P-21;

5. in the alternative, a declaration that provisions of the *Privacy Act*, R.S.C. 1985, c. P-21 are inapplicable with respect to information, including but not limited to documents and submissions, provided to the Canadian Transportation Agency in the course of adjudicative proceedings to the extent that these provisions limit the rights of the public to view such information pursuant to subsection 2(*b*) of the *Canadian Charter of Rights and Freedoms*;

6. a declaration that the power to determine questions related to confidentiality of information provided in the course of adjudicative proceedings before the Canadian Transportation Agency is reserved to Members of the Agency, and cannot be delegated to Agency Staff;

7. an order of *mandamus* directing the Canadian Transportation Agency to provide the Applicant with unredacted copies of the documents in File No. M4120-3/13-05726, or otherwise allow the Applicant and/or others on his behalf to view unredacted copies of these documents;

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

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

20 By order dated December 10, 2014, Stratas J.A. granted the Privacy Commissioner of Canada (the "Privacy Commissioner") leave to intervene in this application on the basis that the application raises issues as to whether certain provisions of the *Privacy Act* provide justification for the Refusal.

21 On November 21, 2014, Dr. Lukács filed a Notice of Constitutional Question in which he challenged the constitutional validity of certain provisions of the *Privacy Act*. Dr. Lukács contends that he has a constitutional right under the open court principle, protected by paragraph 2(b) of the *Charter*, to obtain the Unredacted Documents. He submitted that, if any provisions of the

Privacy Act limit his right to obtain such documents, those provisions infringe paragraph 2(b) of the *Charter*. Further, Dr. Lukács argues that any infringement is not saved under section 1 of the *Charter*.

22 On March 5, 2015, the Attorney General of Canada filed a Memorandum of Fact and Law and became a party to this application.

II. The Refusal

23 In the Refusal, Chairperson Hare stated that the Agency is a government institution ("Government Institution"), as defined under section 3 of the *Privacy Act*, that is subject to the full application of that legislation. He then referred to sections 8, 10 and 11 of the *Privacy Act* and stated that:

> The purpose of the Act is to protect the privacy of individuals with respect to personal information about themselves held by a government institution. Section 8 of the Act is clear that, except for specific exceptions found in that section, personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution. Also, in accordance with sections 10 and 11 of the Act, personal information under the control of a government institution such as the Agency must be accounted for in either personal information banks or classes of personal information. Because there are no provisions in the Act that grant to government institutions that are subject to the Act, the discretion not to apply those provisions of the Act, personal information under the control of the Agency is not disclosed without the consent of the individual and are accounted for either in personal information banks or classes of personal information and consequently published in InfoSource. This is all consistent with the directions of the Treasury Board Canada Secretariat.
>
> Although Agency case files are available to the public for consultation in accordance with the open court principle, personal information contained in the files such as an individual's home address, personal email address, personal phone number, date of birth, financial details, social insurance number, driver's licence number, or credit card or passport details, is not available for consultation.
>
> The file you requested has such sensitive personal information and it has therefore been removed by the Agency as required under the Act.

24 While these reasons do not explicitly so state, it is apparent to me that the Agency concluded that subsection 8(1) of the *Privacy Act* circumscribes the scope and ambit of the open court principle. Thus, the Agency concluded that subsection 8(1) of the *Privacy Act* requires it to redact Personal Information contained in documents placed on its Public Record in dispute resolution proceedings before such documents can be disclosed to a member of the public who requests them.

25 Chairperson Hare's reasons do not explain why any of the disclosure-permissive provisions in the *Privacy Act*, such as paragraphs 8(2)(*a*), (*b*) or (*m*), are inapplicable to Dr. Lukács' request. Additionally, his reasons do not discuss whether the Personal Information that the Agency redacted, in intended compliance with the non-disclosure requirement in subsection 8(1) of the *Privacy Act*, was Publicly Available.

III. Issues

26 This appeal raises two general issues:

(a) whether subsection 8(1) of the *Privacy Act* requires or permits the Agency to refuse to provide the Unredacted Materials to Dr. Lukács (the "Refusal Issue"); and

(b) if the answer to the first issue is in the affirmative, whether subsection 8(1) of the *Privacy Act* infringes upon Dr. Lukács' rights under paragraph 2(*b*) of the *Charter* (the "Constitutional Issue").

IV. Analysis

A. Introduction

The open court principle

27 I will begin this analysis by considering what is meant by the open court principle. In the words of Chief Justice McLachlin in her speech "Openness and the Rule of Law" (Annual International Rule of Law Lecture, delivered in London, United Kingdom, 8 January 2014), at page 3:

> The open court principle can be reduced to two fundamental propositions. First, court proceedings, including the evidence and documents tendered, are open to the public. Second, juries give their verdicts and judges deliver their judgments in public or in published form.
>
> [Emphasis added]

28 It is the first aspect of this formulation that is presently in issue. More particularly, the issue under consideration relates to disclosure of documents that were on the Agency's Public Record and formed the basis for its decision in the Cancun Matter.

29 The open court principle has been recognized for over a century, as noted by the Supreme Court in *Application to proceed in camera, Re*, 2007 SCC 43, [2007] 3 S.C.R. 253 (S.C.C.) at paragraph 31. In that case, Bastarache J. stated at paragraph 33:

> In addition to its longstanding role as a common law rule required by the rule of law, the open court principle gains importance from its clear association with free expression protected by s. 2(*b*) of the Charter. In the context of this appeal, it is important to note that s. 2(*b*) provides that the state must not interfere with an individual's ability to "inspect and copy public records and documents, includng judicial records and documents (*Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at 1328, citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), at p. 597). La Forest J. adds at para. 24 of [*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480]: "[e]ssential to the freedom of the press to provide information to the public is the ability of the press to have access to this information" (emphasis added). Section 2(*b*) also protects the ability of the press to have access to court proceedings (*CBC*, at para. 23; *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75, at para. 53).
>
> [Emphasis added]

30 Thus, where the open court principle is unrestricted in its application, a member of the public has a common law and perhaps a constitutional right to inspect and copy all documents that have been placed on the record that is or was before a court.

31 An important consideration is whether there are any limits on the extent of the application of the open court principle. Clearly, there are.

32 In *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175, 132 D.L.R. (3d) 385 (S.C.C.), Dickson J., as he then was, stated at page 189:

> Undoubtedly every court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.

33 In the context of access to documents, courts generally have procedural rules that permit the filing of documents on a confidential basis where an order to that effect is obtained. For example, sections 151 and 152 of the *Federal Courts Rules*, SOR/98-106 set out a scheme for claiming confidentiality with respect to materials filed in proceedings before the Federal Court and this Court. Importantly, subsection 151(2) of those Rules stipulates that before a confidentiality order can be made, the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings. Thus, both the Federal Court and this Court are empowered to circumscribe the open court principle in appropriate circumstances.

34 More broadly, limitations on the application of the open court principle have been challenged, in a number of circumstances, on the basis that they infringe upon rights protected under s 2(*b*) of the *Charter*. For example:

> (a) A time-limited publication ban to protect the identity of undercover police officers was upheld, but a publication ban on police operational methods was found to be unnecessary (*R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442 (S.C.C.));
>
> (b) In connection with the construction and sale of two nuclear reactors by a Crown corporation to China, the Supreme Court granted a confidentiality order with respect to an affidavit that contained sensitive technical information about the ongoing environmental assessment of the construction site by Chinese authorities (*Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 (S.C.C.));
>
> (c) A request for a blanket sealing order with respect to search warrants and supporting information was denied because the party seeking the order failed to show a serious and specific risk to the integrity of a criminal investigation, but editing of the materials was permitted to protect the identity of a confidential informant (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188 (S.C.C.));
>
> (d) A request for a publication ban prohibiting a newspaper from reporting on settlement negotiations between the federal government and a company with respect to the recovery of public funds in connection with the federal "Sponsorship Program" was denied on the basis that the settlement negotiations were already a matter of public record and a publication ban would stifle the media's exercise of their constitutionally-mandated role to report stories of public interest (*Globe & Mail c. Canada (Procureur général)*, 2010 SCC 41, [2010] 2 S.C.R. 592 (S.C.C.)); and
>
> (e) A teenage girl, who was seeking an order to compel disclosure by an internet service provider of information relating to cyber-bullying, was granted permission to proceed anonymously, but a publication ban on those parts of the internet materials that did not identify the girl was denied (*A.B. (Litigation Guardian of) v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567 (S.C.C.)).

35 In determining whether or not it was appropriate to limit the application of the open court principle in each of these matters, the courts adopted the approach taken by the Supreme Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12 (S.C.C.) and *Mentuck* (the so-called *Dagenais/Mentuck* test). This test was described in *Toronto Star Newspapers*, at paragraph 4, as follows:

> Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in

> Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice or unduly impair its proper administration.*

Stated another way, the test is whether the salutary effects of the requested limitation of the open court principle will outweigh the deleterious effects of that limitation.

36 Another important consideration is whether the open court principle applies only to courts or whether it also applies to quasi-judicial tribunals.

The Agency and the Open Court Principle

37 In this application, all parties are agreed that the open court principle applies to the Agency when it undertakes dispute resolution proceedings in its capacity as a quasi-judicial tribunal. Support for this proposition can be found in *Canadian Broadcasting Corp. v. R.*, 2010 ONCA 726, 327 D.L.R. (4th) 470 (Ont. C.A.), at paragraph 22, where Sharpe J.A. stated:

> [22] The open court principle, permitting public access to information about the courts, is deeply rooted in the Canadian system of justice. The strong public policy in favour of openness and of "maximum accountability and accessibility" in respect of judicial or quasi-judicial acts pre-dates the Charter: *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175, [1982] S.C.J. No. 1, at p. 184 S.C.R. As Dickson J. stated, at pp. 186-87 S.C.R.: At every stage the rule should be one of public accessibility and concomitant judicial accountability" and "curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance".
>
> [Emphasis added]

However, the Agency asserts that it is nonetheless obliged to first apply section 8 of the *Privacy Act* before it can give effect to the open court principle. This assertion necessitates a consideration of both the *Privacy Act* and the particular circumstances of the Agency.

The Privacy Act

38 Section 2 of the *Privacy Act* contains Parliament's stipulation as to its purpose. That provision reads as follows:

> **Purpose**
>
> 2. The purpose of this Act is to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information.
>
> **Object**

> 2. La présente loi a pour objet de compléter la législation canadienne en matière de protection des renseignements personnels relevant des institutions fédérales et de droit d'accès des individus aux renseignements personnels qui les concernent.

39 The Supreme Court of Canada has elaborated upon the objectives of the *Privacy Act*. In *Lavigne v. Canada (Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773 (S.C.C.) at paragraph 24, Justice Gonthier stated,

> [24] The *Privacy Act* is also fundamental in the Canadian legal system. It has two major objectives. Its aims are, first, to protect personal information held by Government Institutions, and second, to provide individuals with a right of access to personal information about themselves...

Several paragraphs later, Justice Gonthier further stated:

> [27] To achieve the objectives of the *Privacy Act*, Parliament has created a detailed scheme for collecting, using and disclosing personal information. First, the Act specifies the circumstances in which personal information may be collected by a government institution, and what use the institution may make of it: only personal information that relates directly to an operating program or activity of the government institution that collects it may be collected (s.4), and it may be used for the purpose for which it was obtained or compiled by the institution or for a use consistent with that purpose, and for a purpose for which the information may be disclosed to the institution under s. 8(2) (s.7). As a rule, personal information may never be disclosed to third parties except with the consent of the individual to whom it relates (s.8(1)) and subject to the exceptions set out in the Act (s.8(2)).

40 These passages from *Lavigne* indicate the importance of the protection of privacy in relation to Personal Information collected and held by our government and its emanations. However, they also point to a number of specific instances in which such Personal Information can be used and disclosed.

41 The *Privacy Act* applies to Government Institutions. Section 4 of the *Privacy Act* prohibits the collection of Personal Information about individuals unless it relates directly to an operating program or activity of the institution.

42 Once Personal Information has been collected and becomes subject to the control of a Government Institution, paragraph 7(*a*) of the *Privacy Act* limits its use to the purpose for which it was obtained or compiled, or to a use consistent with that purpose. Paragraph 7(*b*) of the *Privacy Act* permits such information to be used for a purpose for which it may be disclosed under subsection 8(2) of the *Privacy Act*.

43 Section 7 of the *Privacy Act* reads as follows:

7. Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be used by the institution except:

(a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose; or

(b) for a purpose for which the information may be disclosed to the institution under subsection 8(2).

7. À défaut du consentement de l'individu concerné, les renseignements personnels relevant d'une institution fédérale ne peuvent servir à celle-ci:

a) qu'aux fins auxquelles ils ont été recueillis ou préparés par l'institution de même que pour les usages qui sont compatibles avec ces fins;

b) qu'aux fins auxquelles ils peuvent lui être communiqués en vertu du paragraphe 8(2).

44 Subsection 8(1) of the *Privacy Act* prohibits disclosure of Personal Information under the control of a Government Institution without the consent of the individual, subject to certain exceptions contained in subsection 8(2) of the *Privacy Act*. Subsection 8(1) reads as follows:

8. (1) Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section.

8. (1) Les renseignements personnels qui relèvent d'une institution fédérale ne peuvent être communiqués, à défaut du consentement de l'individu qu'ils concernent, que conformément au présent article.

45 Of particular relevance to this appeal are the exceptions to paragraph 8(1) of the *Privacy Act* contained in paragraphs 8(2)(*a*) and (*b*) and sub-paragraph (*m*)(i) of the *Privacy Act*, which read as follows:

8. (2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed

(a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose;

(b) for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure;

. . .

(*m*) for any purpose where, in the opinion of the head of the institution,

(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure,

8. (2) Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants:

a) communication aux fins auxquelles ils ont été recueillis ou préparés par l'institution ou pour les usages qui sont compatibles avec ces fins;

b) communication aux fins qui sont conformes avec les lois fédérales ou ceux de leurs règlements qui autorisent cette communication;

. . .

m) communication à toute autre fin dans les cas où, de l'avis du responsable de l'institution:

(i) des raisons d'intérêt public justifieraient nettement une éventuelle violation de la vie privée,

46 A further exemption with respect to the use and disclosure of Personal Information is found in subsection 69(2) of the *Privacy Act*, which reads as follows:

69. (2) Sections 7 and 8 do not apply to personal information that is publicly available.

69. (2) Les articles 7 et 8 ne s'appliquent pas aux renseignements personnels auxquels le public a accès.

The *Privacy Act* contains no definition of Publicly Available.

The Agency

47 There is no doubt that the Agency falls within the definition of Government Institution. As such, the Agency is bound by the provisions of that legislation. However, this case raises interesting questions as to how the Agency's adjudicative function — one part of its broad legislative mandate — is affected by the scope and application of the *Privacy Act*.

48 A helpful description of the Agency and its functions can be found in *Lukács v. Canadian Transportation Agency*, 2014 FCA 76, 456 N.R. 186 (F.C.A.), wherein, at paragraphs 50 to 53, Justice Dawson of this Court stated:

[50] the Agency has a broad mandate in respect of all transportation matters under the legislative authority of Parliament. The Agency performs two key functions.

> [51] First, in its role as a quasi-judicial tribunal, it resolves commercial and consumer transportation-related disputes. Its mandate was increased to include resolving accessibility issues for persons with disabilities.
>
> [52] Second, the Agency functions as an economic regulator, making determinations and issuing licenses and permits to carriers which function within the ambit of Parliament's authority. In both roles the Agency may be called to deal with matters of significant complexity.

49 This description highlights the duality of the Agency's functions. It acts in an administrative capacity, when carrying out its economic regulatory mandate, and in a quasi-judicial, or court-like capacity, when carrying out its adjudicative dispute resolution mandate. In this latter capacity, the Agency exercises many of the powers, rights and privileges of superior courts (see sections 25 to 35 of the CTA).

The Agency's Rules

50 Section 17 of the CTA empowers the Agency to make rules governing the manner of and procedures for dealing with matters and business that come before it. At the time that Dr. Lukács brought this application, the Old Rules were in force. They have been superseded by the *Canadian Transportation Agency Rules (Dispute Proceedings at Certain Rules Applicable to All Proceedings*), SOR/2014-104 (the "New Rules").

51 While both sets of Rules relate to proceedings before the Agency, the New Rules are more comprehensive and, in general, apply only to the Agency's dispute resolution proceedings. In an annotated version of the New Rules (the "Annotation") (See: Canadian Transportation Agency, *Annotated Dispute Adjudication Rules* (21 August 2014), online: Canadian Transportation Agency <https://www.otc-cta.gc.ca/eng/publication/annotated-dispute-adjudication-rules>), the Agency provides the following description of its adjudicative and non-adjudicative functions:

> The Agency performs two key functions within the federal transportation system:
>
> • Informally and through formal adjudication (where the Agency reviews an application and makes a decision), the Agency resolves a range of commercial and consumer transportation-related disputes, including accessibility issues for persons with disabilities. It operates like a court when adjudicating disputes.
>
> • As an economic regulator, the Agency makes decisions and issues authorities, licences and permits to transportation service providers under federal jurisdiction.
>
> [Emphasis added]

52 Both the Old Rules and the New Rules contemplate the commencement of dispute resolution proceedings by the filing of complaint documentation. The New Rules specifically provide that the proceedings do not commence until the application documentation has been accepted by the Agency.

53 Both sets of Rules require that documents filed with the Agency in respect of dispute resolution proceedings must be placed by it on its Public Record. Subsection 23(1) of the Old Rules reads as follows:

> **Claim for confidentiality**
>
> 23. (1) The Agency shall place on its public record any document filed with it in respect of any proceeding unless the person filing the document makes a claim for its confidentiality in accordance with this section.
>
> **Demande de traitement confidentiel**
>
> 23. (1) L'Office verse dans ses archives publiques les documents concernant une instance qui sont déposés auprès de lui, à moins que la personne qui les dépose ne présente une demande de traitement confidentiel conformément au présent article.

Subsection 7 of the New Rules reads as follows:

> **Filing**
>
> 7. (1) Any document filed under these Rules must be filed with the Secretary of the Agency.
>
> **Agency's public record**
>
> (2) All filed documents are placed on the Agency's public record unless the person filing the document files, at the same time, a request for confidentiality under section 31 in respect of the document.
>
> **Dépôt**
>
> 7. (1) Le dépôt de documents au titre des présentes règles se fait auprès du secrétaire de l'Office.
>
> **Archives publiques de l'Office**
>
> (2) Les documents déposés sont versés aux archives publiques de l'Office, sauf si la personne qui dépose le document dépose au même moment une requête de confidentialité, en vertu de l'article 31, à l'égard du document.

Both sets of Rules — subsections 23(3) to (9) of the Old Rules and section 31 of the New Rules — empower the Agency to grant confidentiality protection in respect of documents that are filed by parties to the proceedings.

54 The Agency's perspective with respect to the privacy implications of filings made under subsection 7(2) of the New Rules is set forth in the Annotation as follows:

> **The Agency's record**
>
> The Agency's record is made up of all the documents and information gathered during the dispute proceeding that have been accepted by the Agency. This record will be considered by the Agency when making its decision.
>
> The Agency's record can consist of two parts: the public record and the confidential record.
>
> **Public Record**
>
> Generally, all documents filed with and accepted by the Agency during the dispute proceeding, including the names of parties and witnesses, form part of the public record.
>
> Parties filing documents with the Agency should not assume that a document that they believe is confidential will be kept confidential by the Agency. A request to have a document kept confidential may be made pursuant to section 31 of the Dispute Adjudication Rules.
>
> Documents on the public record will be:
>
> - Provided to the other parties involved;
> - Considered by the Agency in making its decision; and
> - Made available to members of the public, upon request, with limited exceptions.
>
> Decisions and applications are posted on the Agency's website and include the names of the parties involved, as well as witnesses. Medical conditions which relate to an issue raised in the application will also be disclosed. The decision will also be distributed by e-mail to anyone who has subscribed through the Agency's website to receive Agency decisions.
>
> **Confidential record**
>
> The confidential record contains all the documents from the dispute proceeding that the Agency has determined to be confidential.
>
> If there are no confidential documents, then there is only a public record.
>
> No person can refuse to file a document with the Agency or provide it to a party because they believe that it is confidential. If a person is of the view that a document is confidential,

> they must file it with the Agency along with a request for confidentiality under section 31 of the Dispute Adjudication Rules. This will trigger a process where the Agency will determine whether the document is confidential. During this process, the document is not placed on the public record.
>
> Decisions that contain confidential information that is essential to understanding the Agency's reasons will be treated as confidential as well and will not be placed on the Agency's website. However, a public version of the decision will be issued and placed on the website.
>
> [Emphasis added]

55 There is no definition of Public Record in either the Old Rules or the New Rules.

The Factual Context in this Application

56 It is undisputed that the documents that were requested by Dr. Lukács were placed by the Agency on its Public Record in the Cancun Matter and that the Agency made no confidentiality order in respect of any of those documents

57 It is equally clear that certain portions of the documents that were provided by the Agency to Dr. Lukács were redacted. Moreover, those redactions were made by an employee of the Agency, not by a member of the Agency carrying out a quasi-judicial function.

B. The Refusal Issue

The Standard of Review

58 The issue is whether the Agency, acting through its Chairperson, erred in concluding that subsection 8(1) of the *Privacy Act* required it to redact Personal Information contained in the documents on its Public Record in the Cancun Matter, before disclosing those documents to Dr. Lukács in response to his request.

59 In accordance with this Court's decision in *Nault c. Canada (Ministre des Travaux publics & Services gouvernementaux)*, 2011 FCA 263, 425 N.R. 160 (F.C.A.) at paragraph 19, citing *Canada (Information Commissioner) v. Royal Canadian Mounted Police Commissioner*, 2003 SCC 8, [2003] 1 S.C.R. 66 (S.C.C.) at paragraphs 14 to 19, the standard of review applicable to the decision of the head of a Government Institution to refuse to disclose documents containing Personal Information is correctness. *Nault* also stipulates that the interpretation of provisions of the *Privacy Act* that are relevant to the refusal to disclose is also to be reviewed on the standard of correctness.

The Positions of the Parties

60 The determination of the correctness of the Refusal requires the interpretation of a number of provisions of the *Privacy Act*.

61 By virtue of subsection 69(2) of the *Privacy Act*, it is clear that the prohibition on disclosure of Personal Information in subsection 8(1) of the *Privacy Act* is inapplicable in respect of Personal Information that is Publicly Available.

62 Thus, if the documents placed by the Agency on its Public Record in the Cancun Matter are Publicly Available, then the redactions made to them on behalf of the Agency were impermissible and, without more, the application for judicial review must be allowed.

Dr. Lukács' Submission — "Publicly Available"

63 Dr. Lukács argues that he is entitled to receive the Unredacted Documents because they were placed on the Agency's Public Record and, accordingly, any Personal Information that might be contained in them is Publicly Available. As such, he asserts that the prohibition in subsection 8(1) of the *Privacy Act* is inapplicable.

The Agency's Position — "Publicly Available"

64 Counsel for the Agency asserts that Personal Information of each party to an adjudicative proceeding before the Agency is put into a personal information bank (a "Personal Information Bank"), as contemplated by section 10 of the *Privacy Act*, and therefore is not information that is Publicly Available. Further, counsel for the Agency asserts that this Court should reject the argument that, in absence of a confidentiality order, the Agency is required to disclose documents on its Public Record in an unredacted form. Finally, counsel for the Agency asserted that, if Parliament had intended that the right to disclosure of documents pursuant to the open court principle was to override subsection 8(1) of the *Privacy Act*, that legislation would have contained a specific provision to that effect.

The Attorney General of Canada's Position — "Publicly Available"

65 The Attorney General of Canada took no position with respect to the interpretation and application of subsection 69(2) of the *Privacy Act* in this appeal.

The Privacy Commissioner's Position — "Publicly Available"

66 Counsel for the Privacy Commissioner asserts that Personal Information cannot be Publicly Available unless it is obtainable from another source or available in the public domain for ongoing use by the public when Dr. Lukács made his request. In addition, the Privacy Commissioner asserts that information on the Agency's Public Record cannot be Publicly Available simply because the Agency is subject to the open court principle.

Discussion

67 To decide this issue, it is necessary to interpret the terms Publicly Available and Public Record. Unfortunately, the parties were unable to provide the Court with any determinative authorities in this regard.

The interpretative approach

68 In *Canada Trustco Mortgage Co. v. R.*, [2005] 2 S.C.R. 601, 2005 SCC 54 (S.C.C.) the Supreme Court provided the following interpretative guidance at paragraph 10:

> 10 It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.
>
> [Emphasis added]

"Publicly Available"

69 The term Publicly Available appears to me to be relatively precise and unequivocal. I interpret these words as meaning available to or accessible by the citizenry at large. This interpretation is also consistent with the apparent context and purpose of subsection 69(2) of the *Privacy Act*. That provision is located in a portion of the *Privacy Act*, entitled "Exclusions", that sets out circumstances in which the *Privacy Act*, or sections thereof, do not apply. The purpose of subsection 69(2) of the *Privacy Act* is to render the use and disclosure limitations that are contained in sections 7 and 8 of the *Privacy Act* inapplicable to Personal Information if and to the extent that the citizenry at large otherwise has the ability to access such information.

"Public Record"

70 In my view, the meaning of Public Record is not precise and unequivocal. Instead, the context in which this term appears is critical to the discernment of its meaning. The term appears in subsection 23(1) of the Old Rules.

71 In the judicial context, the record consists of a documentary memorialization of the proceedings that have come before the court. The documents on the record constitute the foundation upon which the court grounds its ultimate decision. The purpose of the record is to facilitate scrutiny of the court's decision, whether for the specific purpose of appellate review or the more general purpose of judicial transparency. Thus, when a court places documents on its record, it adheres to the open court principle.

72 However, as has been noted earlier in these reasons, there are circumstances in which unfettered access to the record before the court runs counter to competing societal interests. In those circumstances, the affected party may apply to the court for relief, either under the procedural rules of that court or on the basis of the *Dagenais/Mentuck* test in respect of *Charter*-based applications. In appropriate circumstances, the court will circumscribe the scope and application of the open court principle. When it does so, the court will have determined that, in the circumstances, safeguarding the integrity of the administration of justice and protecting the often vulnerable party who seeks that protection, outweigh the benefits of open access that the open court principle would otherwise provide. Thus, the open court principle mandates that the record of the court will be available for public access and scrutiny, except to the extent that the Court otherwise determines.

73 In my view, there is no principled reason to employ a more limited interpretation of the term record simply because that term relates to a quasi-judicial adjudicative tribunal, such as the Agency, rather than a court. The record of the proceedings before the Agency performs essentially the same function as the record of a court.

74 In interpreting the term record, in subsection 23(1) of the Old Rules, I adopt the meaning referred to above, namely a documentary memorialization of the proceedings that have come before the Agency. The additional word "public" provides a useful contrast to the situation in which materials on the record have been determined by the Agency to be confidential. In other words, as noted in the excerpt from the Annotation referred to in paragraph 54 of these reasons, the Agency's Public Record can be viewed as a record that contains no confidential documents.

75 The Annotation provides an illustration of the Agency's perspective with respect to requests for confidentiality

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

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

Is the Agency's public record publicly available?

76 The Privacy Commissioner asserts that to be Publicly Available, the documents requested by Dr. Lukács must have been freely obtainable from a source other than the Agency. However, the Privacy Commissioner offers no jurisprudential authority for this proposition, and I reject it.

77 This assertion ignores the bifurcated nature of the Agency's mandate. As noted above, the Agency functions as an economic regulator and as a quasi-judicial dispute resolution tribunal.

78 The documents initiating a dispute may well be required to be kept in Personal Information Banks, immediately after their receipt by the Agency. However, compliance by the Agency with its obligation in subsection 23(1) of the Old Rules means that those documents have left the cloistered confines of such banks and moved out into the sunlit Public Record of the Agency. In my view, the act of placing documents on the Public Record is an act of disclosure on the part of the Agency. Thus, documents placed on the Agency's Public Record are no longer "held" or "under the control" of the Agency acting as a Government Institution. From the time of their placement on the Public Record, such documents are held by the Agency acting as a quasi-judicial, or court-like body, and from that time they become subject to the full application of open court principle. It follows, in my view, that, once on the Public Record, such documents necessarily become Publicly Available.

79 In this regard, two comments are apposite. First, in placing documents on its Public Record, the Agency is acting properly and within the law. Such disclosure by the Agency is necessary for it to fulfill its dispute resolution mandate, and in particular to comply with the requirements of subsection 23(1) of the Old Rules or subsection 7(2) of the New Rules. Secondly, either subsections 23(3) to (9) of the Old Rules or section 31 of the New Rules will permit the parties to the proceedings to request a confidentiality order from the Agency. These confidentiality provisions enable the Agency to protect the privacy interests of participants in dispute resolution proceedings before it. They do so in substantially the same way that such interests are protected in judicial proceedings, while preserving the presumptively open access to the Agency's proceeding in accordance with the open court principle. To underscore this point, it was open to the parties in the Cancun Matter to request a confidentiality order in relation to any Personal Information filed in that matter, but no such request was made.

80 In conclusion, it is my view that once the Agency placed the documents in the Cancun Matter on its Public Record, as required by subsection 23(1) of the Old Rules, those documents became Publicly Available. As such, the limitation on their disclosure, contained in subsection 8(1) of the *Privacy Act*, was no longer applicable by virtue of subsection 69(2) of the *Privacy Act*. Accordingly, Dr. Lukács was entitled to receive the documents that he requested and the Agency's refusal to provide them to him was impermissible.

C. The Constitutional Issue

81 The resolution of the Refusal Issue makes it unnecessary for me to consider the Constitutional Issue.

V. Disposition

82 For the foregoing reasons, I would allow the application for judicial review and direct the Agency to provide the Unredacted Documents to Dr. Lukács. In view of the complexities of the issues that were raised in this application and the considerable time that was spent by Dr. Lukács I would award Dr. Lukács a moderate allowance in the amount of $750.00 plus reasonable disbursements, such amounts to be payable by the Agency.

***D.G. Near J.A.*:**

I agree

***Richard Boivin J.A.*:**

I agree

Application allowed.

2016 CAF 174, 2016 FCA 174
Federal Court of Appeal

Lukács v. Canadian Transportation Agency

2016 CarswellNat 10267, 2016 CarswellNat 2271,
2016 CAF 174, 2016 FCA 174, 267 A.C.W.S. (3d) 515

Gábor Lukács, Appellant and Canadian Transportation Agency and Newleaf Travel Company Inc., Respondents

Johanne Gauthier J.A., Wyman W. Webb J.A., Mary J.L. Gleason J.A.

Judgment: June 19, 2016
Docket: 16-A-17

Counsel: Dr. Gábor Lukács, Appellant (written), for himself
Allan Matte (written), for Respondent, Canadian Transportation Agency
Brian J. Meronek (written), Ian S. McIvor (written), for Respondent, Newleaf Travel Company Inc.

Subject: Civil Practice and Procedure; Contracts; Public

APPLICATION for leave to appeal decision of Canadian Transportation Agency.

***Mary J.L. Gleason J.A.*:**

1 The appellant, Dr. Gábor Lukács, is seeking leave to appeal Decision 100-A-2016 of the Canadian Transportation Agency, issued on March 29, 2016 [the Decision]. In the Decision, the Agency made two determinations. First, it decided that resellers of domestic air service are no longer required to hold licences under the *Canada Transportation Act*, S.C. 1996, c. 10 [the CTA], so long as they do not hold themselves out as an air carrier operating an air service. Second, in application of the foregoing, the Agency held that the respondent, Newleaf Travel Company Inc., was such a reseller and therefore not required to hold a licence. In so deciding, the Agency modified its previous interpretation of subsection 55(1) and paragraph 57(a) of the CTA that it had applied to several other domestic resellers of air services.

2 Dr. Lukács submits the Agency made an error of law as its changed interpretation of subsection 55(1) and paragraph 57(a) of the CTA is unreasonable. He also alleges that the Agency lacked jurisdiction to undertake the inquiry which led to the new interpretation of the licencing requirements applicable to resellers of domestic air services. The issues in the proposed appeal therefore raise questions that fall within the scope of section 41 of the CTA.

3 Newleaf does not contest this but rather says that Dr. Lukács lacks standing to commence this appeal as he was not a party to the proceeding before the Agency. It also asserts that Dr. Lukács has failed to raise an arguable case in respect of the issues that he has raised.

4 Contrary to what Newleaf asserts, the materials filed do raise an arguable case and Dr. Lukács does have standing to commence this appeal, either as a private or public interest applicant.

5 Dr. Lukács participated in the consultation before the Agency undertaken with respect to the change in the interpretation of the licencing requirements applicable to domestic resellers of air service, which is sufficient to afford him standing to launch this appeal.

6 Even if this were not the case, he would possess standing as a public interest litigant. The test for public interest standing involves consideration of three inter-related factors: first, whether there is a justiciable issue, second, whether the individual seeking standing has a genuine interest in the issue, and, third, whether the proposed proceeding is a reasonable and effective way to bring the matter before the courts: *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45, [2012] 2 S.C.R. 524 (S.C.C.) at paras. 36-37. As leave is being granted, this appeal raises a justiciable issue. It is undisputed that Dr. Lukács is an air passenger rights advocate, who has frequently brought applications to this Court in respect of Agency decisions, and therefore does have a genuine interest in the issues raised in this appeal. Finally, an appeal by someone like Dr. Lukács is an effective way for the issues raised in this appeal to be brought before the Court as Newleaf would not challenge the Decision rendered in its favour.

7 Thus, leave should be granted to Dr. Lukács to commence this appeal.

8 Dr. Lukács requests that this appeal be expedited and joined for hearing with an earlier judicial review application he commenced, challenging the jurisdiction of the Agency to embark upon the inquiry that led to the Decision (Federal Court of Appeal File A-39-16). The judicial review application in File A-39-16 is being conducted on an expedited basis. If the judicial review application is not rendered moot by this appeal, it makes sense that this appeal and the judicial review application be heard one immediately after the other by the same panel of this Court as there is considerable overlap between the files. It also is appropriate to expedite this appeal due both to the fact that the judicial review application is being expedited and to the nature of the issues raised in the appeal.

9 I would therefore order that the appeal be conducted on an expedited basis if Dr. Lukács files his Notice of Appeal within thirty days of the date of this Order. I would also order that if this matter is expedited, this appeal be heard immediately following the judicial review application in File A-39-16 if that application proceeds to hearing. The other issues raised by the parties regarding production of materials should be dealt with in a separate procedural Order issued concurrently with this Order.

10 While Dr. Lukács seeks his costs in respect of this motion for leave, it is more appropriate that they be in the cause.

***Johanne Gauthier J.A.*:**

I agree

***Wyman W. Webb J.A.*:**

I agree

Application granted.

2016 CAF 220, 2016 FCA 220
Federal Court of Appeal

Lukács v. Canadian Transportation Agency

2016 CarswellNat 4268, 2016 CarswellNat 9946, 2016 CAF 220, 2016 FCA 220, 270 A.C.W.S. (3d) 63, 408 D.L.R. (4th) 760

DR. GÁBOR LUKÁCS (Appellant) and CANADIAN TRANSPORTATION AGENCY AND DELTA AIR LINES, INC. (Respondents)

Wyman W. Webb, A.F. Scott, Yves de Montigny JJ.A.

Heard: April 25, 2016
Judgment: September 7, 2016
Docket: A-135-15

Counsel: Dr. Gábor Lukács, Appellant, for himself
Allan Matte, for Respondent, Canadian Transportation Agency
Gerard Chouest, for Respondent, Delta Air Lines Inc.

Subject: Civil Practice and Procedure; Public

APPEAL by complainant from determination regarding air travel complaint.

***Yves de Montigny J.A.*:**

1 This is a statutory appeal under section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10 [the *Act*] of a decision rendered by the Canadian Transportation Agency (the Agency) dismissing a complaint of discriminatory practices filed by Dr. Gábor Lukács (the appellant) against Delta Air Lines Inc. (the respondent) on the preliminary basis that he lacks standing to bring this complaint.

2 This case essentially raises the issue of standing in proceedings before the Agency. The appellant argues that the Agency applied the wrong legal principles and fettered its discretion in denying him public interest standing to challenge Delta's policies and practices. Having carefully considered the parties' written and oral submissions, I am of the view that the appeal must be granted.

I. Background

3 On August 24, 2014, the appellant filed a complaint with the Agency alleging that certain practices of the respondent relating to the transportation of "large (obese)" persons are discriminatory, contrary to subsection 111(2) of the *Air Transportation Regulations*, SOR/88-58 (the *Regulations*) and also contrary to a previous decision of the Agency concerning the accommodation of passengers with disabilities. The appellant relied on an email dated August 20, 2014 from a customer care agent of Delta responding to a concern of a passenger ("Omer") regarding a fellow passenger who required additional space and who therefore made Omer feel "cramped".

4 In that email, Delta apologized to Omer and set out the guidelines it follows to ensure that large passengers and people sitting nearby are comfortable. It reads as follows:

> Sometimes, we ask the passenger to move to a location in the plane where there's more space. If the flight is full, we may ask the passenger to take a later flight. We recommend that large passengers purchase additional seats, so they can avoid being asked to rebook and so we can guarantee comfort for all.
>
> Appellant's Appeal Book, p. 21

5 Since it was not clear to the Agency whether Dr. Lukács had an interest in Delta's practices on the basis of the facts before it, he was provided with the opportunity to file submissions with the Agency regarding his standing. Dr. Lukács filed his submissions on September 19, 2014, Delta responded on September 26, 2014, and Dr. Lukács replied on October 1, 2014. In its Decision No. 425-C-A-2014 dated November 25, 2014, the Agency dismissed Dr. Lukács' complaint for lack of standing.

II. The impugned decision

6 The Agency first distinguished *Krygier v. WestJet et al.*, Decision No. LET-C-A-104-2013 [*Krygier*] and *Black v. Air Canada*, Decision No. 746-C-A-2005 [*Black*], on the basis that the issue in those cases was not the standing of the complainants but the need for a "real and precise factual background". Furthermore, the Agency found that although Dr. Lukács was not required to be a member of the group discriminated against in order to have standing, he must nonetheless have a "sufficient interest". The use of the term "any person" in the *Act* did not mean that the Agency should determine issues in the absence of the persons with the most at stake. On that basis, the Agency found that, at 6 feet tall and 175 pounds, nothing suggested that Dr. Lukács himself would ever be subject to Delta's policy regarding large persons that would not be able to sit in their seat without encroaching into the neighbouring seat.

7 With respect to public interest standing, the Agency took note of the three-part test established by the Supreme Court in the trilogy of *Thorson v. Canada (Attorney General) (No. 2)* (1974),

[1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1 (S.C.C.); *McNeil v. Nova Scotia (Board of Censors)* (1975), [1976] 2 S.C.R. 265, 55 D.L.R. (3d) 632 (S.C.C.); and *Borowski v. Canada (Minister of Justice)*, [1981] 2 S.C.R. 575, 130 D.L.R. (3d) 588 (S.C.C.). The Agency further relied on *Canadian Council of Churches v. R.*, [1992] 1 S.C.R. 236, 88 D.L.R. (4th) 193 (S.C.C.) [*Canadian Council of Churches*] and *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, 33 D.L.R. (4th) 321 (S.C.C.) [*Finlay*] in expressing the view that public interest standing does not extend beyond cases in which the constitutionality of legislation or the non-constitutionality of administrative action is contested. Such being the case, Dr. Lukács could not rely on public interest standing to bring his complaint before the Agency.

III. Issues

8 Dr. Lukács conceded at the hearing that he does not have a direct and personal interest in this case, and as a result he does not claim standing on that basis. The issues upon which the parties disagree can be formulated as follows:

> A. Did the Agency err in applying the general law of standing on a complaint for discriminatory terms and conditions under subsections 67.2(1) of the *Act* and 111(2) of the *Regulations*?
>
> B. Did the Agency err in finding that public interest standing is limited to cases in which the constitutionality of legislation or the non-constitutionality of administrative action is challenged?

9 As I dispose of the current matter on the basis of the issues raised in the above point A, the following analysis will not address the questions raised in point B.

IV. Relevant statutory provisions

10 Airlines operating flights within, to or from Canada are required to create a tariff that sets out the terms and conditions of carriage. The tariff is the contract of carriage between the passenger and the airline, and includes the terms and conditions which are enforceable in Canada (see ss. 67 of the *Act* and 100(1) of the *Regulations*).

11 For the purposes of this proceeding, a few provisions are of particular relevance. The first is section 37 of the *Act*, which grants the Agency the power to inquire into a complaint:

> 37 The Agency may inquire into, hear and determine a complaint concerning any act, matter or thing prohibited, sanctioned or required to be done under any Act of Parliament that is administered in whole or in part by the Agency.
>
> 37 L'Office peut enquêter sur une plainte, l'entendre et en décider lorsqu'elle porte sur une question relevant d'une loi fédérale qu'il est chargé d'appliquer en tout ou en partie.

12 The second, subsection 67.2(1) of the *Act*, sets out the powers of the Agency if it finds terms or conditions in a tariff that are unreasonable or unduly discriminatory:

> 67.2 (1) If, on complaint in writing to the Agency by any person, the Agency finds that the holder of a domestic licence has applied terms or conditions of carriage applicable to the domestic service it offers that are unreasonable or unduly discriminatory, the Agency may suspend or disallow those terms or conditions and substitute other terms or conditions in their place.
>
> 67.2 (1) S'il conclut, sur dépôt d'une plainte, que le titulaire d'une licence intérieure a appliqué pour un de ses services intérieurs des conditions de transport déraisonnables ou injustement discriminatoires, l'Office peut suspendre ou annuler ces conditions et leur en substituer de nouvelles.

13 Lastly, subsection 111(2) of the *Regulations* further expands on prohibited discrimination:

> 111(2) No air carrier shall, in respect of tolls or the terms and conditions of carriage,
>
> (a) make any unjust discrimination against any person or other air carrier;
>
> (b) give any undue or unreasonable preference or advantage to or in favour of any person or other air carrier in any respect whatever; or
>
> (c) subject any person or other air carrier or any description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatever.
>
> 111 (2) En ce qui concerne les taxes et les conditions de transport, il est interdit au transporteur aérien:
>
> a) d'établir une distinction injuste à l'endroit de toute personne ou de tout autre transporteur aérien;
>
> b) d'accorder une préférence ou un avantage indu ou déraisonnable, de quelque nature que ce soit, à l'égard ou en faveur d'une personne ou d'un autre transporteur aérien;
>
> c) de soumettre une personne, un autre transporteur aérien ou un genre de trafic à un désavantage ou à un préjudice indu ou déraisonnable de quelque nature que ce soit.

V. The standard of review

14 At its core, this case calls into question the general principles the Agency should apply when determining whether a party has standing to file a complaint under subsection 67.2(1) of the *Act*. Of course, the actual decision of whether to grant standing engages the exercise of discretion, and as such it must be reviewed by this Court on a standard of reasonableness. To the extent that

determining the standing requirements for a complaint under subsection 67.2(1) also requires an analysis of the particular requirements of the *Act* and the related statutes and case law, it is also entitled to a high degree of deference.

15 Of course, it could be argued that since Parliament has provided, through legislation, a right of appeal from the Agency to this Court on questions of law, correctness is the applicable standard. Such a view would be mistaken, however, as it is clear since the Supreme Court of Canada decision in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.) that the correctness standard will only apply to constitutional questions; questions of law of central importance to the legal system as a whole and that are outside of the adjudicator's expertise; questions regarding the jurisdictional lines between two or more competing specialized tribunals; and the exceptional category of true questions of jurisdiction. The highest Court has repeated on a number of occasions that this is a very narrow exception to the general principle that an adjudicative administrative tribunal's interpretation of its enabling legislation is reviewable on a standard of reasonableness (see, for example, *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 (S.C.C.) at paras. 33-34, [2011] 3 S.C.R. 654 (S.C.C.); *Canada (Attorney General) v. Mowat*, 2011 SCC 53 (S.C.C.) at para. 24, [2011] 3 S.C.R. 471 (S.C.C.); *Canadian National Railway v. Canada (Attorney General)*, 2014 SCC 40 (S.C.C.) at para. 55, [2014] 2 S.C.R. 135 (S.C.C.); *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67 (S.C.C.) at paras. 26-27, [2013] 3 S.C.R. 895 (S.C.C.); *Commission scolaire de Laval c. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8 (S.C.C.) at para. 34, (2016), 481 N.R. 25 (S.C.C.)). In my view, the criteria for standing under subsection 67.2(1) does not raise broad questions relating to the Agency's authority, and does not raise a question of central importance to the legal system as a whole; on the contrary, that question falls squarely within the Agency's expertise. As a result, the task of this Court is rather limited and is restricted to determining whether the decision of the Agency falls within a range of possible, acceptable outcomes which are defensible in light of the facts and the law.

A. Did the Agency err in applying the general law of standing on a complaint for discriminatory terms and conditions under subsections 67.2 (1) of the Act and 111(2) of the Regulations?

16 As recently stated by this Court in *Lukacs v. Canada (Transportation Agency)*, 2016 FCA 202 (F.C.A.) at paragraphs 31-32, the *Act* does not create a general obligation for the Agency to deal with each and every complaint regarding compliance with the *Act* and its various regulations. Section 37 of the *Act*, in particular, makes it clear that the Agency "may" inquire into, hear and determine a complaint. There is no question, therefore, that the Agency retains a gatekeeping function and has been granted the discretion to screen the complaints that it receives to ensure, among other things, the best use of its limited resources.

17 Counsel for the respondent infers from the permissive (as opposed to mandatory) nature of section 37, the power of the Agency to refuse to inquire into, hear and decide complaints lodged

by complainants who do not have standing to bring forward the complaint. It is not clear, however, on what basis the principles governing standing before courts of law ought to be transposed to a regulatory regime supervised and enforced by an administrative body like the Canadian Transportation Agency.

18 The rationale underlying the notion of standing has always been a concern about the allocation of scarce judicial resources and the corresponding need to weed out cases brought by persons who do not have a direct personal legal interest in the matter. Such preoccupations are warranted in a judicial setting, where the objective is to determine the individual rights of private litigants, the accused and individuals directly affected by state action (see *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45 (S.C.C.) at para. 22, [2012] 2 S.C.R. 524 (S.C.C.); *Canadian Council of Churches* at p. 249). As such, the general rule required that a person have a sufficient personal interest in the matter to bring a claim forward. The ability to seek declaratory or injunctive relief in the public interest is usually reserved for the Attorney General, who might allow a private individual to bring such a claim only on consent (*Finlay* at para. 17). Similar rules may also be appropriate before a quasi-judicial tribunal, established to dispose of disputes between a citizen and the government or one of its delegated authorities. It is far from clear that these strict rules developed in the judicial context, however, should be applied with the same rigour by an administrative agency mandated to act in the public interest.

19 I agree with the appellant that the Agency erred in superimposing the jurisprudence with respect to standing on the regulatory scheme put in place by Parliament, thereby ignoring not only the wording of the *Act* but also its purpose and intent. In enacting the *Act*, Parliament chose to create a regulatory regime for the national transportation system, and resolved to achieve a number of policy objectives (set out in section 5 of the *Act*). Within that framework, the role of the Agency is not only to provide redress and grant monetary compensation to persons adversely affected by national transportation actors, but also to ensure that the policies pursued by the legislator are carried out.

20 Administrative bodies such as the Agency are not courts. They are part of the executive branch, not the judiciary. Their mandates come in all shapes and sizes, and their role is different from that of a court of law. Often, such bodies are created to provide greater and more efficient access to justice through less formal procedures and specialized decision-makers that may not have legal training. Moreover, not all administrative bodies follow an adversarial model similar to that of courts. If an administrative body has important inquisitorial powers, ensuring that the particular parties before them are in a position to present extensive evidence of their particular factual situations may be less important than in a court of law, where judges are expected to take on a passive role and decide on the basis of the record and arguments presented to them by the parties.

21 For that reason, the Supreme Court of Canada has recognized that the procedure before administrative bodies must be consistent, above all, with their enabling statute, and need not replicate court procedure if their functions are different from that of a traditional court (see *Innisfil (Township) v. Vespra (Township)*, [1981] 2 S.C.R. 145 (S.C.C.) at pp. 167-168, [1981] A.C.S. No. 73 (S.C.C.). In a similar vein, the Supreme Court recognizes the importance of the particular statutory regime and the procedural choices made by the administrative body itself when it comes to determining the content of the duty of fairness (*Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) at paras. 24 and 27, (1999), 174 D.L.R. (4th) 193 (S.C.C.) [*Baker*]). To the extent that courts have exhibited a tendency to impose court-like procedures on administrative bodies in the context of judicial review for breach of procedural fairness obligations in the wake of *Baker*, they have often been met with criticism (see, for example, David Mullan, "Tribunal Imitating Courts — Foolish Flattery or Sound Policy?" (2005) 28 Dal. L.J. 1 (S.C.C.) ; Robert Macaulay and James Sprague, *Practice and Procedure before Administrative Tribunals*, vol. 2 (Toronto: Carswell, 2010) at pp. 901 to 905).

22 Recognition of the particularity of administrative bodies has been reflected as well in decisions on standing and participation rights before administrative bodies. For example, this Court recently considered the particular language of the National Energy Board's enabling statute (most notably, the terms "directly affected", and "relevant information or expertise" used therein), and gave a wide margin of appreciation to the Board in deciding who should participate in its own proceedings. In so doing, this Court recognized the Board's expertise in managing its own process in light of its particular mandate (see *Forest Ethics Advocacy Assn. v. National Energy Board*, 2014 FCA 245 (F.C.A.) at para. 72, (2014), [2015] 4 F.C.R. 75 (F.C.A.)).

23 Turning now to the Agency, it has a role both as a specialized economic regulator and a quasi-judicial body that decides matters in an adversarial setting. For example, the Agency has regulation-making powers and specialized enforcement officers with investigative powers that verify compliance of carriers with the *Act* and its relevant regulations (see ss. 177 and 178 of the *Act*). The Agency also hears applications for a variety of licenses and other authorizations and complaints which may, or may not, involve disputes between opposing parties (consider, for instance, air travel complaints under s. 85.1; applications to interswitch railway lines under s. 127; and competitive line rate-setting applications under s. 132).

24 The *Act* distinguishes between "complaints" and "applications", and uses different terminology to describe the types of persons who are entitled to file them. The term "application" is used in Part III of the *Act* on Railway Transportation, and is usually accompanied by a specific descriptor of the party entitled to bring the application. For example, an application to establish competitive line rates is made "[o]n the application of a shipper" (s. 132(1) of the *Act*); an application to determine the carrier's liability is made "on the application of the company" (s. 137(2) of the *Act*); an application regarding running rights and joint track usage may be made

by a railway company (s. 138 of the *Act*); and an application to determine the net salvage value of a railway line is made "on application by a party to a negotiation" (s. 144(3.1) of the *Act*). Applications are governed by the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings*), S.O.R./2014-104, which are generally based on an adversarial model, with some variations. Of particular note are Rules 21 and 29 which allow the Agency to grant intervener status to a person that has a "substantial and direct interest", and Rule 23 which allows an "interested person" to file a position statement.

25 In contrast, the term "complaint" is mainly used in Part II — Air Transportation, and is almost always accompanied by the broad phrase "any person" (ss. 65, 66, 67.1, 67.2 of the *Act*). It is particularly telling that the phrase "any person" appearing in section 67.1 and subsection 67.2(1) is used to refer to those complainants who can bring a complaint in writing to the Agency. This is to be contrasted to the phrase "person adversely affected" appearing in subsection 67.1(b) and subparagraph 86(1)(h)(iii), which is more restrictive and determinative of who can seek monetary compensation. The use of those different phrases in the same act must be given effect and is indicative of Parliament's intention to distinguish between those who can bring a complaint to obtain a personal remedy and those who can bring a complaint as a matter of principle and with a view to ensuring that the broad policy objectives of the *Act*, which includes the prevention of harm, are enforced in a timely manner, not just remedied after the fact.

26 Dr. Lukács' complaint is brought under subsection 67.2(1). To the extent that this provision is at play (an issue that is not for this Court to decide and which is not the subject of this proceeding), it is incumbent on the Agency to intervene at the earliest possible opportunity, in order to prevent harm and damage that could result from unreasonable and unduly discriminatory terms or conditions of carriage, rather than to merely compensate those who have been affected *ex post facto*. This is precisely why the Agency is given the authority not only to compensate individuals who were adversely affected by an airline's conduct (s. 67.1(a)) and to take corrective measures (s. 67.1(b)), but also to disallow any tariff or tariff rule that is found to be unreasonable or unduly discriminatory and then to substitute the disallowed tariff or tariff rule with another one established by the Agency itself (*Regulations*, s. 113).

27 In that perspective, the fact that a complainant has not been directly affected by the fare, rate, charge, or term or condition complained of and may not even meet the requirements of public standing, should not be determinative. If the objective is to ensure that air carriers provide their services free from unreasonable or unduly discriminatory practices, one should not have to wait until having been subjected to such practices before being allowed to file a complaint. This is not to say, once again, that each and every complaint filed with the Agency has to be dealt with and decided, but that complaints that appear to be serious on their face cannot be dismissed for the sole reason that the person complaining has not been directly and personally affected or does not comply with other requirements of public standing. When read in its contextual and grammatical

context, there is no sound reason to limit standing under the *Act* to those with a direct, personal interest in the matter.

28 This interpretation is indeed consistent with the Agency's own analysis in a number of previous decisions. In *Black*, for example, the respondent submitted that the complainant had not established that he was sufficiently affected by the policies challenged and that he did not have the requisite direct personal interest standing or public interest standing. The Agency dismissed that argument and wrote:

> [...] The Agency is of the opinion that the term "any person" includes persons who have not encountered "a real and precise factual background involving the application of terms and conditions", but who wish, on principle, to contest a term or condition of carriage. With respect to section 111 of the ATR [Air Transportation Regulations], the Agency notes that there is nothing in the provisions that suggests that the Agency only has jurisdiction over complaints filed by persons who may have experienced "a real and precise factual background involving the application of terms and conditions". The Agency further notes that subsection 111(1) of the ATR provides, in part, that "All tolls and terms and conditions of carriage [...] that are established by an air carrier shall be just and reasonable [...]". The Agency is of the opinion that the word "established" does not limit the requirement that terms or conditions of carriage be just and reasonable to situations involving "a real and precise factual background involving the application of terms and conditions", but extends to situations where a person wishes, on principle, to challenge a term or condition that is being offered.
>
> [...]
>
> Furthermore, it would be inappropriate to require a person to experience an incident that results in damages being sustained before being able to file a complaint. To require a "real and precise factual background" could very well dissuade persons from using the transportation network.
>
> *Black*, paras. 5 and 7

29 That ruling was followed more recently in *Krygier*. Contrary to the appellant's submissions, these decisions do not only stand for the proposition that the absence of a real and precise factual background does not deprive the Agency of jurisdiction to hear a complaint, but also for the (overlapping) principle that it is not necessary for a complainant to have been personally affected by a term or condition for the Agency to assert jurisdiction under subsection 67.2(1) of the *Act* and section 111 of the *Regulations*.

30 For all of the foregoing reasons, I am of the view that the Agency erred in law and rendered an unreasonable decision in dismissing the complaint of Dr. Lukács for lack of standing. The Agency does not necessarily have to investigate and decide every complaint and is certainly empowered

to dismiss without any inquiry those that are futile or devoid of any merit on their face; it cannot, however, refuse to look into a complaint on the sole basis that the complainant does not meet the standing requirements developed by courts of civil jurisdictions. In so doing, the Agency unreasonably fettered its discretion.

31 Having so decided, it will not be necessary to address the second, alternative ground of appeal raised by the appellant. The public interest standing is a concept that has been developed in a judicial setting to bring more flexibility to the strict rules of standing. It is meant to ensure that statutes and regulations are not immune from challenges to their constitutionality and legality as a result of the requirement that litigants be directly and personally affected. Such a notion has no bearing on a complaint scheme designed to complement a regulatory regime, all the more so in a context where the administrative body tasked to apply and enforce the regime may act of its own motion pursuant to sections 111 and 113 of the *Regulations*.

VI. Conclusion

32 For these reasons, I would allow the appeal, set aside Decision No. 425-C-A-2014 of the Canadian Transportation Agency, and direct that the matter be returned to the Agency to determine, otherwise than on the basis of standing, whether it will inquire into, hear and decide the appellant's complaint. I would also award the appellant his disbursements in this Court and a modest allowance in the amount of $750, such amounts to be payable by the Agency.

***Wyman W. Webb J.A.*:**

I agree

***A.F. Scott J.A.*:**

I agree

Appeal allowed.

1999 CarswellNat 218
Federal Court of Canada — Trial Division

Markevich v. Canada

1999 CarswellNat 1796, 1999 CarswellNat 218, [1999] 2 C.T.C. 104, [1999] 3 F.C. 28, [1999] F.C.J. No. 250, 163 F.T.R. 209, 172 D.L.R. (4th) 164, 99 D.T.C. 5136

In the Matter of an application under section 18.1 of the Federal Court Act

Joe Markevich, Applicant and Her Majesty The Queen in Right of Canada, Respondent

Evans J.

Judgment: February 19, 1999
Docket: T-250-98

Counsel: *Douglas, Symes & Brissenden*, for the Applicant.
Mr. Morris Rosenberg, for the Respondent.

Subject: Civil Practice and Procedure; Income Tax (Federal)

Application by taxpayer for judicial review.

***Evans J.*:**

A. Introduction

1 The *Income Tax Act* imposes no limitation on the time within which the Minister of National Revenue (hereinafter "the respondent" or "the Minister") may seek to collect unpaid tax for which a taxpayer has been duly assessed. In the absence of any express provisions in the *Income Tax Act* itself, the principal question raised in this case is whether the Minister's exercise of the statutory collection powers is subject to a limitation period, whether that contained in the *Crown Liability and Proceedings Act* R.S.C. 1985, c. C-50, section 32 or in the relevant provincial limitation statute. The applicant contends that it is, while the Minister says that it is not.

2 The question comes before me in the form of an application for judicial review under section 18.1 of the *Federal Court Act* R.S.C. 1985, c. F-7 [as amended]. The subject matter of the application is a letter of January 15th, 1998 written to the applicant by Ms. Nasim Kara of the Revenue Canada office in Richmond, British Columbia, informing the applicant that he owes more than $770,583.42 in unpaid taxes. The applicant requests a declaration that this amount is

not owing and an order restraining the Minister from issuing requirements to pay to the applicant's creditors.

B. Background

3 The applicant, Mr. Markevich, has been at all material times a resident in the province of British Columbia. In the early 1980s he failed to pay taxes on income that he had earned in the promotion of stocks. He has never challenged the validity or correctness of the notices of assessment issued by the Minister.

4 In 1986 he was assessed as owing $267,437.61 to Revenue Canada. In 1987 his house was sold and Revenue Canada took the proceeds of sale to reduce his indebtedness. Later in that same year Revenue Canada decided to "write-off" the amount of tax still owed by the applicant, on the ground that he had no other assets and no income, and there were no realistic prospects of collecting the tax from him within the foreseeable future.

5 "Writing-off" a tax debt does not extinguish or forgive it; it is an internal book- keeping device that removes a taxpayer's tax debt from Revenue Canada's active collection list. Subsection 25(3) of the *Financial Administration Act*, R.S.C. 1985, c. F-11 [as amended] provides that "[t]he writing off of any debt, obligation or claim pursuant to this section does not affect any right of Her Majesty to collect or recover the debt, obligation or claim."

6 From 1992 the applicant reported income on his tax returns; in some years he was late in paying the amount for which he was assessed. After making payments in respect of those years, he received a statement of account in September 1993 showing the balance owing to Revenue Canada as $0.00. In the years 1995 to 1997 he again fell into arrears, and requirements to pay were issued to creditors informing them of the tax owing by the taxpayer and requiring them to pay to Revenue Canada money that they owed to the applicant. During the period 1995 to 1997, the statements of account sent to the applicant, and the requirements to pay issued to its creditors, showed him as owing only the tax due in respect of those years, not the larger amount owing from the years before 1986.

7 However, in January 1998 the applicant was informed that he also owed unpaid taxes assessed in the years up to 1986 in the amount $770,583.42, which comprised $267,437.61 of unpaid taxes and $503,145.81 of accrued interest. Apparently as a result of a change of policy, previously written-off tax debts are now included by Revenue Canada in both the statements of account sent to taxpayers, and any requirements to pay issued to taxpayers' creditors.

8 Having heard virtually nothing about this debt in any of his communications with Revenue Canada since 1986, and having neither acknowledged nor made any payments in respect of this indebtedness since 1986, the applicant was taken aback when he received this information in January 1998. In particular, he feared that the inclusion of this large amount in any requirements to

pay that Ms. Kara indicated would be issued to his creditors would be extremely damaging to him in the conduct of his business. However, it should also be noted that in August 1996 the applicant had been told that the assessment notice issued for the tax year 1993 did not include a previously unpaid tax liability and that a detailed statement would follow. It did not.

C. Jurisdiction

9 The respondent made a preliminary objection to the Court's jurisdiction to entertain this proceeding. The argument was that only a "decision or order" may be the subject of an application for judicial review under section 18.1 of the *Federal Court Act*. The letter written on behalf of the Minister, which is identified in the applicant's originating notice of motion as the subject of the application for judicial review, was simply informative in nature and did not purport to determine or otherwise affect any legal rights or duties of the applicant. It was not a "decision or order", and was therefore unreviewable by this Court. Indeed, on very similar facts to those at bar, this was the conclusion reached by Teitelbaum J. in *Fuchs v. R.*, [1997] 2 C.T.C. 246 (Fed. T.D.).

10 With all respect, I do not share this rather limited view of the scope of the subject-matter of this Court's judicial review jurisdiction. The words "decision or order" are found in subsection 18.1(2) of the *Federal Court Act*, which provides that an application for judicial review of a "decision or order" must be made within 30 days after the time that the decision or order was first communicated by the decision-maker. In my opinion, this subsection simply provides a limitation period within which an application for judicial review of a decision or order must normally be made. It does not say that only decisions or orders may be the subject of an application for judicial review, nor does it say that administrative action other than decisions or orders are subject to the 30 days' limitation period: *Krause v. Canada* (February 8, 1999), Doc. A-135-98 (Fed. C.A.).

11 It seems to me that the permitted subject-matter of an application for judicial review is contained in subsection 18.1(3), which provides that on an application for judicial review the Trial Division may order a federal agency to do *any act* or *thing* that it has unlawfully failed or refused to do, or declare invalid or set aside and refer back, prohibit or restrain "a decision, order, *act* or *proceeding* of a federal board, commission or other tribunal". The words "act or proceeding" are clearly broad in scope and may include a diverse range of administrative action that does not amount to a "decision or order", such as subordinate legislation, reports or recommendations made pursuant to statutory powers, policy statements, guidelines and operating manuals, or any of the myriad forms that administrative action may take in the delivery by a statutory agency of a public programme: see *Krause v. Canada, supra*.

12 However, in order to qualify as an "act or proceeding" that is subject to judicial review, the administrative action impugned must be an "act or proceeding" of a "federal board, commission or other tribunal", that is a body or person "having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament" (subsection 2(1) of the *Federal Court Act*).

While the letter written on the Minister's behalf to the applicant that is the subject-matter of this application for judicial review was not an act or proceeding by a federal body in the *exercise* of any statutory power, the Minister, of course, is a person *having* statutory powers under the *Income Tax Act*.

13 Even though not taken in the exercise of a statutory power, administrative action by a person *having* statutory powers may be reviewable as an "act or proceeding" under paragraph 18.1(3)(*b*) if it affects the rights or interests of individuals. The letter in question here contained no decision made pursuant to a statutory power, nor did it explicitly purport adversely to affect any right or interest of the applicant. However, it is a reasonable inference from both the letter, and the applicant's communications with Ms. Kara, the writer of the letter, that it signified that Revenue Canada had made a decision to try to collect the unpaid tax and intended to take measures to attempt to recover the previously "written-off" tax debt. And, as is apparent from the requirements to pay that were subsequently issued, this was indeed the case.

14 There is no doubt that it is potentially very damaging to a taxpayer's business or professional reputation for Revenue Canada to issue requirements to pay that disclose that a taxpayer is in default on a large unpaid tax debt and require the creditor to pay to Revenue Canada whatever the creditor owes to the taxpayer. The *Income Tax Act* provides no remedy by which a taxpayer can challenge the validity of the issuance of a requirement to pay. In my opinion, it would be a serious gap in the Court's supervisory jurisdiction if it could not entertain a challenge to the issuance of a requirement to pay where, as here, the ground of the challenge could not have been raised by the taxpayer on receipt of the notice of assessment

D. Legislative Framework

15 It will be necessary in the course of these reasons to refer to a number of provisions in the federal *Income Tax Act* and the *Income Tax Act* of British Columbia. To set them all out at this stage would be both unnecessary and distracting. I shall therefore set out here only the statutory provisions that are of central importance to the disposition of this application.

Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50

> 32. Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.
>
> 32. Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers

s'appliquent lors des poursuites auxquelles l'État est partie pour tout fait générateur survenu dans la province. Lorsque ce dernier survient ailleurs que dans une province, la procédure se prescrit par six ans.

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) [as amended]

222. All taxes, interest, penalties, costs and other amounts payable under this Act are debts due to Her Majesty and recoverable as such in the Federal Court or any other court of competent jurisdiction or in any other manner provided by this Act.

224 (1) Where the Minister has knowledge or suspects that a person is, or will be within one year, liable to make a payment to another person who is liable to make a payment to another person who is liable to make a payment under this Act (in this subsection and subsections (1.1) and (3) referred to as the "tax debtor"), the Minister may in writing require the person to pay forthwith, where the moneys are immediately payable, and in any other case as and when the moneys become payable, the moneys otherwise payable to the tax debtor in whole or in part to the Receiver General on account of the tax debtor's liability under this Act.

222. Tous les impôts, intérêts, pénalités, frais et autres montants payables en vertu de la présente loi sont des dettes envers Sa Majesté et recouvrables comme telles devant la Cour fédérale ou devant tout autre tribunal compétent, ou de toute autre manière prévue par la présente loi.

224(1) S'il sait ou soupçonne qu'une personne est ou sera, dans les douze mois, tenue de faire un paiement à un autre personne qui, elle-même, est tenue de faire un paiement en vertu de la présente loi (appelée "débiteur fiscal" au présent paragraphe et aux paragraphes (1.1) et (3)), le ministre peut exiger par écrit de cette personne que les fonds autrement payables au débiteur fiscal soient en totalité ou en partie versés, sans délai si les fonds sont immédiatement payables, sinon au fur et à mesure qu'ils deviennent payables, au receveur général au titre de l'obligation du débiteur fiscal en vertu de la présente loi.

Limitation Act R.S.B.C. 1996, c. 266

1. The term 'action' is defined as including any proceeding in a court and any exercise of a self help remedy.

3(5) Any other action not specifically provided for in this Act or any other Act may not be brought after the expiration of 6 years after the date on which the right to do so arose.

9(1) On the expiration of a limitation period set by this Act for a cause of action to recover any debt, damages or other money, or for an accounting in respect of any matter, the right and title of the person formerly having the cause of action and of a person claiming through

the person in respect of that matter is as against the person against whom the cause of action formerly lay and as against his successors, extinguished.

9(3) *A cause of action*, whenever arising, to recover costs on a judgment or to recover arrears of interest on principal money is extinguished by the expiration of the limitation period set by this Act for an action between the same parties on the judgment or to recover the principal money,

E. Issues

16 Although they will be broken into several more specific components, the principal issues raised by this litigation are as follows.

1. Does section 32 of the *Crown Liability and Proceedings Act* apply to the exercise by the Minister of National Revenue of the statutory power to issue requirements to pay with respect to a duly assessed tax liability under the *Income Tax Act*?

2. If it does, is the applicant's liability under the *Income Tax Act* one that "arises in a province", or "otherwise than in a province"?

3. If it arises in a province, is the issue of a requirement to pay a "proceeding in a court" or an "exercise of a self help remedy" within the definition of "action" in section 1 of the British Columbia *Limitation Act*?

4. Regarding the requirement to pay issued with respect to unpaid taxes under the British Columbia *Income Tax Act*:

i) does the British Columbia *Income Tax Act* exclude the application of the British Columbia *Limitation Act* from governing the time within which the Minister must exercise the power to collect the tax?

ii) if it does not, does the British Columbia *Limitation Act* apply to the exercise of powers by a Minister of the federal Crown pursuant to the British Columbia *Income Tax Act*?

F. Analysis

17 Before embarking on a detailed analysis of the issues described above, it will be helpful to bear in mind the approaches to the interpretation of taxation statutes adopted by the courts in recent years. At one time, the principal presumption of statutory interpretation in this area of the law was that taxing statutes should be construed narrowly in favour of the taxpayer, who should also be given the benefit of any doubt about the meaning of the legislative provisions in dispute: *Johns-Manville Canada Inc. v. R.*, [1985] 2 S.C.R. 46 (S.C.C.).

18 More recently, however, the courts have developed other interpretative approaches or principles that undoubtedly limit the influence previously exercised by the presumption requiring a narrow interpretation of tax legislation in favour of the taxpayer. The following passage from the judgment of Gonthier J. in *Québec (Communauté urbaine) c. Notre-Dame de Bonsecours (Corp.)*, [1994] 3 S.C.R. 3 (S.C.C.) at 17-18 provides authoritative guidance to the current interpretation of tax legislation:

> ...there is no longer any doubt that the introduction of tax legislation should be subject to the ordinary rules of construction. At page 872 of his text *Construction of Statutes* (2nd. ed. 1983), Driedger fittingly summarizes the basic principles: "... the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". The first consideration should therefore be to determine the purpose of the legislation, whether as a whole or as expressed in a particular provision.
>
> . . . . .
>
> The teleological approach makes it clear that in tax matters it is no longer possible to reduce the rules of interpretation to presumptions in favour of or against the taxpayer or to well-defined categories known to require a liberal, strict or literal interpretation. ...

19 In addition, as the *Income Tax Act* recognizes, the principle of "horizontal equity" among taxpayers is an important policy objective of the statute, so that whenever possible the Act should be interpreted to ensure that taxpayers who are similarly situated should pay the same amount of tax: *Symes v. R.*, [1993] 4 S.C.R. 695 (S.C.C.), 751-752. The cost of the failure to collect duly assessed tax must inevitably be borne by other taxpayers and the population at large.

20 Nonetheless, the special nature of tax legislation, and in particular the reliance placed upon its provisions by those planning their affairs in order to minimize or avoid tax liability, has meant that the broad and purposive approach applied to legislation in general is not applied to the same extent to the interpretation of tax statutes. The "plain meaning" rule retains a vigour in this area that it does not have elswhere: see, for example, *Antosko v. Minister of National Revenue*, [1994] 2 S.C.R. 312 (S.C.C.) at 326-327. And in *2747-3174 Québec Inc. c. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919 (S.C.C.), 1013-1014, L'Heureux-Dubé J. said that, for these reasons, and because business practice has often contextualized the meaning of words used in tax statutes, the "plain meaning" rule should be given priority over the purposive or "modern" approach with which courts generally approach the interpretation of legislation.

Issue 1

21 In order to establish that section 32 of the *Crown Liability and Proceedings Act* applies to the Minister's exercise of the power to issue requirements to pay, the applicant must show that the following two elements are satisfied.

(i) Is the issue of a requirement to pay a "proceeding with respect to any cause of action arising in a province".

22 There are two methods by which the Minister may seek to collect a debt that is owing as a result of an unpaid tax liability under section 222 of the *Income Tax Act*. First, the Minister may institute legal proceedings by way of a statement of claim for the recovery of a debt in the Federal Court or any other court of competent jurisdiction. Second, the Minister may employ one of the statutory collection methods that do not require the institution of an action. These include registering a certificate of indebtedness with the Federal Court under section 223 of the *Income Tax Act* and issuing to third party creditors a requirement to pay under section 224 of the Act.

23 The applicant's first argument was that section 32 of the *Crown Liability and Proceedings Act* applies to anything that is a "proceeding", and that the phrase "in respect of a cause of action" only modifies the words that follow it, namely, "arising in a province" or, when relevant, "otherwise than in a province". He then relied on cases where it has been said that "proceedings" is a word of the broadest connotation and is not confined to measures taken in court or as a step in the initiation or prosecution of litigation.

24 Thus, in *Royce v. Macdonald* (1909), 12 W.L.R. 347 (Man. C.A.) it was held that the sale of property under a writ of *fieri facias* in the execution of a judgment was "a *proceeding*" for the purpose of a municipal taxing statute.

25 Similarly, in *E.H. Price Ltd. v. R.*, [1983] 2 F.C. 841 (Fed. C.A.) the Federal Court of Appeal held that the registration in the Federal Court by the Minister of National Revenue of a certificate of indebtedness was a "proceeding by the Crown" for the purpose of the then subsection 38(2) of the *Federal Court Act*, which prescribed the limitation period applicable to proceedings by and against the Crown. And in *Twinriver Timber Ltd. v. British Columbia* (1980), 25 B.C.L.R. 175 (B.C. C.A.) affirming (1979), 15 B.C.L.R. 38 (B.C. S.C.), the British Columbia Court of Appeal concluded that the filing of a certificate of default for taxes due constituted an "action" within the meaning of section 1 of the provincial *Limitation Act* and that therefore the six year limitation period was applicable.

26 The difficulty that I have with this argument is that it depends upon reading the words of section 32 of the *Crown Liability and Proceedings Act* in an artificial and compartmentalized fashion. It seems to me that a more natural interpretation of the words "proceeding with respect to a cause of action arising in a province" is that they constitute a single concept, so that each of the components limits what precedes it. Thus, the phrase "with respect to a cause of action" limits the scope of the word "proceeding", and "arising in a province" locates the "cause of action".

27 In my opinion, therefore, the relevant question at this stage of the inquiry is whether the issue of a requirement to pay is a "proceeding with respect to a cause of action". Returning to *E.H.*

Price Ltd., the respondent argued that the court in that case concluded that the registration of a certificate was a "proceeding by the Crown" for the purpose of subsection 38(2), as it then was, of the *Federal Court Act*. However, the court also said that the registration was not a "proceeding *in the Court* with respect to a cause of action" for the purpose of the limitation period prescribed by subsection 38(1).

28 The absence of the words, "in the Court", from section 32 of the *Crown Liability and Proceedings Act* arguably makes section 32 broader in scope than subsection 38(2) of the *Federal Court Act* that was considered in *E.H. Price Ltd.* In an attempt to refute this argument, counsel for the respondent submitted that the words, "in the Court", are merely formulaic in nature and are found throughout the *Federal Court Act*, where their function is simply to limit the application of its provisions to the Federal Court of Canada.

29 The words, "in the Court", should therefore not be read in the former subsection 38(1) of the *Federal Court Act* as imposing any kind of limit on the concept of a "proceeding with respect to a cause of action", other than to locate it in the Federal Court of Canada. Thus, the conclusion in *E.H. Price Ltd.* that the registration of a certificate under the *Excise Tax Act* was not a "proceeding in the Court with respect to a cause of action" disposes of the applicant's contention that a requirement to pay is a "proceeding with respect to a cause of action" for the purpose of section 32 of the *Crown Liability and Proceedings Act*.

30 A difficulty with this argument is that, in distinguishing subsections 38(1) and (2) in *E.H. Price Ltd.*, Clement D.J. emphasized the presence of the words "in the Court" (or "in court" as he also sometimes incorrectly put it) in subsection 38(1). This is what he seems to have regarded as preventing him from concluding that registering a certificate of indebtedness fell within that subsection, but permitted him to decide that it did fall within subsection 38(2), where the operative words were "proceedings by and against the Crown", with no "in the court" limitation. In view of this, I am unable to conclude that *E.H. Price Ltd.* is as damaging to the applicant's case as the respondent contends.

31 Counsel for the respondent also argued that, by their very nature, statutory limitation periods operate as defences raised to proceedings taken in the course of litigation. A requirement to pay is not issued as a result of any court process and therefore statutes of limitation are simply irrelevant to the timing of its issuance. While the applicant's failure to pay tax due undoubtedly created a cause of action in the respondent, the respondent had elected not to pursue that cause of action, but to have resort to one of the statutory debt collection tools provided by the *Income Tax Act*. The existence of an uninvoked cause of action is not sufficient to render the issue of a requirement to pay a proceeding "with respect to a cause of action".

32 Support for this view, albeit in a rather different context, can be found in *Mark v. Canada (Minister of Fisheries & Oceans)* (1991), 50 F.T.R. 157 (Fed. T.D.), where Cullen J. held that the

suspension of a commercial fishing licence for allegedly breaching fishery regulations was not "a proceeding in any cause or matter" that could be the subject of a stay by the Court pursuant to section 50 of the *Federal Court Act*, even though the Minister could presumably have instituted proceedings in court for any breach of the regulations.

33 The respondent's submission on the limiting effect of the words "with respect to a cause of action" seems to me persuasive. Nor is it weakened by the fact that limitations statutes may apply both to the initiation of proceedings in court, and to attempts to execute judgments. This is because a judgment is obtained as a result of a litigant's pursuing a cause of action, and the execution of a judgment can therefore readily be characterized as a measure taken "with respect to a cause of action".

34 My conclusion on this point is sufficient to dismiss the application, but out of deference to the thorough arguments presented by counsel, and in case I am wrong, I shall now consider whether the applicant has established that the other element of section 32 of the *Crown Liability and Proceedings Act* is satisfied.

(ii) Does the Income Tax Act exclude the application of section 32 of the Crown Liability and Proceedings Act?

35 The opening words of section 32, "Except as otherwise provided in this Act or any other Act of Parliament", limit the scope of its application. The respondent's argument is that the *Income Tax Act* contains its own limitation periods that apply to various aspects of the assessment, reassessment, review of assessments and collection of tax. In other words, the statute is a complete code and is not subject to limitation periods prescribed in general legislation dealing with proceedings to which the Crown is a party, or to civil litigation as a whole.

36 Two cases were brought to my attention where this issue was explicitly raised. In *E.H. Price Ltd.*, *supra*, it was held that the limitation statutes did not prescribe the time within which a certificate of indebtedness must be registered with the Court under the *Excise Act*. The court drew this inference from provisions in the *Excise Act* to the effect that sums payable under it were recoverable "at any time".

37 A similar inference was drawn in *Brière v. Canada (Employment & Immigration Commission)* (1988), 57 D.L.R. (4th) 402 (Fed. C.A.), where the statute prescribed specific limitation periods within which the Commission could recover benefits paid in error to those not entitled. Having failed to comply with the notice provisions under the *Unemployment Insurance Act*, which were relevant to the running of the limitation period, the Commission was not able to rely upon a provision in the *Civil Code of Lower Canada* governing prescription periods in general.

38 However, since there were words in the statutes in these cases that related to the very measures invoked and alleged to be subject to the limitations statute, the decisions do not bear directly on

the problem in the case at bar. However, counsel for the respondent also pointed out that when *E.H. Price Ltd.*, *supra*, and *Brière*, *supra*, were decided, subsection 38(2) of the *Federal Court Act* stated that it applied unless another act *expressly* provided otherwise. The word "expressly" no longer appears in section 32 of the *Crown Liability and Proceedings Act*, thus making it easier for a court to infer from the overall scheme created by the statute that its limitations provisions are exhaustive.

39 Counsel for the respondent took me through a large number of provisions in the *Income Tax Act* that impose a time limit on other aspects in the assessment and collection of tax. The provision that seemed to me of most direct assistance is section 225.1, which prohibits the collection of tax until the expiry of the 90 days within which the taxpayer may appeal an assessment. The existence of this provision supports an inference from the absence of a prescribed time *after* which no collection can be made that Parliament intended that there should be no such limitation period.

40 In addition, I attach some importance to the fact that subsection 152(1) of the *Income Tax Act* requires the Minister, on the receipt of the taxpayer's return, to examine the return and assess the tax payable "with all due dispatch". This provision ensures that in most cases taxpayers are assessed soon enough after the end of the year in which the income was earned and the return filed, so that the evidence required to challenge the assessment is still likely to be fresh. The fact that the Court has held in *Ginsberg v. R.* (1996), 96 D.T.C. 6372 (Fed. C.A.) reversing (1994), 94 D.T.C. 1430 (T.C.C.) and *J. Stollar Construction Ltd. v. Minister of National Revenue* (1989), 89 D.T.C. 134 (T.C.C.) that a failure by Revenue Canada to comply with subsection 152(1) does not invalidate the assessment is not inconsistent with Parliament's intention that assessments are to be made promptly.

41 Other examples of the inclusion in the *Income Tax Act* of specific time limitation periods include: subsections 227.1(4) (two year limitation period beyond which the Minister may not assess a director of a corporation for corporate tax debts); 152(2) (reassessments must normally be undertaken within three years of an assessment); 152(4) (in certain situations the Minister may reassess tax at any time); and 227(10) (the Minister may assess a director of a corporation at any time).

42 I am satisfied that, given the complex and unique nature of the statutory scheme for the levying and collection of income tax, it is a clear inference from the statutory provisions to which I have referred that Parliament has "otherwise provided" for prescription, and that section 32 of the *Crown Liability and Proceedings Act* accordingly does not apply to the collection of a debt arising under section 222 of the *Income Tax Act*.

43 The courts have often accepted that taxing statutes constitute complete codes into which the legislature did not intend them to import general legal principles, rules or remedies. For example, in *Québec (Sous-ministre du Revenu) c. Marcel Grand Cirque Inc.* (1995), 107 F.T.R. 18 (Fed. T.D.),

21, this Court held that it had no jurisdiction to entertain a motion in revocation of judgment in respect of a certificate filed with the court in which the taxpayer sought to challenge the assessment of tax on which the certificate was based:

> The *Excise Tax Act*, like the *Income Tax Act*, ... contains in effect a complete code for the collection of taxes pursuant to which a taxpayer, after receiving a notice of assessment, may file a notice of opposition and possibly appeal to the Tax Court of Canada.

44 Counsel for the applicant, Mr. Worland, had some difficulty in articulating the injustice that his client would suffer if the Minister were permitted to issue requirements to pay, or to take other statutory collection measures, more than six years after the applicant's tax liability had been assessed. The applicant had been assessed promptly and had had an opportunity to challenge these assessments soon enough after the income had been earned to enable him to produce any relevant evidence. In fact, he has never disputed the assessments. His financial inability to pay the arrears would have prevented him from discharging his pre-1986 tax debts earlier, thus avoiding the large amount of interest that has been charged to him. At best, the applicant could be said to have been entitled in 1992 to the peace of mind that comes from knowing that the Minister of National Revenue could no longer pursue him for an old debt.

45 Although not directly relevant to this application, the logic of the respondent's position is that, since it can be inferred from other provisions in, and the overall structure of, the *Income Tax Act* that section 32 of the *Crown Liability and Proceedings Act* is excluded, the Crown may attempt to collect a tax debt outside the general statutory limitation periods either by one of the statutory collection methods, as here, or by an action for debt. Surprising as it may seem that the Crown's action for debt would not be statute barred, this does seem to be a logical consequence of the respondent's argument. While this consideration has given me some pause, I have decided that it does not tip the balance in favour of the applicant's position.

46 First, it is a hypothetical consideration in the context of this case, and there may be reasons that have not been canvassed here for concluding that the Crown's right to pursue an action for debt is subject to a statutory limitation period, even though the statutory collection methods are not. Second, the respondent's statutory duty to assess "with all due dispatch" the tax owing provides protection against most of the mischiefs at which statutory prescription periods are aimed. Third, to regard the respondent's ability to collect tax as subject to the *Crown Liability and Proceedings Act* for this reason alone would give insufficient weight to the difficulties that importing general limitation periods would cause to the fair and effective collection of tax arrears.

47 For example, as already noted, horizontal equity is a well-established principle of tax law and administration, and to prevent the Crown from recovering against persons whose income may fluctuate considerably over time, as seems to be the applicant's position, would be unfair to the majority of taxpayers whose income is steady and who have tax deducted at source.

48 Moreover, if the prescription period were to run from the date of assessment then, in cases where the taxpayer seeks a review and exercises rights of appeal, the respondent may be left with relatively little time within which to collect any arrears. However, this difficulty may be avoided by holding that the prescription period starts only at the time when the Crown may collect the tax; 90 days after the assessment, or when all rights of appeal have been exhausted.

49 Accordingly, I am satisfied that the *Income Tax Act* provides for prescription and by clear implication excludes section 32 of the *Crown Liability and Proceedings Act* from applying to an exercise by the Minister of the statutory powers to enforce tax debts.

Issue 2

50 In the event that my conclusion on both parts of the above issue are wrong, then the final question relating to the interpretation of section 32 of the *Crown Liability and Proceedings Act* is whether the British Columbia *Limitation Act* applies. It will apply only if the failure to pay tax owing is a "cause of action arising in a province". If, on the other hand, the cause of action arises "otherwise than in a province", then the six years' limitation provision contained in section 32 for proceedings by and against the federal Crown will apply.

51 In this case there appear to be two principal consequences of concluding that the cause of action arises in a province and that the applicable limitation period is that contained in the British Columbia *Limitation Act*. First, section 1 of that Act defines the word "action" to which the Act applies as meaning, "any proceeding in a court and any exercise of a self help remedy". The applicant argues that the issue of a statutory requirement to pay must fall under one or the other branch of this broad definition of the word "action", and that if they are not a "proceeding in a court", they must be a "self help remedy". Second, the *Limitation Act* provides in subsection 9(3) that a time-barred debt is *extinguished*; most limitation statutes merely make the debt unenforceable by proceedings instituted in court.

52 Although not relevant in the context of this case, if the applicant is correct in his contention that a debt owed under the *Income Tax Act* normally arises in the province where the taxpayer resides, then the length of time available to the Crown to collect a tax debt will vary according to the taxpayer's province of residence, since provincial limitation statutes vary quite significantly across the country.

53 Mr. Worland relied on two cases where it was asserted that a debt under a federal statute is a cause of action arising in a province, and therefore would have been subject to the limitations statute of the province in which the taxpayer resided if the federal statute had not excluded its application: *E.H. Price, supra*, at 844 (*Excise Tax Act*), *Brière*, *supra*, at 418-419 (*Unemployment Insurance Act*).

54 More recently, however, in *Gingras v. Canada* (1994), 113 D.L.R. (4th) 295 (Fed. C.A.), Décary J.A. considered (at 319) whether the Crown's obligation to pay a language bonus to the plaintiff as a member of the R.C.M.P. arose under federal or provincial law. If the latter, then it would be subject to the limitation period prescribed in the *Civil Code of Lower Canada*. Décary J.A. pointed out that it would be somewhat incongruous if the enforceability of the right created by a federal statute depended on the province in which the member happened to live. On the facts, however, it was not necessary for him to express a definitive view on whether the statute created a federal cause of action.

55 I should note that I did not find particularly helpful the statements in *English, Scottish & Australian Bank Ltd. v. Inland Revenue Commissioners*, [1932] A.C. 238 (U.K. H.L.) to the effect that a debt must have a "local situation" and that this will normally be where the debtor resides. The context of that case was very different, relating as it did to whether a debt was "property locally situate out of the United Kingdom" for the purpose of being exempted from stamp duty. Moreover, it did not speak at all to the federalism aspect of the issue raised by the case at bar which may call for a different approach to "locating" a debt.

56 In principle there is much to be said in favour of the proposition that the *Income Tax Act* should be applied uniformly to taxpayers across the country to the greatest extent possible. Of course, as Mr. Worland pointed out, there are situations in which taxpayers' liability on the same facts will inevitably vary depending on the province where they reside. Thus, whether or not a tax is payable, or an expenditure deductible, may depend on the legal consequences that the law of contract of the province where the taxpayer resides ascribes to a particular transaction.

57 However, in my view even though the liability of the taxpayer to pay money due under the *Income Tax Act* is a debt to the Crown, and debt is a common law concept, there is no reason of policy for subjecting its enforceability to provincial law when this will detract from the uniform application of the statute without any justification. Indeed, if the law of British Columbia applies to the debt in question here it would be extinguished altogether.

58 Moreover, I note that in *Vancouver Society of Immigrant & Visible Minority Women v. Minister of National Revenue* [reported (1999), 99 D.T.C. 5034 (S.C.C.)] (S.C.C.; January 28, 1999), Gonthier J. said that, even though the *Income Tax Act* did not define the term "charitable", but left it to the courts to elaborate, the statute's conception of charity is uniform federal law across the country and does not

> accord precisely with the way these terms are understood in the common law provinces, due to judicial decisions and provincial statutory incursions into the common law.

59 In my opinion, therefore, the *Income Tax Act* should be interpreted as creating a federal cause of action in the event that a taxpayer fails to pay tax duly assessed. Accordingly, if a general

limitation period were applicable to the Crown's ability to collect tax through any of the statutory collection methods, it would be the six year period prescribed by section 32 of the *Crown Liability and Proceedings Act*, and not that contained in the limitation statute of the province where the taxpayer resided.

Issue 3

60 If I am wrong on this point, and the British Columbia *Limitation Act* applies, then I agree with the applicant's contention that use of the statutory collection methods available under the *Income Tax Act*, including the issue of a requirement to pay, constitutes "any exercise of a self help remedy" within the meaning of section 1 of the provincial *Limitations Act*.

61 No doubt statutory remedies of the kind contained in the *Income Tax Act* were not what the Legislature primarily had in mind when it defined "action" to include "any exercise of a self help remedy". However, when included as an alternative to "any proceeding in court", self help remedies should be regarded as including the statutory remedies available to assist Revenue Canada in recovering tax debts by unilateral means that do not include resort to litigation. Otherwise, there would be a gap in the law that cannot be justified in light of the policy of the *Limitation Act*.

Issue 4

62 The question here is whether the British Columbia *Limitation Act* applies to attempts by the Crown to collect tax due under the British Columbia *Income Tax Act* outside the limitation period prescribed by the *Limitation Act*. Under the *British Columbia-Canada Tax Collection Agreement* [Memorandum of Agreement between The Minister of Finance, Government of Canada and the Minister of Finance, Province of British Columbia, dated August 23, 1984, amending an earlier agreement, pursuant to subsection 7(2) of the *Federal-Provincial Fiscal Arrangements Act* (R.S. 1985, c. F-8) [as amended] and subsection 69(2) of the *Income Tax Act* of British Columbia] the federal Crown collects tax owing under the provincial *Income Tax Act* as agent for the provincial authorities.

63 To a large extent, the assessment and collection provisions of the British Columbia *Income Tax Act* have been amended so as to harmonize with those contained in the federal *Income Tax Act*. For example, the requirement to pay provisions in the federal *Income Tax Act* (subsection 224(1)) are incorporated by reference in section 67 of the British Columbia *Income Tax Act*. And subsections 69(2) and (3) of the British Columbia *Income Tax Act* authorize the Minister and Deputy Minister of National Revenue of Canada to exercise the various powers relating to the collection of tax conferred by the Act on the British Columbia minister.

64 The analysis of the problem raised here is essentially the same as that developed in the context of Issue 1 with regards to the federal *Income Tax Act*. Thus, the first question is whether

the British Columbia *Income Tax Act* can be said to have excluded the application of the Province's *Limitation Act* by the various measures that the Minister may take in the assessment, reassessment and collection of tax.

65 Even when the respondent seeks to collect tax allegedly owing under a provincial tax statute that he is administering under a provincial-federal agreement, section 32 of the *Crown Liability and Proceedings Act* is still potentially relevant because the collection measure is being taken by a minister of the federal Crown, albeit under the authority of provincial legislation.

66 However, the proviso in section 32 that states that the section applies "Except as otherwise provided in this Act or any other Act of Parliament" is obviously inapplicable to a provision in a provincial statute, such as the British Columbia *Income Tax Act*.

67 Nonetheless, section 32 will only apply to the issuance of a requirement to pay if it can be characterized as a "proceeding by the Crown in respect of any cause of action arising in that provision". For the reasons given in connection with requirements to pay issued in respect of moneys owing under the federal *Income Tax Act*, in my opinion the exercise of a power to issue a requirement to pay is not a "proceeding in respect of a cause of action".

68 However, the fact that section 32 does not apply to the issuance of a requirement to pay under the British Columbia *Income Tax Act* still leaves the question whether the British Columbia *Limitation Act* applies of its own force, and not by virtue of the reference to the applicable provincial law in section 32 of the *Crown Liability and Proceedings Act*.

69 The first issue here is whether that provincial *Limitation Act* is capable of applying to a measure taken by the respondent, a Minister of the federal Crown, in an attempt to collect a debt owing to the provincial Crown under the British Columbia *Income Tax Act*.

70 The British Columbia *Interpretation Act* R.S.B.C., c. 238 reverses the common law presumption that statutes do not bind the Crown in the absence of express words or necessary implication. Subsection 14(1) of that Act provides:

> Unless it specifically provides otherwise an enactment is binding on the government

. The question then is whether "the government" includes a Minister of the federal Crown when exercising on behalf of the provincial government a power under a provincial statute.

71 Section 29 of the *Interpretation Act* defines "government" to mean "Her Majesty in right of British Columbia". Therefore, "government" does not include a Minister of the federal Crown, even when acting on behalf of the Crown in right of the Province. Since the statutory presumption does not apply here, the common law presumption does. Therefore, in the absence of express words or necessary implication, the British Columbia *Limitation Act* does not apply to measures taken by

a Minister of the federal Crown to enforce the British Columbia *Income Tax Act*. In my opinion the *Limitation Act* cannot be said as a matter of necessary implication to apply to the federal Crown.

72 However, if I am wrong on this point, for reasons that I have already given I would conclude that the issuance of a requirement to pay is the "exercise of a self help remedy" and thus subject to the British Columbia *Limitation Act* by virtue of section 1.

G. Conclusion

73 For these reasons, the application for judicial review is dismissed. Accordingly, my answers to the questions posed in paragraph 16 are:

1. No

2. "otherwise than in a province"

3. Yes

4. i) No ii) No

Application dismissed.

2019 FC 737, 2019 CF 737
Federal Court

Martell v. Canada (Attorney General)

2019 CarswellNat 2469, 2019 CarswellNat 2470,
2019 FC 737, 2019 CF 737, 306 A.C.W.S. (3d) 834

LESTER MARTELL (Applicant) and ATTORNEY GENERAL OF CANADA (Respondent)

Sylvie E. Roussel J.

Heard: May 9, 2019
Judgment: May 24, 2019
Docket: T-563-19

Counsel: Richard W. Norman, Michel P. Samson, Sian G. Laing, for Applicant
Catherine M.G. McIntyre, for Respondent

Subject: Civil Practice and Procedure; Constitutional; Natural Resources; Public; Human Rights

MOTION by applicant for mandatory injunction authorizing use of medical substitute operator.

***Sylvie E. Roussel J.*:**

I. Introduction

1 The Applicant, Mr. Lester Martell, is the holder of an Owner-Operator licence which authorizes him to fish lobster in Nova Scotia. He has held this licence since 1978 and has fished the licence personally, on a full-time basis, until a medical condition prevented him from doing so. Indeed, since 2009, Mr. Martell has received authorization to use a substitute operator given his inability to be on the fishing vessel full-time. On or around March 6, 2019, the Deputy Minister of the Department of Fisheries and Oceans Canada [DFO] denied Mr. Martell's request for a further extension of his use of a medical substitute operator.

2 On April 2, 2019, Mr. Martell filed a notice of application for judicial review in this Court wherein he seeks, *inter alia*, an order setting aside the Deputy Minister's decision on the basis that it is unreasonable because the Deputy Minister failed to acknowledge or consider his constitutionally protected right to be free from discrimination pursuant to subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

3 As the lobster fishing season for Lobster Fishing Area 30 [LFA 30] was set to commence on May 18, 2019, Mr. Martell brought this motion, pursuant to section 18.2 of the *Federal Courts Act*, RSC 1985, c F-7 and subsection 373(1) of the *Federal Courts Rules*, SOR/98-106. He seeks an order staying the Deputy Minister's decision and, in the alternative, a mandatory interlocutory injunction ordering the DFO to authorize the use of a medical substitute operator.

4 Mr. Martell's motion proceeded before me in Halifax, Nova Scotia on May 9, 2019. After hearing the submissions of both parties, I reserved judgment on Mr. Martell's motion. On May 17, 2019, I granted Mr. Martell's motion with reasons to follow.

5 These are my reasons for granting Mr. Martell's motion for interlocutory relief.

II. Background

A. The DFO's Owner-Operator Policy

6 Beginning in the 1970s, the DFO introduced over a period of time the Owner-Operator policy in Eastern Canada. The policy was formally adopted in 1989 across the entire Eastern Canada inshore and its key elements were incorporated into subsections 11(6) to 11(8) of the *Commercial Fisheries Licensing Policy for Eastern Canada, 1996* [1996 Policy].

7 The goal of the Owner-Operator policy is to maintain an economically viable inshore fishery by keeping the control of licences in the hands of independent owner-operators in small coastal communities and to allow them to make decisions about the licence issued to them. To achieve this, the Owner-Operator policy requires licence holders to personally fish the licences issued in their name. This means that the licence holder is required to be on board the vessel authorized to fish the licence.

8 Subsection 23(2) of the *Fishery (General) Regulations*, SOR/93-53 creates an exception to the Owner-Operator policy where the licence holder is unable to engage in the activity authorized by the licence "because of circumstances beyond the control of the holder or operator." In such circumstances, a fishery officer or a DFO employee engaged in the issuance of licences may, on the request of the licence holder or the holder's agent, authorize another person to carry out the activity authorized under the licence.

9 Over time, the DFO developed policy guidance with respect to situations that may be considered "circumstances that are beyond" the control of the licence holder. In particular, subsection 11(11) of the 1996 Policy provides guidance in instances where the licence holder is ill:

> (11) Where the holder of a licence is affected by an illness which prevents him from operating a fishing vessel, upon request and upon provision of acceptable medical documentation to

support his request, he may be permitted to designate a substitute operator for the term of the licence. Such designation may not exceed a total period of five years.

(11) Si le titulaire d'un permis est affecté d'une maladie qui l'empêche d'exploiter son bateau de pêche, il peut être autorisé, sur demande et présentation de documents médicaux appropriés, à désigner un exploitant substitut pour la durée du permis. Cette désignation ne peut être supérieure à une période de cinq années.

10 In 2008, the DFO introduced flexibility in the application of the five (5) year limit in order to respond to a global economic downturn, and in the hopes of enhancing economic support for the industry.

11 By 2015, the DFO resumed strict compliance of the five (5) year limit following concerns expressed by licence holders and their representatives, including the Canadian Independent Fish Harvester's Federation in the inshore fleet, that the DFO's substitute operator designations were being abused by some licence holders.

B. Mr. Martell's Request for Authorization to Use a Medical Substitute Operator

12 Mr. Martell is eighty-five (85) years old. He has been fishing since 1947. He owns an Owner-Operator licence to fish lobster in LFA 30, situated on the Northeast coast of Nova Scotia. He employs four (4) full-time seasonal employees — three (3) deckhands and one (1) captain — who crew his vessel and assist him to fish the licence. Since holding the licence, he has fished it personally on a full-time basis up until 2009.

13 In or around 2009, Mr. Martell began experiencing problems with his knees which caused him excruciating pain and difficulty with balance. He underwent knee replacement surgery in 2009 which resulted in surgical complications. In 2012, he underwent a second replacement surgery for his other knee. He continues to experience difficulties with his balance.

14 In 2009, as a result of his knee problems, Mr. Martell requested and received authorization to use a medical substitute operator. His requests have been granted on a yearly basis since 2009 by the DFO.

15 In May 2015, Mr. Martell received notice from the DFO that the approval for his request for the 2015 season extended beyond the five (5) year period set out in the 1996 Policy and that further approval would be assessed on a case-by-case basis.

16 On May 10, 2016, Mr. Martell was advised that his request for a medical substitute operator for the 2016 season was approved but that future requests would not be considered.

17 Pursuant to sections 34 and 35 of the 1996 Policy, Mr. Martell appealed this decision to the Maritimes Region Licensing Appeal Committee [MRLAC], arguing that he should be granted

credit for some fishing seasons where he did in fact conduct fishing activities and requesting an extension to the five (5) year limit based on extenuating circumstances, including his ongoing management of the fishing activity and a lack of alternative employment opportunities. The MRLAC agreed and recommended that the 2017 year would count as his fifth (5th) year for the purposes of the application of the five (5) year limit in the 1996 Policy. On May 17, 2017, the MRLAC granted authorization to use a medical substitute operator until June 30, 2017, but did not recommend that further extensions be approved.

18 Mr. Martell appealed the MRLAC's recommendation to the Atlantic Fisheries Licensing Appeal Board [AFLAB] seeking the authorization to use a medical substitute operator up to and including the year 2021. During the appeal, and prior to the AFLAB making a recommendation to the Deputy Minister of the DFO, Mr. Martell was granted the authorization to use a medical substitute operator for the 2018 fishing season.

19 During the appeal before the AFLAB, counsel for Mr. Martell submitted that the five (5) year limit and the decision made pursuant to it were arbitrary, unjust and unconstitutional for violating his right to equality under section 15 of the *Charter*.

20 By letter dated March 6, 2019, the Deputy Minister of the DFO denied Mr. Martell's request for continued use of a medical substitute operator authorization. The Deputy Minister determined that the circumstances raised by Mr. Martell before the AFLAB, namely financial hardship and his succession plan, did not constitute extenuating circumstances that would warrant making an exception to the 1996 Policy.

21 On April 2, 2019, Mr. Martell filed an application for judicial review seeking various orders, including, *inter alia*, setting aside the Deputy Minister's decision and having him reconsider Mr. Martell's constitutionally protected rights to be free from discrimination pursuant to subsection 15(1) of the *Charter*.

22 As the upcoming lobster season was set to commence on May 18, 2019, Mr. Martell brought this motion asking the Court to stay the Deputy Minister's decision pending the determination of his application for judicial review and, in the alternative, to grant a mandatory interlocutory injunction ordering the DFO to authorize him to use a medical substitute operator pending the final resolution of the application for judicial review.

III. Analysis

A. Preliminary Matter

23 In its written submissions in response to Mr. Martell's motion, the Respondent, the Attorney General of Canada [AGC], identified two (2) issues: (1) whether Mr. Martell should be granted injunctive relief in the nature of *mandamus*; and (2) whether Mr. Martell can seek a stay of the

Deputy Minister's decision to refuse the authorization for a medical substitute operator up to and including the 2021 fishing season.

24 As Mr. Martell did not seek the issuance of a writ of *mandamus* in his motion, I do not intend to address the issue of whether or not the remedy of *mandamus* was available to Mr. Martell except to mention that it has its own requirements which are different from those of a mandatory injunction (*Madeley v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FC 634 (F.C.) at para 29).

B. Test for Interlocutory Injunctions

25 In order to succeed on a motion seeking interlocutory injunctive relief, the moving party must meet the requirements of the conjunctive tripartite test articulated by the Supreme Court of Canada [SCC] in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) at 348-349 [*RJR-MacDonald*] which requires the moving party demonstrate that: (1) there is a serious issue to be tried; (2) the moving party will suffer irreparable harm if the relief is not granted; and (3) the balance of convenience favours the granting of the order.

26 In *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 (S.C.C.) [*CBC*], the SCC examined the framework applicable for granting mandatory interlocutory injunctions and held that the appropriate criterion for assessing the first factor of the *RJR-MacDonald* test is *not* whether there is a serious issue to be tried, but rather whether the moving party has shown a strong *prima facie* case (*CBC* at para 15). This is so because 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 a situation back to what it should be" (*CBC* at para 15). In some cases, it is also equivalent to the relief that would be requested at trial or, in this case, the underlying application for judicial review.

27 Establishing a strong *prima facie* case entails showing a *strong likelihood* on the law and the evidence presented that, at trial or the underlying application, the moving party will be ultimately successful in proving the allegations set out in the originating notice (*CBC* at para 18).

28 In the case before me, Mr. Martell has improperly characterized the mandatory interlocutory injunction as an alternative relief. He is essentially seeking an interlocutory order that will allow him to continue earning a livelihood pending the determination of his application for judicial review. A stay of the Deputy Minister's decision alone will not grant him the authorization he requires to use a medical substitute operator for the 2019 fishing season. However, the mandatory interlocutory injunction remedy, which compels action on the part of the DFO, can capture the relief Mr. Martell is seeking in his motion. Consequently, the mandatory interlocutory injunction will not be considered as an alternative relief. Hence, to be successful, Mr. Martell must demonstrate that he meets the elevated standard of a strong *prima facie* case that he will succeed on the underlying judicial review.

29 Relying on the recent case of *Calin v. Canada (Public Safety and Emergency Preparedness)*, 2018 FC 731 (F.C.) [*Calin*], Mr. Martell's counsel submits that the Court should not impose the elevated standard of mandatory injunctions set out in *CBC* and that he should only be required to demonstrate a likelihood or probability of success on the underlying application.

30 In *Calin*, the Court considered whether it was appropriate to impose the exception to the serious issue test when applied to a mandatory interlocutory injunction for the release of a person held in detention pursuant to the *Immigration and Refugee Protection Act*, SC 2001, c 27. The Court held that the test in such circumstance should be at the level of a likelihood or probability of success of the underlying application given that the respondent did not have to take "steps to restore the status quo" or to otherwise "put the situation back to what it should be". It also noted that the individual's release from detention did not entail any "potential severe consequences" for the respondent besides concerns relating to the public interest, which were to be considered in the context of the balance of convenience factor (*Calin* at para 14).

31 Mr. Martell argues that, similarly in his case, the steps to restore the status quo or otherwise put the situation back to what it should be are neither costly nor burdensome and require very little positive action on the part of the Deputy Minister.

32 It is not necessary for me to determine whether a mitigated standard should apply in the circumstances of this case as I am of the view that the elevated standard articulated in *CBC* has been met.

(1) A strong prima facie case

33 Mr. Martell submits the matter underlying the application for judicial review meets the higher threshold of a "strong likelihood" of success because the impugned decision is arbitrary, unjust and unconstitutional as it severely circumscribes the protection afforded by subsection 15(1) of the *Charter* to be free from discrimination based on physical disability, including chronic medical conditions.

34 Mr. Martell argues that he is limited by his medical condition/physical disability and that the decision of the Deputy Minister and by extension, the decision of the AFLAB, imposes differential treatment upon him in comparison to other licence holders. Licence holders who do not suffer from a medical condition preventing them from being on board the vessel are essentially able to renew their licences indefinitely, so long as they abide by their terms and conditions. According to Mr. Martell, it is widely recognized that the DFO's practice is to reissue to a given licence holder, each year, the licence held the previous year. The licence holder can reasonably expect his or her licence to be renewed from year to year, thus providing the holder with a measure of financial stability and certainty. Alternatively, the licence holder can request that the DFO reissue the licence to another person, as a replacement for their own, thus enabling the licence holder to

sell his licence or pass it on to a family member. However, he and others like him with a similar medical condition and physical disability must apply year after year for the authorization to use a medical substitute operator and are subjected to the five (5) year limitation found in the 1996 Policy. Like him, they face the risk of being forced to give up their licence in the event of a refusal as a way to mitigate their losses.

35 Mr. Martell argues that the Deputy Minister's decision has the effect of denying him all of the privileges and entitlements of other licence holders, simply because he is physically unable to remain on board his fishing vessel for the extended periods of time often required to harvest a catch. Instead of reflecting a proportionate balancing of the *Charter* protections and statutory objectives at play as prescribed by the SCC in *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12 (S.C.C.) [*Doré*] and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 (S.C.C.) [*Loyola*], the Deputy Minister gives no effect to Mr. Martell's right to equal benefit of the law without discrimination. Moreover, in the absence of some acknowledgment and accommodation of his disability, the decision is unreasonable and does not fall within the range of possible, acceptable outcomes.

36 Based on the material before me, I am satisfied that the first criterion for obtaining a mandatory interlocutory injunction has been met. I reach this conclusion for a number of reasons.

37 To begin with, the AGC fails to respond in its submissions to Mr. Martell's argument of discrimination, which therefore remains undisputed.

38 Furthermore, there is nothing in the motion materials demonstrating that the Deputy Minister or the AFLAB considered Mr. Martell's discrimination argument or that a proper proportionality analysis was conducted under the *Doré/Loyola* framework balancing Mr. Martell's *Charter* protections and the objectives of the 1996 Policy. To the extent that this argument was raised by Mr. Martell on appeal to the AFLAB and that the issue was not considered by the Deputy Minister, there is a strong likelihood that the decision could be set aside on this basis alone.

39 I have nevertheless considered the submissions of the AGC regarding the goals of the 1996 Policy in reaching my determination. I note from the affidavit filed by the AGC that one of the goals of the 1996 Policy is to maintain an economically viable inshore fishery by keeping the control of licences in the hands of independent owner-operators in small coastal communities. Furthermore, according to the AGC's submissions, one of the purposes of creating policies to achieve this goal was to prevent large corporations from gaining access to the licences by way of agreement. To the extent that these are the goals behind the implementation of the 1996 Policy, I note from Mr. Martell's affidavit that he continues to make all operational decisions related to the fishing vessel, including matters such as storage and repairs to the vessel and gear. He also negotiates the wharf price of the catch, arranges bait and fuel purchase and is responsible for hiring and managing the crew and the fishing operation's financial affairs. Despite his inability of being on the fishing vessel

full-time because of his medical condition or disability, his operations appear to be in line with the principles of the 1996 Policy.

40 I have also considered that granting a mandatory interlocutory injunction in this case will in part grant Mr. Martell the relief he is seeking in the underlying application for judicial review, being the authorization to use a substitute operator for the 2019 lobster fishing season. However, upon review of the relief sought in the notice of application for judicial review filed by Mr. Martell, I note that in addition to seeking an order setting aside the decision of the Deputy Minister, he is also seeking an order declaring that subsection 11(11) of the 1996 Policy, and specifically the five (5) year limit for designating a substitute operator, discriminates against fishermen with disabilities and is contrary to subsection 15(1) of the *Charter*. I also note from the affidavit filed by the AGC that in his appeal to the AFLAB, Mr. Martell sought authorization to use a medical substitute operator up to and including the year 2021. As a result, I am satisfied that by ordering the DFO, through its authorized representative, to allow Mr. Martell to use a medical substitute operator, the interlocutory relief will not be determining the outcome of the underlying judicial review. Mr. Martell will have to proceed with his application for judicial review failing which he will be required to seek a new exemption to the application of the policy for the 2020 fishing season as well as for the subsequent seasons.

(2) Irreparable harm

41 Under this second stage of the test, Mr. Martell submits that if the interlocutory relief he seeks is not granted, he will experience a substantial interference with his ability to earn a livelihood. Mr. Martell affirms in his affidavit that the income he receives from fishing this licence is a large portion of his total income. If he is unable to fish the licence by way of a substitute operator, he will not only forfeit the proceeds of the 2019 season which he estimates to be in the neighbourhood of $600,000.00 based on the value of the total catch for previous years, but also those for future seasons since he will have to transfer or sell his licence in order to mitigate his losses.

42 Mr. Martell adds that if he is forced to transfer or sell his licence, it will be virtually impossible for him to re-acquire the licence or a similar licence. It is his understanding that the LFA 30 fleet is comprised of twenty (20) licence holders and that no LFA 30 licences have been sold in over ten (10) years. The loss of the licence may also result in the loss of his Core enterprise status designation, attached to his licence. This designation allows him to operate an enterprise with several licences on a vessel. Without the Core enterprise status designation, the market of purchasers is very limited.

43 Finally, Mr. Martell indicates in his affidavit that he wishes to keep the licence in his family. His grandchildren are currently attending university and wish to enter the fisheries when they have finished their education. He intends to transfer the licence to one of his grandchildren when they

reach a suitable age and meet the necessary criteria set by the DFO to hold the licence. If forced to transfer the licence, he will be unable to carry out his succession plan for the benefit of his family.

44 In response, the AGC submits that to establish irreparable harm, Mr. Martell must lead clear and non-speculative evidence which goes beyond mere assertions and that the threshold is not lessened by the allegation that the Deputy Minister's decision is discriminatory. I agree. General assertions cannot establish irreparable harm. Moreover, irreparable harm refers to the *nature* of the harm rather than its *magnitude*. Additionally, irreparable harm is harm that cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other (*RJR-MacDonald* at 341; *Gateway City Church v. Minister of National Revenue*, 2013 FCA 126 (F.C.A.) at paras 15-16).

45 The AGC also submits that Mr. Martell has not established that he will suffer irreparable harm given that the nature of the harm he complains of, namely his livelihood, can be quantified in monetary terms.

46 Relying on the SCC decision in *Hislop v. Canada (Attorney General)*, 2007 SCC 10 (S.C.C.) at paragraphs 102 and 103 [*Hislop*], Mr. Martell opposes this argument by contending that if he is successful on the underlying judicial review, he will likely have no recourse to recover his lost income or licence if the DFO pleads the doctrine of qualified immunity to avoid liability. According to this doctrine, it is a general rule of public law that "absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional" (*Hislop* at para 102).

47 While I agree that Mr. Martell's economic loss for the 2019 fishing season can be quantified on the basis of the value of previous years, Mr. Martell's evidence is undisputed that if he is not authorized to use a substitute operator for the 2019 fishing season, the amount of the loss will be significant and he will have to either transfer or sell his licence. It is also undisputed that the number of licence holders in the LFA 30 fleet is comprised of twenty (20) licence holders and no LFA 30 fleet licences have been sold in over ten (10) years. I am satisfied that the sale or transfer of Mr. Martell's licence will constitute irreparable harm to Mr. Martell who has been fishing the licence since 1978 and who, in all likelihood will be limited in pursuing other employment opportunities and deprived of future income.

48 Moreover, I consider the inability to carry out one's succession plan to constitute irreparable harm that can support an application for a mandatory interlocutory injunction, providing the other criteria are met.

49 For these reasons, I am satisfied that Mr. Martell will suffer irreparable harm if the interlocutory relief is not granted.

(3) Balance of convenience

50 Under the third part of the test, Mr. Martell argues that the balance of convenience favours awarding the relief as substantially greater harm will be done to him than to the DFO or the public interest if the requested relief is not granted. Granting him the medical substitute operator authorization would not impose any additional financial or administrative burdens on the DFO staff or the Deputy Minister. Further, there is little to no public interest in allowing the Deputy Minister's decision to stand pending the judicial review.

51 In response, the AGC submits that the balance of convenience must favour the DFO. In support of its argument, the AGC contends that it is within Parliament's authority to manage the fishery on social, economic or other grounds, in conjunction with steps to conserve, protect, and harvest the reserve. The 1996 Policy was adopted pursuant to that broad authority which provides broad discretion to the Minister of the DFO to manage fisheries in the public interest, and in this case, to carry out the socio-economic objective to maintain an economically viable inshore fishery by keeping the control of licences in the hands of independent owner-operators. To do so, licence holders must personally fish the licence issued in their name. The 1996 Policy applies to any and all licence holders for the sake of protecting all affected stakeholders, not only those conducting fishing activities in LFA 30. In this case, Mr. Martell has been able to use a medical substitute operator designation since 2009.

52 I find that in the circumstances of this case, the balance of convenience favours Mr. Martell. While I recognize the importance of the Minister's discretion to manage the fisheries and the presumption of the public interest in enforcing policies, the fact remains that Mr. Martell has been fishing under this licence since 1978 and that he has been authorized to use a medical substitute operator since 2009. Throughout his appeals, he has been granted authorization to continue using a medical substitute operator. In my view, the granting of interlocutory relief allowing him to continue to do so will be maintaining the status quo. It has not been demonstrated that granting the requested interlocutory relief will have any additional or undue impact on the DFO and the lobster fishery industry.

53 The same cannot be said for rejecting Mr. Martell's motion.

54 If Mr. Martell is successful on his underlying application for judicial review, the immediate and continuing irreparable harm that arises from the inability to fish the 2019 season outweighs the inconvenience suffered by the DFO.

IV. Conclusion

55 For these reasons, I am satisfied that Mr. Martell has met the conjunctive tripartite test articulated in *RJR-MacDonald* to justify the granting of a stay of the Deputy Minister's decision

pending the final resolution of the application for judicial review. Mr. Martell has also met the elevated threshold of establishing a strong *prima facie* case, as elaborated in *CBC*, justifying the grant of a mandatory interlocutory injunction which effectively authorizes Mr. Martell to use a medical substitute operator for the upcoming 2019 lobster season in LFA 30.

ORDER in T-563-19

THIS COURT ORDERS that:

1. The Applicant's motion is granted;

2. The decision of the Deputy Minister of the Department of Fisheries and Oceans Canada made on or around March 6, 2019 denying the Applicant's request for the continued use of a medical substitute operator is stayed until a final determination of the application for judicial review has been made;

3. The Department of Fisheries and Oceans Canada, through its authorized representative, shall authorize the Applicant to use a medical substitute operator for the upcoming 2019 lobster season in Lobster Fishing Area 30 until a final determination of the application for judicial review has been made;

4. Costs shall be payable to the Applicant and they shall be assessed in accordance with Column III, Tariff B of the *Federal Courts Rules*, SOR/98 106.

Motion granted.

2007 CAF 273, 2007 FCA 273
Federal Court of Appeal

Moresby Explorers Ltd. v. Canada (Attorney General)

2007 CarswellNat 2681, 2007 CarswellNat 4150, 2007 CAF 273, 2007 FCA 273, 160 A.C.W.S. (3d) 745, 284 D.L.R. (4th) 708, 367 N.R. 204, 73 Admin. L.R. (4th) 80

The Moresby Explorers Ltd. and Douglas Gould (Appellants/ Applicants) and The Attorney General of Canada and Council of the Haida Nation (Respondents/ Respondents)

M. Nadon, J.D.D. Pelletier, K. Sharlow JJ.A.

Heard: March 26, 2007
Judgment: August 30, 2007
Docket: A-240-05

Proceedings: affirming *Moresby Explorers Ltd. v. Canada (Attorney General)* (2005), 2005 CarswellNat 1077, 2005 FC 592, 2005 CF 592, 2005 CarswellNat 3982, 273 F.T.R. 175 (Eng.) (F.C.)

Counsel: Christopher Harvey, Q.C., for Appellants
Sean Gaudet, for Respondent, AGC
Louise Mandell Q.C., Mary Locke Macaulay, for Respondent, Council of the Haida Nation

Subject: Natural Resources; Public; Property; Civil Practice and Procedure

APPEAL by tour operator from judgment reported at *Moresby Explorers Ltd. v. Canada (Attorney General)* (2005), 2005 CarswellNat 1077, 2005 FC 592, 2005 CF 592, 2005 CarswellNat 3982, 273 F.T.R. 175 (Eng.) (F.C.), dismissing application for judicial review of tourist quota imposed on park.

***J.D.D. Pelletier J.A.*:**

Introduction

1 In *Moresby Explorers Ltd. v. Canada (Attorney General)*, 2006 FCA 144, [2006] F.C.J. No. 616 (F.C.A.), this Court noted that the appellants Moresby Explorers Ltd. and Douglas Gould (collectively Moresby) had advised that their challenge to the Haida Allocation Policy (as defined below) was based on Charter grounds only, so that this Court did not have to dispose of Moresby's argument that the Policy was void on grounds of administrative discrimination.

Moresby subsequently advised that, in fact, it had not abandoned its argument with respect to administrative discrimination and requested reconsideration of that part of the Court's decision. As a result, the parties were reconvened for argument on the question of whether the Haida Allocation Policy was invalid on the basis that the enabling legislation did not permit the Superintendent to discriminate between tour operators on the basis of race or size of business.

Facts

2 This dispute arises out of the management of the Gwaii Haanas National Park Reserve (the Park) by the Archipelago Management Board (the AMB). The AMB is a structure adopted to permit the Government of Canada and the Council of the Haida Nation to collaborate in the management of the Park without prejudice to either's position in the negotiation of the Haida land claim over a territory which includes the Park. For the details of the AMB's structure and its legal underpinnings, see *Moresby Explorers Ltd. v. Canada (Attorney General)*, 2001 FCT 780, [2001] 4 F.C. 591 (Fed. T.D.) at paragraph 67.

3 In the exercise of its mandate, the AMB has adopted a group of policies limiting access to the Park with a view to protecting its natural and cultural resources. The starting point for those policies was the determination that the Park's carrying capacity was 33,000 user-day/nights per year. The AMB then allocated those user-day/nights equally between three groups, namely, independent users, Haida tour operators, and non-Haida tour operators. As a result, a maximum allocation of 11,000 user-day/nights was available to each group. The AMB also adopted a "Business caps" policy to limit the maximum number of user-day/nights available to any tour operator: 22 client-days per day, and 2,500 user-day/nights per year. This policy is designed to prevent any single operator from monopolizing Park resources.

4 The difficulty with the policies adopted by the AMB is that there are no Haida tour operators, while the non-Haida quota of user-day/nights is oversubscribed. Moresby alleges that the 11,000 user-day/nights limitation on non-Haida tour operators is unlawfully restricting the growth of its business.

Moresby's Submissions

5 Moresby attacks the Haida Allocation Policy and the Business caps on the ground of administrative discrimination, that is "delegated powers exercised by a subordinate authority (*e.g.* a National Parks superintendent) must be exercised strictly within the ambit of the empowering legislation, particularly where they restrict employment or the right to work.": Moresby's Memorandum, at para. 27.

6 This argument is succinctly summarized at paragraph 31 of Moresby's Memorandum where the following appears:

31. There is nothing in either the *Canada National Parks Act* or *Businesses* Regulations that remotely authorizes a power to discriminate based on race or business size. The *Act*, in s. 4, expressly refers to all the people of Canada. The *Businesses* Regulations, ss. 4.1 and 5, proscribe the licensing discretion in relatively restrictive terms. All statutory provisions focus on the Park and none on the personal characteristics of the licensee. The most that can be said is that a subordinate licensing authority may, by necessary implication, assess the merits and qualifications of individual licence applicants with respect to their competence to carry out the purposes of the legislation. However, the legislation nowhere indicates an intention to allow the Superintendent to fence out or restrict a whole class of applicants on the basis of their race or the size of their businesses. This is not within the ambit of this legislation. The purposes of the *Competition Act* cannot be imported into this *Act*.

Analysis

7 Some preliminary observations are in order.

8 Moresby's argument is based on administrative law concepts of even-handedness and jurisdiction and not on human rights or equality grounds. Thus, the question of prohibited grounds of discrimination does not arise, in the sense that Moresby's argument is that discrimination between businesses on any basis, including race, is *ultra vires* the enabling legislation, not that it is contrary to the *Charter* or the *Canadian Human Rights Act*. Moresby's *Charter* arguments were considered in our original decision. The only issue before us is whether the AMB, acting through the authority of the Superintendent, was authorized by the governing legislation to regulate the tour operator industry as it has.

9 It is necessary at this stage to define more precisely what is at issue in the Haida Allocation Policy. In our original decision, we drew a distinction between the Business caps and the Haida Allocation Policy. Business caps were dealt with separately and were found to be legitimate. The allocation of quota between Haida and non-Haida tour operators was referred to as the Haida Allocation Policy. It is this Policy only which we did not analyze on grounds of administrative discrimination. Because the legitimacy of the basis of distinction is not in issue, the question is simply whether the Superintendent has the legislative mandate to distinguish between, or to create, classes of businesses for licensing and regulatory purposes.

10 While Moresby's arguments focus on the allocation of quota between Haida and non-Haida tour operators, the Haida Allocation Policy deals with three groups: independent visitors, Haida tour operators and non-Haida tour operators. Thus, the Policy fits within a broader policy of managing tourist access to the Park territory so as to preserve its natural and cultural heritage. The Park's carrying capacity is not a function of the availability of tour operators. It is the AMB's best assessment of the extent of the Park's ability to receive visitors without suffering degradation of its natural and cultural resources. To that extent, the fixing of the Park's carrying capacity is not a

matter of the *National Parks of Canada Businesses* Regulations, S.O.R./98-455 (the Regulations), but a matter of the management of the Park itself.

11 The allocation of the Park's total carrying capacity between three groups is an allocation of Park access; in that sense, it is not an allocation of business capacity. The one-third share of the Park access reserved for independent tourists is clearly a reservation of park access for those who choose not to rely upon tour operators for their access to the Park. The allocation of the remaining two-thirds of the Park's carrying capacity between two kinds of tour operators does draw a distinction between tour operators. It is the Superintendent's ability to draw that type of distinction which Moresby challenges.

12 Moresby's Memorandum puts its position as follows:

> 8. These Appellants do not challenge the "park use" restrictions represented by the overall annual visitor cap of 33,000 user-day/nights, the daily visitor cap of 300 visitors, and the group size per site cap of 12 visitors. These are rationally connected with park preservation purposes. However, the Appellants do challenge other restrictions which are aimed at the personal characteristics of the licensee, namely the restrictions on size of the licensee's business and the race or ancestry of the licensee.

13 At paragraph 11 of Moresby's Memorandum, the effect of the Haida Allocation Policy is described as follows:

> ... In 1999, however, Parks Canada (through the AMB) established the Haida Allocation Policy which segregated the quota by barring access by non-Haida persons to the 11,000 user-days/nights which was reserved for Haida persons. The immediate effect of this was that non-Haida persons were no longer permitted to grow their business, whether by increased allotments or by pooling, until the total "non-Haida" quota allotments fell below 11,000. As the Court below held, since the total "non-Haida" quota allocation for 2004 was 13,778 there was no possibility for business growth if the licensee were a "non-Haida." Haida ancestry became a pre-condition to the allotment of new or increased quota. No sharing of Haida quota with non-Haida persons is allowed.

14 In essence, Moresby is restricted in its ability to grow to the point of utilizing the full 2,500 user-day/nights cap by the fact that non-Haida operators must share the 11,000 user-day/nights quota allocated to them. If all tour operators were sharing the 22,000 user-day/nights reserved for tour operators, there would be excess capacity and Moresby could expand up to the 2,500 user-day/nights Business cap.

15 The problem raised by Moresby is simply one of competition for a limited resource. Any quota system carries within it the seeds of the problem of which Moresby complains. At some point, the demand for the subject of the quota system exceeds the total available quota. This, in and

of itself, does not give rise to any remedy. If the quota system is lawful — we found that it is — then the resulting competition for user-day/nights is simply a normal consequence of a quota scheme.

16 In this case, the problem is exacerbated by the fact that while there is unused quota reserved for non-existent businesses (Haida tour operators), the existing tour operators cannot expand their businesses because the quota reserved for them is oversubscribed. The elimination of the Haida/non-Haida distinction would provide some immediate relief for non-Haida tour operators but the same problem will recur when demand for park access exceeds the quota allocated to tour operators.

17 Furthermore, once Moresby reaches the individual Business cap of 2,500 user-day/nights per year, it will not benefit from the availability of additional quota for non-Haida tour operators. Its growth will be constrained by the 2,500 user-day/nights Business cap which we have also found to be valid.

18 Seen in this light, Moresby's complaint about discrimination on the basis of business size is without merit. The 2,500 user-day/nights Business cap ensures that all businesses will remain small businesses even though some will be larger and more successful than others. Every successful tour operator business in the Park will eventually run up against the 2,500 user-day/nights Business cap. There is no discrimination on the basis of business size. The growth of all tour operators, Haida and non-Haida alike, is constrained by the 2,500 user-day/nights Business cap.

19 The only question remaining is whether the Superintendent has the legislative authority to distinguish between, or to create, different classes of businesses. An analogous issue was raised in *Sunshine Village Corp. v. Parks Canada*, 2004 FCA 166, [2004] 3 F.C.R. 600 (F.C.A.) (*Sunshine Village Corp.*), where Sunshine Village argued that setting building permit fees in Banff and Jasper National Parks at a higher rate than in other national parks was unlawful discrimination as it was *ultra vires* the Governor in Council. The Trial Division of the Federal Court of Canada (as it then was) accepted Sunshine Village's argument and held that the differential setting of business fees was discriminatory (in the administrative law sense) and was not authorized expressly or by necessary implication by the governing legislation: see *Sunshine Village Corp. v. Parks Canada*, 2003 FCT 546, [2003] 4 F.C. 459 (Fed. T.D.).

20 This Court allowed the Crown's appeal on the basis that the legislation authorizing the making of the Regulations which were allegedly discriminatory was broad enough to permit the Governor in Council to draw distinctions between users of different national parks. The Court distinguished the situation before it from the usual rule in municipal law cases, where discriminatory by-laws are prohibited, as follows:

> 18. Unlike the historic practice of the provinces granting specific powers to municipalities, these words, on their face, confer broad authority on the Governor in Council. There is no

> indication that they are subject to any limitation. The Court must take the statute as it finds it. In the absence of limiting words in the statute, the Court will not read in limitations.
>
> . . .
>
> 22. The courts have historically required express or necessarily implied authorization in municipalities' governing statutes before the municipalities will be allowed to enact discriminatory by-laws. Conversely, when Parliament confers regulation-making authority on the Governor in Council in general terms, in respect of fees for Crown services, the courts approach the review of such regulations in a deferential manner. That is simply a matter of interpreting, in context, the words Parliament has used in accordance with their ordinary and grammatical meaning.
>
> [*Sunshine Village Corp. v. Canada (Parks) (F.C.A.)*, at para. 18 and 22.]

21 Since there was no limitation in the governing legislation restricting the Governor in Council's power to set different scales for building fees in different parks, the Court was not prepared to read them in. The situation is therefore the exact opposite of that which prevails in municipal law where discrimination is prohibited unless it is expressly allowed. In the context of legislation conferring broad regulation making power on the Governor in Council, discrimination (in the administrative law sense) is permitted unless it is expressly prohibited.

22 Similar views were expressed in *Aerlinte Eireann Teoranta v. Canada (Minister of Transport)*, [1990] F.C.J. No. 170, 68 D.L.R. (4th) 220 (Fed. C.A.) (*Aerlinte Eireann Teoranta*) where the issue was landing fees at airports. Higher fees were charged at some airports than at others. This Court upheld the Governor in Council's right to charge different fees at different airports. In the course of upholding the trial judge's decision, Heald J.A. said:

> ... I also agree with him that: The power to make regulations prescribing charges for use of facilities and services without further fetter, is the power to establish categories of users.
>
> [*Aerlinte Eireann Teoranta (F.C.A.)*, at p. 228.]

23 In this case, we are not dealing with a challenge to the Governor in Council's regulation making power, but rather with the exercise of the power conferred upon the Superintendent by those Regulations. The respondent alleges (at para. 46 of the Attorney General's factum) that because the object of Moresby's challenge is a policy adopted pursuant to the Regulations rather than the Regulations themselves, the application cannot succeed, since mere policies (as opposed to decisions based on policies) are not subject to review.

24 The grounds on which a policy may be challenged are limited. Policies are normally afforded much deference; one cannot, for example, mount a judicial challenge against the wisdom or soundness of a government policy (*Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2

(S.C.C.), at 7-8). This does not, however, preclude the court from making a determination as to the legality of a given policy (*Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735 (S.C.C.), at 751-752; *Roncarelli v. Duplessis*, [1959] S.C.R. 121 (S.C.C.), at 140). Because illegality goes to the validity of a policy rather than to its application, an illegal policy can be challenged at any time; the claimant need not wait till the policy has been applied to his or her specific case (*Krause v. Canada*, [1999] 2 F.C. 476 (Fed. C.A.), at para. 16).

25 Turning to the merits, section 16 of the *Canada National Parks Act* authorizes the Governor in Council to make regulations as follows:

16. (1) The Governor in Council may make regulations respecting	**16.** (1) Le gouverneur en conseil peut prendre des règlements concernant:
. . .	. . .
n) the control of businesses, trades, occupations, amusements, sports and other activities or undertakings, including activities related to commercial ski facilities referred to in section 36, and the places where such activities and undertakings may be carried on;	n) la réglementation des activités — notamment en matière de métiers, commerces, affaires, sports et divertissements — , telles que, entre autres, les activités relatives aux installations commerciales de ski visées à l'article 36, y compris en ce qui touche le lieu de leur exercice;

26 The Regulations deal with the control of business through the licensing process. The material provisions are as follows:

4.1 The superintendent may, on application by a person in accordance with section 4, and having regard to the matters to be considered under subsection 5(1), issue a licence to that person to carry on the business indicated in the application.	4.1 Le directeur peut, sur présentation d'une demande conforme à l'article 4 et après avoir pris en considération les éléments mentionnés au paragraphe 5(1), délivrer un permis visant l'exploitation du commerce mentionné dans la demande.
5. (1) In determining whether to issue a licence and under what terms and conditions, if any, the superintendent shall consider the effect of the business on	5. (1) Le directeur doit, pour décider s'il y a lieu de délivrer un permis et, le cas échéant, en déterminer les conditions, prendre en considération les conséquences de l'exploitation du commerce sur les éléments suivants:
(a) the natural and cultural resources of the park;	a) les ressources naturelles et culturelles du parc;
(b) the safety, health and enjoyment of persons visiting or residing in the park;	b) la sécurité, la santé et l'agrément des visiteurs et des résidents du parc;
(c) the safety and health of persons availing themselves of the goods or services offered by the business; and	c) la sécurité et la santé des personnes qui se prévalent des biens ou services offerts par le commerce;
(d) the preservation, control and management of the park.	d) la préservation, la surveillance et l'administration du parc.
(2) The superintendent must set out as terms and conditions in a licence	(2) Le directeur doit indiquer à titre de condition dans le permis:
(a) the types of goods and services that will be offered by the business; and	a) les types de biens et services qu'offrira le commerce;

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(b) the address, if any, at which, or a description of the area in the park in which, the business is to be carried on.
(3) Depending on the type of business, the superintendent may, in addition to the terms and conditions mentioned in subsection (2), set out in a licence terms and conditions that specify
(a) the hours of operation;
(b) the equipment that shall be used;
(c) the health, safety, fire prevention and environmental protection requirements; and

(d) any other matter that is necessary for the preservation, control and management of the park.

b) l'adresse du commerce, le cas échéant, ou une description des lieux du parc où il sera exploité.
(3) Compte tenu du type de commerce visé, le directeur peut, en sus des conditions visées au paragraphe (2), assortir le permis de conditions portant sur ce qui suit:

a) les heures d'ouverture;
b) l'équipement à utiliser;
c) les exigences visant la santé, la sécurité, la prévention des incendies et la protection de l'environnement;
d) tout autre élément nécessaire à la préservation, à la surveillance et à l'administration du parc. DORS/2002-370, art. 10(F).

27 The regulation making power found in the *Canada National Parks Act* contains no limitation which would prohibit the drawing of distinctions between various classes of businesses. The Regulations promulgated pursuant to that power deal with the regulation of business by means of the licensing power. That power is very broad. The Regulations do not contain any explicit limitation on the Superintendent's power to distinguish between classes of businesses. In fact, subsection 5(3) permits the Superintendent to impose conditions on a business license which depend upon the type of business. Those conditions include matters related to "the preservation, control and management of the park." I have no difficulty concluding that the legislation and the regulations are sufficiently broad to permit the Superintendent to impose conditions on business licenses which vary with the kind of business.

28 Moresby's argument is that it is one thing to distinguish between a hardware store and a restaurant but quite another to distinguish between a Haida owned business and a non-Haida owned business. The nature of the business being regulated may require special conditions to be imposed; the personal characteristics of the owner of the business do not impose a similar requirement. In fact, given human rights legislation and the equality provisions of the *Charter*, conditions or limitations based on race are generally contrary to public policy.

29 In my view, the question of administrative discrimination resolves itself as follows. The regulation making power conferred upon the Governor in Council by the *Canada National Parks Act* is not limited so as to prohibit discrimination between classes of business. Thus the Governor in Council is competent to promulgate regulations which authorize discrimination (in the administrative law sense) between individuals and businesses. This, in itself, sets the present case apart from the municipal law cases relied upon by Moresby where the delegated authority, the municipal council, lacks the power to discriminate unless it is specifically conferred by the legislation.

30 The Regulations passed by the Governor in Council contemplate distinctions being drawn between businesses, but not, says Moresby, the type of distinction being drawn in this case. As noted earlier, administrative law discrimination deals with drawing distinctions, as opposed to the basis on which such distinctions are drawn. Unless the distinction drawn by the Superintendent can be shown to be contrary to public policy, there is nothing in the Regulations which would preclude the type of distinction being drawn here. In the end the question is whether the allocation of access to the Park between Haida and non-Haida tour operators is contrary to public policy.

31 Public policy takes its color from the context in which it is invoked. Discrimination on the basis of race is contrary to public policy when the discrimination simply reinforces stereotypical conceptions of the target group. However, there is legislative support for the proposition that discrimination designed to ameliorate the condition of a historically disadvantaged group is acceptable. See, for example, section 16 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, where Parliament authorizes the adoption of special programs designed to prevent or reduce disadvantages suffered by groups when those disadvantages are based on prohibited grounds of discrimination. See also the *Employment Equity Act*, S.C. 1995, c. 44, which mandates programs designed to increase the representation of visible and other minorities in the workplace. Even the *Charter of Rights and Freedoms* contains a reservation at subsection 15(2) to the effect that the constitutional guarantee of equality "does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups". Consequently, the proposition that discrimination based on race is contrary to public policy is too broad. Discriminatory provisions designed to ameliorate the condition of the historically disadvantaged are not contrary to public policy.

32 The rationale given for the Haida Allocation Policy is found at paragraph 45 of the affidavit of Anna Gadja, sworn March 28, 2004, (Tab 6 — Compendium of Evidence of the Respondent Attorney General of Canada) where the following appears:

> 45. One of the principal reasons for setting aside a portion of the overall allocation for Haida commercial tour operators was that Haida businesses had been "frozen out" of the Park Reserve by the AMB following the introduction of the business licensing system in 1996 and the decision not to license any new businesses. That was not the case in 1993, at the time the Gwaii Haanas Agreement was created, and the Agreement does not speak to that issue directly. Given the spirit of the Gwaii Haanas Agreement, under which both parties share and cooperate in the planning, operation, and management of the Archipelago, it was decided by the AMB to correct this inadvertent circumstance whereby the Haida had been "frozen out" of opportunities to participate in commercial tour operations in Gwaii Haanas by creating a separate Haida allocation pool.

33 The "freezing out" of Haida businesses to which Ms. Gadja refers was the result of the AMB decision to freeze tour operations in the Park at the time that the business licensing system was introduced. As there was only one Haida tour operator at the time (which subsequently lost its license for inactivity), the Haida were effectively precluded from acquiring tour operator licenses by the AMB's own policy.

34 A further consideration in the decision to allocate one-third of the available quota to Haida tour operators appears in the affidavit of Ernie Gladstone, sworn April 1, 2004 (Tab 15 — Compendium of Evidence of the Attorney General of Canada):

> 11. Given the importance of Haida culture to the Park Reserve and to the visitor experience, the AMB considered the possibility of a complete lack of Haida participation in the conducting of commercial tours in the Park Reserve to be unacceptable, as this would have resulted in a considerable void in the interpretation of the area's natural and cultural heritage.

35 This is squarely within the mandate given to the Superintendent by subsections 5(1)(*a*) and (*d*) of the Regulations.

36 In the end result, I conclude that the Regulations authorize the Superintendent to discriminate between classes of businesses and that the distinction drawn on the racial or ethnic origin of the owners of commercial tour businesses is not a distinction which is void on public policy grounds.

37 It follows from this that Moresby's argument with respect to administrative discrimination fails. As a result, I would dismiss Moresby's appeal.

Conclusion

38 In conclusion, I am of the view that the distinction drawn by the Superintendent, acting through the AMB, between Haida and non-Haida tour operators is not *ultra vires* the Superintendent on the basis that it results in discrimination between classes of businesses which is not authorized by the governing legislation. In my view, the Regulations are wide enough to include the power to draw such distinctions or, following this Court's decision in *Sunshine Village Corp.*, there is nothing in the Act or the Regulations which would prohibit such a distinction.

39 I would therefore dismiss this aspect of the appeal. This decision, taken with our decision with respect to the balance of the issues, would lead me to dismiss the whole of Moresby's appeal.

***M. Nadon J.A.*:**

I agree

***K. Sharlow J.A.*:**

I agree

Appeal dismissed.

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2008 CarswellNat 388
Supreme Court of Canada

Moresby Explorers Ltd. v. Canada (Attorney General)

2008 CarswellNat 388, 2008 CarswellNat 389, 385 N.R. 396 (note)

Moresby Explorers Ltd., Douglas Gould v. Attorney General of Canada, Council of the Haida Nation

Fish J., McLachlin C.J.C., Rothstein J.

Judgment: February 21, 2008
Docket: 32327

Proceedings: Leave to appeal refused, 367 N.R. 204, 2007 CarswellNat 2681, 2007 FCA 273, 2007 CarswellNat 4150, 2007 CAF 273, 284 D.L.R. (4th) 708 (F.C.A.); Affirmed, 2005 CarswellNat 1077, 2005 FC 592, 2005 CF 592, 2005 CarswellNat 3982, 273 F.T.R. 175 (Eng.) (F.C.)

Counsel: None given

Subject: Natural Resources; Public; Property; Civil Practice and Procedure

Per Curiam:

1 The application for leave to appeal from the judgment of the Federal Court of Appeal, Number A-240-05, 2007 FCA 273, dated August 30, 2007, is dismissed with costs.

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2000 CarswellNat 980
Federal Court of Canada — Appeal Division

Morneault v. Canada (Attorney General)

2000 CarswellNat 3282, 2000 CarswellNat 980, [2000] F.C.J. No. 705, [2001] 1 F.C. 30, 184 F.T.R. 15 (note), 189 D.L.R. (4th) 96, 256 N.R. 85, 32 Admin. L.R. (3d) 292, 97 A.C.W.S. (3d) 588

The Attorney General of Canada, Appellant and Lieutenant-Colonel Paul R. Morneault, Respondent

Stone, Strayer, Robertson JJ.A.

Heard: March 21, 2000
Judgment: May 24, 2000 *
Docket: A-346-98

Proceedings: reversing in part (1998), 150 F.T.R. 28, 10 Admin. L.R. (3d) 251 (Federal Court of Canada — Appeal Division)

Counsel: *Ivan Whitehall, Q.C.*, *Lynn Watt* and *Catarine Moore*, for appellant
Ronald Lunau and *Mary Rose Ebos*, for respondent

Subject: Civil Practice and Procedure; Public

APPEAL from judgment reported at (1998), 160 F.T.R. 28, 10 Admin. L.R. (3d) 251 (Fed. T.D.), granting application for judicial review of findings made in report of Commission of Inquiry dated June 30, 1997, into deployment in 1992 of Canadian Forces to Somalia.

The judgment of the court was delivered by *Stone J.A.*:

1 This is an appeal from an order of the Trial Division of April 27, 1998, granting the respondent's application for judicial review of findings made in the report of a Commission of Inquiry (the "Commission") dated June 30, 1997 (the "Report"), into the deployment in 1992 of Canadian Forces to Somalia. The Inquiry was carried out pursuant to the provisions of the *Inquiries Act*, R.S.C. 1985, c. I-11. The purpose of the application, brought pursuant to s. 18.1 of the *Federal Court Act*, R.S.C. 1985, c. F-7, was to quash various findings made in the Report. By the order in issue, the Motions Judge declared certain of the findings in the Report not to be applicable to the respondent and declared other findings to be invalid.

2 As the background of the dispute is fully set forth in the judgment of the learned Motions Judge,[1] it will not be necessary to cover the same ground in detail. In approaching the issues in this appeal it is well to recall the counsel of Cory J. in *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 (S.C.C.) (hereafter "*Krever*"), with respect to the distinctive nature of a commission of inquiry. At para. 34, Cory J. stated:

> A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event or series of events. The findings of a commissioner relating to that investigation are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are unconnected to normal legal criteria. They are based upon and flow from a procedure which is not bound by the evidentiary or procedural rules of a courtroom. There are no legal consequences attached to the determinations of a commissioner. They are not enforceable and do not bind courts considering the same subject matter.

Background

3 The Commission was appointed by Order in Council dated March 20, 1995, "under Part 1 of the *Inquiries Act*" with the mandate of inquiring into and reporting,

> . . . on the chain of command system, leadership within the chain of command, discipline, operations, actions and decisions of the Canadian Forces and actions and decisions of the Department of National Defence in respect of the Canadian Forces deployment to Somalia.

In carrying out this mandate the Commission was required by the terms of appointment to have particular regard to several enumerated concerns related to the pre-deployment, in-theatre and post-deployment phases of the Somalia deployment. Those respecting the pre-deployment phase were:

> Pre-Deployment (prior to 10 January 1993)
>
> (a) the suitability of the Canadian Airborne Regiment for service in Somalia;
>
> (b) the mission and tasks assigned to the Canadian Airborne Regiment Battle Group (CARBG) and the suitability of its composition and organization for the mission and tasks assigned;
>
> (c) the operational readiness of the CARBG, prior to deployment, for its mission and tasks;

(d) the adequacy of selection and screening of officers and non-commissioned members of the Somalia deployment;

(e) the appropriateness of the training objectives and standards used to prepare for deployment of the Airborne Regiment;

(f) the state of discipline within the Canadian Airborne Regiment prior to the establishment of the CARBG and within the CARBG prior to deployment;

(g) the effectiveness of the decisions and actions taken during the training period prior to deployment by leadership at all levels of the Airborne Regiment to prepare for its mission and tasks in Somalia;

(h) the effectiveness of the decisions and actions taken by leadership at all levels within Land Forces Command to resolve the operational, disciplinary and administrative problems that developed in the Canadian Airborne Regiment and the CARBG in the period leading up to the CARBG deployment to Somalia;

(i) the effectiveness of the decisions and actions taken by Canadian Forces leadership at all levels to ensure that the CARBG was operationally ready, trained, manned and equipped for its mission and tasks in Somalia;

4 In 1992, at the time the Canadian Airborne Regiment (the "regiment") was selected for deployment to Somalia, it was under the command of the respondent, who had been appointed to the position on June 24, 1992. In addition to a headquarters and services unit, the regiment comprised "three company sized units: 1 Commando, 2 Commando and 3 Commando," which were under the command of Majors Pommet, Seward and Magee, respectively. On September 5, 1992, the regiment was given formal notice (a "Warning Order") that it had been assigned to Somalia on a peacekeeping mission (code named "Operation Cordon") under Chapter VI of the *United Nations Charter*. The nature of the mission changed on December 2, 1992, when it became a peace enforcement mission under Chapter VII of the *United Nations Charter*. The respondent had continued to serve as Commanding Officer until October 21, 1992, when he was removed. His hope was that the Inquiry would investigate the circumstances which led to his removal.

5 On September 15, 1995, the respondent applied for full standing as a party before the Commission, and by order of September 20, 1995, his application was granted. On September 22, 1995, he was served in confidence with a notice under s. 13 of the *Inquiries Act*. The notice reads in part:

TAKE NOTICE that pursuant to powers vested in them under section 13 of the *Inquiries Act*, R.S.C. 1985, c. I-11, the Commissioners will hear and consider submissions that you or your counsel may wish to make in relation to charges of misconduct or allegations that

may lead to an adverse finding that could reasonably be expected to bring discredit upon you, or that may be made against you during the pre-deployment phase of the Commission's evidentiary hearings.

At the evidentiary hearings, in relation to the shortcomings or failures in the fulfilment of your military duties, your actions, or the role played by you, Commissioners' counsel may investigate charges of misconduct or allegations that may lead to an adverse finding that could reasonably be expected to bring discredit upon you, as regards:

(a) whether the Canadian Airborne Regiment was suitable for the Somalia mission;

(b) whether the Canadian Airborne Regiment Battle Group (CARBG) was properly constituted in terms of its organization and composition, and operationally ready for deployment in Somalia;

(c) the effectiveness of your decisions within the chain of command with respect to the pre-deployment phase of the Somalia mission, the selection and screening of officers and non-commissioned members and the operational readiness of CARBG, as well as your leadership;

(d) preparing and declaring the Battle Group ready or approving a decision to that effect, especially in light of the composition of CARBG, the state of discipline in CARBG, the lack of previous command experience of many of the officers, the high turnover in officers and non-commissioned members in 2 Commando, the late replacement of the Commanding Officer of CAR, the change in the structure of CAR, the late change in the nature of the mission and the training received; or

(e) addressing the administrative, operational and disciplinary problems encountered in the pre-deployment phase.

6 By this notice the respondent was informed that he was entitled to be heard in relation "to the above-noted charges or allegations" either in person or by counsel or by means of written submissions. By his counsel's letter to the Commission of October 3, 1995, the respondent indicated his wish to be heard in person and by counsel. In the same letter he requested "that you provide us with further information concerning the specific charges of misconduct or allegations that may be made against our client, and which form the basis of the section 13 notice" and, also, that the respondent be provided "with any witness statements in which allegations that may lead to an adverse finding against our client have been made."

7 On October 2, 1995, shortly after the evidentiary hearings into the pre-deployment phase of the Inquiry commenced, the respondent was informed that he would be called as a witness. On October 9, 1995, he was interviewed by Commission counsel for a full day, at which time he suggested

names of a number of possible witnesses and provided documentation from his own personal files. The respondent testified before the Inquiry from January 22, 1996, to January 25, 1996.

8 By letter of January 31, 1997, Commission counsel notified the respondent as follows:

> The Commissioners have instructed me to advise you that, pursuant to the section 13 Notice already delivered to you and based upon the evidence adduced before the Inquiry, the Commissioners will, in their Final Report, consider allegations that you exercised poor and inappropriate leadership in the pre-deployment phase of the Somalia mission by failing:
>
> > (i) in advising Brigadier-General Beno that the Canadian Airborne Regiment would be operationally ready once the unit had completed Exercise Stalwart Providence when you knew, or ought to have known, that the Regiment was experiencing problems with discipline, cohesiveness, training at the regimental level and informal leadership.
> >
> > (ii) to adequately organize, direct and supervise the training preparations of the Canadian Airborne Regiment during the period from receipt of the Warning Order for Operation Cordon until you were relieved of command.
> >
> > (iii) to ensure that all members of the Canadian Airborne Regiment were adequately trained and tested in the Law of War or the Law of Armed Conflict including the four 1949 Geneva Conventions on the protection of victims of armed conflict.
> >
> > (iv) in your duty as a Commanding Officer as defined in Queen's Regulations and Orders, s. 4.20 and in military custom.
>
> This letter is designed to provide greater specification and particularization of the matters previously conveyed to you in your section 13 Notice.
>
> The Commissioners, in writing their Final Report, will limit their comments regarding your possible misconduct to these matters.

9 A letter of reply dated February 3, 1997, from the respondent's counsel reads in part:

> We also request further particulars of some of the allegations against LCol. Morneault that are set out in your notice, in order for our client to effectively respond. The allegations, as stated, are very sweeping. The requested particulars include:
>
> > (a) With respect to para. 2 of the notice, what acts or omissions by LCol. Morneault are alleged to have constituted poor and inappropriate leadership in adequately organizing, directing and supervising the training preparations?
> >
> > (b) With respect to para. 3 of the notice, what acts or omissions of LCol. Morneault are alleged to have shown poor and inappropriate leadership in training and testing

in the Law of War and the Law of Armed Conflict, including the four 1949 Geneva Conventions?

(c) With respect to para. 4 of the notice, in what respect is LCol. Morneault alleged to have failed to perform his duty as defined in QR&O 4.20?

(d) With respect to para. 4 of the notice, what "military customs" are being referred to?

10 Commission counsel responded by letter dated February 11, 1997, addressed to the respondent's counsel. The material portion of that letter reads:

For the four allegations against LCol Morneault for which you request further particulars in your February 3, 1997 letter, the Commissioners will consider in their Final Report:

(a) With respect to para. 2 of the Notice:

He spent insufficient time observing and supervising training and providing direction with respect to training, especially as it related to the tone of the training [see the testimony of BGen Beno, p. 7795 and 8115; Maj Turner, pp. 3547-48, 3446, 3449, 3527, 3674 and 3728; Maj Kyle, pp. 3845, 3808 and 3855-57. LCol Morneault said in his own evidence that he spent 15 to 20 per cent of his time supervising training. [see also his testimony at p. 7321]

He did not set out a statement of concept, objectives, standards and priorities in the training plan. [See the testimony of BGen Beno, p. 7753; Maj Turner, pp. 3724, 3435-38 and 3619-20; Maj Seward, p. 5760 and Maj MacKay, p. 6485]

He did not provide uniform training for the various sub-units. [See the testimony of Maj Turner, pp. 3449 and 3528 and MWO Murphy, p. 6646. In this context, the Commissioners will take into account the performance of the CAR during exercise Stalwart Providence]

Please note: these references are not exhaustive.

(b) With respect to para. 3 of the Notice:

He did not exercise his responsibility as commander of the CAR, to ensure that all of the personnel under his command were familiar with their rights and obligations under the law of armed conflict (LOAC). Reference should be made to his obligations as set out in the four Geneva Conventions of 1949 (articles 47, 48, 127, 144 respectively for Convention I-IV), and the First Additional Protocol of 1977 (article 87).

The Commissioners will examine the question of whether your client ensured that the members of the CAR understood their obligations toward the basic rights of "detainees", whether civilian or captured, sick or wounded combatants.

The Commissioners will also consider if your client directed his staff to include adequate LOAC training in the Op Cordon training plan, provided guidance to his subordinates on the content of the LOAC training, directed the OCs to include refresher training in the LOAC in their sub-unit training and tested or provided for testing of all ranks on this subject.

The Commissioners will consider if your client advised the SSF Commander, BGen Beno, or his staff of the importance of including LOAC in Exercise Stalwart Providence, with a view to ensuring that the soldiers understood the principles of the LOAC.

(c) With respect to para. 4 of the Notice:

The Commissioners will consider whether LCol Morneault retained for himself "important matters requiring the Commander's personal attention and decision," in accordance with s. 4.20 of the QR&O. In particular, the Commissions will consider whether he supervised the training of his commandos, supervised specific training in 2 Commando even though problems had been brought to his attention concerning the status of readiness of the sub-units, redressed problems of command within the CAR, adequately assess the operational readiness of the CAR and properly informed his superiors of the state of readiness, discipline and training of the CAR.

A further question which will be addressed is whether LCol Morneault maintained adequate "general control and supervision of the various duties" that he allocated to others. In particular, did he supervise adequately the training plans and activities of the OCs, review properly the orders and directives that his subordinate commanders were issuing and ensure that his orders and directives were being followed as intended.

(d) With respect to para. 4 of the Notice:

The Commissioners will consider whether LCol Morneault maintained good order and discipline in the unit under his command.

Did he lead by example in the field?

A further reference for you with respect to "military custom" is found in s. 1.13 of Q.R.&O and s. 49 of the *National Defence Act*.

11 Hearings into the pre-deployment phase continued until February 22, 1996. They were followed by hearings into the in-theatre phase, which began on April 1, 1996, and, after a four-month interruption relating to the post-deployment phase, continued until March 1997. In the meantime, the time for completing the Inquiry and for filing a report with the Governor in Council was extended to March 31, 1997, and to June 30, 1997, respectively. A total of 116 witnesses testified before the Inquiry and something in the order of 200,000 documents were filed

in evidence. In April 1997 the respondent filed lengthy written submissions and presented oral submissions before the Inquiry with respect to the alleged misconduct.

The Motion

12 The respondent's motion focussed on general statements made by the Commission in the preface to Vol. 1 of the Report and in the introductory chapter to Vol. 4, as well as on specific findings made in c. 35 of Vol. 4, which is devoted exclusively to the respondent's conduct as Commanding Officer of the regiment. The principal attack on the general statements is that they ought to have been made the subject of a s. 13 notice. While the Motions Judge agreed that this was so, she found that the statements did not apply to the respondent and granted a declaration to that effect.

13 In the preface to Vol. 1 the Commission laments the Government's "decision to impose time constraints" on the Inquiry and, more significantly, that the Commissioners "were too often frustrated by the behaviour of witnesses whose credibility must be questioned." The statement attacked appears in the same section of the Report, at pp. xxxii-xxxiii. It reads:

> We are cognizant of the institutional and peer pressure on witnesses appearing before us. Giving testimony before a public inquiry is a test of personal integrity that demands the moral courage to face reality and tell the truth. It also involves a readiness to be held to account and a willingness to accept the blame for one's own wrongdoing. Many soldiers, non-commissioned officers and officers have shown this kind of integrity. They have demonstrated courage and fidelity to duty, even where doing so required an acknowledgement of personal shortcomings or the expression of unwelcome criticism of the institution. These soldier-witnesses deserve society's respect and gratitude for contributing in this way to improving of an institution they obviously cherish.
>
> With regret, however, we must also record that on many occasions, the testimony of witnesses before us was characterized by inconsistency, improbability, implausibility, evasiveness, selective recollection, half truths, and even plain lies. Indeed, on some issues, we encountered what can only be described as a "wall of silence". When several witnesses behave in this manner, the wall of silence becomes a wall of calculated deception.
>
> The proper functioning of an inquiry depends upon the truthfulness of witnesses under oath. Truthfulness under oath is the foundation of our system of justice. Some witnesses clearly flouted their oath.
>
> Perhaps more troubling is the fact that many of the witnesses who displayed these shortcomings were officers, non-commissioned members (active or retired) or senior civil servants - individuals sworn to respect and promote the values of leadership, courage, integrity, and accountability. For these individuals, undue loyalty to a regiment or to the

> military institution or, even worse, naked self-interest, took precedence over honesty and integrity. By conducting themselves in this manner, these witnesses have also reneged on their duty to assist this Inquiry in its endeavours. In the case of officers, such conduct is a breach of the undertakings set out in their Commissioning Scroll.
>
> . . . . .
>
> Our concern is not with the mere fact of contradictions in testimony. Even where all who testify speak the truth as they know it, contradictions can occur. Contradictions often relate to recollections of conversations that took place between or among people without the presence of other witnesses and without the benefit of notes. At the time, a particular conversation may have seemed unimportant. The passage of time may have driven its details from memory. We are not concerned with differences in recollection that simply reflect the frailty of human memory. We are concerned, however, with something darker than imprecision and contradiction, something closer to a pattern of evasion and deception.

14 The respondent also attacks the general statement at p. 953 in the introductory chapter to Vol. 4 of the Report. It reads:

> A few additional words are called for concerning the portrayal of the actions of individuals that follows. The individuals whose actions are scrutinized are members of the Canadian Forces (CF) who have had careers of high achievement. Their military records, as one would expect of soldiers who have risen so high in the CF pantheon, are without blemish. The Somalia deployment thus represents for them a stain on otherwise distinguished careers. There have been justifications or excuses advanced before us which, if accepted, might modify or attenuate the conclusions that we have reached. These have ranged from "the system performed well; it was only a few bad apples" to "there will always be errors" to "I did not know" or "I was unaware" to "it was not my responsibility" and "I trusted my subordinates". We do not review these claims individually in the pages that follow, but we have carefully considered them.
>
> Also mitigating, to a certain extent, is the fact that these individuals must be viewed as products of a system that placed great store in the "can do" attitude. The reflex to say "yes sir" rather than to question the appropriateness of a command or policy obviously runs against the grain of free and open discussion, but it is ingrained in military discipline and culture. However, leaders properly exercising command responsibility must recognize and assert not only their right but their duty to advise against improper actions, for failing to do so means that professionalism is lost.

15 The respondent also challenges various specific findings in c. 35 of Vol. 4 for lack of procedural fairness and for absence of evidentiary support.

16 It was contended before the Motions Judge that the c. 35 findings in issue were not reviewable under para. 18.1(4)(d) of the *Federal Court Act* because they did not constitute "decisions." The

Motions Judge rejected this argument. She rejected the appellant's further argument that, in any event, there was evidence in the record of the Inquiry to support each of the c. 35 findings. After proceeding to a detailed examination of those findings the Motions Judge concluded, at para. 109 of her reasons:

> It is clear, on the basis of the above, that the Commission's finding of misconduct against the applicant on the ground that he failed to adequately organize, direct, and supervise training preparations from September 5, 1992 to September 21, 1992 is deeply flawed. Many of the primary findings of fact simply do not accord with the evidence. Many conclusions are simply not supported by the evidence. I do not think it is possible to reach any other conclusions than that the decision was patently unreasonable.

Issues

17 Three issues are raised in this appeal. First, whether the Motions Judge erred in determining that the Commission did not give reasonable notice of matters that were eventually cited by the Commission as grounds for findings of misconduct. Second, whether the Judge erred in determining that the findings of misconduct constituted reviewable "decisions" under para. 18.1(4)(d) of the *Federal Court Act*. Third, whether the Judge erred in determining that findings of fact made by the Commission in respect of the respondent's conduct were not supported by the evidence and, therefore, were patently unreasonable.

18 I turn to a discussion of these issues.

Analysis

Reasonable Notice

The General Statements

19 The respondent contends that the general statements in issue include findings that reflect adversely on his own reputation and that he was denied procedural fairness because they were not made the subject of a s. 13 notice. He maintains, as well, that five specific findings made by the Commission in c. 35 were not the subject of such a notice.

20 The requirement for "reasonable notice" of alleged misconduct is laid down in s. 13 of the *Inquiries Act*, which reads:

> 13. No report shall be made against any person until reasonable notice has been given to the person of the charge of misconduct alleged against him and the person has been allowed full opportunity to be heard in person or by counsel.

. . . . .

13. La rédaction d'un rapport défavorable ne saurait intervenir sans qu'auparavant la personne incriminée ait été informée par un préavis suffisant de la faute qui lui est imputée et qu'elle ait eu la possibilité de se faire entendre en personne ou par le ministère d'un avocat.

21 The critical importance for reasonable notice of alleged misconduct is made clear in *Krever*, *supra*, given that a finding may damage the reputation of a witness. As Cory J. put it, at para. 54:

> That same principle of fairness must be extended to the notices pertaining to misconduct required by s. 13 of the *Inquiries Act*. A commission is required to give parties a notice warning of potential findings of misconduct which may be made against them in the final report. As long as the notices are issued in confidence to the party receiving them, they should not be subject to as strict a degree of scrutiny as the formal findings. This is because the purpose of issuing notices is to allow parties to prepare for or respond to any possible findings of misconduct which may be made against them. The more detail included in the notice, the greater the assistance it will be to the party. In addition, the only harm which could be caused by the issuing of detailed notices would be to a party's reputation. But so long as notices are released only to the party against whom the finding may be made, this cannot be an issue. The only way the public could find out about the alleged misconduct is if the party receiving the notice chose to make it public, and thus any harm to reputation would be of its own doing. Therefore, in fairness to witnesses or parties who may be the subject of findings of misconduct, the notices should be as detailed as possible. Even if the content of the notice appears to amount to a finding that would exceed the jurisdiction of the commissioner, that does not mean that the final, publicized findings will do so. It must be assumed, unless the final report demonstrates otherwise, that commissioners will not exceed their jurisdiction.

If a notice of alleged misconduct complies with s. 13 requirements and the inquiry process is otherwise fair, a commission of inquiry is authorized by that section, as Cory J. found in *Krever*, *supra*, at para. 52, to make findings of fact and reach conclusions based upon the facts.

22 The tone of the statement in the preface to Vol. 1 is unquestionably harsh. However, while the respondent complains that the statement applies to him, the language in which it is couched suggests that this is not necessarily so. It refers to "the testimony of witnesses," "several witnesses" and "some witnesses," and states that "many of the witnesses who displayed these shortcomings were officers, non-commissioned officers, and senior civil servants." It is clear, therefore, that the statement is not aimed at *all* senior officers so as to unmistakably include the respondent. The Motions Judge herself concluded with respect to both statements that it was not "seriously contended that the statements of general condemnation" applied to Lieutenant-Colonel Morneault.

23 Even if it could be said that the statement in Vol. 1 applies to the respondent, I am not at all sure that its presence deprived the respondent of procedural fairness. There would appear to be no link between that statement and findings of misconduct in c. 35. What needs to be

addressed is whether the adverse findings of credibility suggested by the statement required a s. 13 notice, assuming for the moment that the statement was intended to apply to the respondent. As was emphasized by Cory J. in *Krever*, *supra*, at para. 52, the "primary role, indeed the *raison d'être*, of an inquiry investigating a matter is to make findings of fact" and that, in doing so, the commission "may have to address and make findings of credibility of witnesses." Indeed, as Cory J. explained in that case, at para. 42, the very wording of s. 13 of the *Inquiries Act* "by necessary inference authorizes a commissioner to make findings of fact and to reach conclusions based upon those facts, even if the findings and conclusions may adversely affect the reputation of individuals or corporations." He also explained, at para. 40, that the authority in s. 13 to make findings of "misconduct" encompasses "not only findings of fact, but also evaluating and interpreting them" and, if necessary, "to weigh the testimony of witnesses . . . and make findings of credibility." It is by adhering to this process that a commissioner is able to determine whether a party's behaviour amounted to "misconduct."

24 The process would not in general appear to require the giving of prior notice that a party's credibility may be made the subject of an adverse finding. Such a finding could be made only after the witness had testified and perhaps not until his or her testimony could be weighed and evaluated in the light of other evidence. A requirement that there be prior notice could well impose on a commission of inquiry an unduly onerous standard of procedural fairness.

25 By contrast with the Vol. 1 statement, the general statement in the introductory chapter to Vol. 4 would appear on its face to apply to *all* of the military officers whose conduct is addressed in that volume including the respondent. Thus, the "portrayal of actions" is of the "individuals that follows," namely, "members of the Canadian Forces . . . whose actions are scrutinized." The statement is objected to on the twin bases that the respondent was not given prior notice and that the evidence does not support the finding that the respondent conducted himself in the manner described in the statement. The Motions Judge concluded that the statement ought not be have been made because no reasonable notice had been given in compliance with s. 13.

26 The appellant contends that the statement is unassailable because it cannot be construed as a finding of misconduct against the respondent. I find this difficult to accept. As a "product of the system" the respondent was one whose reflex was to say "yes sir," who as a "leader exercising command responsibilities" had a "duty to advise against improper actions" and to lose "professionalism" by failing in that duty. There is a direct link between the statement and the findings in c. 35, for, as we have seen, the statement is expressly tied to the "individuals that follow." The appellant conceded before the Motions Judge and in written argument on appeal that the statement did not amount to misconduct and, indeed, the Motions Judge herself found that it did not apply to the respondent. In my view, the Court should, if it can, uphold the declaratory order below in this respect, so as to remove any possible question that this critical statement which, on its face, applies to the respondent was not intended to apply to him.

Availability of Declaratory Relief

27 There was a time when declaratory relief was not available if it would have no legal effect, but this is no longer so. In *Merricks v. Nott-Bower*, [1964] 1 All E.R. 717 (Eng. C.A.), at 721, Lord Denning stated:

> If a real question is involved, which is not merely theoretical, and on which the court's decision gives practical guidance, then the court in its discretion can grant a declaration. A good instance is the recent case on the football transfer system decided by WILBERFORCE, J., *Eastham v. Newcastle United Football Club, Ltd.*, [1963] 3 All E.R. 139. Counsel for the plaintiff said that, in this particular case, the declaration might be of some use in removing a slur which was cast against the plaintiffs by the transfer. He also put us on the wider ground of the public interest that the power to transfer can only be used in the interest of administrative efficiency and not as a form of punishment. He said that it would be valuable for the court so to declare. Again on this point, but without determining the matter, it seems to me that there is an arguable case that a declaration might serve some useful purpose.

Salmon L.J., concurring, added at 774:

> It is said: Even if the plaintiffs' rights under the regulations were infringed, what good could the remedies which are claimed by the plaintiffs do them? Can they benefit by these declarations? If a plaintiff seeks some declaration in which he has a mere academic interest, or one which can fulfil no useful purpose, the court will not grant the relief claimed. In this case, however, again without deciding the point in any way, it seems to me clearly arguable that, if the declarations are made, they might induce those in authority to consider the plaintiffs' promotion, there being some evidence that the alleged transfers by way of punishment have prejudiced, and whilst they remain will destroy, the plaintiffs' chances of promotion.

The principle was applied by Pratte J. (as he then was) in *Landreville v. R.*, [1973] F.C. 1223 (Fed. T.D.), at 1231, and very recently, again in the context of a commission of inquiry, in *Peters v. Davidson*, [1999] 2 N.Z.L.R. 164 (New Zealand C.A.), at 186-187. The Motions Judge granted declaratory relief in respect of this error. I am satisfied that this remedy was available notwithstanding Cory J.'s characterization of a report of a commission of inquiry in *Krever*, *supra*, as having "no legal consequences." Cory J. acknowledged at the same time that it is precisely because the reputation of a witness is at stake that procedural fairness must be accorded for, as he put it at para. 55: "For most, a good reputation is their most highly prized attribute." In my view, the respondent does have an interest in protecting his reputation. It is also to be noted that R. 64 of the *Federal Court Rules, 1998* provides for the granting of declaratory relief, whether or not any consequential relief is or can be claimed.

28 It seems to me that while a declaration would not affect a legal right, it would serve the useful purpose of removing any possible, though perhaps unintended, harm that may have been caused to the respondent's reputation by the statement in the introductory chapter to Vol. 4 of the Report. I would restrict the declaration accordingly.

Specific Findings

29 Five specific findings in c. 35 of the Report are then attacked on the ground that they were not made the subject of prior notice in compliance with s. 13. I shall underline these findings in the following extracts from c. 35: [2]

> 1. [P]ersonal supervision is of utmost importance and must be made one of the highest priorities in the matter of training, if not the overall priority, for it is on the CO that the greatest responsibility for training falls. We find, however, that LCol Morneault failed to meet this important responsibility in two respects. First, *he failed to inculcate in his commandos, through the design of an appropriate training plan and through adequate direct supervision, an attitude suitable to a peacekeeping mission* . . .
>
> 2. LCol Morneault knew his troops were training for a Chapter VI United Nations peacekeeping mission, *and he knew or ought to have known that such missions require a broader knowledge base than normal general purpose combat training permits*. Despite this, he allowed 2 Commando (2 Cdo) to train in a manner far too focused on general purpose combat skills, and with a level of aggression not in keeping with a peacekeeping mission. LCol Morneault himself admitted that 2Cdo spent too much time on general purpose combat training, and did not complete the tasks it was assigned. LCol Morneault also knew of 2 Cdo's aggressiveness . . .
>
> 3. We find that LCol Morneault knew early in the training period that 2 Cdo had problems with leadership and aggressiveness, and that these problems were closely linked. He was the primary officer answerable for training, and bore the responsibility of ensuring that pertinent and adequate training was conducted by the appropriate officers commanding (OCs). *If any of the OCs were found lacking, it was incumbent upon LCol Morneault to make the required changes. But LCol Morneault did not make these changes* . . .
>
> 4. LCol Morneault responded similarly to LCol MacDonald's criticisms of Maj Seward and 2 Cdo. He told him that he did not want his hands tied with regard to Maj Seward and requested that LCol MacDonald remove critical comments about Maj Seward from a letter LCol MacDonald was to send to BGen Beno. LCol MacDonald deleted the reference as LCol Morneault requested, and no subsequent action was taken to correct the serious deficiency in 2Cdo's leadership as noted by LCol MacDonald. *Though LCol Morneault was relieved of command almost immediately after this incident, and cannot*

> *be held responsible for others' inactions, his direction to LCol MacDonald prevented immediate action from being taken against Maj Seward, and for this he is accountable . . .*
>
> 5. On this point, one of the more serious criticisms arising from Stalwart Providence was that the *three commandos operated independently without the cohesion required of a regimental unit. Cohesion develops in accordance with clear training direction issued from the CO, and is ensured only when the CO personally supervises the execution of that direction. LCol Morneault did neither . . .*

30 The Motions Judge found that reasonable notice had not been given of many of the matters cited by the Commission in these c. 35 findings. She noted further, at para. 46 of her reasons, that most of the negative comments concerning the respondent's conduct "originated with one person, a person whose version of events conflicted with his own," and that the comments were repeated by others. "In those circumstances," she added, "the applicant would have great difficulty knowing, in the absence of specific notice, which of the statements concerning his conduct the Commission was treating seriously."

31 I must respectfully disagree that the respondent was not given reasonable notice of these findings. It is to be recalled that Commission counsel's letter of January 31, 1997, as amplified by his letter of February 11, 1997, sets forth a general allegation that the respondent had "exercised poor and inappropriate leadership in the pre-deployment phase of the Somalia mission" by failing, inter alia,

> . . . to adequately organize, direct and supervise the training preparations of the Canadian Airborne Regiment during the period from the receipt of the Warning Order for Operation Cordon until [he was] relieved of command;
>
> . . . in his duty as a Commanding Officer, as defined in Queen's Regulations and Orders, art. 4.20, and in military custom.

32 These allegations were clearly the prime focus of the Commission's findings in c. 35. That training of the regiment while the respondent was its Commanding Officer was the Commission's predominant concern is made plain at the beginning of the chapter, where the Commission stated: [3]

> As the Commanding Officer (CO) of the Canadian Airborne Regiment (CAR) until October 23, 1992, LCol Morneault bore primary responsibility to ensure that training was conducted appropriately during that time with regard to factors relevant to a peacekeeping mission. Training is fundamental to deployment preparations and is the principal activity through which leadership is exercised, attitudes conveyed, and operational readiness ascertained. Those who bear responsibility for training are therefore expected to pay particular attention to its proper supervision, ensuring that the conduct of training is adequate and appropriate, and that its progression follows a carefully articulated plan.

With respect to the applicability of Art. 4.20 and military custom, the Commission wrote: [4]

> Given our findings above concerning the leadership failures of LCol Morneault, and in view of the importance of control and supervision of training for overseas missions, we conclude that LCol Morneault failed as a commander.

33 As early as September 22, 1995, the respondent was put on formal notice that the Commission would investigate the "suitability of the regiment" for service in Somalia, its "readiness," the "screening of officers and non-commissioned officers," the "appropriateness of training objectives and standards" and "effectiveness of decisions and actions taken during the training period prior to deployment," and the "state of discipline." The particularized notice of January 31, 1997, as we have seen, laid primary emphasis on the adequacy of "training preparations" for the Somalia assignment. It was followed by the letter of February 11, 1997, which contained additional details of alleged misconduct as particularized in the January 31, 1997, letter with respect to the adequacy of "training preparations" and performance of the duty imposed by Art. 4.20 of the Q.R.&O. and by military custom.

34 In my view, when the findings in issue are viewed in their immediate contexts and the entire context of c. 35, it cannot be said that the respondent was denied procedural fairness due to lack of reasonable notice. It seems to me that the findings were well within the scope of the notice and of the Commission's mandate. I am satisfied in all of the circumstances that the respondent was given reasonable notice in accordance with s. 13 of the *Inquiries Act*. The respondent was present in person or by counsel throughout all of the evidentiary hearings into the pre-deployment phase, was provided in advance with a summary of what other witnesses intended to say on the stand, had access to all of the documentary evidence, had the right to examine and cross-examine witnesses and to apply to call witnesses of his own, was prepared by Commission counsel prior to testifying, was given the opportunity to, and did, present oral submissions and written submissions before the findings in issue were made. The written submissions, running to some 117 pages, addressed in much detail the issues of training and discipline within the regiment. In my view, all of these factors are relevant in considering whether the respondent was given reasonable notice. They, together with the s. 13 notice, made the respondent aware of the substance of the case against him such that nothing that the Commission found could have caught him by surprise: see *Canadian Fishing Co. v. Smith*, [1962] S.C.R. 294 (S.C.C.), at 316.

Reviewability of Commission's Findings

35 The respondent next attacks specific findings made in c. 35 on the basis that they are not supported by the record. The Motions Judge agreed and declared them invalid. These findings are conveniently summarized by the Motions Judge in her reasons:

> [40] I turn then to a summary of the findings against Lieutenant-Colonel Morneault set out in chapter 35 of the Commission's Report. The relevant portion of the text starts with the statement that Lieutenant-Colonel Morneault failed to meet his important responsibilities with respect to training because he failed to inculcate in his commandos, through the design of an appropriate training plan and through adequate direct supervision, an attitude suitable to a peacekeeping mission. The Report then states that: he spent insufficient time directly supervising the troops; the content of the training plan was too focussed on general purpose combat skills with an inappropriate level of aggression; he ought to have known that a broad knowledge base was required; he had been warned several times about the inappropriate level of aggression in the training but had not corrected this; he had not removed Major Seward as officer commanding of 2 Commando when he had been told that that officer was not fit to command the unit; he had prevented immediate action being taken against the officer.
>
> [41] The second basis for the Commission's finding of misconduct with respect to training set out in the Report is that Lieutenant-Colonel Morneault failed to adequately instruct his OCs on the aim, scope, and objectives of the training they were to conduct, and failed to include a proper statement of these in the training plan he designed; he should have known that a written statement clearly establishing priorities within an overall training concept is an important feature of training direction; the cohesiveness within the Regiment suffered as a result of this absence; he failed to make every effort to draw his unit together as a cohesive whole.

36 Two discrete issues are raised in this connection. The first is whether the Motions Judge erred in concluding that she had jurisdiction to review the findings because they were "decisions" within the meaning of para. 18.1(4)(d) of the *Federal Court Act* and, second, whether she erred in determining that the findings were not supported by the Inquiry's record.

37 The issue of reviewability is certainly novel and not without some difficulty. Although the Motions Judge found that the c. 35 findings were "decisions" that were amenable to review under para. 18.1(4)(d), the whole of the section should be examined not only so as to assist in the interpretation of that paragraph but because it was invoked by the respondent in his application for judicial review.

38 Section 18.1 reads:

> 18.1(1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.
>
> (2) An application for judicial review in respect of a decision or order of a federal board, commission or other tribunal shall be made within thirty days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected thereby, or within

such further time as a judge of the Trial Division may, either before or after the expiration of those thirty days, fix or allow.

(3) On an application for judicial review, the Trial Division may

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

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

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

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

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

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

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

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

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

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

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

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

. . . . .

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

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

(3) Sur présentation d'une demande de contrôle judiciaire, la Section de première instance peut :

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

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

(4) Les mesures prévues au paragraphe (3) sont prises par la Section de première instance si elle est convaincue que l'office fédéral, selon le cas :

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

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

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

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

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

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

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

39 The Motions Judge noted that the procedure adopted by the Commission in investigating the alleged misconduct was similar to that which applies in a court of law, and that this supported an argument that the findings were "decisions" reviewable under para. 18.1(4)(d). Her analysis on the point appears in para. 52 of her reasons, where she stated:

> The procedure followed by the Commission for the purpose of its Volume 4 findings has many similarities to that followed in a court: the proceedings are all held in public; the individuals are answering "charges of misconduct"; the individuals are allowed to call at least some witnesses; they are given an opportunity to make submissions; the outcome is either a dismissal of the "charge" or a finding of misconduct against the individual. This is a quasi-judicial decision-making process. In addition, the Commission's findings of individual misconduct against named individuals can have grave consequences for the reputations and careers of those individuals. To hold that decisions arising out of such a process are not reviewable under paragraph 18.1(4)(d) would be completely contrary to the whole purpose of judicial review and its development as a remedy in the law.

40 The issue, in my view, resolves itself into one of statutory construction. It is not clear, however, that similarities in procedure by itself affords a reliable basis for concluding that the findings in issue are "decisions" reviewable under para. 18.1(4)(d). This Court has been called upon on many occasions to construe the phrase "decision or order . . . required by law to be made on a judicial or *quasi*-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal" in s. 28 of the Act as it read prior to the 1992 amendments. As has been pointed out in D. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing, 1998), at para. 2:4420, note 476, "initially the Court restricted the term to 'final' decisions or orders, and to those that the tribunal was expressly charged by its enabling legislation to make" but, subsequently, the scope of s. 28 was "broadened to include a decision that was fully determinative of the substantive rights of the party, even though it may not be the ultimate decision of the tribunal." Indeed, a recommendation to a Minister of the Crown by an investigative tribunal, which, by reasonable expectation, would lead to a deportation, has been considered reviewable under s. 28: *Moumdjian v. Canada (Security Intelligence Review Committee)*, [1999] 4 F.C. 624 (Fed. C.A.).

41 I must confess to some difficulty in viewing the findings in issue as "decisions" within the meaning of the section. The decision in *Krever*, *supra*, suggests that the contrary may be true, for, as has been seen, the findings of a commissioner under the *Inquiries Act* "are simply findings of fact and statements of opinion" that carry "no legal consequences," are "not enforceable" and "do not bind courts considering the same subject matter." In an earlier case, *Nenn v. R.*, [1981] 1 S.C.R. 631 (S.C.C.), at 636, it was held that the "opinion" required of the Public Service Commission under para. 21(b) of the *Public Service Employment Act*, R.S.C. 1970, c. P-32, was not a "decision or order" that was amenable to judicial review by this Court under s. 28. I must, however, acknowledge the force of the argument the other way, that the review of findings like those in issue is available on the ground afforded by para. 18.1(4)(d) despite their nature as non-binding opinions, because of the serious harm that might be caused to reputation by findings that lack support in the record.

42 If a ground for granting relief is not available under that paragraph, I have the view that the findings are yet reviewable under the section. Judicial review under s. 18.1 is not limited to a "decision or order." This is clear from subs. 18.1(1), which enables the Attorney General of Canada and "anyone directly affected by a matter" to seek judicial review. It is plain from the section as a whole that, while a decision or order is a "matter" that may be reviewed, a "matter" other than a decision or order may also be reviewed. This Court's decision in *Krause v. Canada*, [1999] 2 F.C. 476 (Fed. C.A.), illustrates the point. It was there held that an application for judicial review pursuant to s. 18.1 for a remedy by way of *mandamus*, prohibition and declaration provided for in s. 18 of the Act, were "matters" over which the Court had jurisdiction and that the Court could grant appropriate relief pursuant to paras. 18.1(3)(a) and 18.1(3)(b). See also *Sweet v. R.*, [1999] F.C.J. No. 1539 (Fed. C.A.); *Devinat v. Canada (Immigration & Refugee Board)* (1999), [2000] 2 F.C. 212 (Fed. C.A.). I am satisfied that the respondent is directly affected by the findings and that they are amenable to review under s. 18.1. The findings are exceptionally important to the respondent because of the impact on his reputation. The Court must be in a position to determine whether, as alleged, the findings are not supported by the evidence.

43 To be reviewable under s. 18.1 a "matter" must yet emanate from "a federal board, commission or other tribunal." Such was the case in *Krause*, *supra*. The phrase "a federal board, commission or other tribunal" is defined in s. 2 of the Act to mean "any body or any person having, exercising or purporting to exercise jurisdiction or power conferred by or under an Act of Parliament . . . " In my view, the Commission falls within the scope of that definition, for it derived its mandate from the March 20, 1995, Order in Council, as subsequently amended, and its detailed investigatory powers and power to make findings of misconduct from the *Inquiries Act*: see *Yamani v. Canada (Solicitor General)* (1995), [1996] 1 F.C. 174 (Fed. T.D.).

44 If, as I have stated, the findings in issue are reviewable under s. 18.1, it would follow that relief may be made available under subs. 18.1(3) provided a ground for granting relief is established under subs. 18.1(4). If the findings are not "decisions or orders" no ground for review is available under para. 18.1(4)(d) or para. 18.1(4)(c). The appellant suggested in argument that a finding of the Commission that happened to be contrary to the evidence might be reviewed under para. 18.1(4)(f), "acted in any other way that was contrary to law." I have difficulty in accepting this argument in that the intent of the paragraph appears to have been to afford a ground that was not otherwise specifically mentioned in subs. 18.1(4). I leave the point open as I believe that an unsupported finding in c. 35 made in exercise of the Commission's statutory powers falls within the scope of para. 18.1(4)(b). While natural justice and procedural fairness are usually associated with the quality of a hearing that ends with a decision or order, it has not been so confined by the case law. Thus, natural justice will be denied if the findings of the tribunal, including those of a commission of inquiry, are not supported by some evidence: *Mahon v. Air New Zealand Ltd.*, [1984] 1 A.C. 808 (New Zealand P.C.), per Lord Diplock, at 820:

> The rules of natural justice that are germane to this appeal can, in their Lordships' view, be reduced to those two that were referred to by the Court of Appeal of England in *Reg. v. Deputy Industrial Injuries Commissioner, Ex parte Moore*, [1965] 1 Q.B. 456, 488, 490, which was dealing with the exercise of an investigative jurisdiction, though one of a different kind from that which was being undertaken by the judge inquiring into the Mt. Erebus disaster. The first rule is that the person making a finding in the exercise of such a jurisdiction must base his decision upon evidence that has some probative value in the sense described below. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.

See W. Wade and C. Forsyth, *Administrative Law* (Oxford: Clarendon Press, 1994), at 540. See also *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)*, [1996] 3 F.C. 259 (Fed. T.D.), at para. 144; compare *O.P.S.E.U. v. Ontario* (1984), 45 O.R. (2d) 70 (Ont. Div. Ct.); *Hamilton Street Railway v. A.T.U., Local 1585*, [1996] O.J. No. 3039 (Ont. Div. Ct.).

45 If the findings in issue are supported by some evidence, the respondent could not really complain that the findings may have harmed his reputation. On the other hand, if there was no evidence to support the findings, the potential harm to the respondent's reputation would be significant. The respondent could not go back to the Commission to have the error corrected. Its mandate has been exhausted. Nor could he appeal an erroneous finding to a court of law. Unless the findings in issue are reviewable under s. 18.1, any error that may have been committed could never be corrected and harm that may have been done could never be undone. The respondent would be obliged to live with the harm for the rest of his life regardless of how much damage may have been done to his reputation. This would seem unjust. I concede that these considerations alone are not decisive of the issue of reviewability, but neither are they to be ignored. I am satisfied, however, that a case such as this is indeed reviewable on the ground provided in para. 18.1(4)(b) so as to ensure that natural justice has been done and that no unjustified harm is caused to the respondent's reputation.

The Inquiry's Evidentiary Record

46 I turn, then, to the appellant's argument that the findings in issue are supported by the record. The motions judge examined the findings on a standard of patent unreasonableness, although they are findings of a commission of inquiry. Where that standard applies, the Supreme Court has held that "if there is any evidence capable of supporting the decision even though the reviewing court may not have reached the same decision" the decision is not patently unreasonable: *C.J.A., Local*

579 v. Bradco Construction Ltd., [1993] 2 S.C.R. 316 (S.C.C.), at 340-341. Given that the findings are those of a commission of inquiry, I prefer to review them on a standard of whether they are supported by some evidence in the record of the inquiry. In *Mahon*, *supra*, at 814, Lord Diplock remarked on differences between an investigative inquiry and ordinary civil litigation and went on, at 820, to lay down the two rules of natural justice in the passage quoted above. He then added, at 821:

> Technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice. What is required by the first rule is that the decision to make the finding must be based on *some* material that tends logically to show the existence of facts consistent with the finding and that the reasoning of the finding, if it be disclosed, is not largely self-contradictory.

47 I am satisfied from my own examination of the Inquiry's record that it contains some evidence to support each of the findings which the Motions Judge found to be unsupported. I say this even if the evidence may not appear to be wholly consistent for, in the final analysis, it was for the Commission to weigh and assess the evidence of the various witnesses in coming to its findings of fact. It scarcely requires mention that such is not an easy task in the best of circumstances, and certainly not here where the sense of frustration with some of the testimony is made readily apparent in the Report. In my view, therefore, it is surely not the proper function of a reviewing Court to assume the role of the Commissioners by reweighing and reassessing the evidence that is here in dispute.

48 As to the first of these findings, the respondent testified that "of the time available to me, I think it is 15 per cent of my time, 15 to 20 per cent of my time supervising training."[5] This evidence and other evidence on the point are discussed in the respondent's written submissions, at paras. 165-173.[6] The finding that the time spent was "insufficient" would appear to represent the conclusion or opinion the Commission arrived at on the basis of the facts found.[7] Then a finding is made that the respondent knew or ought to have known that a peacekeeping mission "requires a broader knowledge base than normal general purpose combat training permits." There is evidence to the effect that a peacekeeping mission involves a "completely different mind set"[8] and that too little "mission-specific training" had been given to the soldiers during the pre-deployment phase.[9] The finding that the respondent allowed 2 Commando "to train in a manner far too focussed on general purpose combat skills, and with the level of aggression not in keeping with a peacekeeping mission" would, again, appear to be supported by the record. There was some evidence of general purpose combat training including use of lethal force in 2 Commando that was not compatible with a peacekeeping mission.[10] The finding that the respondent "failed to take Captain Kyle's criticism of 2 Commando training seriously" appears to have some basis in the evidence.[11] So too the finding that a direction given by the respondent to Lieutenant-

Colonel Macdonald "prevented immediate action being taken against Major Seward, the officer commanding 2 Commando" and for which the respondent was accountable.[12] Similarly, the finding that the respondent "failed to adequately instruct his OCs on the aim, scope and objective of the training that they were to conduct, and failed to include a proper statement of these in the training plan he designed," has support in the evidence.[13] Finally, the findings that the 3 Commando units "operated independently without the cohesion required of a Regimental unit" and that the respondent "failed to make every effort to draw his unit together as a cohesive whole," has support in the evidence.[14]

Disposition

49 I would allow the appeal in part, set aside the order of the Trial Division and substitute a declaration that the general statement quoted above and appearing at pp. xxxii-xxxiii of Vol. 1 and the general statement quoted above and appearing at p. 953 of Vol. 4 of the Report do not apply to the respondent. In all other respects I would dismiss the application for judicial review. As the appellant has enjoyed a large measure of success on this appeal, she should have two-thirds of her party and party costs of the appeal.

Appeal allowed in part.

Footnotes

* On October 25, 2000, the court released a corrigendum, and the changes have been incorporated herein.

1 *Morneault v. Canada (Attorney General)* (1999), 150 F.T.R. 28 (Fed. T.D.)

2 Commission Report, Vol. 4, at 1030-1031

3 *Ibid.*, at 1029

4 *Ibid.*, at 1032

5 *Inquiry Transcript*, Appeal Book, Vol. IV, at 765

6 *Ibid.*, Appeal Book, Vol. I, at 190-191

7 *Ibid.*, Appeal Book, Vol. IV, at 764

8 *Ibid.*, Appeal Book, Vol. IV, at 918

9 *Ibid.*, Appeal Book, Vol. V, at 953-954, 1112

10 *Ibid.*, at 1166-1167, Vol. VI, at 1176

11 *Ibid.*, Vol. V, at 954-955

12 *Ibid.*, Vol. VI, at 1182-1183

13 *Ibid.*, Vol. V, at 1131, 1151-1161. See also at 1113, 1116, 1128, 1129, 1130

14 *Ibid.*, Vol. VI, at 1185, 1205, 1208, 1212, 1215; Vol. V, at 1086-1087, 1134-1135

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2019 FCA 149
Federal Court of Appeal

'Namgis First Nation v. Canada (Fisheries and Oceans)

2019 CarswellNat 2011, 2019 FCA 149, 305 A.C.W.S. (3d) 463

'NAMGIS FIRST NATION (Appellant) and MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST GUARD, and MOWI CANADA WEST LTD.(FORMERLY KNOWN AS MARINE HARVEST INC.) (Respondents)

David Stratas J.A.

Judgment: May 16, 2019
Docket: A-110-19

Counsel: Sean Jones (written), for Appellant
Tim Timberg (written), Gwen MacIsaac (written), for Respondent, Minister of Fisheries, Oceans and the Canadian Coast Guard
Chris Watson (written), Ian Knapp (written), for Respondent, Mowi Canada West Ltd.

Subject: Civil Practice and Procedure; Natural Resources; Public

MOTION by appellant First Nation for order settling contents of appeal book.

***David Stratas J.A.*:**

1 The Federal Court dismissed the appellant's application for judicial review of a decision by the Department of Fisheries and Oceans to grant a transfer licence. The appellant appeals to this Court. The appeal is pending.

2 Within this appeal, the appellant moves for an order settling the contents of the appeal book. The appellant submits that the appeal book should contain materials that were not before the Federal Court.

3 The written representations before the Court are very good. But, to some extent, they do not clearly identify and articulate all of the operative legal principles that bear upon this issue. Thus, the Court will set out the operative legal principles. This exposition also may be useful to litigants elsewhere: the law in this area is stable and is largely shared by all Canadian jurisdictions.

The administrative decision-maker as fact-finder and merits-decider

4 It is well-known that, absent a legislative provision to the contrary, evidence relevant to the issues to be decided by the administrative decision-maker is to be adduced before that decision-maker, not before someone else later.

5 Most legislative regimes, like the one in issue in this case, set up and empower the administrative decision-maker to find the facts, apply the law and make a decision. In short, the administrative decision-maker is the merits-decider. Normally, the first-instance reviewing court is not the merits-decider: *Assn. of Universities & Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22, 428 N.R. 297 (F.C.A.) at paras. 17-18; *Delios v. Canada (Attorney General)*, 2015 FCA 117, 100 Admin. L.R. (5th) 301 (F.C.A.) at para. 41.

6 In this context, the only time the reviewing court acts in a practical sense as the merits-decider is where *mandamus* lies or where the reviewing court decides as a matter of remedial discretion not to send the matter back to the administrative decision-maker because no use would be served by it: on *mandamus*, see *Lebon v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FCA 55, 444 N.R. 93 (F.C.A.) and *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167 (F.C.A.) (a power far broader, more powerful and more useful in this Court than the Supreme Court just suggested in *Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29 (S.C.C.) at para. 65); on remedial discretion, see *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, 2017 FCA 45, 411 D.L.R. (4th) 175 (F.C.A.) at paras. 51-52 and cases cited therein.

The first-instance reviewing court

7 Thus, the normal rule, subject to limited exceptions, is that only material that was before the administrative decision-maker, the merits-decider, is admissible on judicial review: see, *e.g.*, *Association of Universities* at para. 17; *Delios* at para. 42; *Bernard v. Canada Revenue Agency*, 2015 FCA 263, 479 N.R. 189 (F.C.A.). Attempts in the first-instance reviewing court to file evidence that goes to the merits of the administrative decision and that was not before the administrative decision-maker must be rebuffed.

8 The normal rule must be applied flexibly, in accordance with its purpose. Material that was not formally filed before the administrative decision-maker but which it nevertheless considered may properly be in the record placed before the first-instance reviewing court. See *Bell Canada v. 7262591 Canada Ltd.*, 2016 FCA 123 (F.C.A.) at paras. 11-16.

9 The normal rule admits of exceptions. The exceptions apply where the receipt of evidence by the reviewing court respects the differing roles of the reviewing court and the administrative decision-maker: *Association of Universities* at para. 20.

10 Specific recognized categories of exception currently include the following:

(a) *General background affidavits*. Sometimes this Court will receive an affidavit that provides general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review: see, *e.g.*, *Association of Universities* at para. 20 and authorities cited therein; and see the important limits to this exception discussed in *Delios* at paras. 44-46. For example, care must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider.

(b) *Affidavits concerning grounds of review where evidence cannot be found in the record of the administrative decision-maker*. Sometimes affidavits are necessary to bring to the attention of the judicial review court defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can discharge its role of review: *e.g*, *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 29 O.R. (2d) 513 (Ont. C.A.). For example, if a party discovers that the opposing party has been bribing the administrative decision-maker and evidence of that is not in the evidentiary record of the administrative decision-maker, the evidence can be placed before the reviewing court to support a ground of bias. Another example of this exception is where the applicant alleges in the reviewing court that the administrative decision cannot stand for a reason that the administrative decision-maker could not legally consider: see, *e.g.*, *Gitxaala Nation v. Canada*, 2016 FCA 187, [2016] 4 F.C.R. 418 (F.C.A.) and *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 116 (F.C.A.) (the administrative decision-maker could not consider whether the Crown had complied with its obligation to consult Indigenous peoples and failure to consult would invalidate the administrative decision). Still another is a proper allegation of improper purpose where evidence exists outside of the record: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 (F.C.A.) at para. 99.

(c) *Affidavits to highlight gaps in the record*. Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding: *Keeprite*, above.

(d) *Affidavits relevant to the reviewing court's remedial discretion*. Sometimes events following the administrative decision may affect the reviewing court's remedial discretion. For example, post-decision events may be such that no practical purpose would be served by quashing and sending the matter back: see, *e.g.*, *Dennis v. Adams Lake Band*, 2011 FCA 37, 419 N.R. 385 (F.C.A.). In this instance, the evidence is not being used to supplement the record of the administrative decision-maker; rather, it is assisting the reviewing court in formulating an appropriate remedy.

11 In certain circumstances, the doctrines of *res judicata*, issue estoppel, abuse of process and judicial notice and legislative provisions that deem facts to exist can have the practical effect of placing certain facts before the first-instance reviewing court: on *res judicata*, issue estoppel and

abuse of process, see *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.); *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.); and on judicial notice, see *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458 (S.C.C.).

12 Sometimes parties in the first-instance reviewing court try to add issues that should have been raised first before the administrative decision-maker and then try to adduce evidence in support of the new issues. For good reason, reviewing courts are very reluctant to entertain new issues: *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.); and for new constitutional issues, see *Okwuobi v. Lester B. Pearson School Board*, 2005 SCC 16, [2005] 1 S.C.R. 257 (S.C.C.) and *Forest Ethics Advocacy Assn. v. National Energy Board*, 2014 FCA 245, [2015] 4 F.C.R. 75 (F.C.A.) at paras. 43-47. In part, this is due to the normal rule, explained above, that the reviewing court normally cannot receive evidence other than what was before the administrative decision-maker. This also respects the law the legislature has set out: it has assigned the responsibility of deciding the issues to the administrative decision-maker, not us.

The appellate court

13 The evidentiary record in the appellate court is the record that was before the first-instance court. That is the normal rule — one that admits of few exceptions. As for new issues, they cannot be introduced into an appeal if they need a factual record: *Cusson v. Quan*, 2009 SCC 62, [2009] 3 S.C.R. 712 (S.C.C.); *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678 (S.C.C.).

14 Evidence excluded or not admitted by the first-instance reviewing court does not form part of the record before the appellate court and should not appear in the appeal book. But if on appeal the appellant is challenging the first-instance court's decision to exclude or not admit the evidence, the evidence can be placed in the appeal book. Such evidence is admissible only to show the appellate court the nature of the evidence over which there is a challenge. If the appellate court rules on the admissibility issues and decides that the first-instance court should have admitted the evidence, it may consider the evidence for all purposes before it.

15 Suppose evidence arises after the first-instance reviewing court has made its decision. And suppose the evidence would have been admissible in the reviewing court (under the principles discussed above) had it existed at the time and had it been presented to the reviewing court? What should the appellate court do with this late evidence?

16 As usual, first principles must be kept front of mind. The first-instance reviewing court was the forum for building the record for the application for judicial review. The appellate court is not such a forum. Thus, any new evidence presented to the appellate court that is meant to supplement the record for judicial review purposes is fresh evidence that can be admitted only under the relevant test in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759, 106 D.L.R. (3d) 212 (S.C.C.).

17 It must be remembered, though, that evidence can be offered to the appellate court for purposes other than building the record for judicial review. Take, for example, evidence that goes to a procedural flaw in the first-instance reviewing court's hearing or decision, such as procedural unfairness or bias in that court. This sort of evidence is relevant not to whether the administrative decision should be set aside, nor is it being used to supplement the judicial review record. Rather, it goes to whether the first-instance reviewing court did its job in a procedurally fair or unbiased way. For this sort of evidence, the difficult *Palmer* test for the admission of fresh evidence does not apply: see *Mediatube Corp. v. Bell Canada*, 2018 FCA 127 (F.C.A.); *R. v. McKellar* (1994), 19 O.R. (3d) 796 (Ont. C.A.) at p. 799, *R. v. McKellar* (1994), 34 C.R. (4th) 28 (Ont. C.A.) at p. 31; *R. v. Barbeau* (1996), 110 C.C.C. (3d) 69, 50 C.R. (4th) 357 (C.A. Que.).

18 Except in the most exceptional circumstances permitted by an appellate court, interveners in the appellate court must take the case as they find it and not add new issues or add to the evidentiary record: *Canada (Minister of Indian & Northern Affairs) v. Corbiere* (1996), 206 N.R. 122 (Fed. C.A.); *York University v. Canadian Copyright Licensing Agency (Access Copyright)*, 2018 FCA 81 (F.C.A.); *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 174 (F.C.A.) at para. 55.

19 A motion to settle the contents of the appeal book, including difficult questions on the admissibility of evidence, need not be determined on an interlocutory basis: *Collins v. R.*, 2014 FCA 240, 466 N.R. 127 (F.C.A.); *Bernard v. Canada Revenue Agency*, 2015 FCA 263, 479 N.R. 189 (F.C.A.) at paras. 9-11, *Mediatube Corp. v. Bell Canada*, 2018 FCA 127 (F.C.A.) at paras. 9-14, *McKesson Canada Corp. v. R.*, 2014 FCA 290, 466 N.R. 185 (F.C.A.) at paras. 9-10, and cases cited therein. The admissibility of materials can be left for the appeal panel to decide.

20 Whether the issues should be left for the appeal panel is a discretionary call governed by several factors: see the above authorities, *Association of Universities* at para. 11 and *SNC-Lavalin Group Inc. v. Canada (Public Prosecution Service)*, 2019 FCA 108 (F.C.A.) at paras. 16-17. These factors include whether determining the motion on an interlocutory basis will allow the hearing to proceed in a more timely and orderly fashion and whether the result of the motion is clear-cut or obvious. Overall, Rule 3 governs the exercise of this discretion: we are to adopt the course of action that "will secure the just, most expeditious and least expensive determination of every proceeding on its merits."

Agreements made by the parties concerning the admissibility of evidence

21 In any level of court, the parties can agree that certain evidence can be admitted and considered. Or they can stipulate to certain facts.

22 As long as there are no legislative provisions or other legal reasons against admissibility that cannot be shunted aside by agreement, courts at any level can receive such facts and evidence. See *Pfizer Canada Inc. v. Teva Canada Ltd.*, 2016 FCA 161, 400 D.L.R. (4th) 723 (F.C.A.) at

paras. 79-80. In the end, though, it is always for the court to determine the weight, if any, to be accorded to the facts and evidence. And in the area of judicial review, despite agreements and stipulations by the parties on a certain issue, the first-instance reviewing court and the appellate court may still have to decline to determine the issue because the administrative decision-maker is the merits-decider.

Recourse back to the administrative decision-maker for revised fact-finding

23 At any time, if new facts relevant to the administrative decision have arisen while the matter is before the first-instance reviewing court or the appellate court, one potential recourse is to go back to the administrative decision-maker and seek a variation or a reconsideration of the decision, assuming the decision-maker has that power.

24 Whether the administrative decision-maker has that power and in what circumstances depends on the legislation governing the administrative area: *Chandler v. Assn. of Architects (Alberta)*, [1989] 2 S.C.R. 848, 62 D.L.R. (4th) 577 (S.C.C.). Administrative decision-makers only have the powers granted to them explicitly or implicitly by legislation: *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513 (S.C.C.) at para. 16; *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394, 92 D.L.R. (4th) 609 (S.C.C.); and for a recent discussion and application of this, see *Hillier v. Canada (Attorney General)*, 2019 FCA 44 (F.C.A.) at para. 10.

Rule 351 of the Federal Courts Act

25 The parties have cited Rule 351. This Rule empowers the Court, on motion, in "special circumstances" to grant leave to a party to present evidence on a question of fact. Rule 351 does not broaden the bases for admissibility discussed above.

Application of these principles to this case

26 The appellant moves to add certain new documents to the evidentiary record of this Court: the Svanvik Affidavit, the Further Further Amended Certified Tribunal Record from another judicial review, a Policy JR Notice, an Amended Policy JR Notice, and a group of documents known as the "G2G Recommendations".

27 This list is found in the appellant's written representations. It does not appear to be exactly the same as the relief sought in the notice of motion.

28 Legally speaking, the Court can only give the relief sought in the notice of motion. To the extent that the relief sought in the written representations is different from that sought in the notice of motion, the appellant should have amended his notice of motion. This being said, in this instance I am prepared to consider the list found in the appellant's written representations.

29 The new documents shall not be added to the appeal book in this Court: they cannot form any part of the evidentiary record in this Court.

30 In the Federal Court, there was another judicial review among the parties (T-430-18) but it was not joined or consolidated with this judicial review (T-744-18). The documents from the other judicial review (T-744-18) were never before the Federal Court in the judicial review in this case (T-430-18). Therefore, the documents from the other judicial review (T-430-18) are not admissible in the record before this Court. And the appellant has not satisfied the test for fresh evidence: all of these documents were either available through the exercise of due diligence at the time of the first-instance judicial review proceedings or are not significant enough to have a determinative effect upon the outcome of the appeal.

31 The Federal Court's decision in the other judicial review (T-744-18) has not been appealed and, thus, is final. It might contain factual findings among these parties on the issue before this Court that are admissible in this court as a result of the operation of *res judicata* and issue estoppel. But this does not affect the content of the appeal book in this appeal, which is the issue currently under consideration.

32 The respondent, the Minister of Fisheries, Oceans and the Canadian Coast Guard, is prepared to allow into the appeal book the notice of application and the amended notice of application in the other judicial review (file T-430-18). But there is no agreement here: the respondent, Mowi Canada West Ltd., opposes their inclusion into the appeal book. It submits that the documents are from a different case, a case that is not under appeal. It terms them "distracting" and "unnecessary to dispose of any issue under appeal." I agree.

33 The appellant seeks to include a Further Further Amended Certified Tribunal Record from another judicial review (T-1710-16). This stands in the same position as the documents sought to be included from T-430-18, above. For the same reasons, they too cannot be admitted into the appeal book.

34 The appellant also wishes to add into the appeal book a group of documents called the "G2G Recommendations". The appellant submits that these provide evidence that the federal Crown can achieve practical consultation and accommodations for introductions of farmed Atlantic salmon. The documents postdate the judgment of the Federal Court.

35 I have not been persuaded that they are admissible as fresh evidence. Under the *Palmer* test, they are not of such significance that they could have a determinative effect on the appeal, *i.e.*, whether the Federal Court was wrong not to set aside the administrative decision in issue. For example, one of the documents in the group called the "G2G Recommendations" provides that it and any acts performed in connection with it are not "to be used, construed or relied on by anyone

as evidence or admission of the nature, scope or content of any Aboriginal Rights or Title and Crown Rights or Title".

36 The appellant also wishes to add an affidavit, known as the Svanik Affidavit, into the appeal book. The Federal Court struck this affidavit from the record on the ground that it was not before the administrative decision-maker whose decision it was reviewing. The appellant is not appealing the Federal Court's ruling. Therefore, there is no basis for including this document into the appeal book.

Disposition

37 I will make an order settling the contents of the appeal book in accordance with these reasons. The appeal book will not include the new evidence the appellant wishes to include.

Motion granted in part.

2008 NLTD 20
Newfoundland and Labrador Supreme Court (Trial Division)

N.A.P.E. v. Western Regional Integrated Health Authority

2008 CarswellNfld 38, 2008 NLTD 20, 152 C.L.R.B.R. (2d) 96,
165 A.C.W.S. (3d) 258, 275 Nfld. & P.E.I.R. 241, 842 A.P.R. 241

NEWFOUNDLAND AND LABRADOR ASSOCIATION OF PUBLIC AND PRIVATE EMPLOYEES (Applicant) and WESTERN REGIONAL INTEGRATED HEALTH AUTHORITY (First Respondent) and CANADIAN UNION OF PUBLIC EMPLOYEES AND ITS LOCAL 488 (Second Respondent) and ASSOCIATION OF ALLIED HEALTH PROFESSIONALS (Third Respondent) and LABOUR RELATIONS BOARD OF NEWFOUNDLAND AND LABRADOR (Fourth Respondent)

D.B. Orsborn J.

Heard: January 31, 2008; February 1, 2008
Judgment: February 7, 2008
Docket: 200701T4433

Counsel: Sheila H. Greene, Q.C., Paula Schump, Christina Kennedy for Newfoundland and Labrador Association of Public and Private Employees
Augustus G. Lilly, Q.C. for Western Regional Integrated Health Authority
Susan D. Coen for Canadian Union of Public Employees and its Local 488
John J. Harris, Q.C. for Association of Allied Health Professionals
Ernest Boone, Q.C. for Labour Relations Board of Newfoundland and Labrador

***D.B. Orsborn J.*:**

Introduction

1 This is an application seeking a stay of proceedings of the Labour Relations Board. These are my reasons in summary form.

2 On April 10, 2008, the Labour Relations Board is scheduled to commence hearings into three applications of Western Regional Integrated Health Authority. These applications have been brought to address labour relations issues said to arise out of what Western Regional asserts is a transfer of business to it from various predecessor employers. The Board has set aside twenty days

for the hearings, but the formal order of proceedings as between the three separate applications has not been finalized.

3 On September 12, 2007, following a hearing, the Board determined that it had the jurisdiction under the *Public Service Collective Bargaining Act*, R.S.N.L. 1990, c. P-42 to determine whether or not a transfer of business or successorship has occurred. The Newfoundland Association of Public and Private Employees ("NAPPE") has brought an application for judicial review of this order; the application is set to be heard over three days commencing March 18, 2008. NAPPE, supported by the Canadian Union of Public Employees ("CUPE"), and the Association of Allied Health Professionals ("AAHP"), has applied to stay the proceedings of the Board pending the outcome of the judicial review application.

4 Although there are some differences between the positions taken by the three unions, my understanding of the argument, in essence, is that the recent amendments to the *Public Service Collective Bargaining Act* do not go far enough in filling a jurisdictional gap previously identified by the Court in respect of the transfer of business or successorship provisions in ss. 44 and 45 of the *Public Service Collective Bargaining Act.* See *N.A.P.E. v. Newfoundland (Treasury Board)* (1994), 125 Nfld. & P.E.I.R. 140 (Nfld. T.D.).

5 NAPPE also advanced the argument that because of provincial legislation in 2004 imposing collective agreements and identifying specific employers bound by such agreements, the Labour Relations Board has no jurisdiction to determine that Western Regional is an employer for the purpose of the *Public Service Collective Bargaining Act*. Thus, so the argument goes, Western Regional cannot avail of the remedial powers of the Board under s. 44 of the *Public Service Collective Bargaining Act*.

6 The unions say that the Labour Relations Board hearings will cause them to incur significant costs and that if it is later determined that the Board had no jurisdiction to consider and determine the successorship issue, there will be no way to recover these costs. They also assert that unspecified irreparable harm — apparently stress and confusion — will flow from the *fact* of the Board hearings. NAPPE's application, supported by the affidavit of its President, also asserts irreparable harm flowing from the imposition of any remedies that might be found appropriate by the Board. I refer to pars. 17 and 19 of the interlocutory application:

> 17. If one or more of the hearings proceed and the Labour Relations Board makes an Order that a transfer of business has occurred and that a restructuring of the bargaining units is appropriate, NAPE could be forced to participate in votes to determine who will be the bargaining agent. If NAPE is not successful on the votes, and the Supreme Court subsequently overturns the Labour Relations Board Order dated the 12th day of September A.D., 2007, NAPE could experience catastrophic losses including the loss of union dues, the loss of

confidence of its members and the loss of the opportunity to collectively bargain. NAPE and its members could suffer drastic financial and collective bargaining losses.

. . . . .

19. If the Labour Relations Board hearings continue before the Judicial Review Application is concluded, collective bargaining in the Health Care Sector could be conducted based upon bargaining unit configurations which are fatally flawed by the lack of jurisdiction in the Labour Relations Board. Any disruption to collective bargaining in the Health Care Sector would have a catastrophic financial and collective bargaining impact upon NAPE and its members and the public interest.

7 The parties were generally agreed on the test to be applied on an application of this nature. The unions must establish:

1. A serious issue to be tried on the judicial review application;

2. irreparable harm if the stay of proceedings is not granted, and

3. that the balance of convenience favours granting a stay.

8 In argument, the unions suggested that when it is sought to enjoin an illegal action, the requirement of irreparable harm need not be established.

9 On this point, I do not agree that the circumstances here are such that irreparable harm need not be established. The authorities provided [1] suggest that where the illegality of an act — i.e. an illegal strike — is established or is not in contention at the time of an injunction hearing, there is no need to consider the irreparable harm issue. This, of course, makes sense; the illegality of the act is sufficient to warrant stopping the activity and no balancing of interests is required. Here, there is simply a challenge to the Board's jurisdiction to make a particular determination. Counsel for NAPPE conceded that the Board has jurisdiction to consider at least one of the requests in the applications — that is, that Western Regional is a party to and is bound by the collective agreements in question. The fact that there is an argument over the Board's jurisdiction to consider and determine other aspects of the application does not turn the Board hearings into an activity that is illegal or unlawful in and of itself and, therefore, subject to restraint. On this point, I refer to the 2001 decision of Chief Justice Green in *Hibernia Management and Development Company Ltd. v. Communications, Energy andPaperworkers Union of Canada*. [2] I refer in particular to pars. 20 and 21. Irreparable harm must be established.

10 I should also say a word about the context of this application. The application is brought not to stay the enforcement of a judgment or order; it is brought simply to stop the normal hearing processes of the Board. I note that in *Hibernia Management & Development Co.*. — a case under the *Labour Relations Act*, R.S.N.L. 1990, c. L-1 — Chief Justice Green concluded that a threshold test of a *prima facie* case rather than a serious issue was appropriate when an injunction was sought

to restrain the actions of a tribunal protected by a privative clause. That case, I believe, involved the counting of a vote following a certification order.

11 It was argued here that the privative clause in the *Public Service Collective Bargaining Act* is "weaker" than that under the *Labour Relations Act*. Here, the *Act* says — subs. 45(2) — "A decision or order of the board made under this Act is not open to review or question...". The provision in the *Labour Relations Act* — s. 19 — is more extensive. I am not sure why the clarity and conciseness of the phrase "not open to review or question" should suggest weakness, but the authorities do suggest that such wording, at least when compared to other privative clauses, may indicate a legislative intention of lesser judicial deference to decisions of the Board.

12 In any event, later decisions from the Court of Appeal [3] strongly suggest that the "serious issue" threshold is the appropriate one for consideration on stay of proceedings or interlocutory injunction applications.

13 However, it is not necessary to pursue this issue further. I have concluded that the application should not be granted because irreparable harm has not been established and because the application is premature. Accordingly, and in view of the upcoming judicial review, I do not propose to offer any comment or opinion on whether or not there is a serious issue raised by the application. Neither is it necessary to consider the balance of convenience.

14 I do not accept that harm which could be characterized as irreparable will flow from the hearings themselves. One can accept that attending hearings will be costly; but in the absence of knowing how the hearings will be structured, it is not possible to assess what the financial impact will be on the individual unions. For example, one may expect that the involvement of the AAHP will be less than that of the other two unions. Further, I do not consider as compelling the argument that such costs may be lost, and therefore constitute irreparable harm. Attending hearings is part of the normal administration of labour relations. The costs involved here — and the marginal costs may not be high if in-house counsel are used — are simply not comparable to the "very large sums of money" involved in the contemplated repackaging expenses in *RJR-MacDonald Inc.*. [4] Neither do I consider that unspecified and unproven stress and strain on one or more employees allegedly resulting from the fact of participation in hearings can constitute, or does constitute, irreparable harm. It is true that the end result may be an order or judgment that affects rights, obligations or practices. At that stage, concerns may arise over compliance with a challenged order. Such concerns may include potential disruption of the working environment of employees; but these are a far cry from the suggestion of legally significant harm arising — among hundreds of individuals — just from the holding of the Board hearings.

15 Even if I were to accept the assertions of union counsel of the harm that will flow simply from proceeding with the hearings, these assertions ring hollow in light of counsels' having turned

down the opportunity offered by the Court to have all of the outstanding legal issues heard and determined by the Court in advance of the scheduled Board hearings.

16 At the outset of the stay hearing, I indicated that, instead of proceeding with the stay application, I would be prepared to set an earlier date for and hear the substantive judicial review application and would give a prompt decision on the jurisdictional issues raised by that application. If the decision on that application were that the Court rather than the Board has the exclusive jurisdiction to determine whether or not a transfer of business has occurred, I committed to providing hearing dates and a decision on this issue in advance of the start of Board hearings on April 10th. Such a schedule would ensure that any legal uncertainty concerning the transfer of business issue — the expressed reason for the stay application — would be resolved before the Board hearings. Accordingly there would be no possibility of harm from participating in an unnecessary hearing. Western Regional's counsel was prepared to do this; but none of the union counsel agreed, saying that their calendars could not accommodate the suggestion. It seems to me that when assertions, not just of harm, but of irreparable harm to many individuals, are being put forward, counsels' calendars would take second place to the prospect of avoidance of such harm. The priority of counsels' schedules detracts from the assertion of both the existence and the irreparability of harm.

17 The unions have failed to establish irreparable harm, one of the necessary preconditions for consideration of a stay.

18 The application is also premature. It is not yet known what the results of the judicial review will be. Should the Court conclude that the Board has jurisdiction to decide the transfer of business question, it is not known — notwithstanding union counsels' suggestion of a foregone conclusion — what decision the Board will render. Similarly, if the Court is the proper forum in which to determine the transfer business issue, it is not known what the result will be. Finally, should the Board or the Court conclude that a transfer of business has indeed taken place, it is not known what, if any, remedial order may eventually be made by the Board. And, I reiterate, it is only after any such order that the labour relations consequences, if any, of the applications and the Board hearings will be established.

19 Aside from any cost or stress that may flow from the Board hearings themselves — and I have concluded that these consequences do not represent irreparable harm — to project outcomes at this stage piles speculation upon speculation.

20 Importantly, there will be other opportunities to at least apply for a stay of proceedings. Firstly, at the conclusion of the judicial review application hearing, when some idea of the timing of any decision may be available, counsel may seek to have the Board proceedings halted. Secondly, there will be opportunity to seek a stay of any Board order that may follow the Board hearings, which order, if any, will define the legal and practical results of the hearings. I offer no opinion, of

course, on the likelihood of success of a stay application on either of these occasions. I simply note that, at either time, more will be known than is known now. Accordingly, the present application is premature.

21 In view of my conclusions, it is not necessary to comment on whether or not certain aspects of this application may suggest that, in any event, the Court should not exercise its discretion to grant the requested relief, relief which engages what may be considered to be the equitable jurisdiction of the Court. I note the shifting positions of NAPPE and CUPE on the core legal issue of the jurisdiction of the Board to issue one or more of the orders requested, recognizing at the same time that specifically the transfer of business issue is more of a factual question to which parties may consent. I note also two paragraphs in NAPPE's originating application — pars. 23 and 86 — which assert a jurisdictional position taken by CUPE which is the opposite of the position actually taken by CUPE in its reply to Western Regional's application to the Board. Such issues, in a proper case, may suggest to the Court that its discretion should not be exercised in that particular party's favour. It is not necessary to make any other comment.

Conclusion

22 The application for a stay is denied. Western Regional Integrated Health Authority is entitled to its costs of the application on a party and party basis, with 70 percent of its costs as taxed being borne by the Newfoundland and Labrador Association of Public and Private Employees, 20 percent of its costs by the Canadian Union of Public Employees, and 10 percent of its costs by the Association of Allied Health Professionals. There is no order of cost for or against the Board.

Application dismissed.

Footnotes

1 *Newlab Clinical Research Inc. v. N.A.P.E.*, 2003 NLSCTD 167 (N.L. T.D.); appeal dismissed as moot 2004 NLCA 45 (N.L. C.A.); *Hart Leasing & Holdings Ltd. v. St. John's (City)*, [1992] N.J. No. 309 (Nfld. C.A.); *St. John's Transportation Commission v. A.T.U., Local 1462* (1989), 76 Nfld. & P.E.I.R. 148 (Nfld. T.D.).

2 (Decision: October 9, 2001, Docket: 2001 01T 2567).

3 *Newlab Clinical Research Inc. v. N.A.P.E.*, 2004 NLCA 45 (N.L. C.A.); *Peter Kiewit Sons Co. v. U.A., Local 740*, 2005 NLCA 8 (N.L. C.A.).

4 *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.).

2003 NLSCTD 167
Newfoundland and Labrador Supreme Court (Trial Division)

Newlab Clinical Research Inc. v. N.A.P.E.

2003 CarswellNfld 265, 2003 NLSCTD 167, [2003] N.J. No. 305,
127 A.C.W.S. (3d) 458, 232 Nfld. & P.E.I.R. 332, 690 A.P.R. 332

NEWLAB CLINICAL RESEARCH INC. (APPLICANT) AND NEWFOUNDLAND AND LABRADOR ASSOCIATION OF PUBLIC AND PRIVATE EMPLOYEES AND THE LABOUR RELATIONS BOARD (RESPONDENTS)

Adams J.

Heard:
Judgment: November 25, 2003
Docket: 2003 01T 3215

Counsel: Augustus F. Lilly, Q.C. for Newlab Clinical Research Inc.
Ms Sheila H. Greene for Newfoundland and Labrador Association of Public and Private Employees
Mr. Jamie Smith for Labour Relations Board

***Adams J.*:**

INTRODUCTION

1 The applicant, Newlab Clinical Research Inc. (hereinafter "Newlab"), seeks a stay of proceedings of an order of the Labour Relations Board for Newfoundland and Labrador (hereinafter "the Board") dated 16 June 2003 certifying the first respondent, Newfoundland and Labrador Association of Public and Private Employees (hereinafter "NAPE"), as the bargaining agent of the employees of Newlab (hereinafter "the certification order") pending the hearing of an application for judicial review which is set to heard on 11 December 2003. Newlab also seeks an order for an expedited hearing of the application for judicial review.

2 Newlab seeks to have the certification order set aside on three principal grounds:

(1) that the Board lacked jurisdiction to hear the application for certification because it was signed by persons not authorized to execute documents in behalf of NAPE contrary to Section 135 of the *Labour Relations Act* (hereinafter "the Act") which are mandatory;

(2) that NAPE applied to be certified for two or more employers and the Board considered the application without first having obtained the consent of both employers, contrary to Section 48 of the Act, which consent is mandatory; and

(3) alternatively, the Board made a patently unreasonable error when it certified NAPE as the bargaining agent of one of two employers named in the application for certification on the basis of a representation vote naming the two employers as the employer. In fact, the Board found that there were four separate employers of the employees sought to be represented. The votes of all employees but those of the applicant were destroyed and not counted in the representation vote.

(4) At the hearing of this application Newlab raised a denial of natural justice issue in connection with ground (1) above and a public interest issue in respect of the application generally.

3 Newlab is a medical research company which conducts clinical trials for national and international pharmaceutical companies which are seeking approval for the drugs from the United States Food and Drug Administration. It also provides drug infusion services to patients suffering from inflammatory bowel disease and severe arthritis.

ISSUE

4 Should a stay of proceedings of the certification order be granted?

POSITIONS OF THE PARTIES

5 The parties agreed that the granting of a stay of proceedings is governed by the tripartite test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.): the applicant must establish a serious issue to be tried or a *prima facie* case; the applicant would suffer irreparable harm if the stay were not granted; and, the balance of convenience favours the granting of the stay.

6 The parties disagreed on whether the first leg of the test required the establishment of a *prima facie* case or the less stringent burden of a serious issue to be tried and on the application of this test as a whole to the facts of this case.

Newlab

7 Newlab submitted that it was obliged only to satisfy the Court that there was a serious issue to be tried. It stated that the first two issues raised in the application for judicial review go to the very core of the jurisdiction of the Board to entertainment the application for certification and therefore raise a serious issue. It submits that since there was a violation of Section 135 and Section 48 of

the Act the Board lacked jurisdiction to proceed with the application for certification and ought to have dismissed it. It submits in the alternative that it has also met the more stringent test of a *prima facie* case because of the jurisdiction questions brought into play and the facts on which it relies.

8 On the question of irreparable harm and balance of convenience, Newlab submits firstly that since the violation of a statute is the central question in the matter, it does not have to establish irreparable harm. In the alternative, it states that in any event it has established that it will suffer irreparable harm by having to enter into collective bargaining and spend significant amounts of money and time in the process when the very certification order requiring it to do so may be set aside. These costs, in addition to any possible increase in wages and benefits, would not be recoverable from NAPE.

9 It submits that the balance of convenience favours the granting of the stay as Newlab could be put out of business due to the nature of its enterprise if a strike were to take place and it were to be subject to damages for breach of contract if it could not continue with its pharmaceutical testing. Newlab also raises a natural justice argument surrounding the alleged lack of authority to sign the application for certification in that the resolution of NAPE purportedly authorizing employee relations officers to execute the application and on which the Board relied to find such authority, was not before the Board and subsequent evidence of the resolution put before this Court but which was not before the Board brings the matter into question as to whether the resolution actually grants the purported authority to the employee relations officers. Newlab says that it was thereby deprived of the opportunity to make argument to the Board about the efficacy of the resolution of the union to authorize the action on which the Board relied.

10 Newlab also raises a public interest argument based on the nature of its business which it says favours the granting of the stay of proceedings.

NAPE

11 NAPE submits that the test should be on the higher standard of a strong *prima facie* case to be met on the first leg of the **RJR - MacDonald** test. It says that this accords with the weight of judicial authority in this province which recognizes that because of the strong privative clause in the Act, judicial review of an order of the Board is an exception to the general rule in **RJR - MacDonald** which sets the bar at the level of a serious issue to be tried. NAPE submits that the applicant has not met the test of a *prima facie* case as the Board considered all Newlab arguments and essentially rejected them. NAPE also says that neither Section 135 nor Section 48 of the Act was violated by NAPE and there is no natural justice issue because Newlab was given all of the documents and evidence on which the Board relied and had the opportunity to make full representation in respect of them.

12 However, NAPE says the case really rests on the second two legs of the **RJR - MacDonald** formula (irreparable harm and balance of convenience). It says that Newlab has failed to prove that

it will suffer irreparable harm in that the courts do not recognize lost costs of collective bargaining as legitimate examples of non-recoverable damages and the amounts are small in any event. It also says that most of the suggestions of potential losses relied on by Newlab are speculative and depend on whether a strike takes place which is not a certainty.

13 On the issue of balance of convenience, NAPE says the weight of authority favours not granting the stay of proceedings. It says NAPE has lawfully been certified as the bargaining agent for the employees of Newlab. Those employees have the right to have NAPE represent them. If a stay is granted, NAPE will be prevented from doing its duty for those employees and they will be deprived of their collective bargaining rights. NAPE suggests it may lose support if it is seen as being unable to deliver on its mandate to represent the employees. NAPE says the law recognizes that collective bargaining delayed is collective bargaining denied.

ANALYSIS

14 The Supreme Court of Canada has set out the procedure to be followed in determining an application for a stay of proceeding in the case of **RJR - MacDonald, supra**. **RJR - Macdonald** was a case involving an injunction but the principles applicable to a stay are the same: *Barrys Ltd. v. F.F.A.W. -C.A.W.* (1993), 112 Nfld. & P.E.I.R. 12 (Nfld. C.A.).

15 In *RJR-MacDonald*, Sopinka and Cory, JJ., speaking for the Court, stated at page 334:

> *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.
>
> Emphasis added.

16 This demonstrates a clear restatement of the court's intention to move away from the old test of a *prima facie* case. The Supreme Court of Canada established through *RJR-MacDonald* that in all but limited exceptional cases the burden on an applicant seeking a stay of proceedings is to demonstrate that it has established that there is a serious issue to be tried.

17 Because of the strong privative clause in the Act protecting decisions of the Board, NAPE submits that an application to stay an order of the Board falls into a recognized exception taking this case out of the serious issue test and putting it into the *prima facie* case test. This issue has not been definitively determined by our Court of Appeal. In *Barrys Ltd. v. F.F.A.W. -C.A.W.*, Marshall, J.A., stated at paragraph 47:

> With the general rules governing interlocutory relief applying, the applicant seeking the stay will be called upon to establish the traditional criteria of a prima facie or serious case, irreparable harm, and the balance of convenience.
>
> Emphasis added.

18 NAPE has drawn my attention to a number of Trial Division decisions of this Court in which the *prima facie* case test has been applied. These include: *C.P.U., Local 58 v. Corner Brook Pulp & Paper Ltd.* (1987), 65 Nfld. & P.E.I.R. 261 (Nfld. T.D.), *Fishermen, Food & Allied Workers' Union v. Carling O'Keefe Breweries Ltd.* (1988), 75 Nfld. & P.E.I.R. 137 (Nfld. T.D.), *Eastern Road Builders Ltd. v. Construction General Labourers, Rock & Tunnel Workers, Local 1208* (1990), 225 Nfld. & P.E.I.R. 107 (Nfld. T.D.) and *Hibernia Management and Development Co. Ltd. v. Communications Energy and Paperworkers Union of Canada, et al.* 2001 01 T 2567 (unreported). I was also referred to several cases from other jurisdictions to the same effect.

19 In my respectful view, these cases are distinguishable from the case before me. All of the above cases except for the **Hibernia Management** case were decided prior the Supreme Court of Canada's pronouncement in *RJR-MacDonald*, **supra**. The **Hibernia Management** case deals with attempts to restrain the Board itself from conducting a proceeding, specifically, the counting of a representational note. In earlier decisions, similar questions were at issue.

20 For example, in the Carling O'Keefe case Cameron, J., stated at paragraphs 14 and 20:

> In this case in light of the existence of a privative clause great weight should be given to the first test of the merits of the case and I conclude the appropriate test is prima facie case.
>
> It must be remembered that a decision to certify a trade union is not under consideration here. It is the decision to hold a vote and failure to hold a hearing. Except as specified under s. 47(2) the decision to hold a vote is completely within the discretion of the Board. It is one of the methods available to the Board to determine the wishes of the members of the unit.
>
> Emphasis added.

21 Cases which deal with attempts to prevent the Board from carrying out its statutory mandate and obligations in which the court held that a *prima facie* case had to be established are to be distinguished from the case before me where the Board's very jurisdiction to enter into the inquiry is in question.

22 A case relied on extensively by NAPE which dealt with the same issue before me (i.e. a stay of proceedings of a certification order pending judicial review) is *C.P.U., Local 58 v. Corner Brook Pulp & Paper Ltd.*, *supra*. In my respectful view that case is also distinguishable from the one before me. In the first place, it was decided prior to the Supreme Court of Canada's

decision in *RJR-MacDonald*. Secondly, Woolridge, J., decided the matter based on the Rules of Court rather than the common law principles applicable to the granting of an injunction or stay of proceedings. Thirdly, Woolridge, J., appears to have decided the matter almost exclusively on the issue of balance of convenience and he does not enter into any significant discussion of the first two elements of the **RJR - MacDonald** test.

23 I am not alone in my determination that the serious issue test is the applicable one to be applied when an order of a Labour Relations Board is at issue. The serious issue test was applied by the New Brunswick Court of Appeal in *Allsco Building Products Ltd. v. U.F.C.W., Local 1288P* (1998), 207 N.B.R. (2d) 102 (N.B. C.A.) and most recently by the Federal Court of Appeal in *Marine Atlantic Inc. v. C.M.O.U.*, 2003 FCA 311 (F.C.A.) per Evans, J.A.

24 While I recognize that some other jurisdictions have applied the *prima facie* case test and such decisions are worthy of considerable respect, I respectfully decline to follow their reasoning. In any event, they are not binding on me.

25 It should also be noted that the Newfoundland and Labrador Court of Appeal has applied the serious question to be tried test in an injunction application to restrain a municipality from carrying out its statutory obligations where its statutory jurisdiction was in issue: *Hart Leasing & Holdings Ltd. v. St. John's (City)* (1992), 101 Nfld. & P.E.I.R. 131 (Nfld. C.A.), per Goodridge, C.J.N., at paragraphs 26 to 37. This is essentially the issue before me.

APPLICATION OF THE TEST TO THE FACTS OF THIS CASE

26 Having found that the appropriate test is that of a serious issue to be tried, I will now turn to a consideration of whether Newlab has met this burden. This will require me to make a preliminary assessment of the case. As stated in *RJR-MacDonald*, **supra**, at page 337:

> 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.

27 Newlab has attacked the Board's order on grounds which go to the very root of the Board's jurisdiction to make the order it has made. It says that the Board has violated at least two sections of the Act in coming to its decision to certify NAPE as the bargaining agent for the employees of Newlab, which if properly applied by the Board, would have deprived it of jurisdiction to entertain the application for certification in the first place.

28 The first is Section 135 which states in relevant part:

> **135.** An application to the board or a notice or a collective agreement may be signed,

> (d) where it is made, given or entered into by a trade union or employers' organization, by the president and secretary or by 2 officers, or by a person authorized for the purpose by resolution passed at a meeting of the trade union or employers' organization.

29 That section requires that only persons authorized to do so by a trade union may sign an application for certification in the absence of the president or secretary or two other officers of the union. Trade unions must speak through resolutions of their members in regular meetings. A resolution of the executive board of the union is not sufficient: *Eastern Road Builders Ltd. v. Construction General Labourers, Rock & Tunnel Workers, Local 1208* (1990), 225 Nfld. & P.E.I.R. 107 (Nfld. T.D.) at paragraph 17.

30 In *Eastern Road Builders*, Cameron, J., found that while the authorization for one of the officials in question to sign the application for certification initially came from a resolution of the executive board of the union which was not compliant with Section 135, she went on to find that the subsequent adoption of the resolution of the executive board at a meeting of the members of the trade union regularized the purported authorization previously given. She held that to decide otherwise would be to allow form to trump substance which would be contrary to Section 139 of the Act.

31 In the case before me, the Board was presented with a resolution of the executive board granting authority to employee relations officers to sign the document in question which the union submitted confirmed and particularized an earlier resolution of the union at its biennial convention in 1993; in fact, the reverse of the *Eastern Road Builders* case. However, the Board at the top of page 10 of its reasons for decision declined to rely on the resolution of the executive board as it found that there was a valid resolution of the trade union authorizing employee relations officers to sign applications for certification. The Board did not have the actual resolution before it but merely a letter from the trade union confirming that such a resolution existed.

32 In affidavit evidence before me, the wording of the resolution of the trade union from its 1993 convention (which was not before the Board) disclosed that the union authorized "Staff as designated by the Board of Directors" to sign documents before the Board. Minutes of the meeting disclosed that the discussions surrounding the resolution indicated that it was intended to include employee relations officers, perhaps among others, and NAPE submitted that, in any event, the later authorization of the employee relations officers by the executive board ought to be accepted as sufficient compliance with Section 135 of the Act.

33 While this may be so, it is not something I can or should decide at this point in the proceedings. That is a matter for determination on the merits by the judge hearing the application for judicial review. However, I am satisfied that it raises a serious issue to be tried and thus establishes the first leg of the test in **RJR - MacDonald**.

34 Since I have found that on at least one of the grounds raised Newlab has established a serious issue to be tried, it is not strictly necessary for me to decide whether any of the other matters raised by Newlab also meet the test. However, since the parties took considerable time to argue the points, I will make brief reference to them.

35 Newlab alleges that the Board lacked jurisdiction to entertain the application for certification as it related to two employers and, contrary to Section 48 of the Act, both employers had not consented to the application. Section 48 states:

> **48.** Where a trade union or a council of trade unions, claiming to have as members in good standing a majority of the employees of 2 or more employers in an appropriate unit, applies for certification as the bargaining agent of the employees in that unit, the board shall not certify that union or council. as the bargaining agent for the employees, unless
>
> (a) a majority of the employers of those employees consent to the certification; ...

36 NAPE submitted to the Board that it wished to represent some 12 or 13 employees who it alleged were employed by "Dr. Wayne Gulliver/Newlab Clinical Research". The Board found that there were in fact four separate legitimate employers of these employees. It was not a case of a payroll company employing employees on paper while the true employer was another company such as in *Bowringer Engineering Ltd., Re*, [1998] Nfld. L.R.B.D. No. 13 (Nfld. L.R.B.), *RDN Construction Ltd., Re*, [1998] Nfld. L.R.B.D. No. 20 (Nfld. L.R.B.) and *Newfoundland Placing/ Allstar Rebar Ltd., Re*, [2002] Nfld. L.R.B.D. No. 3 (Nfld. L.R.B.) (application for judicial review reported at [*I.A.B.S.O.I., Local 764 v. Fleming*] [(Nfld. T.D.)). The employment set up in the case before me was not found by the Board to have been a sham.

37 The Board then went on to find that the appropriate bargaining unit was for a group of employees numbering six employed in the medical research field by Newlab. It destroyed the ballots of all but the employees of Newlab from a representational vote taken of all the employees originally sought to be represented by NAPE for the named employer and essentially converted the application to one in respect of Newlab only.

38 The union submitted that the Board had the authority to do this pursuant to Section 18(k) of the Act which allows it to determine who is an employer in respect of an application for certification. Newlab says that this is an example of over-reaching by the Board in applying principles which have usually, if not always, been employed in the construction industry only or in respect of sham employment setups which the circumstances before the Board in this case were found not to have been. (See for example the recent decision of Barry, J., of this Court relied on extensively by the union in *Newfoundland Placing*.)

39 Again, while the resolution of this issue must be left to the judge hearing the application for judicial review, I am satisfied that it too presents a serious issue to be tried and meets the test set out in the first leg of **RJR - MacDonald**.

40 I am also satisfied that the issue surrounding an alleged denial of natural justice raises a serious issue to be tried. In this case, the Board relied on a letter from NAPE indicating that there was a resolution of the trade union authorizing employee relations officers to sign applications for certification and that this resolution was subsequently confirmed by a resolution of the executive board, as referred to in the earlier part of these reasons. The resolution of the Board of Directors clearly referred to employee relations officers as being authorized to sign the application. However, it was not this resolution that the Board relied on. The Board stated that it relied upon a resolution passed by the trade union at its biennial convention in 1993 as the authority pursuant to Section 135(d) for employee relation officers to sign the application.

41 However, the Board did not have the resolution of the biennial convention of 1993 before it. That resolution was placed before this Court in an affidavit from Mr. Leo Puddister, the President of NAPE. The resolution provided that "Staff as designated by the Board of Directors will have signing authority". It did not make specific reference to employee relations officers. Newlab was therefore denied the opportunity to argue that this resolution and any subsequent resolution of the Board of Directors did not meet the test set out in the jurisprudence surrounding Section 135 of the Act. This issue had been placed squarely before the Board by Newlab in its reply to the application for certification. There is a real question as to whether Newlab was denied natural justice in these circumstances through the Board failing to insist on the filing of the actual resolution from the 1993 biennial convention as opposed to accepting a letter from the union purporting to say that it allowed employee relations officers to sign the application when in fact it referred to "Staff as designated by the Board of Directors" and it was a later resolution of the Board of Directors which specifically authorized employee relations officers to sign the applications and where it was not that authorization on which the Board relied to come to its conclusion: See generally *Memorial University of Newfoundland v. C.U.P.E., Local 1615* (2000), 194 Nfld. & P.E.I.R. 190 (Nfld. T.D.) and *Memorial University of Newfoundland v. Memorial University of Newfoundland Faculty Assn.* (2001), 203 Nfld. & P.E.I.R. 118 (Nfld. T.D.).

IRREPARABLE HARM

42 The second leg of the **RJR - MacDonald** test requires that Newlab establish that it will suffer irreparable harm which cannot be remedied in damages if the stay of proceedings is not granted.

43 Newlab submits that it ought not to have to establish irreparable harm since the application for judicial review is based on an alleged breach of statute by the Board. In *St. John's Transportation Commission v. A.T.U., Local 1462* (1989), 76 Nfld. & P.E.I.R. 148 (Nfld. T.D.) at paragraph 51, Puddester, J., of this Court concluded that:

> ... in cases where the breach of a statute through the activities of the party to be enjoined is established, irreparable harm need not be proved.

To the same effect is *Hart Leasing & Holdings Ltd.*, **supra** where Goodridge, C.J.N., stated at paragraph 41:

> ... any statutory corporation can only do that which it is required or authorized to do. If it is acting within its powers, it should not be restrained; if it is acting outside of its powers, it should be restrained. The subsequent payment of damages cannot be a justification for a statutory corporation doing that which it has no power to do. In fact, it could be said that no question of damages arises at the time of such an application. Such a body cannot so act whether or not damages ensue.

44 Therefore, in a case such as this, Newlab is not obliged to demonstrate that it would suffer irreparable harm in the event the stay of proceedings is not granted.

45 However, in the event that I am incorrect in the above conclusion I am satisfied that Newlab has in fact demonstrated that it would suffer irreparable harm in the event the stay of proceedings is not granted.

46 In this case, Newlab submits that it will suffer irreparable harm in respect of the costs of entering into collective bargaining with NAPE which would not be recoverable if the certification order is ultimately overturned. Similarly, since, if it was forced to enter into negotiations to conclude a collective agreement, Newlab says it would do so in good faith as required by the Act, any additional wages or benefits for its employees which might result from that process would not be recoverable if the certification order was eventually set aside. Likewise, the affidavit of Debbie Reynolds, the President and Chief Executive Officer of Newlab, filed in this matter indicates that she has no experience in collective bargaining negotiation and Newlab would be forced to hire outside consultants to bargain with NAPE. She also says in her affidavit that if Newlab's employees were to go on strike, Newlab would be forced out of business as it would not be able to replace its technical staff, all of whom would be members of the bargaining unit, and its business reputation for reliability in respect of pharmaceutical drug testing would be irreparable destroyed.

47 NAPE says that these fears on the part of Newlab are speculative and do not reach the level recognized by courts as constituting irreparable harm. NAPE relies on several authorities for this proposition, including the decision of Woolridge, J., in *C.P.U., Local 58 v. Corner Brook Pulp & Paper Ltd.*, *supra*, in particular paragraph 10 thereof. NAPE also relies on the decision of Green, C.J., in *Hibernia Management and Development v. Communications, Energy and Paperworkers Union of Canada, supra.*

48 I am satisfied that both of these cases are distinguishable from the case before me. In the *C.P.U., Local 58 v. Corner Brook Pulp & Paper Ltd.* case, as earlier indicated, Woolridge, J., decided the case on different principles than have been argued before me and the case was decided prior to the decision in **RJR - MacDonald**. In respect of the **Hibernia Management** case, Green, C. J., was dealing with an attempt to prevent the Board from counting a vote and he was satisfied that this was too speculative a basis on which to determine irreparable harm.

49 I prefer the reasoning of the Prince Edward Island Court of Appeal in *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158 (P.E.I. C.A.) where McQuaid, J., at paragraph 29 states:

> With respect to the second test, irreparable harm, the Company argued, and I think with some merit, that compliance with the Commission's order touching the preparation of materials, would put it, the Company, to no inconsiderable expense which would be of no use should its appeal prove successful. Normally, this would be compensable in damages if such should be the case. However, it is questionable whether the Commission could be made liable in damages in such an eventuality. ... I think the criteria required for the second test have been met.

50 One must also bear in mind the comments of Sopinka and Cory, JJ., in *RJR-MacDonald*, **supra**, where the learned justices state at page 341:

> "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 ...; where one party will suffer permanent market loss or irrevocable damage to its business reputation ...

51 And in *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.), Beetz, J., states at page 151:

> The "irreparable harm" test also clearly appears to have been satisfied.
>
> As I read her reasons, Krindle J., at p. 153, implicitly accepted the employer's argument that the imposition of a first contract was susceptible to prejudice its position.
>
> It may give to the union a semblance of bargaining strength which the union does not in fact possess. It may permit the union to benefit from a contract which, left to its own devices, it could not have successfully negotiated. That, however, was the object of the legislation.
>
> It is difficult to imagine how the employer can be compensated satisfactorily in damages, for instance for the imposition of possibly higher wages or of better conditions of work, if it is later to be held that the imposed collective agreement is a constitutional nullity.

52 If the certification order were to be set aside on the application for judicial review, I am satisfied that Newlab would have suffered irreparable harm in that it would have suffered damages which would not be recoverable from NAPE. Therefore, Newlab has established the second leg of the **RJR - MacDonald** test.

BALANCE OF CONVENIENCE

53 The third leg of the **RJR - MacDonald** formulation for the granting of a stay of proceedings or an injunction, and generally the most vexing from the Court's perspective, is the balance of convenience. The Court must decide whether it would do greater harm to Newlab to deny the requested order than it would do to NAPE to allow it.

54 Generally speaking, in most cases, as is the case here, both sides have eloquently and forcefully made the case that the balance of convenience warrants a finding in their respective favour. The union legitimately argues that it has lawfully won the right to represent the employees of Newlab and to allow a stay or proceedings of the certification order would be to deprive it of the fruits of its victory. Moreover, it submits that while it is the union which is the party before me, the victory is really that of the employees who have successfully sought the right accorded to them by the Act to collectively bargain with their employer. To deny them these rights while the order of the Board is being challenged flies in the face of the policy behind the Act and the clear intention of the legislature. As already stated, if a union is seen not to be able to carry out its function, it runs the risk of losing support among its members and the employees legitimate wishes may be thwarted.

55 On the other side, the employer applicant pleads with justification that it ought not to be forced into a collective bargaining position with all its attendant costs and vicissitudes when it has challenged the Board's order on the basis that the Board lacked jurisdiction from the outset to even entertain the application for certification, let alone issue the certification order in question. Newlab says that the Board's breach of at least two sections of the Act conferring its jurisdiction on it favours the granting of the stay of proceedings. These circumstances, says Newlab, are different than a case where the Board has acted within its jurisdiction but is accused of having committed some error by which it has lost jurisdiction. In this case, says the employer, it lacked jurisdiction *ab initio*.

56 Newlab also submits on this part of the case that the balance of convenience should fall in its favour because of the nature of its business and the allegedly devastating effects a possible strike would have on it. Newlab has submitted a detailed affidavit from its President and Chief Executive Office outlining the nature of its business and the effects of a strike if that were to ensue. NAPE says this is purely speculative as collective bargaining may be successful and there would not then be a strike.

57 I find that the concerns expressed by Newlab, while they may not ultimately come to pass, are nonetheless real. Newlab has contracts with international pharmaceutical companies to conduct sophisticated tests on developmental drugs. These tests require highly skilled nurses and other health professionals to administer the drugs in a highly structured and consistent manner. If Newlab were not able to do this it would risk being in breach of its existing contracts and likely lose its reputation in the market as a reliable company to conduct these tests. It is not realistic to suggest that these tests could be carried on by management or even replacement workers because of the training and sophistication involved.

58 NAPE says that a strike may not ensue. While this is so, it was NAPE which chose, among less confrontational options, to seek the appointment of a conciliation board rather than merely an officer. Pursuant to the Act the request for a Board clearly leads down the path to the ultimate right to strike/lockout. While the union might be in a position to engage in a strike, it is illusory to suggest that the employer would be able to lockout the employees as to do so would result in it having to breach its contracts with the pharmaceutical companies for which it is conducting the drug trials. While it might be said that this is nothing more than a situation in which an employer would find itself if the certification order is ultimately upheld, I sympathize with the employer's plea that to essentially force it into this position, which would in all likelihood force it to close its doors permanently in the face of the jurisdictional challenges it has raised to the Board's certification order, would cause far greater harm to it than would be caused to NAPE if its collective bargaining rights were delayed for a short time. If a stay were granted, NAPE would retain its bargaining rights and the employees would be protected under the statutory regime set up by the Act disallowing any changes in terms and conditions of employment pending the issuance of a certification order.

59 In the result, I find that the balance of convenience favours the granting of the stay of proceedings. The hearing of the application for judicial review is set for 11 December 2003. While the judge hearing the matter cannot be constrained in the reasonable time he or she will need to consider and decide the matter, I am certain that the urgency and importance of an early decision will not be lost on the judge hearing the matter and the parties will be able to make appropriate representations in this regard.

CONCLUSION

60 In conclusion, I find that Newlab has met the test set out in **RJR - MacDonald** in that it has established that there is a serious issue to be tried, that it would suffer irreparable harm if such needs to be proved if the stay of proceedings were not granted and that the balance of convenience favours the granting of the stay.

61 I therefore order a stay of proceedings of the certification order of the Labour Relations Board granted to NAPE dated 16 June 2003 until the application for judicial review of the certification order has been decided or until further order of the Court.

62 Since the application for judicial review is to be heard on its merits on 11 December 2003, I do not find it necessary to order an expedited hearing date.

63 Costs of this application shall be in the cause.

Application allowed.

2018 FC 337, 2018 CF 337
Federal Court

Odyssey Television Network Inc. v. Ellas TV Broadcasting Inc.

2018 CarswellNat 1434, 2018 CarswellNat 1772, 2018 FC 337,
2018 CF 337, 155 C.P.R. (4th) 134, 291 A.C.W.S. (3d) 269

ODYSSEY TELEVISION NETWORK INC and 2371349 ONTARIO INC (Plaintiffs) and ELLAS TV BROADCASTING INC, ELLAS TV CANADA INC, ELLAS TV INC and 1606911 ONTARIO INC (a.k.a. GREEK WORLD MUSIC & ENCORE PRODUCTIONS) (Defendants)

Michael L. Phelan J.

Heard: December 7, 2017
Judgment: March 26, 2018
Docket: T-2141-15

Counsel: Peter Mantas, Alexandra Logvin, for Plaintiffs
Toba Cooper, for Defendants, Ellas TV Broadcasting Inc., Ellas TV Canada Inc. and Ellas TV Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial; Intellectual Property

MOTION by plaintiffs for default judgment; MOTION by defendants for extension of time to file statement of defence.

***Michael L. Phelan J.*:**

I. Introduction/Nature of Matter

1 The two motions at issue were originally Rule 369 proceedings but were ordered to be argued orally.

2 The overriding dispute relates to the rights to distribute Greek language programming in Canada. The Plaintiffs had commenced an action to prevent the Defendants from distributing this programming. The grounds asserted were that the Plaintiffs were the exclusive legal distributors and the Defendants' conduct in distributing Greek language programs was a breach of the Plaintiffs' rights under the *Copyright Act*, RSC 1985, c C-42, and the *Radiocommunication Act*, RSC 1985, c R-2.

3 The first motion, filed by the Plaintiffs, is for default judgment in light of the Defendants' failure to file a Statement of Defence.

The second motion, filed by the Defendants on the same day they filed their response to the Plaintiffs' default judgment motion, is for an extension of time to serve and file a Statement of Defence.

4 Both motions were fully argued orally. It should be noted that Greek World Music & Encore Productions was later added as a Defendant on the Plaintiffs' motion but has not participated in this action.

II. Background

5 The Plaintiffs are related companies that assert that they are the exclusive holders of the right to receive, encode, offer, exhibit, disseminate, distribute, broadcast, and to authorize others to broadcast in Canada via television (cable and satellite) and over the internet various programming from Greece.

6 The Plaintiff Odyssey Television Network Inc [Odyssey] holds these rights pursuant to three agreements:

> 1. an April 4, 2013 agreement with KB Impuls Hellas AE, a Greek company, who transferred its exclusive rights to Alpha Satellite Television SA [Alpha] programming in Canada to Odyssey;
>
> 2. an agreement dated December 27, 2012 and May 2014 with Titan Television Network LLC, a New Jersey company, that Odyssey has exclusive right and licence to Teletypos SA [Mega] programming in Canada; and
>
> 3. an agreement since 2005 with Antenna Pay TV USA, Inc, a Delaware corporation, that granted Odyssey the distribution rights to Antenna TV SA [Antenna] programming in Canada, an authorization that no other entity has been given in Canada.

7 The Plaintiff 2371349 Ontario Inc holds these rights pursuant to an agreement with Alpha dated January 1, 2015, which grants 2371349 Ontario Inc an exclusive license to transmit and distribute the Alpha Channel in Canada, and to authorize third parties to do so.

8 The Plaintiffs hold the necessary licenses and authorizations from the Canadian Radio-television and Telecommunications Commission in furtherance of the above agreements.

9 The Alpha, Mega, and Antenna programming are encrypted outside Greece. The programming consists of Greek-language television channels, programming, and signals from Greece.

10 The Defendants are comprised of Ellas TV Broadcasting Inc, Ellas TV Canada Inc, and Ellas TV Inc [the Ellas Defendants] and 1606911 Ontario Inc, aka Greek World Music & Encore Productions [Greek World Music]. The Ellas Defendants are corporations incorporated in Illinois, and Greek World Music is an Ontario corporation that serves as its Canadian distributor.

11 The Defendants provide an online service and IPTV service made available to the public through the internet at the following sites: http://ellastv.us, http://ellastvcanada.com, http://ellastvshop.net, and http://ellastv2go.com/ [Infringing Sites]. The Infringing Sites offer some limited free content, but provide unlimited access to the programming for paying subscribers.

12 The Plaintiffs allege that since November 2014, the Defendants have installed, configured, sold, offered, exhibited, disseminated, distributed, and broadcast the Alpha, Mega, and Antenna programming in Canada through online subscription service and broadcasting equipment such as set-top boxes. The Plaintiffs submit that this is a breach of their rights under the *Copyright Act* and *Radiocommunication Act*.

13 Since November 2014, the Plaintiffs allege that the Defendants have broadcast 39,435 individual works consisting of news, movies, series, and other programming. The Defendants are alleged to have been continuously unlawfully decoding the encrypted programming signals during this time, providing it to visitors to the Infringing Sites and their subscribers.

14 The Defendants have ignored demands by the Plaintiffs and the Greek owners of that programming to cease and desist. At paras 88-100 of John Maniatakos' affidavit, there is evidence from the Plaintiffs that their subscribers and resulting revenue has significantly declined since 2014, when they discovered that the Defendants were operating in the market.

15 The Plaintiffs filed a Statement of Claim against the Ellas Defendants on December 22, 2015, seeking statutory damages under the *Copyright Act*, or, alternatively, damages for the Defendant's breach of the *Radiocommunication Act*. Greek World Music was added as a Defendant when the Plaintiffs filed an Amended Statement of Claim on November 21, 2016. The Plaintiffs seek not only damages but injunctive and ancillary relief.

16 In summary, the Plaintiffs claim $5,000,000 as statutory damages for infringement under the *Copyright Act*, or, alternatively, damages under the *Radiocommunication Act*, and injunctive relief preventing, *inter alia*, retransmission of the works or their encrypted signals.

17 The Defendants did not file a Statement of Defence despite the Plaintiffs' repeated requests, attempts by the learned Prothonotary to move this file along, and oblique indications that the Defendants would be taking some action.

18 The procedural history is important and it is set forth below.

19 Despite all these procedural steps, no Statement of Defence was filed until October 23, 2017 in response to the Plaintiffs' motion of September 28, 2017 for default judgment. The Plaintiffs' Statement of Claim had been filed December 22, 2015.

20 The Ellas Defendants claim that they have always intended to defend the Plaintiffs' claim against them, and further claim that they were unaware until October 13, 2017 that the Statement of Defence had not been served and filed. They claim that the fault is that of then counsel and their general lack of understanding of the Canadian legal process.

A. Procedural History

21 As noted above, the Plaintiffs filed a Statement of Claim on December 22, 2015. It was served on the Ellas Defendants on February 4, 2016.

The Ellas Defendants had 30 days to file a Statement of Defence. They did not.

22 On March 9, 2016, the parties consented to an extension of time to file a Statement of Defence no later than April 4, 2016. That deadline was not met.

23 On March 29, 2016, the Ellas Defendants filed a notice of motion for an Order striking out the Statement of Claim, seeking in the alternative to halt the proceedings until the alleged copyright owners were added to the claim as parties. No motion record was filed.

24 On June 24, 2016, the Ellas Defendants filed a notice of change of solicitor and appointed Jim Koumarelas as solicitor of record, and the hearing set for June 28, 2016 was removed from the motions list.

25 On September 27, 2016, Prothonotary Aylen (who was later assigned as Case Management Judge) ordered that the action would continue as specially managed, and the Ellas Defendants' motion to strike would be heard on November 8, 2016. The parties were to provide a proposed timetable for filing of materials and availability for a case management conference by October 11, 2016. They did not.

26 Prothonotary Aylen issued a Direction that recognized that the Court had received no communications whatsoever from the parties as required by the September 27, 2016 Order. The parties were given until October 19, 2016 to provide availability for a case management conference and a proposed timetable for the perfection of the motion.

27 On October 24, 2016, Prothonotary Aylen issued a Direction that stated that the Ellas Defendants had failed to comply with the Court's Order and Directions in relation to the provision of a timetable for the perfection of the Ellas Defendants' motion to strike, the Ellas Defendants had not met the deadline for providing availability for a case management conference, and it appeared

that the Ellas Defendants had failed to respond to any communications from the Plaintiffs. The hearing date set for November 8, 2016 to hear the motion to strike was vacated.

28 On November 2, 2016, Prothonotary Aylen issued an Order resulting from a case management conference that set an operative timetable. This Order recognized that the Ellas Defendants no longer intended to bring a motion to strike the Statement of Claim, and the Plaintiffs were given until November 21, 2016 to serve and file an Amended Statement of Claim. The Ellas Defendants had 21 days from the date of service to file a Statement of Defence.

29 On November 21, 2016, the Plaintiffs filed an Amended Statement of Claim, in which Greek World Music was added as a Defendant. The Defendants did not file a Statement of Defence. Again, Greek World Music has taken no steps to participate in this action.

30 A case management conference was held on March 1, 2017, and the parties were directed to speak to each other and provide the Court with a status report by March 31, 2017. Nothing was provided. There being no further movement on the file, on September 19, 2017, Prothonotary Aylen issued a Direction that the parties were to provide the Court with a status update and availability for a case management conference by September 29, 2017.

31 On September 28, 2017, the Plaintiffs filed this motion for default judgment against the Defendants. This is one of the two motions that were heard by this Court. On September 29, 2017, counsel for the Plaintiffs provided availability for a case management conference.

32 On October 4, 2017, Prothonotary Aylen issued a Direction that recognized that no availability for a case management conference had been provided by the Ellas Defendants contrary to the Direction of September 19, 2017. The Court scheduled a case management conference for October 16, 2017.

33 As a result of that case management conference, Prothonotary Aylen issued a Direction as follows:

> The date for the delivery of the Defendants' Statement of Defence has long since passed, with no request for an extension of time having been made by the Defendants. As a result, the Plaintiffs have brought a motion for default judgment to be determined in writing pursuant to Rule 369 of the Federal Courts Rules. The date for the delivery of any responding motion materials has also passed, with no request for an extension of time having been made by the Defendants. At today's case management conference (which was convened at the Court's insistence), counsel for the Defendants advised that his clients are seeking to appoint new counsel and as a result, seek an extension of time to respond to the motion of approximately five weeks (two weeks to appoint counsel and three weeks to prepare responding materials).

> The Court is mindful of the numerous delays in this matter occasioned by the Defendants' failure to respect the deadlines established by the Court. However, the Court is prepared to grant one further extension of time to the Defendants to serve and file responding motion materials by no later than October 23, 2017. This extension of time is peremptory. Should the Defendants fail to file responding materials by October 23, 2017, the motion will be placed before the Court on October 24, 2017 for determination.

34 The Ellas Defendants then filed a second notice of change of solicitor, and appointed Heer Law as solicitor of record.

35 On October 23, 2017, the Ellas Defendants filed a responding motion record in response to the Plaintiff's motion for default judgment and a notice of motion for an extension of time to file and serve a Statement of Defence. This was the second motion heard by this Court.

36 On November 1, 2017, Prothonotary Aylen issued a Direction that the Plaintiffs were permitted to refer to and rely on their material filed on October 27, 2017, in reply to the Ellas Defendants' position in the default judgment motion as part of their responding material on the Ellas Defendants' motion for an extension of time to serve and file their Statement of Defence.

On November 9, 2017, the Plaintiffs wrote to the Court objecting that the Ellas Defendants' reply in the motion for an extension of time to serve and file their Statement of Defence was improper, as it was a "full blown re/fresh-argument" of the Ellas Defendants' motion that sought new relief. The Plaintiffs sought for the reply to be disallowed, that the Ellas Defendants be required to file a proper reply, or that the Plaintiffs be allowed to file a sur-reply.

On November 10, 2017, the Ellas Defendants wrote to the Court and stated that their reply was not improper, and suggested an oral hearing rather than further written submissions.

37 Following an exchange between the parties as to the propriety of the Ellas Defendants' reply on its motion for an extension of time, on November 14, 2017, Prothonotary Aylen issued a Direction that stated that "[h]aving reviewed the written submissions of the parties on the two motions and the recent correspondence regarding the propriety of the Ellas Group's reply written representations on their motion, I am satisfied that these motions warrant a hearing. Any additional submissions that the Plaintiffs seek to make in relation to the Ellas Group's motion may be made at the hearing."

38 Prothonotary Aylen's comments described in paragraph 33 encapsulated the Ellas Defendants' dealings with the Court and with the Plaintiffs.

III. Analysis

39 While the two motions and their pleadings overlap, they raise different issues and legal tests. The Ellas Defendants' motion to extend time to file a Statement of Defence was an effort to have its motion heard and granted before the Plaintiffs' motion for default judgment - despite being filed after the default judgment motion.

40 The issues for the Court are:

a) Should default judgment be granted?

b) If not, should an extension of time to serve and file a Statement of Defence be granted?

A. Default Judgement

41 The motion is governed by Rule 210(1). While this motion and that of the extension of time are separate, they were heard together and one impacts the other. Since the default judgment motion was filed first, the extension of time motion was only brought to challenge the default judgment. The default judgment motion is more encompassing than the extension of time and is final in nature. In the circumstances of this case, the default judgment motion should be considered first. The Court will also deal with the extension of time motion later.

42 In *Kornblum v. Canada (Minister of Human Resources & Skills Development)*, 2010 FC 656, 192 A.C.W.S. (3d) 52 (F.C.), this Court endorsed the principle articulated in *Bruce v. John Northway & Son Ltd.*, [1962] O.W.N. 150 (Ont. S.C.), that as a general rule, once a notice of motion is filed, the rights of the moving applicant cannot be prejudiced by anything done after.

43 A motion for default judgment is a matter of the exercise of the Court's discretion. In this case the factors at issue in setting aside a default judgment are relevant. The procedural history establishes that but for the delaying and non-responsive acts of the Defendants, the Plaintiffs' motion would have been dealt with *ex parte* and in writing. Given the facts established, particularly by John Maniatakos in his affidavit, that motion would have been granted since the Defendants were clearly in default of filing a Statement of Defence.

44 As held in *Louis Vuitton Malletier S.A. v. Yang*, 2008 FC 45 (F.C.) at para 4, (2008), 164 A.C.W.S. (3d) 594 (F.C.), the test is well established:

a) Is there a reasonable explanation for failure to file a Statement of Defence?

b) Is there a *prima facie* defence on the merits of the claim?

c) Did the party move promptly?

45 To these factors must be added whether the Plaintiffs have made out their claim for relief.

(1) Reasonable Explanation

46 The Ellas Defendants attribute much of the blame for their lateness on their former counsel, Mr. Koumarelas (who was in fact their second counsel on this litigation). They also raise, as if relevant, that they were engaged in litigation in the United States.

47 As part of this attribution of responsibility upon former counsel, the Ellas Defendants say that they forwarded funds for the defence of the action to the Canadian Defendant Greek World Music. The relationship between these two groups has now broken down.

48 The evidence, particularly of e-mails involving Mr. Koumarelas, points away from any reasonable explanation for delay. Mr. Koumarelas informed the Defendants that there was jeopardy in not filing a defence and that he could not file a defence until they had executed a retainer for his services. In late December 2016, Mr. Koumarelas' communications with his clients were peppered with phrases like "imperative that the Defence be served and filed", "[y]ou are out of time to file your Defence", and "there is no way of 'buying more time'". They never did file a defence.

49 Mr. Koumarelas further advised his clients that it was unlikely that a further extension to file a Statement of Defence would be granted. *Prima facie*, this was reasonable advice and the Defendants failed to act upon it.

50 Despite Mr. Koumarelas' advice of the dire consequences of failing to act, the Ellas Defendants continued to delay with no reasonable justification. In a case of infringement of intellectual property rights, delay generally works to the advantage of the alleged infringer and to the detriment of the rights owner/licensee.

51 The alleged transfer of funds to Greek World Music for purposes of the defence of this action is not proven. If it was done, the responsibility of failing to follow up and ensure that counsel was retained rests with the Ellas Defendants.

There is no evidence that the Ellas Defendants have claimed against Greek World Music for their failure to engage counsel nor is there evidence that former counsel has been put on notice of a claim against him for breach of his professional responsibilities in failing to file a Statement of Defence.

52 The claim by the Ellas Defendants that they were surprised by the motion for default judgment is difficult to accept. This specially managed file was the subject of numerous communications, updates, and directions by Prothonotary Aylen. Former counsel twice advised the Ellas Defendants before the deadline that it was necessary to file a Statement of Defence and that failure to do so would be to their prejudice.

53 I have concluded that there is no reasonable explanation for delay. The strategic advantage to the Ellas Defendants of delay is not lost on the Court but even that aside, the evidence does not support their explanation.

(2) Prima Facie Defence

54 The next factor to consider is whether there is at least a *prima facie* defence. In this case, the defence is largely a series of denials that the Plaintiffs do not have the rights alleged, and if they do, the agreements giving those rights are invalid. The Ellas Defendants deny that the Plaintiffs are owners of the Alpha, Mega, and Antenna programming and deny breach of the *Copyright Act* and the *Radiocommunication Act*.

55 There then follows a series of cascading denials and partial denials. The Ellas Defendants do assert that they have the same exclusive rights as the Plaintiffs and that they do not retransmit the Plaintiffs' signals but merely redistribute the programs and operate an IPTV through public and unencrypted sources in Greece.

56 An examination of the defence in the context of the material the Ellas Defendants submitted shows that the defence is largely made up of blanket or general denials and vague, unsubstantiated allegations which lack an air of reality.

57 Even if there had been a reasonable explanation for delay, the Ellas Defendants have not established a *prima facie* defence.

(3) Prompt Action

58 As noted by Prothonotary Aylen in her October 16, 2017 Direction, the date for delivery of responding material to the default judgment motion had passed and no request for an extension had been sought. An extension was granted to allow for the retention of new counsel and to file responding material.

59 I find no fault with new counsel's actions (nor with previous counsel), but appropriate action at this stage does not cure the default of delay as discussed under the Reasonable Explanation heading.

60 Given what the Ellas Defendants knew, were told, or what they ought to have known about being in default of filing a defence, they failed to act in anything approaching promptness - indeed the opposite.

(4) Plaintiffs' Claim

61 I am satisfied that the Plaintiffs have established the test on default judgment of establishing the basis of their claim and they have established their entitlement to the relief sought.

62 The $5 million in statutory damages, while a large amount, is conservatively measured at the lower end of the $500 - $20,000 per work scale. Based on the calculation pursuant to *Telewizja Polsat S.A. v. Radiopol Inc.*, 2006 FC 584, [2007] 1 F.C.R. 444 (F.C.), the amount is proper.

Based on the factors in s 38.1(5) of the *Copyright Act*, including bad faith which is established through the Ellas Defendants' delaying tactics, the need to deter others, particularly those infringers who benefit by delay, and the lack of response by Greek World Music, the calculation is reasonable.

63 The Ellas Defendants' conduct since the start of this action has significantly delayed the Plaintiff's attempts to litigate it. It should not be forgotten that, based on the nature of the claim, any delay is to the financial advantage of the Ellas Defendants. The following are procedural steps impacted by the Ellas Defendants' conduct:

- No Statement of Defence was filed to the Statement of Claim filed December 22, 2015, despite an extension of time to file on consent on March 9, 2016 (although a notice of motion to strike was filed March 29, 2016, it was never perfected, and counsel in November 2016 indicated that the Ellas Defendants no longer intended to bring that motion).

- No proposed timetable for filing of materials and availability for a case management conference were provided, contrary to an Order of Prothonotary Aylen on September 27, 2016 (although the Plaintiffs had also not provided this information).

- The Ellas Defendants' counsel provided their availability for a case management conference on October 21, 2016 when Prothonotary Aylen's Direction had required it by October 19, 2016, but failed to provide a timetable for perfection of the motion to strike. The hearing date for the motion was vacated.

- The Ellas Defendants' counsel failed to respond to any communications from the Plaintiffs in September and October 2016.

- No Statement of Defence was filed to the Amended Statement of Claim filed November 21, 2016.

- Neither party provided a status report by March 31, 2017 as directed by Prothonotary Aylen.

- No availability for a case management conference was provided by the Ellas Defendants' counsel, contrary to the September 19, 2017 Direction.

• The Ellas Defendants failed to file a response or a request for an extension of time within the statutory deadline for responding motion materials for the Plaintiffs' motion for default judgment, filed September 28, 2017.

• Prothonotary Aylen on October 16, 2017 granted "one further extension of time" for the Ellas Defendants to file and serve responding materials to the motion for default judgment, recognizing that the Ellas Defendants were seeking new counsel.

64 Solicitor-client costs - even a partial indemnity, lump sum award - are warranted in light of this egregious conduct and considering the factors in Rule 400(3), particularly the amount of money involved, the complexity, the amount of works affected, and the delay occasioned by the Ellas Defendants. The amount of $50,000 sought is also in line with *Microsoft Corp. v. PC Village Co.*, 2009 FC 401, 345 F.T.R. 57 (Eng.) (F.C.).

65 It would not be just in these circumstances to further draw out this litigation by permitting a proposed defence. It would not be fair to the Plaintiffs, nor to others who face infringement, to permit the continuance of proceedings in light of the Plaintiffs' strong claim which entitled them to default judgment, the weakness of the defence proposed, the history of the Ellas Defendants' delay tactics, the Ellas Defendants' disregard of the Court's process, Directions and instructions, and the benefit to the Ellas Defendants of further delay.

66 In keeping with the more modern approach to litigation as fostered by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.), and exhibited by this Court in its case management process, the Defendants' actions, or, more accurately, their lack thereof, are deserving of condemnation.

67 The Plaintiffs are further entitled to injunctive relief. As time has passed from the commencement of its action, the Court will permit the Plaintiffs to file the proposed terms of the injunctive relief and serve the same on the Defendants, who shall have fifteen (15) days to respond and the Plaintiffs a further five (5) days to reply.

B. Motion to Extend Time

68 Given the above findings, the Ellas Defendants' motion will not be granted. For completeness, the Court summarizes below its conclusions on the motion.

69 As indicated earlier, the Court does not accept, particularly in this case management situation, that the filing of a motion for extension of time to file a defence acts to cure the default and preclude or prevent a motion for default judgment.

70 In *Canada (Attorney General) v. Hennelly* (1999), 167 F.T.R. 158 (note) (Fed. C.A.) at para 3, (1999), 89 A.C.W.S. (3d) 376 (Fed. C.A.), the Court set out the proper test for an extension of time, which is that the applicant must demonstrate as follows:

> 1. a continuing intention to pursue his or her application;
>
> 2. that the application has some merit;
>
> 3. that no prejudice to the respondent arises from the delay; and
>
> 4. that a reasonable explanation for the delay exists.

71 The underlying consideration is whether an extension, in the circumstances, would do justice between the parties: *Grewal v. Canada (Minister of Employment & Immigration)*, [1985] 2 F.C. 263, 1985 CarswellNat 43 (Fed. C.A.) (WL Can) at para 14. This means that "an extension of time can still be granted even if one of the criteria is not satisfied": *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 (F.C.A.) at para 33, (2007), 154 A.C.W.S. (3d) 1238 (F.C.A.).

72 As indicated in the discussion above under the heading Reasonable Explanation, the Ellas Defendants did not exhibit a continuing intention to proceed. They exhibited an intention to delay which is not the same thing.

73 Despite numerous warnings from counsel, they never instructed the filing of a defence. The Ellas Defendants admit to delaying the proceeding for their strategic benefit due to litigation in the United States.

74 The Ellas Defendants exhibited a disregard for the Court's Rules, and the Court's Order and directions. Compliance with case management orders and directions are not optional. They cannot now say that they had a *bona fide* intention to defend when they actively avoided compliance with the Court's process.

75 Justice Shore in *Louis Vuitton Malletier S.A. v. Singga Enterprises (Canada) Inc.*, 2011 FC 247 (F.C.) at para 1, (2011), 198 A.C.W.S. (3d) 926 (F.C.), summarized the Court's approach to this type of conduct:

> Requirements, including those on timing, laid down by the Court, both pursuant to the Rules and by Order, are not merely targets to be attempted, but are to be observed, both because delay may cause prejudice and because litigation must come to a timely conclusion. To ignore orders of a case management judge or prothonotary is an abuse of process, an abuse which can be dealt with by dismissing the pleadings by which a party seeks to obtain the aid of the Court.

76 While the test of "meritorious claim" is lower than the *prima facie* threshold applicable to motions for default judgment, as discussed earlier, it is difficult to see much merit in the vague and unsubstantiated defence. The Ellas Defendants have failed to have even "some" merit in its defence. A showing of merit is not simply having a pleading to file, but there must be real and concrete evidence of some merit. The Ellas Defendants have not shown that merit.

77 Even if the Ellas Defendants had some merit to their defence, there is clear prejudice to the Plaintiffs by virtue of continuing to delay the outcome of this matter.

78 Lastly, the matter of a reasonable explanation for the delay has been fully canvassed above in respect to the motion for default judgment. The Court's findings apply with equal force to the Ellas Defendants' motion for extension of time.

79 Therefore, the Ellas Defendants' motion for an extension of time cannot succeed. To the extent that it is necessary to say - the motion will be dismissed. The costs are subsumed in the lump sum award made.

IV. Conclusion

80 The Court will grant the Plaintiffs' motion for default judgment, award damages of $5,000,000 with pre-judgment interest as claimed, and allow for a $50,000 lump sum for the costs of both motions, all of which is to be paid jointly and severally as proposed by the Plaintiffs. The terms of the injunction and ancillary relief are to be settled as directed in these Reasons.

81 A final Judgment will issue upon completion of submissions as to injunctive and ancillary relief.

Plaintiffs' motion granted; defendants' motion dismissed.

2014 FC 672, 2014 CF 672
Federal Court

Ottawa Athletic Club Inc. v. Athletic Club Group Inc.

2014 CarswellNat 2636, 2014 CarswellNat 4167, 2014 FC 672, 2014 CF 672, [2014] F.C.J. No. 743, 128 C.P.R. (4th) 1, 242 A.C.W.S. (3d) 937, 459 F.T.R. 39

Ottawa Athletic Club Inc d.b.a. the Ottawa Athletic Club, Applicant and The Athletic Club Group Inc. and The Registrar of Trade-marks, Respondents

James Russell J.

Heard: January 13, 2014
Judgment: July 9, 2014
Docket: T-1396-11

Counsel: Scott Miller, Jahangir Valiani, for Applicant
Michael Adams, Thomas McConnell, for Respondents

Subject: Civil Practice and Procedure; Evidence; Intellectual Property; Property

APPLICATION to strike out trade-mark and for permanent injunction prohibiting respondent's use of trade-mark.

***James Russell J.*:**

Introduction

1 This is an application under s. 57 of the *Trade-marks Act*, RSC, 1985, c T-13 [Act] to strike a trade-mark from the register kept under s. 26 of the Act [Register], or in the alternative to amend the Register to narrow the scope of the registration. The Applicant also requests a prohibition on any future use of the allegedly invalid trade-mark or its common law equivalent on the grounds that it offends ss. 10 and 11 of the Act. The trade-mark in question bears the registration number TMA633,422 and was registered on February 22, 2005 [Registration]. The Respondent, the Athletic Club Group Inc. [Athletic Club, or Respondent] is the registered owner.

Background

108 In a footnote at paragraph 26 of *Milliken*, above, Justice Tremblay-Lamer cited the following authorities for the "well established rule that an adverse inference may be drawn if, without reasonable explanation, a party fails to adduce evidence available to him which could have resolved the issue": *Murray v. Saskatoon (City) (No. 2)* (1951), 4 W.W.R. (N.S.) 234 (Sask. C.A.); *Levesque v. Comeau*, [1970] S.C.R. 1010 (S.C.C.); Adrian Keane, *The Modern Law of Evidence*, 3d ed. (London: Butterworths, 1995) at 13; Colin Tapper, *Cross on Evidence*, 8th ed. (London: Butterworths, 1995) at 38-40 (cited to the 12th edition hereinafter); John Sopinka & Sidney N. Lederman, *The Law of Evidence in Civil Cases* (Toronto: Butterworths, 1974) at 535-537; Stanley Schiff, *Evidence in the Litigation Process*, vol. 1, 4th ed. (Toronto: Carswell, 1993) at 452.

109 These authorities suggest to me that context is important in determining whether a negative inference can be drawn from the failure of a party to present evidence uniquely within its possession, or to put forward a witness whose testimony could be expected to help its cause. As Tapper explains the concept, its main import in civil cases is that the failure to answer evidence put forward by the other party without a good explanation, when the means of answering that evidence seem to be within the party's control, can turn inconclusive evidence (or a *prima facie* case) into strong evidence:

> Very soon after the parties were enabled to testify in most civil cases by the Evidence Act 1851, Alderson B recognized that the failure of one of them to deny a fact that it is in his power to deny 'gives colour to the evidence against him'... [I]*n Halford v Brookes* [[1991] 3 All ER 59, [1991] WLR 428, CA], it was argued that the effect was... to make it clear that a party to civil proceedings enjoyed no right of silence, and that inferences could be drawn even more readily in civil proceedings. The strength of such inference was examined by the House of Lords *in R v IRC*, ex p TC Coombs & Co [[1991] 2 AC 283, [1991] 3 All ER 623]:
>
> > In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the client party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party may be either reduced or nullified.
>
> This makes it clear, first, that a prima facie case must be established; second, that it applies to partial as well as total failure to testify; and third, that the inference may be rebutted by a plausible explanation for silence. The effect can be to convert a prima facie case into proof of even the most serious matter, such as murder or equitable fraud, or one having very serious consequences, such as a child being taken into care...

> [Colin Tapper, *Cross & Tapper on Evidence*, 12th ed (Oxford: Oxford University Press, 2010) at 40-41.]

110 Keane also emphasizes that this type of inference can strengthen the evidence introduced by the other party (even weak evidence), but cannot make up for the absence of evidence on a point:

> In civil cases, one party's failure to give evidence or call witnesses may justify the court in drawing all reasonable inferences from the evidence which has been given by his opponent as to what the facts are which the first party chose to withhold. Thus adverse inferences have been drawn from the unexplained absence of witnesses who were apparently available and whose evidence was crucial to the case. In *Wisniewski v Central Manchester Health Authority* [[1992] Lloyd's Rep Med 223] Brooke LJ derived the following principles from the authorities on the point.
>
> > 1. In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in the action.
> >
> > 2. If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
> >
> > 3. There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
> >
> > 4. If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.
>
> [Adrian Keane, James Griffiths & Paul McKeown, *The Modern Law of Evidence*, 8th ed (Oxford: Oxford University Press, 2010) at 14-15, emphasis added]

111 The other case cited by the Applicant, *Hoffman*, above, seems less helpful to their cause. In that case, the defendant, a generic drug distributor, had an obligation to pay royalties to the plaintiff until the Plaintiff's four patents relating to the manufacture of the drug Diazepam expired, unless they were no longer in use. The Defendant paid royalties until the third patent expired, but then stopped, claiming that the process protected by the fourth patent was not used by its manufacturer (a third company located in Italy).

112 A string of letters between the parties followed. The Defendant claimed its manufacturer had assured it the process protected by the fourth patent was not in use. The Plaintiff demanded

2020 ABCA 183
Alberta Court of Appeal

Piikani Nation v. McMullen

2020 CarswellAlta 806, 2020 ABCA 183

Piikani Nation, Piikani Nation Chief and Council, Piikani Nation Oldman Hydro Limited Partnership, Chief Reg Crow Shoe, Councilor Adam North Peigan and Councilor Erwin Bastien (Respondents / Plaintiffs) and Dale McMullen (Applicant / Defendant) and Stephanie Ho Lem, Kerry Scott, Stan Knowlton, Edwin Yellow Horn, Jordie Provost and Shelly Small Legs (Not parties to this Application / Defendants) and Corbin Provost, Herman Many Guns, Doane Crow Shoe, Mike Zubach, the Accounting Firm Meyers Norris Penny LLP, Will Willier, Mark Klassen, Gayle Strikes With A Gun, Wesley Provost, Willard Yellow Face, Angela Grier, Andrew Provost Jr., Fabian North Peigan, Clayton Small Legs, Kyle David Grier, Rebecca Weasel Traveller, Maurice Little Wolf, Eloise Provost, Casey Scott, Piikani Resource Development Ltd., Shawna Morning Bull, Sonny Richards and Kirby Smith (Not parties to this Application / Third Parties)

Barbara Lea Veldhuis J.A.

Heard: April 22, 2020
Judgment: May 4, 2020
Docket: Calgary Appeal 2001-0049-AC

Counsel: C.G. Jensen, Q.C., C. Hanert, for Piikani Nation
Dale McMullen, Applicant, for himself
D.V. Tupper, I.J. Breneman, for Canadian Imperial Bank of Commerce, CIBC Trust Corporation, CIBC World Markets Inc.
C.G. Jensen, Q.C., for Jensen Shawa Solomon Duguid Hawkes LLP, Gowlings WLG
D.J. Wachowich, Q.C., for Blake, Cassels & Graydon LLP

Subject: Civil Practice and Procedure; Public

***Barbara Lea Veldhuis J.A.*:**

Overview

1 The applicant, Dale McMullen, has filed six appeals related to case management decisions regarding leave applications.

2 This action has a complex and lengthy history before this Court and the Alberta Court of Queen's Bench. The litigation was commenced in 2010, although it is related to an earlier bankruptcy proceeding and other related-party litigation. There have been numerous reported judgments from this Court that have consumed significant judicial resources: see *Piikani Energy Corporation (Re)*, 2013 ABCA 293; *Piikani Nation v Kostic*, 2015 ABCA 60; *Kostic v Piikani Nation*, 2017 ABCA 53; *Piikani Nation v Kostic*, 2017 ABCA 259; *Kostic v Piikani Nation*, 2017 ABCA 263; *Piikani Nation v Kostic*, 2017 ABCA 350; *Piikani Nation v Kostic*, 2017 ABCA 399; *Ho Lem v Piikani Nation*, 2018 ABCA 171; *Ho Lem v Piikani Nation*, 2018 ABCA 180; *Piikani Nation v Kostic*, 2018 ABCA 219; *Piikani Nation v Kostic*, 2018 ABCA 234; *Piikani Nation v Kostic*, 2018 ABCA 275; *Piikani Nation v Kostic*, 2018 ABCA 320; *Piikani Nation v Kostic*, 2018 ABCA 358; *Kostic v CIBC Trust Corporation*, 2018 ABCA 64; *Kostic v CIBC Trust Corporation*, 2018 ABCA 355; *Kostic v CIBC Trust*, 2019 ABCA 29; *Kostic v CIBC Trust*, 2019 ABCA 173; *McMullen v Norton Rose Fullbright Canada LLP*, 2018 ABCA 299; and *McMullen v Norton Rose Fulbright Canada LLP*, 2019 ABCA 181.

3 The litigation has been case managed for several years. I understand that the parties have been plagued by procedural and other interlocutory disputes for the better part of a decade and that they have not completed a number of basic litigation steps. It is unclear whether there is a formal litigation plan in place. Trial is still a long way off.

4 The history and current circumstances reinforce the need for all levels of court to make decisions and provide direction to the parties that are consistent with the foundational rules of court. Rule 1.2 of the *Alberta Rules of Court*, Alta Reg 124/2010 states:

> Purpose and intention of these rules
>
> 1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.
>
> (2) In particular, these rules are intended to be used
>
> (a) to identify the real issues in dispute,
>
> (b) to facilitate the quickest means of resolving a claim at the least expense,
>
> (c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,

(d) to oblige the parties to communicate honestly, openly and in a timely way, and

(e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

(3) To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,

(a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,

(b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,

(c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and

(d) when using publicly funded Court resources, use them effectively.

(4) The intention of these rules is that the Court, when exercising a discretion to grant a remedy or impose a sanction, will grant or impose a remedy or sanction proportional to the reason for granting or imposing it.

Background

5 In 2013, the case management judge issued an order requiring all parties to bring leave applications before every application was heard on the merits. There were a variety of reasons for why this procedural order was issued, including the complexity of the litigation and the voluminous number of applications being filed.

6 The parties filed a series of applications in 2018 and 2019. The case management judge issued decisions on all six in February 2020. They are reported as follows:

(a) Decision #1 (2020 ABQB 87): Leave application by McMullen for recusal of the case management judge (referred to as the Recusal Leave Application);

(b) Decision #2 (2020 ABQB 88): Leave application by McMullen to disqualify opposing counsel JSS Barristers (JSS Disqualification Leave Application);

(c) Decision #3 (2020 ABQB 89): Leave application by McMullen to bring a third-party claim (TPC) against JSS Barristers et al (JSS TPC Leave Application);

(d) Decision #4 (2020 ABQB 90):

(i) Leave application by McMullen to bring a TPC against opposing counsel Blakes (Blakes TPC Leave Application),

(ii) Leave application by Blakes to strike the Blakes TPC Leave Application on the basis that McMullen incorporated privileged information protected by restricted access orders into his affidavit filed in support (Blakes Strike Leave Application),

(iii) Leave application by JSS Barristers to hold McMullen in contempt for breaching the restricted access orders and other court orders (JSS Contempt Leave Application);

(e) Decision #5 (2020 ABQB 91) — Leave application by McMullen to bring a separate originating application against the Piikani Investment Corporation (PIC) under an alleged indemnity and save harmless agreement (PIC Originating Leave Application);

(f) Decision #6 (2020 ABQB 92) — Leave application by McMullen to strike or dismiss action 1001- 10326 for delay (Strike/Dismiss 326 Leave Application).

7 The beginning of each judgment is almost identical and provides for a bit of history and other procedural information to assist the parties (and this Court) with understanding the circumstances of the applications and decisions reached. The reasons suggest that all six decisions should be read together to get a full appreciation of the facts and the results.

8 In the decisions, the case management judge reminded himself that he was not actually deciding the substance or merits of the issues raised in the applications. Instead he was imposing a threshold requirement that appears to have been informed by the conditions set out in Rule 3.68(2). In particular, the case management judge assessed whether the application disclosed a reasonable chance of success, was frivolous, irrelevant or improper or was an abuse of process. In any case, the threshold for granting leave imposed by the case management judge was low.

9 The case management judge dismissed the Recusal Leave Application, the JSS Disqualification Leave Application, the JSS TPC Leave Application, and the PIC Originating Leave Application in Decisions #1-3 and #5.

10 In Decision #4, the case management judge granted the Blakes Strike Leave Application and the JSS Contempt Leave Application. He stayed the Blakes TPC Leave Application pending the result of the Blakes Strike Application. He also set out a procedural timeline regarding the exchange of materials and the conduct of examinations on affidavits for the Blakes Strike Application/JSS Contempt Application.

11 In Decision #6, the case management judge was inclined to grant leave of the strike portion of the Strike/Dismiss 326 Leave Application, however he decided to stay it pending the results of the

ongoing McMullen application to disqualify the opposing counsel of Gowlings WLG (Gowlings Disqualification Application). Leave was denied on all other relief requested.

12 McMullen now seeks a stay of the directions set out in Decision #4. He also seeks a variety of relief related to opposing counsel. He asks this Court to disqualify and remove JSS Barristers, Blakes and Gowlings WLG and to direct them to deliver to him certain records.

13 I will deal first with the stay of proceedings application.

Stay of Proceedings

14 The tripartite test for granting a stay pending appeal is set out in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, 111 DLR (4th) 385. McMullen must demonstrate that:

(a) there is a serious question arguable on appeal;

(b) he would suffer irreparable harm absent the stay; and

(c) the balance of convenience favours granting the stay.

15 A stay of proceedings and an injunction are remedies of the same nature and in absence of legislation setting out different tests, the same general principles should be applied: *RJR-MacDonald* at 334. As a result, I find that the Supreme Court of Canada's guidance in *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at paragraph 25 is equally applicable here: the fundamental question is whether the stay of proceeding is just and equitable in all of the circumstances of the case. This will necessarily be context-specific.

16 The respondents oppose the application on the basis that McMullen has not satisfied any branch of the test. They state that McMullan has not identified a serious question arguable on appeal and reiterate that the case management judge's leave decisions will be owed considerable deference on appeal. Further, they stress that the Blakes Strike Application/JSS Contempt Application have not actually been heard yet. The respondents also argue that McMullen has not provided any evidence of irreparable harm. Finally, they state that the balance of convenience favours the Piikani Nation and Blakes as they have submitted evidence demonstrating a strong case for contempt and to strike the Blakes TPC Leave Application. Given McMullen's repeated breaches of court orders and other abuses of process in the Alberta courts and elsewhere, they state that he does not come to this Court with clean hands. As a result, his is not entitled to any equitable relief.

17 I have reviewed the substantial record before me, which includes the six leave applications under appeal. The case management judge sought fit to consider all six leave applications together, despite the fact that they were filed months apart. Looking at these applications holistically was

likely done because a few of them are interrelated; two of them relate to applications that could bring about an end to the litigation, but with success to different parties; and one calls into question whether the case management judge should recuse himself for bias or a reasonable apprehension of bias. As a result, fairness dictates that all six decisions should be considered together for the purposes of this application.

18 I conclude that a stay of proceedings is just and equitable in all of the circumstances of this case and best accords with the foundational rules. The interests of justice, court resources and parties are best served if Decision #4 is stayed until such time as the Court of Appeal renders its decisions on the six appeals. I understand from the Registry that the six appeals will be heard together by the same panel. Once a decision has been reached, the parties will be in a better position to assess the path forward.

Is there a serious question arguable on appeal?

19 McMullen raises a variety of arguments regarding the Blakes Strike Application/JSS Contempt Application. He challenges the procedures followed in obtaining the 2014 restricted access orders and what he characterizes as false and misleading submissions made by JSS Barristers. He proposes an alternative interpretation of these orders that suggest he was entitled to possession and use of the privileged information. He also suggests that JSS Barristers' decision to amend the application materials to seek additional relief that would strike his defence and claim was improper, constitutes an abuse of process, and is a collateral attack on Decision #4 and an earlier order that he states permitted him to file the affidavit containing the offending material. Finally, he argues that the Supreme Court's decision in *R v Jordan*, 2016 SCC 27 applies to contempt applications and that JSS Barristers is out of time to pursue its allegations of contempt.

20 McMullen agreed during the oral hearing that in the ordinary course, the proper procedure would be to bring these arguments before the case management judge during the hearing of the applications on the merits. However, this litigation is contentious and one of the outstanding appeals relates to McMullen's assertion that the case management judge is biased against him. McMullen stresses that he will not receive a fair hearing before the existing case management judge with these allegations outstanding.

21 The test for whether an appeal is arguable is a low threshold; it is an assessment of whether the appeal is frivolous or vexatious: *Polansky Electronics Ltd v AGT Limited*, 2000 ABCA 46 at para 11.

22 Judicial impartiality is of fundamental importance to our society. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer: *R v S(RD)*, [1997] 3 SCR 484, 1997 CanLII 324 at paras 93-94 per Cory J. Language and the approach used in the six leave decisions, regardless of whether there is merit, suggests

that the case management judge's long history with the parties and the dispute may no longer be having the intended positive benefit.

23 I agree that a case management judge's decisions will be owed considerable deference on appeal. However, in these unique circumstances the allegations of bias and a reasonable apprehension of bias speak to procedural fairness, which is a principle of fundamental justice: see *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177, 1985 CanLII 65. I find that this branch of the test is met.

Irreparable Harm and Balance of Convenience

24 McMullen's irreparable harm and balance of convenience arguments are predicated on his insistence that opposing counsel are guilty of serious misconduct and that the case management judge is biased, undermining the administration of justice. He states that to allow the Blakes Strike Application/JSS Contempt Application to proceed will result in continuing breaches of procedural fairness and solicitor-client privilege. In the end, he may be found liable for millions of dollars in damages.

25 When irreparable harm is considered in context of all six appeals, and in particular the appeal of the Recusal Leave Application, McMullen has satisfied me that he will suffer irreparable harm. If a reasonable apprehension of bias arises, it colours the entire proceedings and it cannot be cured by the correctness of subsequent decision: *S(RD)* at para 100 per Cory J. In my view, it would also throw into question the validity of any interlocutory decision made in the interim.

26 I do not accept the respondents' position that somehow the parties will be able to easily roll back any interim decision should McMullen's appeal of the Recusal Leave Application be successful. Costs are not an adequate remedy for McMullen should this circumstance arise. He would in effect have to run the Recusal Leave Application and appeal any interim decision on the same grounds of bias and reasonable apprehension of bias. This is nonsensical.

27 The Piikani Nation states that it is prejudiced by the continuing breaches of the restricted access orders. But given the court-access restrictions imposed by the COVID-19 pandemic, it appears that the status quo can easily be maintained, and each party kept on the same footing, until the appeals are heard. I see no prejudice to the respondents in having to wait.

28 Continuing with piecemeal litigation is a waste of resources and entirely impractical in these circumstances. Courts are community property that exist to service everyone. They have finite resources that cannot be squandered: *Canada v Olumide*, 2017 FCA 42 at paras 17-19. The balance of convenience weighs in favour of a stay.

Conclusion on Stay of Proceedings

29 The application for a stay of proceedings of Decision #4 is allowed pending the appeal of the six related leave decisions on the specific conditions set out below:

(a) McMullen will file one appeal record by June 8, 2020, and

(b) McMullen will file a single factum to address all six appeals with a total maximum of 50 pages.

30 Any further directions will be given by the Case Management Officer at the Court of Appeal, which will include arranging the earliest possible appeal hearing date in the fall of 2020 with a single panel hearing all six appeals.

Relief against Opposing Counsel

31 The Court of Appeal is not a court of first instance and it has no ability to remove opposing counsel or direct them to return documents to McMullen. Many of McMullen's arguments are applicable to the *merits* of the numerous applications and not the appeals of the leave applications which are before this Court. *There has not yet being a finding on the merits of any application.* As a result, McMullen will still have an opportunity to advance these arguments on the applications where leave is granted and the Gowlings Disqualification Application, which is ongoing. He will also have the right to appeal the outcome of these applications. As a result, only the request for a stay of proceedings is properly before this Court.

Costs

32 Given the mixed success, neither party is entitled to costs of this application.

2019 ABCA 158
Alberta Court of Appeal

PT v. Alberta

2019 CarswellAlta 780, 2019 ABCA 158, [2019] 8 W.W.R. 419, [2019] A.W.L.D. 2291, [2019] A.W.L.D. 2330, [2019] A.W.L.D. 2385, [2019] A.W.L.D. 2386, 305 A.C.W.S. (3d) 548, 88 Alta. L.R. (6th) 235

PT, DT, FR, KR, PH, MT, JV, AS, RM, Universal Education Institute of Canada, Headway School Society of Alberta, The Canadian Reformed School Society of Calgary, Gobind Marg Charitable Trust Foundation, Congregation House of Jacob Mikveh Israel, Khalsa School Calgary Education Foundation, Central Alberta Christian High School Society, Saddle Lake Indian Full Gospel Mission, St. Matthew Evangelical Lutheran Church of Stony Plain, Alberta, Calvin Christian School Society, Canadian Reformed School Society of Edmonton, Coaldale Canadian Reformed School Society, Airdrie Koinonia Christian School Society, Destiny Christian School Society, Koinonia Christian School - Red Deer Society, Covenant Canadian Reformed School Society, Lacombe Christian School Society, Providence Christian School Society, Living Waters Christian Academy, Newell Christian School Society, Slave Lake Koinonia Christian School, Ponoka Christian School Society, Yellowhead Koinonia Christian School Society, The Rimbey Christian School Society, Living Truth Christian School Society, Lighthouse Christian School Society, Devon Christian School Society, Lakeland Christian School Society, 40 Mile Christian Education Society, High Level Christian Education Society, Parents for Choice in Education, and Association of Christian Schools International - Western Canada (Appellants / Applicants) and Her Majesty the Queen In Right of Alberta (Respondent / Respondent) and Calgary Sexual Health Centre (Intervenor) and The Evangelical Fellowship of Canada (Intervenor)

J.D. Bruce McDonald, Frederica Schutz, Dawn Pentelechuk JJ.A.

Heard: December 3, 2018
Judgment: April 29, 2019

Docket: Calgary Appeal 1801-0239-AC

Proceedings: affirming *PT v. Alberta* (2018), 2018 CarswellAlta 3322, 2018 ABQB 496, J.C. Kubik J. (Alta. Q.B.)

Counsel: R.J. Cameron, M.R. Moore, for Appellants
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A. Polizogopoulos, for The Evangelical Fellowship of Canada
K. Millar, S.E.D. Fairhurst, for The Calgary Board of Education
S.E. Ward, for CBC and others

***Frederica Schutz, Dawn Pentelechuk JJ.A.*:**

I. Introduction

1 The appellants are parents, private schools and school boards who challenge the constitutional validity of ss 16.1(1)(a), 16.1(3.1), 16.1(6), 28(8) and (9), 45.1(3) to (10), 45.3, and 50.1(4) of the *School Act*, RSA 2000, c S-3. That constitutional validity hearing has not taken place.

2 In the Court of Queen's Bench of Alberta, the appellants brought two applications, one for "an interim injunction staying the operation of the provisions of s 16.1 of the *School Act*, and the second for an interim injunction prohibiting the Minister of Education from defunding or de-accrediting their schools for non-compliance with the provisions of section 45.1": *PT v. Alberta*, 2018 ABQB 496 (Alta. Q.B.) at para 2 ("Decision").

3 The chambers judge dismissed both interim injunction applications: Decision at para 54.

4 The appellants appeal the dismissals. Additionally, they have now filed two applications to adduce new evidence, one application for leave to late file more evidence and a related third application to adduce new evidence.

5 Except for the r 6.28 applications on behalf of appellants and the Calgary Board of Education, on which rulings were given at the outset of the oral hearing, the appellants' applications to admit new evidence were heard and decided with the appeal as is the normal practice of this Court.

6 For the reasons that follow, the appeal is dismissed.

II. Background

A. The School Act

7 On March 19, 2015, the Legislative Assembly of Alberta enacted Bill 10, *An Act to Amend the Alberta Bill of Rights to Protect our Children*, 3rd Sess, 28th Leg, Alberta, 2014.

8 As found by the chambers judge, Bill 10 amended the *School Act*:

> ... to empower students to create voluntary student organizations and lead activities which promote a welcoming, caring, respectful and safe learning environment that respects diversity and fosters a sense of belonging. Those organizations and activities can include any one of a number of laudable goals including the promotion of equality and non-discrimination with respect to race, religious belief, colour, gender, gender identity, gender expression, physical disability, mental disability, family status, or sexual orientation. The purpose of the legislation was to create safe spaces for children in school, but in particular to protect vulnerable minorities, including LGBTQ+ students.
>
> Decision at para 1

9 On December 15, 2017, the Legislative Assembly of Alberta enacted Bill 24, *An Act to Support Gay-Straight Alliances*, 3rd Sess, 29th Leg, Alberta, 2017. Bill 24 amended the *School Act*; its objective was to implement greater "protections for LGBTQ+ students, including prohibitions on exposing children to their parents or peers, who participate in 'gay-straight alliances' and 'queer-straight alliances,'" collectively referred to in the Decision (para 1), and here, as "GSAs".

10 The following provisions of the *School Act*, as amended by Bill 24, are relevant:

> (a) Under s 16.1(1)(a), a student may request, and the principal of the school shall "immediately grant permission," "to establish a voluntary student organization, or to lead an activity intended to promote a welcoming, caring, respectful and safe learning environment that respects diversity and fosters a sense of belonging."
>
> (b) Section 16.1(6) requires principals to ensure that notification respecting a voluntary student organization or activity, such as a GSA, "is limited to the fact of the establishment of the organization or the holding of the activity."
>
> (c) Under section 16.1(3.1), a principal shall not prohibit or discourage students from using a name which may include "gay-straight alliance" or "queer-straight alliance."
>
> (d) Section 45.1(4) requires a school board to demonstrate compliance with s 16.1 by establishing a policy that addresses its responsibilities under s 16.1. Section 45.1(4)(c)(i) provides that a distinct portion of the policy "must provide that the principal is responsible for ensuring that notification, if any, respecting a voluntary student organization or an activity referred to in section 16.1(1)" is "limited to the fact of the establishment of the organization or the holding of the activity."

(e) Section 50.1(4) exempts "the establishment or operation of a voluntary student organization referred to in section 16.1" from the requirement in s 50.1(1) that a board must notify a parent of a student "where courses of study, educational programs or instructional materials, or instruction or exercises, include subject-matter that deals primarily and explicitly with religion or human sexuality."

11 In Alberta, private schools must submit annual declarations to the Minister of Education in order to receive continued funding and maintain accreditation. For some years, the Minister has required private schools to confirm that they will comply with the relevant legislation and policies governing schools, including the *School Act* and *Private Schools Regulation*, Alta Reg 190/2000.

12 As part of the annual declaration for the 2018-2019 school year, the Minister introduced a new requirement: declarants must provide an attestation of compliance with the *School Act*, including s 45.1 of the *Act*: Decision at para 45. Section 45.1 of the *Act* governs a school board's responsibility to establish, implement and maintain a policy respecting its obligation to provide a welcome, caring, respectful and safe learning environment:

Board responsibility

45.1(1) A board has the responsibility to ensure that each student enrolled in a school operated by the board and each staff member employed by the board is provided with a welcoming, caring, respectful and safe learning environment that respects diversity and fosters a sense of belonging.

(2) A board shall establish, implement and maintain a policy respecting the board's obligation under subsection (1) to provide a welcoming, caring, respectful and safe learning environment that includes the establishment of a code of conduct for students that addresses bullying behaviour.

. . .

(4) A policy established under subsection (2) must contain a distinct portion that addresses the board's responsibilities under section 16.1, and the distinct portion of the policy

(a) must not contain provisions that conflict with or are inconsistent with this section or section 16.1, and in particular must not contain provisions that would

(i) undermine the promotion of a welcoming, caring, respectful and safe learning environment that respects diversity and fosters a sense of belonging, or

(ii) require a principal to obtain the approval of the superintendent or board or to follow other administrative processes before carrying out functions under section 16.1,

(b) must include the text of section 16.1(1), (3), (3.1), (4) and (6),

(c) must provide that the principal is responsible for ensuring that notification, if any, respecting a voluntary student organization or an activity referred to in section 16.1(1)

(i) is limited to the fact of the establishment of the organization or the holding of the activity, and

(ii) is otherwise consistent with the usual practices relating to notifications of other student organizations and activities,

and

(d) must set out the name of the legislation that governs the disclosure of personal information by the board.

(8) If a board does not establish a policy or a code of conduct under subsection (2), or in the opinion of the Minister a policy or a code of conduct established under subsection (2) does not meet the requirements under subsections (3), (4), (5) or (6), as applicable, the Minister may, by order, do one or both of the following:

(a) establish a policy or code of conduct for, or add to or replace a part of a policy or code of conduct of, a board;

(b) impose any additional terms or conditions the Minister considers appropriate.

B. Proceedings in the Court of Queen's Bench

13 In the Court of Queen's Bench, the appellants contended that the legislation infringed their rights under ss 2 and 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982 [*Charter*], s 1(g) of the *Alberta Bill of Rights*, RSA 2000, c A-14, and the *Family Law Act*, SA 2003, c F-4.5. The appellant parents submitted that the legislation undermined the protection of children, deprived them of choice in the education of their children, and interfered with their right to be fully informed of their children's activities, contrary to s 7 of the *Charter* and the *Alberta Bill of Rights*. Collectively, the appellants contended that their parental and institutional rights to religious freedom, expression, and association, as protected by s 2 of the *Charter*, were infringed because the legislation interfered with the ability to educate children in accordance with their moral and religious values: Decision at para 11.

14 The chambers judge reviewed a volume of evidence tendered by the parties, including evidence from parents, current and former educators, teachers, school administrators, school board members, medical doctors, staff from the Ministry of Education, and experts: Decision at paras 21, 23-24, 28, 30-33.

15 The parents generally expressed concerns about the legislation's impact on their ability to monitor and protect their children. Two parents said that their children were convinced to believe that they were transgender, were encouraged to behave in an opposite gender role, and experienced notable distress. Concern was also expressed about the potential dissemination of sexually explicit materials through GSAs and related websites. School administrators and board members associated with several Alberta private schools tendered affidavits setting out the nature of their religious beliefs, including those concerning sexuality and gender, the genuineness of which beliefs is not in dispute. They explained that the schools could not adopt the policies required by the *School Act*, as amended by Bill 24, or submit the attestation required as part of the annual declaration, because to do so would be contrary to their beliefs. Further, they stated that the failure to attest would jeopardize their schools' funding or accreditation: Decision at paras 10-11, 21, 28, 45.

16 The appellants' experts, Dr Quentin Van Meter (a pediatric endocrinologist), and Dr Miriam Grossman (a child and adolescent psychiatrist) gave their opinions about the challenges faced by LGBTQ+ youth, the impact of school GSAs, biomedical approaches to sex and gender identity, and the benefits and harms of GSAs to children: Decision at paras 30-33.

17 The respondent tendered evidence from the Assistant Deputy Minister of the Strategic Services and Governance Division for the Department of Education of the Alberta Government, concerning the addition of the s 45.1 attestation to the annual declarations, and about the Government of Alberta's financial support for the development of a provincial GSA Network website. The website was intended to host information, resources, webinars and networking opportunities that support GSAs. In addition, the respondent's expert, Dr Kevin Alderson (a psychologist) gave his opinions arising from his research on LGBTQ+ matters.

18 The Calgary Sexual Health Centre intervened and presented evidence through its CEO and its Calgary GSA Network Coordinator, that described the Centre's role in hosting the Calgary GSA Network, the information that it makes available to youth about sexuality, gender identity, and transitioning, and provided information about the first-hand experience of the Centre's staff relating the impact of GSAs in Alberta.

19 The chambers judge identified two primary issues arising from the injunction applications, which framed her analysis. First, the appellants contended that s 16.1(6) of the *School Act* limited the information that a principal may disclose to parents regarding a child's involvement in a GSA. Second, the appellant schools challenged the requirement to attest compliance with s 45.1, and thereby the obligations set out in s 16.1 of the *School Act*.

20 The chambers judge correctly cited *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) at 334-335, 341, (1994), 111 D.L.R. (4th) 385 (S.C.C.) [*RJR-MacDonald*], for the test for granting an interim injunction: (1) is there a serious question to be

tried; (2) will the applicant suffer irreparable harm if the application is refused; and (3) does the balance of convenience favour granting the relief sought?

21 With respect to ss 16.1(1)(a) and 16.1(3.1), the chambers judge found that there was no serious issue to be tried. Those provisions require, respectively, a principal not to delay the establishment of a GSA and not to prohibit or discourage the use of the names "gay-straight alliance" or "queer-straight alliance" in describing a voluntary student organization. Because GSAs are voluntary student organizations, the *School Act* did not require children to participate in them. In her view, those provisions, therefore, did not infringe the applicants' religious freedoms. In support of this conclusion, the chambers judge relied on *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710 (S.C.C.); *L. (S.) c. Des Chênes (Commission scolaire)*, 2012 SCC 7, [2012] 1 S.C.R. 235 (S.C.C.) [*SL*]; and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613 (S.C.C.) [*Loyola*]: Decision at paras 15-16.

22 In relation to s 16.1(6), which limits notification respecting a voluntary student organization to the fact "of the establishment of the organization or the holding of the activity", the chambers judge stated that "the *Charter* rights of parents come into direct conflict with the *Charter* rights of children, and in particular, those rights to free expression, association, life, liberty, security, and equality." She found that these competing rights gave rise to a serious issue to be tried: Decision at para 18.

23 As part of the irreparable harm analysis in respect of the various components of s 16.1, the chambers judge considered all of the evidence tendered by the parties and the intervenor, the Calgary Sexual Health Centre. The appellants contended that sexually explicit material was being disseminated at GSAs, and GSAs were imparting to children ideological, unscientific theories of human sexuality and gender identity. The chambers judge summarized the appellants' assertions in this way: "[t]he information provided, coupled with the limitations on disclosure have, in their submission, resulted in harm to at least two children and represent a risk of harm to other children": Decision at para 21.

24 The chambers judge determined that the appellants had "failed to prove a degree of irreparable harm, which outweighs the public good in maintaining the legislation": Decision at para 38. Accordingly, the test for the granting of an interim injunction was not met because:

> (a) The applicants showed that a variety of sexually explicit materials were, at one point, linked through the Alberta GSA Network; however, the chambers judge found no evidence that such materials were promoted by the respondent or were disseminated to students through a GSA: Decision at para 25.
>
> (b) After considering the evidence of the parents and the Calgary Sexual Health Centre, the chambers judge concluded that there was no evidence that GSAs encourage gender transitioning, the use of medical or surgical options, or provide medical advice; further, that

the parents' affidavits were largely hearsay. While the chambers judge accepted that children received information about sexual orientation and gender identity in the context of GSAs, she was unable to form a reliable conclusion that the particular harms alleged to the children were directly attributable to the children's participation in a GSA, or to a lack of parental notification: Decision at paras 27-28.

(c) The chambers judge rejected the expert opinions tendered by the appellants. First, the court held that Dr Van Meter's evidence about the harmful effects of GSAs in promoting unscientific theories and encouraging children to keep secrets from their parents was premised on the affidavits of parents alleging these activities were taking place in GSAs, an unproven factual premise. Dr Van Meter's opinion that GSAs cause harm was also rejected. Second, the chambers judge expressed concerns about Dr Grossman's objectivity as an expert; for that reason, she rejected Dr Grossman's opinion that GSAs cause harm: Decision at paras 30-33.

(d) The chambers judge accepted the evidence of the Calgary Sexual Health Centre, and the expert opinion of Dr Alderson, finding that the presence of GSAs in schools resulted in positive effects for both LGBTQ+ students and others, including an increased sense of safety and belonging in school and enhanced psychological well-being: Decision at paras 35-37.

25 In the chambers judge's view, the appellants had failed to demonstrate that the public benefit resulting from a suspension of the legislation outweighed the legal presumption that validly enacted legislation serves the public good. As found by the court, this presumed good is the safe and supportive climate that GSAs are intended to provide to LGBTQ+ students, as well as the overall benefits to schools generally: Decision at para 41.

26 Assessing the statistical evidence adduced through Dr Alderson, the chambers judge found that there was a risk of harm to LGBTQ+ students in the absence of legislation and concluded that the balance of convenience militated in favour of maintaining its operation: Decision at paras 39-40.

27 In relation to s 45.1 of the *School Act*, the chambers judge found no serious issue to be tried because the attestation of compliance with s 45.1, and the requirement to post a policy that included the provisions of s 16.1, did not require the appellants to forsake their religious beliefs. Rather, this provision merely required the appellants to signify their compliance with common public interest values, including those reflected in the *Alberta Human Rights Act*, RSA 2000, c A-25.5, and the *Charter*. Even if the act of attesting engaged the appellants' *Charter* rights, the chambers judge was of the view that those rights would be minimally impaired in the context of a multicultural, democratic society, adopting the reasoning of the majority of the Supreme Court of Canada in *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, 423 D.L.R. (4th) 197 (S.C.C.) [*TWU 2018*]: Decision at paras 48-49.

28 The chambers judge found there was no real risk of irreparable harm to the appellant schools because the respondent's evidence indicated that remedial options existed for non-compliance with s 45.1 short of the respondent terminating funding for, or accreditation of, appellant schools. Similarly, the court held that the balance of convenience favoured the respondent, given that the public interest in promoting basic equality for staff and students would not be served by staying s 45.1 on the basis of an unproven risk to funding or accreditation: Decision at paras 50-53.

29 The appellants appeal the chambers judge's order dismissing the injunction applications in relation to ss 16.1(1), 16.1(6), 45.1(4)(c)(i), and 50.1(4) of the *School Act*. The appellants also appeal the dismissal of their application for injunctive relief that would prevent the respondent from taking action to terminate funding or accreditation of appellant schools for their failure to attest compliance with the *School Act*, specifically s 45.1 of the *Act*.

30 Pre-hearing, this Court granted intervenor status to the Calgary Sexual Health Centre and the Evangelical Fellowship of Canada.

III. Issues on Appeal

31 The appellants advanced numerous grounds of appeal that may be condensed into two questions:

> 1. Did the chambers judge err in declining to grant injunctive relief in respect of s 16.1(1)(a) and ss 16.1(6), 45.1(4)(c)(i), and 50.1(4) (the "notification limitation provisions") of the *School Act*?
>
> 2. Did the chambers judge err in declining to grant injunctive relief to prevent the respondent from taking any action to terminate funding for, or accreditation of, appellant schools for failure to attest their compliance with the *School Act*, specifically s 45.1?

IV. Analysis

32 Generally, the moving party seeking interim injunctive relief must demonstrate (1) on a preliminary assessment of the merits of the case, that there is a serious question to be tried, that is, the application is not frivolous or vexatious; (2) the applicant will suffer irreparable harm if the application is refused, "irreparable" referring to the nature of the harm and not its magnitude; and (3) the balance of convenience favours granting the relief: *RJR-MacDonald* at 334-335, 341.

33 Since legislation can be understood as expressing a reasoned choice by the legislature, "only in *clear cases* will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed" [emphasis added]; "[i]t follows that in assessing the balance of convenience," the court must proceed on the assumption that the law "is directed toward the

public good and serves a valid public purpose": *Harper v. Canada (Attorney General)*, 2000 SCC 57 (S.C.C.) at para 9, [2000] 2 S.C.R. 764 (S.C.C.) [*Harper*].

34 As said in *RJR-MacDonald* at 342: "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 the balance of convenience] stage."

35 The factors which must be considered in assessing the balance of convenience are numerous and will vary in each individual case, but 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": *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.) at 149, (1987), 38 D.L.R. (4th) 321 (S.C.C.) [*Metropolitan Stores*].

36 An interim injunction is a discretionary order; the standard of review on appeal deferential. This Court must not interfere with the decision below unless the chambers judge committed an error of law, or the decision is unreasonable, or manifestly unjust: *Unifor, Local 707A v. Suncor Energy Inc*, 2018 ABCA 75 (Alta. C.A.) at paras 7, 27, (2018), 64 Alta. L.R. (6th) 227 (Alta. C.A.); *Laser Clean Ltd. v. Clark*, 2016 ABCA 4 (Alta. C.A.) at para 7, (2016), 609 A.R. 209 (Alta. C.A.); *Globex Foreign Exchange Corp. v. Kelcher*, 2005 ABCA 419 (Alta. C.A.) at para 18, (2005), 262 D.L.R. (4th) 752 (Alta. C.A.).

A. Did the chambers judge err in declining to grant injunctive relief in respect of sections 16.1(1)(a), 16.1(6), 45.1(4)(c)(i), and 50.1(4) (the notification limitation provisions) of the School Act?

1. Serious question to be tried

37 The appellants agree that the chambers judge correctly found that the s 7 *Charter* rights of parents were engaged by s 16.1(6) of the *School Act*. In oral submissions, however, they forcefully challenge the court's conclusion that the notification limitation provisions do not infringe the appellants' freedom of religion rights under s 2(a) of the *Charter*.

38 This is an appeal from an interlocutory decision. Whether the chambers judge applied the correct principles and reasonably concluded that there was no "serious question to be tried" arising from the appellants' claims under s 2(a) of the *Charter*, is limited to "a preliminary assessment ... of the merits of the case", and does *not* decide the underlying constitutional claim: *RJR-MacDonald* at 334, 337, 340.

39 The appellants submit that the notification limitation provisions withhold critical information from all parents about their children regarding GSAs and related activities. The appellant parents trust the appellant schools to care for and educate their children in accordance with shared religious values. They contend that the impugned provisions disrupt the right of parents and schools to

impart religious values to children. Further, they assert that parents have the right to be informed about what sexual or ideological content their children might be exposed to, by whom, and under what circumstances. The notification limitation provisions are said to interfere with the vital link between parents and children, interference that is permitted only where necessary to safeguard a child's autonomy or health: *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 (S.C.C.) at 371-72, (1995), 122 D.L.R. (4th) 1 (S.C.C.) [*B(R)*]. In reliance on these arguments the appellants submit, therefore, that the chambers judge erred in determining that there was no serious question to be tried in relation to the constitutionality of s 16.1(1)(a) of the *School Act*.

40 An intervenor, the Evangelical Fellowship of Canada, submits that the chambers judge did not fully appreciate that the appellants' religious freedom and parental rights, as protected by ss 2(a) and 7 of the *Charter*, were implicated in the application for injunctive relief. These rights, it contends, encompass choice over the education and moral upbringing of one's own children. The Evangelical Fellowship of Canada acknowledges that the state has an interest in setting curricula, promoting learning outcomes for students, and even instilling civic virtues in students; however, those interests are secondary to the rights of parents to care for their children, including making decisions about education: *E.T. v. Hamilton-Wentworth District School Board*, 2017 ONCA 893 (Ont. C.A.) at para 65, (2017), 420 D.L.R. (4th) 240 (Ont. C.A.).

41 The respondent submits, to the contrary, that the chambers judge reasonably found that neither s 16.1(1)(a) nor the notification limitation provisions raised a serious issue to be tried on the basis of alleged unconstitutionality, on several bases. First, s 16.1(1)(a) affirms the appellant schools' long-standing obligations under the *Alberta Human Rights Act*. Second, the right to freedom of religion does not give schools or parents a right to dictate what children are exposed to at school: *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710 (S.C.C.); *L. (S.)*; *Loyola*. Third, parents do not have a constitutional right to know exactly who their child is interacting with at every moment, nor to prohibit their children from joining school clubs, including GSAs. Fourth, the state may override a parent's religious beliefs when it is in the child's best interests to do so. Fifth, in a conflict of rights between parents and children, the best interests of the child prevail: *B. (R.)*; *R. (A.) v. Alberta (Director of the Child, Youth and Family Enhancement Act)*, 2014 ABCA 148 (Alta. C.A.) at para 17, (2014), 11 Alta. L.R. (6th) 392 (Alta. C.A.).

42 The Calgary Sexual Health Centre made no submissions on whether there was a serious issue to be tried, confining its submissions to the questions of irreparable harm and balance of convenience.

43 The threshold for showing a serious question is low, merely requiring the court to be satisfied that the application is "neither frivolous nor vexatious": *RJR-MacDonald* at 337. In our view, the chambers judge reasonably concluded that s 16.1(6) of *School Act* could potentially engage the s 7 *Charter* rights of parents; thus, the constitutional question is neither frivolous nor vexatious.

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Given that ss 45.1(4)(c)(i) and 50.1(4) of the *Act* also bear upon aspects of notification of parents, however, it is our view that a serious question is raised in relation to all of these provisions.

44 We note that some of the cases upon which the chambers judge relied did, in fact, involve the finding of a *prima facie* infringement of s 2(a) of the *Charter*: *Loyola* at para 58; *TWU 2018* at para 75. Further, at this juncture in the proceedings, an inquiry under s 1 of the *Charter* ought to be avoided because it is a normative and highly contextual inquiry, and neither the chambers judge nor this Court have the benefit of a full record and argument: *R. v. J. (K.R.)*, 2016 SCC 31 (S.C.C.) at para 58, [2016] 1 S.C.R. 906 (S.C.C.); *TWU 2018* at para 81. Additionally, any determination in relation to s 1 of the *Charter* ought to be avoided because such a determination "essentially addresses the merits of the case": *Metropolitan Stores* at 130-132; see also, *RJR-MacDonald* at 340.

45 In light of the very low bar required to meet the first stage of *RJR-MacDonald*, on the first question, the appellants' claims relating to s 2(a) of the *Charter* also raise a serious question to be tried.

46 Having concluded that the appellants' claims relating to ss 2(a) and 7 of the *Charter* raise serious questions to be tried, we now turn to the second part of the test for injunctive relief.

2. Irreparable Harm

47 The appellants submit that the chambers judge incorrectly applied a presumption in favour of validly enacted legislation at the irreparable harm stage, rather than at the balance of convenience stage. By doing so, they assert that the court erroneously found that the legislation gave rise to a presumed good in the form of the safe and supportive climate fostered by GSAs, a finding that contradicts the principle that state intervention with parental rights is permitted only where necessity is demonstrated. The appellants further contend that the legislation contains no parameters around GSAs, that there is no requirement that the GSAs and related activities remain on school property, and that the legislation makes no distinction with respect to children of different ages and states of maturity, or between children with, and without, disabilities or mental health issues. In essence, they argue the legislation mandates secrecy but abdicates government responsibility.

48 In reply, the respondent submits that the chambers judge reasonably found that the appellants had not established irreparable harm because they failed to adduce any credible evidence to prove that sexually explicit material has been disseminated in a GSA. The respondent's evidence was to the contrary: upon being notified, the Province promptly addressed concerns about explicit material being linked to the Alberta GSA Network website, and the evidentiary record revealed that GSAs typically involve activities such as permitting students to openly discuss challenges they are facing and participating in activities aimed at reducing the stigmatization of LGBTQ+ persons.

49 As intervenor, the Calgary Sexual Health Centre submits that GSAs and the impugned legislative provisions have a helpful, not harmful, impact on students, schools, and families because they serve to protect the privacy of GSA participants, which is essential to their safety and security. In the Calgary Sexual Health Centre's experience, GSAs have the effect of increasing the sense of personal empowerment and well-being of students; thus, to the extent that the harms relied upon by the appellants exist, these "are attributable to a lack of proper training amongst schools and teachers, not the [notification limitation provisions]."

50 "Harm is generally viewed from the standpoint of the person seeking to benefit from the interlocutory relief," and it is preferable to consider harm *to others* "when the balance of convenience is being determined":*143471 Canada Inc. c. Québec (Procureur général)*, [1994] 2 S.C.R. 339 (S.C.C.) at 360, (1994), 90 C.C.C. (3d) 1 (S.C.C.), per La Forest J in dissent but not on this point; *RJR-MacDonald* at 340-341. The weight of judicial authority mandates that it is only at the last stage of the *RJR-MacDonald* test that the presumption that validly enacted legislation serves the public good arises: *Harper* at para 9.

51 If the appellants are correct that the chambers judge erred in misapplying this presumption at the irreparable harm stage, they have nonetheless failed in our view to demonstrate that this error tainted the court's crucial findings that there was no evidence that the respondent promoted explicit materials through GSAs, that GSAs encourage gender transitioning, or that GSAs provide any medical treatment advice. The chambers judge's findings were supported by the evidence accepted; this Court owes deference to those findings and appellate intervention is not warranted.

52 The court's rejection of the opinions given by Drs Grossman and Van Meter is similarly entitled to deference, as are most judicial decisions about whether to accept or reject expert evidence, particularly when it has been determined that the assumptions underpinning the opinion are unproven. In relation to the expert evidence, no error has been demonstrated. Nor are we persuaded by the appellants' submissions to the effect that the court improperly resorted to majoritarian views.

53 The appellants' specific objection about the chambers judge's disregard of certain evidence as hearsay is addressed in the context of the new evidence tendered.

a. New Evidence

54 In two applications to admit new evidence, the appellants seek to introduce:

(a) affidavits from two children ("AA" and "BB"), recounting their personal experiences at an Alberta school GSA and at a GSA conference off the school grounds; and

(b) two recent studies on the topics of "Transgender Adolescent Suicide Behaviour" and "rapid-onset gender dysphoria", plus a recent report published by the University of Calgary on the mental health of Canadian children.

55 AA (the child of PT) was diagnosed with autism at an early age. In AA's affidavit, AA describes experiencing gender and sexuality issues, deposing that when participating in a school-based GSA beginning in grade 7, AA felt pressure to transition genders. An exhibit to AA's affidavit contains a psychological assessment, which elaborates on AA's diagnosis, and social and behavioural difficulties. In PT's affidavit in support of admitting AA's affidavit, PT states that although PT knew about and referred to AA's experiences at the time of the initial injunction application, AA was then recovering from the experiences and PT was not prepared to permit AA to participate in the court proceedings.

56 BB (a child of a person not a party to these proceedings) is fifteen. Apparently, sometime after the chambers judge rendered the decision under appeal, one of BB's parents invited contact with the appellants' counsel. BB's affidavit recounts attending what is described as a "GSA Conference" that was held at a community hall, not on school grounds. BB says, among other things, that this conference provided participants with give-away bags which contained a substantial number of condoms and a flip book with pictorial drawings illustrating proper condom use during male-to-male sexual activity.

57 Whether to admit new evidence is governed by the test set down in *R. v. Palmer*, [1980] 1 S.C.R. 759 (S.C.C.) at 775, (1979), 106 D.L.R. (3d) 212 (S.C.C.) [*Palmer*]: (1) the evidence must not have been previously available through due diligence; (2) the evidence must be relevant; (3) the evidence must be credible; and (4) the evidence must be such that if believed it could reasonably, when taken with the other evidence adduced, be expected to have affected the result.

58 The appellants state that AA's and BB's affidavits meet the *Palmer* criteria; furthermore, "all evidence which bears on what is in the best interest of the child should be before the Court": *Horse v. Wapass*, 2002 SKCA 78 (Sask. C.A.) at para 8, (2002), 27 R.F.L. (5th) 337 (Sask. C.A.) [*L (JL), Re*].

59 The respondent opposes the applications to admit the affidavits on the basis the evidence was previously available but the appellants chose not to tender it. It is further argued that AA's psychological assessment, and the cross-examinations of AA and PT, call into question AA's ability to accurately convey what transpired due to AA's poor social judgment, poor reading of social cues, and difficulties with interpersonal relationships. The respondent also opposes admitting BB's evidence because mere lack of prior knowledge of BB's evidence does not satisfy the *Palmer* due diligence criterion.

60 The respondent submits, in any event, that the content of the affidavits would not have affected the result below. This is because one child's belief in the alleged failure of a particular school to appropriately oversee GSA activities, and one child's accounting of being given free condoms and pictographic advice on their use at one conference, if believed, could not reasonably when taken with the other evidence adduced, be expected to have affected the result.

61 We are prepared to assume a flexible and generous approach when considering whether to admit the evidence of AA and BB, given that the interests of children are implicated in the challenged legislation. Generally, all cogent evidence bearing on the issue of a child's best interests should be admitted; however, a flexible approach does not displace the requirements of relevance and materiality: see for example *B. (R.) v. B. (E.)*, 2010 ABCA 229 (Alta. C.A.) at para 21, (2010), 86 R.F.L. (6th) 266 (Alta. C.A.); *Doncaster v. Field*, 2014 NSCA 39 (N.S. C.A.) at paras 47-50, (2014), 373 D.L.R. (4th) 75 (N.S. C.A.).

62 Nonetheless, we are not persuaded that AA's description of a reaction to information claimed to have been conveyed in a GSA ought to be imputed solely to the operation of the impugned legislation. Similarly, the evidence of BB relating to an off-site event does not disclose how the materials were promoted or endorsed by the respondent.

63 In our view, the evidence of AA and BB is not such that, if believed, and when taken with the other evidence adduced, be reasonably expected to have affected the result.

64 The studies sought to be admitted may provide up-to-date information about the best interests of children, as the appellants asserts, but they do not address the effects of GSAs on children, which is a core controversy in these proceedings. Accordingly, the publications fail to meet the requisite *Palmer* relevance criterion.

65 In the alternative, and in any event, the *Palmer* criteria reflect a judicial policy of finality, which militates against applications that would "if allowed, broaden the field of combat": *Public School Boards' Assn. (Alberta) v. Alberta (Attorney General)*, 2000 SCC 2 (S.C.C.) at para 10, [2000] 1 S.C.R. 44 (S.C.C.). The respondent submits that should this Court admit the studies, it would seek to rely on a recently sworn affidavit of its own expert that is highly critical of the methodology used and findings made in these studies. Therefore, coupled with the relevance problem mentioned above, admitting the publication may unduly "broaden the field of combat".

66 Finally, the appellants submit that the violation of constitutionally-protected rights is sufficient to constitute irreparable harm, and infringement of *Charter* rights of children and parents is not compensable by monetary damages. Intervening in support of this position, the Evangelical Fellowship of Canada submits that the chambers judge did not consider the appellants' religious freedom and parental rights as part of the irreparable harm analysis; unless injunctive relief is

granted suspending the operation of the legislation, these rights will continue to be violated by depriving the appellant parents of knowledge and control over their children's education.

67 To these contentions, the respondent submits that simply alleging a *Charter* breach does not entitle a party to injunctive relief; rather, the default position presumes that the challenged law will produce a public good and that harm will result from staying or suspending operation of the law.

68 There is presently case law supporting and opposing the position taken by the appellants: see Robert J Sharpe, *Injunctions and Specific Performance* (Aurora: Canada Law Book, 1992) (loose-leaf updated 2018, revision 27) at §§ 3.1285-87. From this Court, *Whitecourt Roman Catholic Separate School District No. 94 v. Alberta*, 1995 ABCA 260, 30 Alta. L.R. (3d) 225 (Alta. C.A.) [*Whitecourt*], held that harm can arise from the dissolution of school boards and their reconstitution by boards which "do not necessarily share the same religious philosophy"; finding that "[h]arm arising from the effects of changes in policy or philosophy is not fully reversible". In *Whitecourt* at paras 27, 29, this Court accepted in that case that "students and parents whose religious philosophy may be compromised, even on a temporary basis, would all suffer harm of the sort which is not compensable". Distinguishing *Whitecourt* on the premise that no school board in these proceedings will be dissolved or reconstituted does not readily extinguish the force of the proposition that if religious philosophy is compromised, even temporary harm suffered may not be compensable.

69 In our view, however, it is not necessary for this Court to attempt to resolve that which remains unresolved. First, as the Supreme Court of Canada noted, assessing irreparable harm in the second stage of an *RJR-MacDonald* constitutional interim injunction review is exceedingly difficult, and fraught with unknowns and uncertainties. Second, we are of the view that an assessment and determination of irreparable harm, in the circumstances of this case, is not dispositive. Rather, the answer to the first question as to whether the chambers judge erred in declining to grant injunctive relief in respect of the notification limitation provisions, falls to be determined at the balance of convenience stage.

3. Balance of Convenience

70 The appellants submit that the balance of convenience does not favour maintaining privacy for other GSA participants by jeopardizing the safety and emotional well-being of younger or disabled children, and by interfering with full and open communication between parent and child that is essential to the well-being of children. They also contend that the *Alberta Bill of Rights* supersedes, so as to protect the right of parents to be informed about GSAs and GSA-related activities. Additionally, the appellants assert there is no evidence that GSAs would cease to exist if the enforcement of the impugned provisions were temporarily stayed. The appellants rely on *Winnipeg Child & Family Services (Central Area) v. W. (K.L.)*, 2000 SCC 48 (S.C.C.) at para 72, [2000] 2 S.C.R. 519 (S.C.C.) [*KLW*] for the proposition that "[t]he mutual bond of love and support between parents and their children is a crucial one and deserves great respect. Unnecessary

disruptions of this bond by the state have the potential to cause significant trauma to both the parent and the child."

71 The appellants' assertions are broadly cast. *W. (K.L.)* involved the constitutionality of legislation permitting the warrantless apprehension of a child by the state; compare *W. (K.L.)* at para 87: "the removal of a child from parental care by way of apprehension may give rise to great emotional and psychological distress for parents and constitutes a serious intrusion into the family sphere." *W. (K.L.)* is not analogous to this case.

72 Consistent with its position on irreparable harm, the Evangelical Fellowship of Canada submits that the chambers judge did not expressly consider the religious freedom or parental rights implications when assessing the balance of convenience. This intervenor asserts that because the chambers judge was not equipped to scrutinize the theological underpinnings of an individual's religious beliefs, the court ought to have accepted at face value the affiant parents' expressed concerns that exposing their children to certain materials amounted to interference with their religious freedom, citing *Syndicat Northcrest c. Amselem*, 2004 SCC 47 (S.C.C.) at para 50, [2004] 2 S.C.R. 551 (S.C.C.). The Evangelical Fellowship of Canada further asserts that the parental right to shield children from materials inconsistent with their religious faith is protected under s 2(a) of the *Charter*, and therefore should form part of the balance of convenience analysis.

73 In reply, the respondent submits that the chambers judge's conclusions on the balance of convenience were reasonable. Specifically, the evidence on the record shows that LGBTQ+ and other youth would suffer harm if an injunction is granted, noting that LGBTQ+ students face challenges including high rates of school drop-outs and suicides, self-destructive behaviour, violence, and intimidation. Because supportive and safe spaces, such as GSAs, help to protect youth from these harms and have a number of benefits for students, the balance of convenience rightly favours the denial of injunctive relief. Moreover, the respondent states that the *Alberta Bill of Rights* does not pertain to participation in a GSA, since it protects only the right of parents to be informed in relation to "education": s 1(g). In the respondent's view, GSAs or related activities are not "education" within the meaning of the *School Act*, since they are not curricula, courses of study, or educational or instructional programs.

74 The Calgary Sexual Health Centre submits that grave harms would result from an injunction suspending the privacy protections afforded by the notification limitation provisions, noting that many Alberta students will have joined GSAs in reliance on these enhanced privacy protections. It submits these children will suffer significant fear and anxiety arising from the possibility of "being outed" before they are ready. Again, the Calgary Sexual Health Centre contends that these protections have a helpful, not harmful, impact on students, schools, and families, and that without the assurance of such protections, new GSAs could be prevented from forming and existing GSAs could dissolve. Further, this intervenor urges that the balance of convenience analysis must be

informed by the constitutional dimension of the interests of LGBTQ+ youth, including *their* rights to freedom of association, liberty and security of the person, and equality.

75 As the Court explained in *RJR-MacDonald* at 348-49, in an application to stay legislation, the assessment of the balance of convenience imposes a higher burden on a private applicant:

> ... When the nature and declared purpose of legislation is to 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.
>
> [Emphasis added]

76 Accordingly, the appellants bore the burden of rebutting the presumption in this manner. The court must take into account that "[t]he assumption of the public interest in enforcing the law weighs heavily in the balance": *Harper* at para 9; *Toronto (City) v. Ontario (Attorney General)*, 2018 ONCA 761 (Ont. C.A.) at para 21, (2018), 296 A.C.W.S. (3d) 300 (Ont. C.A.).

77 The chambers judge found that the evidence adduced by the respondent and the Calgary Sexual Health Centre showed that the presence of GSAs in schools, and the safe and supportive climate they are intended to provide, result in positive effects for LGBTQ+ and other students. These benefits include providing youth with the ability to come to terms with their sexuality and gender identity, an enhanced ability to share this information with their families, improved school performance, an increased sense of safety and belonging, and enhanced psychological well-being: Decision at paras 35-38. In our view, the chambers judge reasonably concluded that these benefits constitute the presumed good of the legislation.

78 The weighing of the balance of convenience in applications involving *Charter* rights "is always a complex and difficult matter"; courts "will not lightly" render inoperable the legislature's reasoned choices: *Harper* at para 9.

79 We decline to interfere with the chambers judge's balancing because we discern no error of law, and the decision was not unreasonable, or manifestly unjust.

80 It follows that the answer to the first question, did the chambers judge err in declining to grant injunctive relief in respect of s 16.1(1)(a) and ss 16.1(6), 45.1(4)(c)(i), and 50.1(4) of the *School Act*, is: no.

B. Did the chambers judge err in declining to grant injunctive relief to prevent the respondent from taking any action to terminate funding for, or accreditation of, appellant schools for failure to attest their compliance with the School Act, specifically s 45.1?

81 The appellants also appeal the chambers judge's dismissal of their application for injunctive relief to prevent the respondent from taking any action to discontinue their funding or accreditation by reason of their non-compliance with s 45.1 of the *School Act*, see para 12 *supra.* In essence, the appellant schools seek an exemption from, as opposed to the suspension of, the operation of s 45.1 of the *Act* and the requirement to attest compliance with s 45.1 in their annual declaration to the Minister.

1. Serious question to be tried

82 The appellants submit that unless they attest to their compliance in the annual declaration, then funding and accreditation of their schools are both at risk. The boards and schools state that they cannot make the required attestation as it is inconsistent with their religious beliefs, and compliance with s 45.1 would require them to betray their relationship of trust with parents, which is grounded in shared religious values. Accordingly, the appellants submit that the chambers judge erred in concluding that there is no serious question to be tried in relation to s 45.1 of the *School Act*.

83 The respondent submits that the appellants' objections under s 45.1 are subsumed by their challenge to the constitutionality of s 16.1 of the *School Act*; therefore, if it is constitutional to require the appellant schools to comply with the underlying requirements of s 16.1, then it is necessarily constitutional to require them to attest to such compliance.

84 While we agree that the issues raised in relation to s 16.1 and the notification limitation provisions of the *School Act*, on the one hand, and s 45.1 and the attestation requirement, on the other, are substantively similar, for the reasons mentioned above we are satisfied that the appellants' claims are not frivolous or vexatious. Accordingly, for the limited purpose of an appeal involving interim injunctive relief, s 45.1 raises a serious question that is not frivolous or vexatious. In so deciding, we do not engage the merits of the constitutional validity challenge.

2. Irreparable Harm

85 The appellants urge that being required to attest in their annual declaration and otherwise comply with the impugned legislation forces them to contravene their fundamental beliefs. Further, they state that the consequences of termination of governmental funding, suspension of accreditation, or both would harm their ability to serve the appellants' student populations.

86 The Evangelical Fellowship of Canada states that the *Charter* violations identified by the appellants have serious religious and spiritual implications, which would result in irreparable harm to the appellants. Therefore, this intervenor contends that granting an interim injunction affecting a minority of faith-based schools in Alberta would ensure that the appellants' *Charter* rights are protected pending the outcome of the constitutional challenge, while not materially interfering with the state's objectives.

87 In contrast, the respondent takes the position that the chambers judge reasonably found that the appellants had not established irreparable harm; moreover, case law supports the public benefit objectives of the legislation and the perceived or predicted harms claimed have been greatly overstated. The respondent maintains that there is no harm in requiring schools to teach students, as part of the curriculum, about other religions or about same-sex relationships. To the contrary, it contends that the chambers judge reasonably found that having to respect the rights of LGBTQ+ students in *all* Alberta schools does not constitute irreparable harm to the appellants.

a. New Evidence

88 The appellants applied to admit new evidence comprising:

(a) email correspondence since August 2018 between Alberta Education and the appellant schools in relation to consequences for non-compliance with s 45.1 of the *School Act*, as well as providing feedback to various appellant schools on the policies they have submitted to Alberta Education to comply with the requirements of s 45.1; and

(b) affidavits sworn on November 21, 2018 by Keith Penner, the principal of the appellant Living Waters Christian Academy and by Michelle Gusdal, office administrator for the appellants' counsel, with the following exhibits attached:

i) several Ministerial Orders (#038/2018, #040/2018, #041/2018, #043/2018, #052/2018, #058/2018) dated November 1, 2018 and issued pursuant to s 45.1(8) of the *School Act*, establishing a policy and code of conduct compliant with s 45.1 for six of the appellant schools; and

ii) email correspondence from the Minister of Education dated November 14, 2018 to representatives of the six schools that accompanied the Ministerial Orders, which set out the consequences for non-compliance therewith.

89 The appellants assert that this evidence is new, credible, reliable and relevant, bearing directly on whether appellant schools ought to be exempted from the operation of s 45.1 of the *School Act* pending determination of the constitutional question. That is, the appellants state the evidence, if believed, and when taken with the other evidence adduced, could reasonably be expected to have affected the outcome of the Decision.

90 Specifically, the correspondence accompanying the Ministerial Orders states that "[c]onsequences for failing to comply with the Ministerial Order in its entirety will include funding being withheld for the 2019-2020 school year". In the appellants' view, this now makes clear that which was not clear before the chambers judge: the Minister of Education will terminate funding for the appellants' schools and boards, unless they comply with and adopt the Minister's policies.

91 The respondent points out that since the appellants have not shown that *compliance* with s 45.1 of the *School Act* will cause irreparable harm, and termination of funding is simply the natural and predictable consequence of the appellants' failure to comply with the *School Act*, in fact, the evidence does not meet the *Palmer* criteria.

92 In our view, the freshly-communicated consequences of non-compliance are relevant to "whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm": *Metropolitan Stores* at 128.

93 Further, we note that the chambers judge found that irreparable harm had not been established because "there [was] no evidence to suggest that the schools will be defunded or de-accredited for the upcoming school year": Decision at 51. We are satisfied that the affidavits of Keith Penner and Michelle Gusdal dated November 21, 2018, provide evidence, which post-dates the Decision by several months, to suggest that "the schools will be defunded or de-accredited" for the 2019-2020 school year.

94 To that extent, the Ministerial Orders dated November 1, 2018 and the accompanying correspondence from the Minister must be construed as reflecting what amounts to a new development of which the chambers judge could not have been aware.

95 The pivotal issue is whether the new affidavit evidence is such that if believed it could reasonably, when taken with the other evidence adduced, be expected to have affected the result.

96 Funding for the 2019-2020 school year is to be in place by August 31, 2019. The Minister's stated intention to withhold funding is cogent evidence that there is now a real and non-speculative risk that at least some appellant schools will lose funding: see *Bowden Institution v. Khadr*, 2015 ABCA 159 (Alta. C.A.) at paras 30-32, (2015), 600 A.R. 214 (Alta. C.A.).

97 At the irreparable harm stage, it is the nature of the harm suffered rather than its magnitude, that is to be assessed: *RJR-MacDonald* at 341. "Harm in the form of administrative disruption and inconvenience may not be recoverable even though quantifiable, because the Crown may not be liable for its unconstitutional acts. That includes re-negotiation of collective agreements, re-assignment of staff, travelling time of staff, and changes to school programs": *Whitecourt* at para 30. If the Minister terminates funding, similar problems may be suffered by the appellant schools.

98 For the purposes of this aspect of the appeal, once again it is not essential to categorically determine irreparable harm for the reasons previously given at para 69 *supra*. Moreover, if the appellants' focus is on harm to school children, it is preferable to consider harm *to others* when the balance of convenience is being determined, see para 50 *supra.*

99 It is preferable to determine this aspect of the appeal upon the balance of convenience; that is, at the third stage of the *RJR-MacDonald* test, with added constitutional factors.

3. Balance of convenience

100 In the appellants' view, the balance of convenience favours, at minimum, an exemption of the appellant schools from the operation of s 45.1, especially with the 2018-2019 school year now underway. Otherwise, they contend, the interests of children, families, and staff of affected appellant schools will be seriously compromised.

101 The Evangelical Fellowship of Canada observes that the appellant schools do not propose to bully, intimidate, harass, or otherwise malign students for their sexual orientation or gender identity. Accordingly, it submits, the chambers judge was required to weigh the harm caused to the appellants or the state, rather than to the students of the school.

102 The respondent maintains that granting any form of injunctive relief would lead to harm to LGBTQ+ students at the appellant schools, as they would no longer be permitted to form GSAs. It relies on evidence that GSAs have various benefits for LGBTQ+ students, and argues that the appellant schools have not demonstrated that the balance of convenience weighs against the presumed public good that the impugned provisions provide.

103 The Calgary Sexual Health Centre suggests that the heightened sense of safety and well-being fostered by GSAs extends to the school environment more broadly. It states that all students, not merely those participating in a GSA, benefit from the operation of the impugned provisions. Further, it argues that exempting the appellant schools from compliance with the impugned provisions would provide those schools with enhanced powers to interfere with the freedom of association of students.

104 The appellants present new, compelling evidence that if injunctive relief is not granted to prevent the respondent from terminating funding pending a determination of the constitutional validity of the legislation, they may have to close their school doors. This evidence was not before the chambers judge. The appellant schools and boards serve a not insignificant population of students. Termination of funding would doubtless negatively impact the schools' operations. Thus, in our view, there is a public interest in the continued operation of the schools.

105 We are unable to accept the submission of the Evangelical Fellowship of Canada to the effect that that the harm to students of the schools is not relevant to the balance of convenience analysis. The respondent correctly points out that "the concept of inconvenience should be widely construed in *Charter* cases," and at the balance of convenience stage the court may properly assess both the harms to the parties and "any harm not directly suffered by a party to the application": *RJR-MacDonald* at 344-46.

106 It is worth repeating that in cases involving constitutional challenges to properly enacted legislation, the legislation is *presumed* to produce a public good.

> ... The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed: ***Harper*** at para 9.

107 As between suspension cases and exemption cases, principles governing the granting of interlocutory injunctive relief are generally alike: *Metropolitan Stores* at 140. It is clear that the presumption the impugned legislation is in the public interest applies equally when the applicant seeks an exemption, as opposed to a stay of its operation. But, because the public interest is less likely to be detrimentally affected by an exemption, the "public interest considerations will carry less weight in exemption cases than in suspension cases": *RJR-MacDonald* at 348; *Baier v. Alberta*, 2006 SCC 38 (S.C.C.) at paras 16(c)-17, [2006] 2 S.C.R. 311 (S.C.C.) [*Baier*].

108 However, as was aptly said in *RJR-MacDonald* at 351-352:

> 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 democratically-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]

109 Here, at the third stage of the test for injunctive relief on a constitutional question, the public interest in the continued operation of the appellant schools must be balanced against the purpose of the legislation from which the appellants seek to be exempt, and the assumed benefit to the public interest arising from the legislation's continued application: *RJR-MacDonald* at 350-351. The legislation has been enacted to protect the privacy interests of all children in Alberta schools, including all children in the appellant schools, by allowing for the formation and operation of GSAs

in their schools. The legislation supporting GSAs is aimed at ensuring that all schools provide a safe and open space for all students, including LGBTQ+ children who may be especially vulnerable.

110 Attendance at a GSA is not compulsory. Attendance is voluntary. Nothing prevents an individual student from disclosing and discussing their attendance with their parents, if and when they so choose. Nothing prevents a parent from engaging in an open dialogue about GSAs in their child's school. Nor is a parent precluded from inquiring as to the existence of a GSA, who acts as the student liaison and whether the GSA participates in activities off school property.

111 In the meantime, the legislation puts the choice of disclosure of a child's attendance at a voluntary GSA in the child's hands, not in the control of their parents, their school or its school board. The public good presumed in protecting the safety and privacy interests of these individual children, as well as promoting an inclusive school environment generally, is extremely high. In our view, even a temporary exemption for non-compliant appellant schools does not constitute a public interest benefit that outweighs the presumed good from the continued enforcement of s 45.1 of the *School Act* in all Alberta schools: *Baier* at paras 17-18. We are of the view that the balance of convenience militates in favour of maintaining the legislation: this is not a clear case and granting injunctive relief "is susceptible temporarily to frustrate the pursuit of the common good."

112 The evidence of the good achieved by GSAs in protecting the safety and privacy interests of individual children is more compelling than the new evidence of schools' termination of funding for non-compliance with the legislation. In this instance, the balance of convenience tips in favour of upholding the legislation pending a full hearing on the merits of its constitutionality, not granting an interim injunction.

113 It follows that the answer to the second question, did the chambers judge err in declining to grant injunctive relief to prevent the respondent from taking any action to terminate funding for, or accreditation of, appellant schools for failure to attest their compliance with the *School Act*, specifically s 45.1, is: no.

V. Disposition

114 The appeals from the denial of the interlocutory injunctions are dismissed. It is of course axiomatic that the dismissal of these appeals does not in principle preclude the court when dealing with these matters on their merits from granting substantive relief to the appellants. As referenced in paragraphs 44 and 84, an application for an interim injunction does not and should not address the merits of the case: see *Talbot v. Pan Ocean Oil Corp.* (1977), 5 A.R. 361 (Alta. C.A.) at para 4, 3 (1977), 3 Alta. L.R. (2d) 354 (Alta. C.A.).

115 The constitutional validity question is to be expedited; the parties shall seek the further direction of Miller, J, Judicial District of Medicine Hat, forthwith.

J.D. Bruce McDonald J.A. **(dissenting in part):**

116 I agree with paragraphs 1 through 109 and the first three sentences only of paragraph 110 of my colleagues' Memorandum of Judgment. However, and for the reasons that follow, I would allow the appeal from the dismissal of the second application and would enjoin the respondent from withholding or reducing from the current levels, the funding for the schools in question for the academic year 2019 - 2020 and further to enjoin the respondent from de-accrediting these same schools (the schools in question) until further order of this Court. [1]

117 In dismissing the second application for an interim injunction, namely for an order to prohibit the Minister of Education from defunding or de-accrediting the schools in question for non-compliance with the provisions of section 45.1 of the *School Act*, the chambers judge seems to have relied upon representations of respondent's counsel when she wrote "...there is no immediate risk of losing funding or accreditation as the *Act* itself provides multiple steps for dealing with non-compliance, including investigation, enquiries, and the imposition of a policy consistent with the *Act*.": Decision at para 47.

118 Similarly, in holding that there was no irreparable harm demonstrated, the chambers judge observed "There is no evidence which demonstrates a real, concrete and unavoidable risk that the schools will lose funding or accreditation ... This suggests that the Minister has considered options short of defunding or de-accreditation to address issues of non-compliance": Decision at para 51.

119 Similarly, in considering the balance of convenience, the chambers judge wrote at para 53:

> The public interest in promoting basic equality for staff and students of institutions supported by public funding would not be served by staying the provisions of s. 45.1 or otherwise ratifying the schools' decision not to attest **on the basis of an unproven risk to funding or accreditation**. As such the balance of convenience favours the respondent.
>
> [emphasis added]

120 To my mind, in the face of these statements of the chambers judge, the respondent's subsequent conduct in issuing the various Ministerial Orders referred to in paragraph 88 above is troubling.

121 The chambers judge's decision to dismiss the two applications was issued on June 27, 2018. The appellants' appealed in a timely fashion and filed their factum on September 17, 2018. The respondent then filed its factum on October 15, 2018. The date for hearing the appeals had previously been set for Monday, December 3, 2018.

122 On November 14, 2018 (after the factums had been filed and less than three weeks before the appeals were to be argued) the Minister informed the schools in question of the Ministerial Orders and then went on to issue this warning:

> Consequences for failing to comply with the Ministerial Order in its entirety will include funding being withheld for the 2019 - 2020 school year.

123 At the time the applications were argued before the chambers judge in June 2018, the focus had been upon the upcoming academic school year, namely 2018 - 2019.

124 Realistically, it does not appear likely that this complex constitutional challenge will be determined on its merits for many months and accordingly the parties will find themselves, come June 2019, in the same position that they had been when the applications for the interim injunctions were argued before the chambers judge last June. Except now the respondent has made it abundantly clear that the schools in question will lose their funding for the upcoming academic year should they not adhere to the Ministerial Order that is applicable to each school.

125 Given the timing of the Minister's advices to the subject schools, it is not surprising that their factums did not specifically deal with the issue of irreparable harm in the context of these recent developments.

126 In my view, the reasoning of this Court in *Whitecourt Roman Catholic Separate School District No. 94 v. Alberta* [1995 CarswellAlta 195 (Alta. C.A.)] is germane. That decision involved an appeal from the refusal to grant an interlocutory injunction. The appellants, the Board of Trustees of Whitecourt Roman Catholic Separate School District No. 44, had sought an interim injunction to exempt their separate school districts from the implementation of five Orders in Council until the trial of the matter was concluded. They contended that the enactments were unconstitutional and that they would be irreparably harmed if compelled to comply on an interim basis.

127 The central issue in that appeal was whether the chambers judge had erred in finding that any harm from dissolving the school boards was completely curable since the boards could be re-established if the appellants succeeded at trial. In the opinion of the chambers judge the mere possibility of a change of policy did not constitute the level of irreparable harm required by the tripartite test.

128 On appeal the appellants contended that the mere fact that the school boards would be dissolved constituted harm simply because others would make decisions in their stead and may not share a community of interest.

129 Addressing the issue of irreparable harm, this Court stated in *Whitecourt* at para 29 in part:

> In our view, evidence of actual harm is unnecessary where the alleged harm relates to the abolition of the entity alleging it, and the substitution of another administrative body.

This Court then went on to deal with the issue of balance of convenience which had not been considered by the chambers judge in light of his ruling of no irreparable harm.

130 This Court further noted at para 35 that this aspect of the test involves a weighing of the harm that will be suffered by the parties from the granting or refusal of the injunction. The key factor in constitutional cases is the consideration of the public interest.

131 This Court then went on to state at para 40 of *Whitecourt*:

> Both the Appellants and the Respondent represent a public interest in the outcome of this application. Though the public interest in allowing the Government to implement its legislative commitments is of considerable import, so too is the public interest in avoiding a costly and potentially invalid disruption of part of the educational system.

132 Similarly, it is in the public interest that the schools in question not be closed pending a determination of the constitutionality of the impugned legislation. I acknowledge that any such closure would not be as a result of complying with the legislation, but rather from not complying with it. I am prepared to find that there will be irreparable harm done to the schools in question if they are forced to comply with the legislation that impinges their religious beliefs in order to keep open pending a determination of its constitutionality. I am prepared to find that this irreparable harm tips the balance of convenience in their favour only in so far as to allow a limited exemption from the legislation. The public interest, in my view, militates in favour of not requiring the schools in question to violate their religious beliefs, pending the outcome of the challenge to the constitutionality of the provisions at issue.

133 In this instance, the respondent has not yet acted upon the Ministerial Orders and therefore to grant an interim injunction which is limited only to the schools in question would not disrupt the *status quo*.

134 A broadly similar result was rendered in the recent British Columbia Supreme Court decision in *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2018 BCSC 2084 (B.C. S.C.). The case involved a constitutional challenge to certain provisions of the *Medicare Protection Act (BC)*. In *Cambie* the chambers judge granted the alternate relief sought by issuing an interim injunction enjoining enforcement by the provincial government of sections 17, 18 and 45 of the *Medicare Protection Act (BC)* until June 1, 2019 or further order of the Court.

135 In the course of reaching his conclusion the chambers judge stated in part:

> The Plaintiffs have established that the balance of convenience tips on their favour. This is so despite the Court's conclusion that the *MPA* Amendments are directed to the public good and serve a valid public purpose.

136 Accordingly, I would have allowed the second appeal to the limited extent to order as follows:

> (a) the respondent is hereby enjoined from withholding or reducing from the current levels, the funding for the schools in question for the academic year 2019-2020; and
>
> (b) the respondent is hereby enjoined from de-accrediting the schools in question

until further Order of this Court. This limited injunction would not suspend any of the impugned legislation and would only apply to the schools in question and in the limited manner as set forth herein.

Appeal dismissed.

Footnotes

1 Living Waters Christian Academy, Universal Educational Institute of Canada, St. Matthew Evangelical Lutheran Church of Stony Plain Alberta, Ponoka Christian School Society, Lighthouse Christian School Society and Koinonia Christian School - Red Deer Society.

2005 CAF 9, 2005 FCA 9
Federal Court of Appeal

Sander Holdings Ltd. v. Canada (Attorney General)

2005 CarswellNat 118, 2005 CarswellNat 4525, 2005 CAF 9, 2005 FCA 9, [2005] F.C.J. No. 31, 136 A.C.W.S. (3d) 787, 329 N.R. 214

Sander Holdings Ltd., Donald Patenaude and Mathew Nagyl on their own behalf and on behalf of all persons who have been Producers, shipping grain through Canadian Wheat Board, as defined under The Canadian Wheat Board Act and who reside or have resided in Canada between 1994 and the date of the decision, Appellants and The Attorney General of Canada representing The Minister of Agriculture of Canada, Respondent

Desjardins J.A., Evans J.A., Pelletier J.A.

Heard: November 8, 2004
Judgment: January 14, 2005
Docket: A-120-04

Proceedings: reversing in part *Sander Holdings Ltd. v. Canada (Attorney General)* (2004), 2004 FC 188, 247 F.T.R. 123, 2004 CF 188, 2004 CarswellNat 1702, 2004 CarswellNat 321 (F.C.)

Counsel: Mr. Terry Zakreski, Ms Cathleen Edwards, for Appellants
Mr. Brian Hay, for Respondent

Subject: Civil Practice and Procedure; Corporate and Commercial; Public

APPEAL by farmer of judgment reported at *Sander Holdings Ltd. v. Canada (Attorney General)* (2004), 2004 FC 188, 247 F.T.R. 123, 2004 CF 188, 2004 CarswellNat 1702, 2004 CarswellNat 321 (F.C.) dismissing action for declaration of invalidity of income stabilization policies.

***Desjardins J.A.*:**

1 The appellants appeal a decision of a motions judge (von Finckenstein J.) who granted the respondent's motion for summary judgment on the ground that the appellants' statement of claim failed to disclose a reasonable cause of action, or a genuine issue for trial or judicial review. The motions judge's reasons for judgment are reported at (2004), 247 F.T.R. 123 (F.C.) .

2 The appellants are agricultural producers. They brought an action on their own behalf and on behalf of all other producers who have shipped grain through the Canadian Wheat Board. They are proceeding by way of a class action under rules 299.1 *et seq*. of the *Federal Court Rules*, 1998, SOR/98-106. Certification has been sought, but has not been obtained yet.

3 Each appellant is a participant in an agricultural income stabilization program entitled "the Federal/Provincial Agreement Establishing the Net Income Stabilization Account Program" (the "Agreement", the "NISA Program", or the "Program"), established under the authority of the *Farm Income Protection Act*, S.C. 1991, c. 22 (the "Act"). The NISA Program has now been replaced by the "Canadian Agriculture Income Stabilization Program" ("CAIS"), effective April 1, 2003. The appellants' claim relates to contributions made prior to the coming into existence of CAIS.

4 The objective of the Program is to stabilize the incomes of primary agricultural producers by establishing individual accounts for each participant which are meant to be used as a saving vehicle in good years so that funds are available to producers in lean years.

5 The Program operates by allowing a producer to make both matchable and non-matchable deposits to the Program. A producer can deposit up to three percent (3%) of his or her eligible net sales and receive matching contributions cost-shared between the federal and participating provincial governments. A producer can also make additional deposits of up to twenty percent (20%) of his or her eligible net sales, although these deposits are not matched by the governments. All deposits earn a three percent (3%) interest bonus.

6 While participation in the Program is voluntary, enrollment is high. In 2002, approximately 157,000 farmers were participating in the NISA Program.

I. Introduction

7 According to the appellants, in 1995, after the repeal of the *Western Grain Transportation Act*, R.S.C. 1985, c. W-8, which had for a number of years subsidized the transportation costs from elevator to port through the "CROW" rate, the value of grain at the elevators decreased as the transportation costs of the elevator to get the grain to port increased. The repeal of that statute, they say, had important repercussions on the grain trade.

8 The appellants complain that following what they allege were changes to the Point of Sales Guidelines in 1994, they are now forced by the NISA Administration to deduct transportation and elevation costs from their gross sales when calculating their eligible commodity sales.

9 Each year, participants in the NISA Program are asked to complete a form which details income and expenses in various categories. The forms must be completed in accordance with a handbook entitled "Individual Instrument Guide". These instructions include guidelines, referred

to as Point of Sales Guidelines (the "Guidelines"), designed to assist participants in determining their net sales for the purpose of the NISA Program.

10 Until 1994, the Point of Sales Guidelines read as follows:

> The point of sale occurs when one of the following point is met:
>
> • you no longer have full ownership of the commodity; or
>
> • you no longer have full managerial control of the commodity to make decisions on transportation, cleaning, packaging, marking etc.; or
>
> • you are no longer fully responsible for the loss of the commodity; or
>
> • your sales invoice does not clearly show the actual sale value of the commodity.

11 In October 1994, the NISA Committee recommended that the Point of Sales Guidelines be changed to read as follows:

> Participants may report for NISA the gross revenues of qualifying commodities and the applicable expenses recognized in the calculation of farming income for income tax purposes providing:
>
> • The commodities were produced on their farm;
>
> • They can demonstrate ownership of the product through identity preservation and bear full direct ownership of the commodity; and
>
> • They have separate billing or accounting transactions clearly showing the commodity sales value and any deductions from the commodity sales value.

12 The effect of the change in the Guidelines appears to be in the treatment of the figures which, in the form, come under the heading "Miscellaneous Deductions". These deductions may include expenses such as freight and elevation costs, terminal cleaning and administration fees (see exhibit A of the affidavit of Mr. Barry Jolly, income tax consultant and the NISA preparer for the appellants, A.B. p. 100 at 107). Prior to the change in the Guidelines those deductions were not applied to eligible net sales. The alleged change has the effect of reducing eligible net sales by the amount of the miscellaneous deductions. This reduction, in turn, affects the contributions the agricultural producers are entitled to receive.

13 This result, the appellants say, creates an inequity because identical farming operations will attract varying government NISA contributions depending upon proximity to port. The Guidelines are therefore a hardship to producers, such as those located in Saskatchewan, Alberta and Manitoba, who are located at great distances from port.

14 In an earlier case which reached the Court, *Boyko v. Canada (Attorney General)* (2000), 191 F.T.R. 6 (Fed. T.D.) ("*Boyko v. Canada (Attorney General)*"), a number of producers completed their 1996 annual application package for the NISA Program but did not include the cost of grain transportation to port as part of their revenue. They, however, included that amount in their 1997 application. As a result of an audit conducted by the NISA Administration, their accounts were reassessed and their eligible net sales for the year 1997 were reduced.

15 The producers asked the Appeals Sub-Committee to reverse the decision of the NISA Administration, which had reduced their eligible net sales. The Appeals Sub-Committee found that the Guidelines had been correctly applied by the NISA Administration. It recommended that the producers' appeals be rejected.

16 The producers sought review of that decision before Rouleau J. of the Federal Court, Trial Division (as it then was), on the ground that the Appeals Sub-Committee erred in fact and in law in its interpretation of the Agreement as it related to deducting freight and elevator expenses in determining eligible net sales.

17 Rouleau J. held, at para. 13 of his reasons, that administrative bodies frequently develop a coherent set of guidelines to assist in the exercise of their discretionary statutory powers. He stated that policies allowed a public body to develop guidelines which bridged the gap between a general discretionary statutory power and its specific application to a particular case. The content of the policy had, however, to be within the scope of the power bestowed by the enabling legislation. Moreover, it could not be formulated or applied in bad faith or with regard to irrelevant considerations or purposes extraneous to the intent of the legislation.

18 He was satisfied that the 1994 Guidelines met the above tests. There was, in his view (see para. 15 of his reasons), no evidence of bad faith or reliance upon irrelevant or extraneous considerations in the development of the Guidelines. He stated that, although the application before him was couched in terms of a direct attack on the recommendations of the Appeal Sub-Committee, the real essence of the applicants' complaint was with the policy itself. The applicants, he wrote, were taking exception to the fact that the phrase "eligible net sales" did not include grain transportation costs to port and were arguing that the Guidelines in some way constituted an unlawful amendment to the Agreement. He noted that all the evidence before him clearly established that "eligible net sales" had never, since the inception of the Program, included grain transportation cost to port nor had the Agreement ever been formally amended to reflect any change of that nature.

19 The producers appealed to this Court, which took the view that the producers were, for all practical purposes, seeking a declaration that the Point of Sales Guidelines adopted in 1994 by NISA were *ultra vires* the Act. Décary J.A., for the Court, held that the matter was not raised at trial, *Boyko v. Canada (Attorney General)*, 2001 FCA 22 (Fed. C.A.). He said, starting at para. 2:

> This was not the issue raised in the Trial Division. The issue, there, which was raised through a judicial review proceeding, was whether the Appeals Sub-Committee of the NISA Committee had erred in finding that the Point of Sale Guidelines had been properly applied by the NISA Administration.
>
> Assuming, for the sake of discussion, that the Appeals Sub-Committee has jurisdiction to decide whether guidelines are ultra vires, the issue was not put to it and we are in no position to rule on it.
>
> While there may be some merit in the views expressed by counsel, the proper avenue, it seems to us, -- apart, of course, from attempting to reach a consensus through the administrative process already in place -- would be to start afresh with a new proceeding seeking the proper remedy from the proper authority (my emphasis)

20 Hence the present class action.

21 The respondent moved for summary judgment.

II. The Decision Below

22 Von Finckenstein J. granted the Motion for summary judgment. He stated that the facts regarding the change were not in dispute (para. 20 and 22 of his reasons). He agreed with Rouleau J. in *Boyko* , that the process by which the change was made to the Guidelines was unexceptionable and that the 1994 Guidelines' treatment of freight and storage costs did not amount to an amendment of the Agreement (para. 25 of his reasons). He treated Rouleau J's decision as a final determination. He never addressed his mind to Décary J.A.'s reasons for judgment, where, at the end, the Court invited the parties to "start afresh with a new proceeding seeking the proper remedy from the proper authority". Von Finckenstein J. mentioned the citation to the decision of the Federal Court of Appeal, but no more.

23 Von Finckenstein J. further held that the Guidelines were not legal norms within the meaning of *Pereira v. Canada (Minister of Citizenship & Immigration)* (1994), 86 F.T.R. 43 (Fed. T.D.) ("*Pereira* ") and, for that reason, they could not be *ultra vires* the Act or its Regulations, neither could they be contrary to the Agreement (para. 26 of his reasons). He concluded that there was no genuine issue for trial or judicial review and that the appellants' further contentions that a cause of action existed based on negligence or on a breach of fiduciary duty were unfounded.

III. Relevant Statutory Provisions

24 The *Farm Income Protection Act* defines the words "agricultural product" thus:

2. In this Act,	2. Les définitions qui suivent s'appliquent à la présente loi.

...	...
"agricultural product" means	« produit agricole » Tout produit végétal ou animal -- ou d'origine végétale ou animale --, y compris les aliments et boissons qui en proviennent en tout ou en partie.
(a) an animal, a plant or an animal or plant product, or (b) a product, including any food or drink, that is wholly or partly derived from an animal or a plant;	
...	...

It provides, in section 4, that the Governor in Council may authorize the Minister of Agriculture and Agri-Food to enter into an agreement with one or more provinces to provide for the establishment of, *inter alia*, a net income stabilization account program.

25 Paragraph 5(1)(*c*) of the Act stipulates that an agreement shall provide:

(*c*) The manner of determining the income of producers and the manner of determining the value of the eligible agricultural products produced by them.	*c*) le mode de détermination du revenu des producteurs et de la valeur de leurs produits agricoles admissibles.

26 Paragraph 5(3)(*a*) of the Act provides for the establishment of one or more national committees representing the parties to the Agreement and the producers, and such technical experts as may be considered appropriate. Paragraph 8(1)(*a*) declares that an agreement that provides for the establishment of a net income stabilization account program shall, in addition, provide for:

(*a*) the eligible net sales, eligible production costs, gross margin and maximum eligible net sales, or the method of determining the sales, costs and margin that enable a producer to participate in the program.	*a*) le mode de détermination et le niveau des coûts de production et des marges brutes à partir duquel un producteur est admissible, ainsi que, dans le cas des ventes nettes, le seuil et le plafond;

27 The Act also provides, in section 15, for the establishment of a net income stabilization account.

IV. The Agreement

28 Under the Agreement which came into force in 1991, Canada is responsible for the administration of the NISA Program. The Agreement contemplates the establishment of the National NISA Committee (the "Committee") as advisory to Canada. The Committee is composed

of representatives from the federal and provincial governments and producers. Article 6.8 of the Agreement provides that:

> This agreement between Canada and any one Province shall take effect on the date that the signatories for that Province add their signatures to that of the Minister ...

29 Under Article 2 of Schedule C to the Agreement, the Committee is to have a minimum of six and a maximum of ten producers appointed by the Minister to represent commodity groups and regions of Canada. Each participating province is entitled to name one member to the Committee, while Canada is entitled to name four members to the Committee. Canada names the chairperson of the Committee who is responsible for referring matters of significant financial impact to the parties to the Agreement for approval. Article 2.5 of Schedule C to the Agreement stipulates the following:

> Canada shall name the chairperson of the Committee from those individuals appointed above. The chairperson shall be responsible to refer matters of significant financial impact to the parties to this Agreement for approval. (my emphasis)

30 The Agreement contains a special amendment clause. Article 6.9 provides that an amendment must be approved by Canada and at least two-thirds of the participating provinces, where these provinces represent at least 50% of the eligible net sales reported to the Program in the previous year. The wording of the amendment clause is the following:

> Except as provided in Section 5 of Schedule B, this Agreement may be amended from time to time by the agreement of Canada and at least two-thirds of the participating Provinces where these Provinces represent at least fifty (50) percent of the eligible net sales reported to the Program in the previous year. A Province which does not wish to comply with an amendment respecting significant financial implications, may elect, by written notice to Canada, to withdraw from the Agreement as of the end of the next calendar year and the amendments will not apply to that Province for this period.

31 Schedule B of the Agreement contains the following provisions:

> 1. All agricultural products are eligible for Program purposes.
>
> 2. Initially, only the revenue derived from the sale of the following commodities or classes of commodities produced in Canada is eligible for contribution to the Program:
>
> 2.1 All cereal grains.
>
> 2.2 All oilseed grains.
>
> . . . . .

V. The Contention of the Parties

32 The appellants claim that they are concerned, not with the policy behind the 1994 Guidelines, as held by Rouleau J., but with the fact that changes were made to the Guidelines in 1994. They contend that these changes constitute an amendment to the Agreement and the Act, and were made without regard to the amending formula provided in the Agreement.

33 Contrary to von Finckenstein J.'s statement that the facts regarding the change made to the Guidelines in 1994 were not in dispute, the appellants claim that there is conflicting evidence concerning the changes and the circumstances surrounding the adoption of the 1994 Guidelines.

34 They further explain that, according to a letter written by Mr. Nawolsky of the NISA administration, dated December 23, 1998, the Guidelines were adopted following a vote by Program signatories and that the chairperson of the Committee, in accordance with section 2.5 of Schedule C of the NISA Federal/Provincial Agreement, properly recognized that the Guidelines were a matter of significant financial impact.

35 They add that, once a matter of significant financial impact has been identified, the amendment procedure of article 6.9 of the Agreement is engaged since the requisite majority is necessary to adopt a change that would impact upon the funding requirements of the participatory authorities to the Program.

36 They further add that, in the case at bar, the proper procedure was not followed. They say that when a vote was taken (which body took the vote remains unclear), Canada, Manitoba, Ontario, Quebec, Nova Scotia and Newfoundland supported the motion to amend. British Columbia, Alberta, Saskatchewan, Prince Edward Island and New Brunswick did not support the motion. A majority of two-thirds of the participating provinces, they say, is therefore lacking. They add that Quebec participated in the vote but was not entitled to, because article 6.8 of the Agreement states that the agreement takes effect between Canada and any province that adds its signature to that of the Minister. Quebec, they say, did not add its signature.

37 The respondent, on the other hand, submits that the elimination of the "CROW" rate did not alter or directly affect the NISA Program, which is an income stabilization program and not a grain transportation program. He says that, from the inception of the Program to the time that this case was filed, the meaning of "eligible net sales" has never included grain transportation costs to port, nor has the Agreement ever been formally amended to reflect any change of that nature.

38 The respondent further submits that the appellants have no legal cause of action considering that guidelines or policy directives, "whether made pursuant to regulatory authority or general administrative capacity, are no more than directions and are unenforceable by members of the public" (*Mohammad v. Canada (Minister of Employment & Immigration)*), (1988), [1989] 2 F.C.

363 (Fed. C.A.) at para. 14). The respondent adds that the motions judge correctly decided that the Guidelines were not part of the Agreement, but existed merely to facilitate its administration.

39 The respondent claims that the appellants are really seeking a Court order that governments ought to have changed their policy, which would have resulted in governments paying more money to farmers for income support than the governments had intended under the NISA Program.

VI. Analysis

40 There are three issues in this appeal:

(i) whether the Guidelines are *ultra vires* the Act and the Agreement;

(ii) whether there is a reasonable cause of action based on negligence; and

(iii) whether the respondents owe a fiduciary duty to the NISA participants.

(i) The validity of the Guidelines

41 On this key point, the issues are whether there was a change to the Guidelines in 1994 and whether, if a change occurred, that change amended the Agreement, in which case the proper procedure, it would appear, was not followed.

(a) Did a change to the Guidelines occur?

42 The appellants claim that, whatever their technical legal status, the Guidelines were used by the NISA Administration to determine producers' eligible net sales and, hence, their contribution base. They argue that, since the Agreement only requires producers to deduct "agricultural input" (seeds, feed, for example), from the value of the commodity (see article 2.3 of the Agreement), in order to determine their eligible net sales on which their contribution was based, it was inconsistent with the Agreement for the NISA Administration to require the producers to deduct from the value of the commodity the cost of post-sale freight and storage.

43 Whether the Guidelines were inconsistent with the Agreement is not readily apparent from the record. There appears to be a conflict in the evidence as to whether freight and elevation costs have always been deducted from the calculation of the value of net sales or whether they only occurred after the adoption of the 1994 Guidelines. It is a reasonable, but not necessarily correct, inference from the 1998 instructions addressed to the producers (see exhibit I of the affidavit of Barry Jolly, A.B. p. 100 at 103 and 128 and 129) that, whereas post-sale freight and storage charges had previously been treated as expenses for the purpose of calculating producers' income, they were not taken off net sales so as to reduce the producers' contribution base. Finally, the fact that the chairperson of the NISA Committee regarded the 1994 Guidelines as having a significant

financial impact suggests that they may well have involved more than the minor tinkering with the definition of the point of sale alleged by the respondent.

44 Considering that the respondent pleads that no change occurred, I conclude that the facts are in dispute.

(b) Whether the change constitutes an amendment to the Agreement

45 It is not correct to state, as the motions judge seems to say, that non-statutory guidelines or other policy documents, used by program administrators, are not legal norms. This is far too broad a proposition. When they determine individuals' legal rights, they can be the subject of a declaration of invalidity.

46 Von Finckenstein J. found that the Guidelines were not part of the Agreement, but rather existed to facilitate its administration, on the basis of the case of *Pereira* , where MacKay J. wrote at para. 10 and 11:

> It is urged that the tribunal erred by failing to consider not just "unusual" hardship, but also whether the applicant faced 'undeserved or disproportionate hardship'.
>
> In my view, this argument implies the guidelines have the status of legal norm, which they do not. They are not more than guidance, for officers, with the intent of seeking a reasonable measure of consistency in the exercise of discretion. That does not establish the guidelines as equivalent to law; it does not require that the officers consider particular qualities or tests or measures, for that would fetter discretion, in a manner disapproved of in *Yhap*. (my emphasis)

47 *Pereira* is a case where a refugee claimant claimed that the officers erred by not considering all of the elements of the guidelines dealing with the exercise of discretion based on humanitarian and compassionate grounds. The applicant argued that the guidelines should always be followed. The Judge disagreed with her and found that the particular guidelines in question did not have the status of law and therefore did not have to be applied in every case. It is difficult to see how this decision is on point here.

48 In deciding whether the Guidelines were invalid, the more relevant decision is *Ainsley Financial Corp. v. Ontario (Securities Commission)* (1994), 21 O.R. (3d) 104 (Ont. C.A.) ("*Ainsley*"). *Ainsley* dealt with the difference between guidelines not requiring statutory authorization and those that amount to mandatory statements of law which require statutory authorization.

49 Doherty J.A., for the Ontario Court of Appeal, recognized the authority of a regulator to use non-statutory instruments, like guidelines, to fulfil its mandate in a fairer, more open and more efficient manner. He acknowledged, however, that there were limits on the use of these instruments.

50 He identified, at p. 109, three situations where guidelines issued without statutory authorization (the status of law) are impermissible:

> Having recognized the Commission's authority to use non-statutory instruments to fulfil its mandate, the limits on the use of those instruments must also be acknowledged. A non-statutory instrument can have no effect in the face of contradictory statutory provision or regulation: Capital Cities Communications Inc., *supra*, at p. 629; H. *Janisch, Reregulating the Regulator: Administrative Structure of Securities Commissions and Ministerial Responsibility in Special Lectures of the Law Society of Upper Canada: Securities Law in the Modern Financial Marketplace* (1989), at p. 107. Nor can a non-statutory instrument pre-empt the exercise of a regulator's discretion in a particular case: *Hopedale Developments Ltd., supra*, at p. 263. Most importantly, for present purposes, a non-statutory instrument cannot impose mandatory requirements enforceable by sanction; that is, the regulator cannot issue de facto laws disguised as guidelines. Iacobucci J. put it this way in Pezim at p. 596:
>
> > However, it is important to note that the Commission's policy-making role is limited. By that I mean that their policies cannot be elevated to the status of law; they are not to be treated as legal pronouncements absent legal authority mandating such treatment. [my emphasis]

51 Doherty J.A. recognized there was no bright line which always separates a guideline from a mandatory provision having the effect of law. At p. 110 of *Ainsley* he stated:

> At the centre of the regulatory continuum one shades into the other. Nor is the language of the particular instrument determinative. There is no magic to the use of the word "guidelines", just as no definitive conclusion can be drawn from the use of the word "regulate". An examination of the language of the instrument is but a part, albeit an important part, of the characterization process. In analyzing the langauge[sic] of the instrument, the focus must be on the thrust of the language considered in its entirety and not on isolated words or passages.

52 He found two factors to be particularly significant to the case: the fact that Policy Statement 1.10, at issue, was setting a code of conduct, and that it was made mandatory through the threat of sanctions which gave them a coercive effect.

53 It has also been held that policy guidelines that are in conflict with the primary legislation are impermissible (*Independent Contractors & Business Assn. (British Columbia) v. British Columbia* (1995), 6 B.C.L.R. (3d) 177 (B.C. S.C.)).

54 It cannot be said, in the case at bar, that the validity of the Guidelines was conclusively decided in *Boyko* . Although Rouleau J. seems to have found that there was nothing legally wrong

with the Guidelines, this Court was of the view that the only issue before Rouleau J. was whether the Appeals Sub-Committee of the NISA Committee had applied them properly. Since the validity of the Guidelines was not in issue, this Court held it could not pronounce on it. The appellants were invited to "start afresh with a new proceeding seeking the proper remedy from the proper authority."

55 The Guidelines therefore must be properly characterized in order to determine whether they amount to a mandatory statement of conduct and if so, whether they were authorized in accordance with the Agreement and the Act.

(c) Conclusion

56 The two issues discussed in (a) and (b) raise questions of fact and law of sufficient complexity and uncertainty that the motions judge erred in dismissing the appellants' statement of claim on the basis of a summary motion.

57 There is a genuine issue for trial or judicial review. If the appellants' claim is well-founded, they will be entitled to a declaration, a conclusion which is already found in their prayer for relief (para. 21 of their statement of claim, A.B. p. 33).

58 In view of my conclusion, it is not necessary to comment on the other bases of the appellants' attack on the validity of the 1994 Guidelines.

(ii) The actions in negligence

59 The motions judge, at para. 36 of his reasons, stated that, while the appellants did not allege negligence, they asserted that the alleged breach of the amendment provisions of the Agreement entitled them to damages. He dismissed their contention on the authority of the *Anns/Kamloops* test (see the cases of *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.) and *Nielsen v. Kamloops (City)*, [1984] 2 S.C.R. 2 (S.C.C.) succinctly summarized by Hugessen J. in *A.O. Farms Inc. v. Canada* (2000), 28 Admin. L.R. (3d) 315 (Fed. T.D.) at para. 10-12.

60 Since that negligence was not pleaded by the appellants, I conclude that this issue should go no further.

(iii) The breach of a fiduciary duty

61 The appellants submit that the categories of fiduciary relationships are not closed, even when dealing with public law duties. They claim that the breach of fiduciary duty is apparent if the Guidelines are *ultra vires*. They say that the farmers' NISA accounts were in the care of the Minister of Agriculture. Under the Agreement, the Minister of Agriculture was obliged to set up separate NISA accounts for each producer similar to bank accounts. He was, in effect, given the control of those bank accounts. The appellants further argue that, if the Minister, through the NISA

Administration, in effect dipped into the NISA "bank" accounts of prairie farmers by applying unlawful and regional prejudicial Guidelines, a clear breach of trust arose.

62 In doing so, they rely on a line of cases, which they characterize as the "pension commission cases", namely *Collins v. Ontario (Pension Commission)* (1986), 56 O.R. (2d) 274 (Ont. Div. Ct.) and *Retirement Income Plan for Salaried Employees of Weavexx Corp. v. Ontario (Superintendent of Pensions)* (2002), 58 O.R. (3d) 380 (Ont. C.A.) .

63 Theses cases are not determinative of the law and are not binding on me.

64 Historically, fiduciary relationships were identified by whether or not they fit within specific "categories". For example, fiduciary relationships were found to arise between doctors and their patients, directors and a corporation, and solicitors and their clients. More recently, the law of fiduciary relationships has moved away from the notion of "categories" to an approach which requires the analysis of the particular characteristics of the relationship in question (*Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.)).

65 The relationship between the appellants and the respondent in this case must therefore be considered, in all of its context, in order to determine whether it can properly be characterized as fiduciary. While the analysis must be contextual and situation-specific, relationships that have been held to be fiduciary in nature have usually had the following three characteristics:

> (1) the fiduciary has scope for the exercise of some discretion or power;
>
> (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests;
>
> (3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

66 These characteristics were first enunciated by Wilson J. in dissent in *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.). La Forest J. noted in *International Corona Resources Ltd. v. Lac Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.) at para. 145, that, while the majority in Frame disagreed with the result, they had not disapproved of the statement listing the three characteristics.

67 It follows that the presence of vulnerability is an essential element to a finding of fiduciary obligations. In *Lac Minerals Ltd.v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.), Sopinka J. quoted with approval, at para. 34 of his reasons, the following paragraph from *Hospital Products Ltd. v. United States Surgical Corp.* (1984), 55 A.L.R. 417 (Australia H.C.) :

> There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the

part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other 1/4"

68 Von Finckenstein J. found that the relationship between the appellants and the respondent could not be considered a fiduciary one. Specifically, he found that the appellants were not at the mercy of the Minister's discretion, given that the Program was voluntary, and hence were not vulnerable to the Minister.

69 I agree. The relationship between the Minister and the appellants in the context of the NISA Program is not fiduciary in nature. The appellants are clearly not at the mercy of the Minister. The Program is a voluntary one.

VII. Conclusion

70 For these reasons, I would allow this appeal, I would set aside the decision of the motions judge and I would grant the respondent Minister's motion except insofar as the appellants claim a declaration that the Guidelines are invalid.

71 Finally, I wish to emphasise the limited nature of the issue that I have decided in concluding that the motions judge erred in granting the respondent Minister's motion for summary judgment and in dismissing the appellants' claim for a declaration that the Guidelines are invalid. In particular, I should not be taken as deciding whether an action, rather than an application for judicial review, is the appropriate procedural form in which the issue should be brought before the Court; whether there are any discretionary bars to the grant of declaratory relief; or whether, if awarded a declaration of invalidity, the appellants are entitled to any consequential relief. These are all issues to be decided when and if the matter comes before the Federal Court for determination.

72 Since success is divided, no costs should be awarded.

***Evans J.A.*:**

I agree.

***Pelletier J.A.*:**

I agree.

Appeal allowed in part.

1999 CarswellNat 2513
Federal Court of Canada — Trial Division

Shipdock Amsterdam B.V. v. Cast Group Inc.

1999 CarswellNat 2513, 1999 CarswellNat 5889, 179 F.T.R. 279, 93 A.C.W.S. (3d) 450

Shipdock Amsterdam B.V., Plaintiff and The Cast Group Inc. and Cast (1983) Limited and Cast Management Limited and The Royal Bank of Canada and Price Waterhouse Coopers and Fasken, Campbell, Godfrey and Richards Hogg Lindley and Aon Reed Stenhouse and M.J. Oppenheim in His Quality as Attorney in Fact in Canada for Underwriters, Members of Lloyd's, London, England, Defendants

Lafrenière Prothonotary

Judgment: November 25, 1999
Heard: November 22, 1999
Docket: T-485-99

Counsel: *Mr. Jonathan Marler*, for Plaintiff.
Mr. T. Anthony Ball, for Defendants, Royal Bank of Canada and PricewaterhouseCoopers.

Subject: Public; Civil Practice and Procedure

MOTION by defendant to stay or adjourn plaintiff's summary judgment motion until after determination of pending motion for security for costs.

***Lafrenière P.*:**

Reasons for Order and Order

1 The present motion dated November 12, 1999 is brought by the Defendant Royal Bank for a stay or adjourn a summary judgment motion filed by the Plaintiff against the said Defendant until disposition of a pending motion for security for costs. The relief sought by the Defendant is as follows:

> 1. An Order that the Plaintiff's motion for Summary Judgment against The Royal Bank of Canada ("Royal Bank") be stayed or adjourned pending the disposition of the motion for security for costs previously brought by Royal Bank and PriceWaterhouseCoopers LLP ("PriceWaterhouseCoopers");

2. Further, Orders that the time for the Royal Bank to deliver responding materials in relation to the Summary Judgment motion be extended accordingly, and that a timetable be fixed for the hearing of the Plaintiff's Summary Judgment motion after the security for costs motion is disposed of;

3. An Order that the security for costs motion brought by Royal Bank and PriceWaterhouseCoopers proceed on November 22, 1999, pre-emptory of the Plaintiff, or at another date agreed upon by the parties to the motion;

4. An Order abridging the time to serve and file the within Motion Record, if necessary;

5. Its costs of this motion in an amount to be fixed by the Judge hearing the motion and payable by the Plaintiff forthwith or, in the alternative, payable forthwith after assessment; and

6. Such further and other relief as counsel may advise and to this Court seems just.

2 By way of background, on October 12, 1999 two Defendants, the Royal Bank of Canada and PriceWaterhouseCoopers, brought a motion for security for costs pursuant to Rule 416 of the *Federal Court Rules, 1998*. The motion, which included a request for a stay of the proceedings pending payment of security for costs, was made returnable on October 25, 1999. At the request of the Plaintiff, the matter was adjourned on consent to November 22, 1999.

3 On November 2, 1999, the Plaintiff filed a motion for summary judgment against the Defendant Royal Bank. This motion was made returnable on the same day the motion for security for costs was scheduled to be heard. The Defendant Royal Bank sought the Plaintiff's consent to adjourn the summary judgment motion until disposition of its motion for security, which was refused.

4 The Defendant Royal Bank objects to the Plaintiff's motion being scheduled before disposition of its motion for security for costs. Otherwise, it is submitted, the Defendant will be prejudiced by having to incur substantial costs in responding to the summary judgment motion without any means to enforce a costs order should the motion be dismissed. As such, the objective of Rule 416, and in particular Rule 416(3), would be frustrated.

5 The Defendant Royal Bank sought short leave to bring the present motion on November 15, 1999. The Plaintiff refused to provide its consent. On November 15, 1999, during a hearing by teleconference, counsel for the Plaintiff advised the Court that it was his intention to file responding materials in opposition to the present motion. Consequently, the motion was adjourned one week to allow the Plaintiff an opportunity to respond. In addition, the two motions scheduled for November 22 were ordered adjourned pending disposition of the present motion.

6 The Plaintiff submits that the Defendants' motion for security for costs is an abuse of process and that delaying its summary judgment motion will lead to a further injustice. The Plaintiff also contends that nothing in the *Federal Court Rules, 1998* prevents two motions from being heard together or consecutively.

7 Notwithstanding the able arguments of counsel for the Plaintiff, I am satisfied that there are compelling reasons to grant the relief requested by the Defendant Royal Bank. It seems logical that a matter properly before the Court should not be defeated by a subsequent step taken by another party. In *Bruce v. John Northway & Son Ltd.*, [1962] O.W.N. 150 (Ont. Master), the Senior Master stated the general rule as follows at page 151:

> After service of a notice of motion, as a general rule, any act done by any party affected by the application which affects the rights of the parties on the pending motion will be ignored by the Court. *In Preston v. Tunbridge Wells Opera House*, [1903] 2 Ch. 323, Farwell, J., said at p. 325
>
> > It is due to the exigencies of the business of the Courts that an application cannot be heard the moment it is made.

8 The learned Master went on to say:

> In that case it was held that the right of the first mortgagee to rents was to be determined as of the date of the service of the notice of motion and not as of the date the application was heard. In *Holmested*, 5th ed., p. 837 citing this case it is stated
>
> > The rights of an appellant [applicant?] cannot be prejudiced by anything done after the notice of motion has been served, but his rights are to be determined as they existed at the date of its service.
> >
> > This appears to me to correctly state the practice. This principle is illustrated by the situation where a defendant serves a notice of motion to dismiss an action for want of prosecution and subsequent thereto and prior to the hearing of the application the plaintiff files and serves notice of discontinuance. In these circumstances it was held in *Campbell v. Sterling Trust Corp.*, [1948] O.W.N. 557 that the defendant's right was not abrogated by the subsequent notice of discontinuance.

9 The Plaintiff's argument that the Defendants' motion for security for costs is an abuse of process should properly be advanced at the hearing of that motion. I agree with the submission of counsel for the Defendant Royal Bank that it would be unjust to allow the Plaintiff to defeat the moving party's rights, particularly in the present circumstances where the hearing of the motion for security for costs was delayed at the request of the Plaintiff.

Order

10 The security for costs motion brought by Royal Bank of Canada and PriceWaterhouseCoopers LLP is adjourned to December 6, 1999, at 9:30 a.m.

11 The Plaintiff shall serve and file its responding record for the security for costs motion no later than 2:00 p.m. on November 29, 1999.

12 The Plaintiff's motion for Summary Judgment against The Royal Bank of Canada shall be and hereby is stayed pending the disposition of the security for costs motion brought by Royal Bank of Canada and PriceWaterhouseCoopers LLP. A timetable for the Summary Judgment motion shall be fixed after the disposition of the security for costs motion.

13 The costs of this motion are costs to Royal Bank of Canada in the cause, fixed in the amount of $1,000.00.

Motion granted.

2011 CAF 299, 2011 FCA 299
Federal Court of Appeal

Stemijon Investments Ltd. v. Canada (Attorney General)

2011 CarswellNat 4372, 2011 CarswellNat 5330, 2011 CAF 299, 2011 FCA 299, [2011] F.C.J. No. 1503, [2012] 1 C.T.C. 207, 2011 D.T.C. 5169 (Eng.), 209 A.C.W.S. (3d) 721, 341 D.L.R. (4th) 710, 425 N.R. 341

Stemijon Investments Ltd., Appellant and The Attorney General of Canada, Respondent

Canwest Communications Corporation, Appellant
and The Attorney General of Canada, Respondent

Canwest Direction Ltd., Appellant and The Attorney General of Canada, Respondent

Leonard Asper Holdings Inc., Appellant and
The Attorney General of Canada, Respondent

Lenvest Enterprises Inc., Appellant and The Attorney General of Canada, Respondent

Sensible Shoes Ltd., Appellant and The Attorney General of Canada, Respondent

Marc Noël, Johanne Trudel, David Stratas JJ.A.

Heard: October 11, 2011
Judgment: October 26, 2011
Docket: A-376-10, A-374-10, A-375-10, A-377-10, A-378-10, A-382-10

Proceedings: affirming *Stemijon Investments Ltd. v. Canada (Attorney General)* (2010), 2010 CarswellNat 3943, 2010 CF 893, 2010 D.T.C. 5156 (Eng.), 2010 CarswellNat 3315, 2010 FC 893 (F.C.)

Counsel: Ian S. MacGregor, Peter Macdonald, for Appellants
Josée Tremblay, Julian Malone, for Respondent

Subject: Income Tax (Federal)

APPEAL by taxpayers from judgment reported at *Stemijon Investments Ltd. v. Canada (Attorney General)* (2010), 2010 CarswellNat 3943, 2010 CF 893, 2010 D.T.C. 5156 (Eng.), 2010 CarswellNat 3315, 2010 FC 893 (F.C.), upholding Minister of National Revenue's decision not to waive penalties and interest assessed against taxpayers for their late filings.

***David Stratas J.A.*:**

A. Introduction

1 Before this Court are six appeals from six judgments of the Federal Court (*per* Justice Mandamin): 2010 FC 892 (F.C.), 2010 FC 893 (F.C.), 2010 FC 894 (F.C.), 2010 FC 895 (F.C.), 2010 FC 897 (F.C.), 2010 FC 898 (F.C.). In each, the Federal Court dismissed an application for judicial review brought by the taxpayer concerning a decision by the Minister of National Revenue. In each, for identical reasons, the Minister refused the taxpayer relief from penalties and interest under subsection 220(3.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

2 Since the facts and the law are substantially the same in each matter, this Court consolidated the appeals, the appeal in file A-376-10 being designated as the lead appeal. A copy of these reasons for judgment will be filed in each of files A-374-10, A-375-10, A-376-10, A-377-10, A-378-10 and A-382-10, and shall serve as this Court's reasons for judgment in each appeal. Given the identical nature of the appellant's submissions, the Minister's decision for each appellant, and the Federal Court's decision, these reasons will speak of one decision, one decision letter and one Federal Court decision.

3 In my view, for the reasons set out below, the Minister's decision falls outside the range of defensibility and acceptability and, thus, is unreasonable. However, the relief is discretionary. In these particular circumstances, no practical end would be accomplished by setting aside the Minister's decision and returning the matter back to him for redetermination: the Minister could not reasonably grant relief on these facts. Therefore, I would dismiss the appeals.

B. The basic facts

(1) Background information

4 The Act requires persons to file certain forms in certain circumstances. These forms convey information to the Canada Revenue Agency. The Canada Revenue Agency uses this information to discharge its responsibilities under the Act.

5 Form T1135 is one such form. This form must be filed by taxpayers who own specified foreign property, the total cost amount of which is over $100,000: subsection 233.3(3) of the Act.

6 The appellants were obligated to file this form for each of the 2000 to 2003 taxation years. They did so, but were late. Due to their lateness, the Minister assessed penalties and interest against the appellants.

7 The appellants sought relief from the penalties and interest from the Minister. The Minister can grant such relief under subsection 220(3.1) of the Act. Broadly speaking, the appellants alleged

that they had made an innocent mistake and that it would be unfair to levy penalties and interest in the amounts assessed.

(2) How the late filings happened

8 The appellants employed a common financial representative to make all tax filings on their behalf.

9 For the 1998 and 1999 taxation years, the appellants' representative filed the appellants' Forms T1135 on time. However, for the 2000 to 2003 taxation years, the appellants' representative formed the view, contrary to the wording of subsection 233.3(3) of the Act, that it was unnecessary to file the forms. The appellants' representative felt that the Canada Revenue Agency was getting all the information it needed from other filings made by the appellants' Canadian investment managers.

10 Specifically, the appellants' representative believed that Form T1135 did not need to be filed where a foreign investment portfolio was managed by a Canadian investment manager subject to Canadian tax reporting requirements. In his view, that was the case with each of the appellants. However, as the appellants' representative conceded in a letter dated June 2, 2005, that logic did not apply to the appellant Canwest Communications Corporation, which had U.S. investments administered by U.S. fund managers.

11 Somewhat later, the Canada Revenue Agency alerted the appellants to the fact that they had not filed their forms for some time. The appellants complied, filing their forms late and explaining their misunderstanding.

(3) The appellants' request for relief from interest and penalties and the first level administrative decision

12 The appellants' financial representative wrote on behalf of the appellants to the Fairness Committee of the Canada Revenue Agency, requesting relief under subsection 220(3.1) of the Act against the penalties and interest assessed against the appellants for their late filings of the forms. The representative conceded that the delay in filing was "a conscious decision" but was done in the mistaken belief, described above, that the forms did not need to be filed. The representative explained that it was guilty of "administrative oversight."

13 In its first level administrative decision, the Canada Revenue Agency denied the appellants' request for relief. It found that the appellants did not fall within one of the three specific scenarios set out in Information Circular (IC) 07-01 ("Taxpayer Relief Provisions"), a policy statement issued by the Minister. These three specific scenarios are extraordinary circumstances beyond the taxpayer's control, actions of the Canada Revenue Agency, and inability to pay. The Canada Revenue Agency also denied the appellants' request for relief under a "one chance policy" that

existed at the time. The appellants failed to qualify under that policy because they filed the forms only as a result of an inquiry made by the Canada Revenue Agency.

(4) The appellants' further request for relief from interest and penalties and the Minister's decision

14 Dissatisfied, the appellants made a second level request for relief to a delegate of the Minister (hereafter, the "Minister"). They explained that their representative had engaged in an "administrative oversight." They enclosed their previous correspondence that explained that the representative believed that the forms did not need to be filed because the Canada Revenue Agency was getting information about the appellants' foreign holdings from other filings. They suggested that the delay of the Canada Revenue Agency should result in some relaxation in the interest charges. Finally, they also argued that there was an "error of omission common to all entities" and so the penalty, levied for each of the six appellants, should be substantially reduced.

15 The Minister set out his reasons in a decision letter. In his decision letter, the Minister partly granted the appellants' request for relief. He was prepared to reduce the interest charged during six months due to the Canada Revenue Agency's delay in replying to the appellants. The Minister denied the remainder of the appellants' request for relief.

(5) The applications to the Federal Court for judicial review

16 The appellants applied to the Federal Court for judicial review of the Minister's denial of relief.

17 In the Federal Court, and also in this Court, the appellants focused on the reasons set out in the Minister's decision letter. They submitted that the Minister improperly narrowed the scope of discretion permitted to him under subsection 220(3.1) of the Act. In their view, the Minister had regard only to the three scenarios of relief specifically set out in the Information Circular rather than the general concept of fairness under subsection 220(3.1) of the Act. In other words, the Minister improperly fettered his discretion.

18 The appellants also submitted that the Minister's refusals of relief on the facts of this case could not be sustained under the standard of review of reasonableness.

(6) The Federal Court's decision

19 The Federal Court rejected the appellants' submissions. It found that the Minister had not fettered his discretion. Instead, he was aware of the full extent of his discretion and decided against granting relief. The Federal Court based this conclusion on the fact that the Minister had before him an array of material that went beyond the three scenarios set out in the Information Circular, such as the submissions of the appellant and a wide-ranging Taxpayer Relief Report. The Federal

Court also found that the Minister fully addressed the appellants' requests for relief and reached a conclusion that passed muster under the standard of review of reasonableness.

C. Analysis

(1) The standard of review to be applied

20 The Federal Court held that the standard of review of the Minister's decision is reasonableness. In this Court, the parties accept this. This Court can interfere only if the Minister reached an outcome that is indefensible and unacceptable on the facts and the law: *Telfer v. Canada (Revenue Agency)*, 2009 FCA 23 (F.C.A.) at paragraphs 24-28; *Slau Ltd. v. Canada (Revenue Agency)*, 2009 FCA 270 (F.C.A.) at paragraph 27; *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9 (S.C.C.) at paragraph 47, [2008] 1 S.C.R. 190 (S.C.C.).

21 The appellants' submissions, while based on reasonableness, seem to articulate "fettering of discretion" outside of the *Dunsmuir* reasonableness analysis. They seem to suggest that "fettering of discretion" is an automatic ground for setting aside administrative decisions and we need not engage in a *Dunsmuir*-type reasonableness review.

22 On this, there is authority on the appellants' side. For many decades now, "fettering of discretion" has been an automatic or nominate ground for setting aside administrative decisionmaking: see, for example, *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 (S.C.C.) at page 6. The reasoning goes like this. Decision-makers must follow the law. If the law gives them discretion of a certain scope, they cannot, in a binding way, cut down that scope. To allow that is to allow them to rewrite the law. Only Parliament or its validly authorized delegates can write or rewrite law.

23 This sits uncomfortably with *Dunsmuir*, in which the Supreme Court's stated aim was to simplify judicial review of the substance of decision-making by encouraging courts to conduct one, single methodology of review using only two standards of review, correctness and reasonableness. In *Dunsmuir*, the Supreme Court did not discuss how automatic or nominate grounds for setting aside the substance of decision-making, such as "fettering of discretion," fit into the scheme of things. Might the automatic or nominate grounds now be subsumed within the rubric of reasonableness review? On this question, this Court recently had a difference of opinion: *Kane v. Canada (Attorney General)*, 2011 FCA 19 (F.C.A.). But, in my view, this debate is of no moment where we are dealing with decisions that are the product of "fettered discretions." The result is the same.

24 *Dunsmuir* reaffirms a longstanding, cardinal principle: "all exercises of public authority must find their source in law" (paragraphs 27-28). Any decision that draws upon something other than the law — for example a decision based solely upon an informal policy statement without regard or cognizance of law, cannot fall within the range of what is acceptable and defensible and,

thus, be reasonable as that is defined in *Dunsmuir* at paragraph 47. A decision that is the product of a fettered discretion must *per se* be unreasonable.

25 In the circumstances of this case, if the Minister did not draw upon the law that was the source of his authority, namely subsection 220(3.1) of the Act, and instead fettered his discretion by having regard only to the three specific scenarios set out in the Information Circular, his decisions cannot be regarded as reasonable under *Dunsmuir*.

(2) Subsection 220(3.1) of the Act

26 Subsection 220(3.1) of the Act provides that if an application for relief is made in time, the Minister has discretion to grant relief against penalties and interest. Subsection 220(3.1) reads as follows:

> **220.** (3.1) The Minister may, on or before the day that is ten calendar years after the end of a taxation year of a taxpayer (or in the case of a partnership, a fiscal period of the partnership) or on application by the taxpayer or partnership on or before that day, waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by the taxpayer or partnership in respect of that taxation year or fiscal period, and notwithstanding subsections 152(4) to (5), any assessment of the interest and penalties payable by the taxpayer or partnership shall be made that is necessary to take into account the cancellation of the penalty or interest.
>
> **220.** (3.1) Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin de l'année d'imposition d'un contribuable ou de l'exercice d'une société de personnes ou sur demande du contribuable ou de la société de personnes faite au plus tard ce jour-là, renoncer à tout ou partie d'un montant de pénalité ou d'intérêts payable par ailleurs par le contribuable ou la société de personnes en application de la présente loi pour cette année d'imposition ou cet exercice, ou l'annuler en tout ou en partie. Malgré les paragraphes 152(4) à (5), le ministre établit les cotisations voulues concernant les intérêts et pénalités payables par le contribuable ou la société de personnes pour tenir compte de pareille annulation.

27 The scope of the Minister's discretion under this subsection is determined, like any other matters of statutory interpretation, by examining the statutory words setting out the discretion (here unqualified), the other sections of the Act which may provide context, and the purposes underlying the section and the Act itself. When that examination is conducted, it is fair to say that the scope of the Minister's discretion is broader than the three specific scenarios set out in the Information Circular.

(3) Does the Minister's decision pass muster under the standard of review of reasonableness?

28 In my view, the Minister fettered his discretion, and thereby made an unreasonable decision. He did not draw upon subsection 220(3.1) of the Act to guide his discretion. He looked exclusively to the Information Circular. This is seen from the Minister's reasons for decision.

(a) The Minister's reasons for decision, as evidenced by his decision letter

29 In his decision letter, the Minister sets out reasons for his decision. At the beginning of the decision letter, the Minister mentions that his decision falls under "Taxpayer Relief Legislation." He explains that this legislation "gives the Minister the discretion to waive or cancel all or part of any penalty or interest payable." At this point, he says nothing about the scope of his discretion under this legislation. He never does.

30 In the next sentence in his decision letter, the Minister defines the scope of his discretion, limiting it somewhat. He does this by reference to the Information Circular, not subsection 220(3.1). Specifically, he states that his discretion is to be guided by "whether the penalty or interest resulted from extraordinary circumstances, is due mainly to actions of the Canada Revenue Agency (CRA), or...[is due to an] inability to pay." As we have seen in paragraph 13 above, these are the three specific scenarios set out in the Information Circular for the granting of relief. These words show that the Minister was limiting his consideration to the three circumstances set out in the Information Circular, and was not considering the broad terms of subsection 220(3.1) of the Act.

31 Alone, reference to a policy statement, such as the Information Circular, is not necessarily a cause for concern. Often administrative decision-makers use policy statements to guide their decision-making. As I mention at the end of these reasons, such use is acceptable and helpful, within limits. But many administrative decision-makers are careful to note those limits — policy statements can only be a guide, and, in the end, it is the governing law that must be interpreted and applied. In his decision letter, however, the Minister did not note any limits on his use of the Information Circular.

32 In the next portion of his decision letter, the Minister stated that the appellants sought relief on the basis of "administrative oversight." This was incomplete: as mentioned in paragraph 14, above, the appellants offered other explanations and justifications. The Minister never addressed these in his decision letter. The Minister responded to the appellants' explanation of "administrative oversight" by reminding them about their responsibility to determine and follow the deadlines set out in the Act.

33 Next, the Minister turned to the appellants' request for interest relief due to the Canada Revenue Agency's delay. Here, as mentioned in paragraph 15 above, he granted limited relief. In granting that relief, the Minister did not refer to the Information Circular. However, delay by the Canada Revenue Agency does fit within the second scenario set out in the Information Circular for the granting of relief, namely conduct by the Agency.

34 At the end of his decision letter, the Minister refused the rest of the relief sought by the appellants. In support of this, he offered the following explanation:

> While I can sympathize with your position, the Taxpayer Relief Provisions do not allow for cancellation of penalties and interest when a Taxpayer, or their representative, lacks knowledge or fails to meet filing deadlines. I trust this explains the Agency's position in this matter.

35 This passage offers further evidence that the Minister was restricting his consideration to the three scenarios set out in the Information Circular and was not drawing upon subsection 220(3.1) of the Act as the source of his decision-making power. This is seen from the Minister's reference to the "Taxpayer Relief Provisions" — the title of the Information Circular — as the source of his decisionmaking power, not subsection 220(3.1) of the Act. On a fair reading of this passage, the Minister denied the appellants relief because their claims for relief did not fit within the scenarios set out in the Information Circular.

(b) Does the record before the Minister shed any further light on the Minister's decision?

36 The respondent urges us to go beyond the stated reasons in the Minister's decision letter. It points to the record that was placed before the Minister, and an affidavit filed with the Federal Court. The respondent submits that these materials demonstrate that the Minister drew upon more than the Information Circular as the source of his authority.

37 I agree that the reasons in a decision letter should not be examined in isolation. Reasons can sometimes be understood by appreciating the record that was placed before the administrative decision-maker: *Vancouver International Airport Authority v. P.S.A.C.*, 2010 FCA 158 (F.C.A.) at paragraph 17.

38 But sometimes the record is of no assistance. That is the case here. While the Minister had a broad record before him, his decision letter shows no awareness that he could go beyond the Information Circular. To the contrary, his decision letter shows an understanding — faulty — that he was governed exclusively by the Information Circular. Further, as explained in paragraph 32, above, the Minister did not seem to have full and accurate regard to key portions of the record before him, namely the explanations and justifications in letters sent by the appellants. In such circumstances, resort to the record to explain why the Minister decided in the way that he did is not possible.

39 The Federal Court was willing to assume that the Minister considered the record before him. In my view, that assumption was not open to it given the reasons in the preceding paragraph.

(c) Does an affidavit filed in the Federal Court shed any further light on the Minister's decision?

40 During argument of this appeal, the respondent referred us to an affidavit that was filed with the Federal Court. The affidavit is from the delegate of the Minister who made the decision that is the subject of judicial review in these proceedings. In that affidavit, and also in cross-examination on that affidavit, the delegate testified that he relied on other matters when he made his decision, including "the relevant sections of the *Income Tax Act*." The respondent points to this affidavit as evidence that the Minister had regard to the full extent of his discretion under subsection 220(3.1) of the Act and drew upon that section as the source of his authority.

41 The Federal Court appears to have placed no weight on this evidence. I also place no weight on it. This sort of evidence is not admissible on judicial review: *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 114 D.L.R. (3d) 162 (Ont. C.A.). The decision-maker had made his decision and he was *functus*: *Chandler v. Assn. of Architects (Alberta)*, [1989] 2 S.C.R. 848 (S.C.C.). After that time, he had no right, especially after a judicial review challenging his decision had been brought, to file an affidavit that supplements the bases for decision set out in the decision letter. His affidavit smacks of an after-the-fact attempt to bootstrap his decision, something that is not permitted: *Bransen Construction Ltd. v. C.J.A., Local 1386*, 2002 NBCA 27 (N.B. C.A.) at paragraph 33. As a matter of common sense, any new reasons offered by a decision-maker after a challenge to a decision has been launched must be viewed with deep suspicion: *R. v. Teskey*, 2007 SCC 25, [2007] 2 S.C.R. 267 (S.C.C.).

42 In this case, the Minister was obligated to disclose the full and true bases for his decision at the time of decision. The decision letter, viewed alongside the proper record of the case, is where the bases for decision must be found. In this case, the proper record sheds no light on the bases for the Minister's decision, and so the bases set out in the Minister's decision letter must speak for themselves.

(d) Conclusion: the Minister's decision was unreasonable

43 I conclude that in making his decision the Minister did not draw upon the law that was the source of his authority, namely subsection 220(3.1) of the Act. Instead, he drew upon the Information Circular, and nothing else. His decision thereby became unreasonable.

(4) Should the decision be set aside and the matter returned to the Minister for redetermination?

44 Just because a decision is unreasonable does not mean that it must automatically be set aside and returned to the decision-maker for redetermination. Relief on an application for judicial review is discretionary.

45 In particular, this Court may decline to grant relief for an unreasonable decision where, for example, there is no substantial miscarriage of justice or the granting of relief would serve no

practical end: *MiningWatch Canada v. Canada (Minister of Fisheries & Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6 (S.C.C.); *Dennis v. Adams Lake Band*, 2011 FCA 37 (F.C.A.).

46 In this case, there would be no practical end served in setting aside the Minister's decision and returning the matter to him for redetermination. The excuses and justifications offered by the appellants for the delay in filing and the grounds offered in support of relief have no merit. The Minister could not reasonably accept them and grant relief under subsection 230(3.1) of the Act. Returning the matter back to the Minister would be an exercise in futility.

47 The appellants say that their financial representative had a reasonable but mistaken belief that filing the form was not obligatory. This is belied by the fact that it did file the forms for the 1998 and 1999 taxation years. It knew that the Act required that the forms be filed and filed them.

48 After the 1999 taxation year, the appellants' representative consciously chose not to comply with the Act. It did so on the basis that the Canada Revenue Agency was getting information from other sources, such as the appellants' Canadian money managers. As it turned out, this basis did not apply to the appellant Canwest Communications Corporation.

49 Even if the Canada Revenue Agency was getting the information from other sources, this cannot be an acceptable excuse or mitigating factor for non-compliance in the circumstances of this case, especially where we are dealing with the appellants' representative, a professional firm that deals with tax matters. It is notorious that in various provisions of the Act, the Canada Revenue Agency is allowed to obtain the same type of information from different sources. This allows it to verify compliance with the Act. For example, an employer is obligated to file T-4 slips reporting the income it has paid to its employees. At the same time, the employees disclose their income from employment. The employers' and employees' figures should match. What if the employer, after filing T-4 forms for a period of years, consciously declined to file the T-4 slips and then argued that it should avoid penalties because the Canada Revenue Agency would get information about the employees' income from the employees? In those circumstances, would there be any case for relief? Of course not.

50 In this case, compliance was fully within the appellants' control. Compliance happened in the 1998 and 1999 taxation years and there were no new extenuating circumstances that might explain the later non-compliance. These facts fall outside of what this Court has identified as being a focus of subsection 220(3.1), namely the granting of relief where there are extenuating circumstances beyond the control of the person seeking relief: *Bozzer v. Minister of National Revenue*, 2011 FCA 186 (F.C.A.) at paragraph 22.

51 The appellants also argued that it is unfair for the Minister to levy six separate, sizeable penalties against the six appellants when there was really only one mistake made by their one common representative. The appellants contended that the penalties should be substantially reduced for that reason. This argument, smacking of a plea for a "volume discount," has no

merit. Each of the appellants is a separate legal entity and a separate taxpayer, potentially subject to penalties and interest for its own non-compliance. Each is capable of independent decision-making concerning the forms that are to be filed. Each, accepting the risk, chose instead to have a representative look after the filings. That risk materialized: their representative made a conscious decision not to file the forms, a decision made without reasonable excuse or justification, as explained above. Granting relief under subsection 220(3.1) on the basis of this argument would be an unreasonable exercise of discretion.

52 I accept that the normal remedy for an unreasonable decision is to set it aside and return the matter back to the decision-maker for redetermination. I also accept that this Court should be reluctant to wade into the merits of administrative decision-making. But there are cases, perhaps rare, where no practical end would be served by returning the matter back to the decision-maker. This is just such a case.

53 In these circumstances, the appellants' explanations and justifications are entirely without merit. The appellants could not succeed on them if we returned the matter to the Minister for redetermination. Similar to what happened in *MiningWatch Canada*, *supra*, the Minister made an unreasonable decision but no practical end would be served in returning the matter back to him for redetermination. Therefore, in this case, I would decline to do so.

D. Postscript

54 So that these reasons provide proper guidance and are not misunderstood and misapplied in future cases, I wish to make three brief observations.

-I -

55 Portions of the language used in the decision letter in this case are identical to that used in other decision letters: see, for example, *Spence v. Canada (Revenue Agency)*, 2010 FC 52 (F.C.). In itself, there is nothing wrong with using form letters or stock language taken from other decision letters. The reasons offered in one case can be appropriate for other cases, and the repeat use of those reasons is efficient. However, as this case shows, a blind use of form letters or stock language can sometimes lead to trouble.

56 Whether the reasons are cut and pasted from a previous letter, are slightly modified from a previous letter or have to be drafted from scratch, the final product issued to the applicant for relief under subsection 220(3.1) of the Act should show an awareness of the scope of the available discretion under the Act, offer brief reasons why relief could or could not be given in the particular circumstances, and meaningfully address the arguments made that have a chance of success. If the reasons do not deal with one or more of these matters — something that can happen through careless or unthinking use of a form letter or stock language — the decision may not pass muster under the standard of review of reasonableness.

-II -

57 The foregoing comment and these reasons should not be taken to impose onerous new reasons-giving requirements upon the Minister. In this case, all that was required was perhaps a few additional lines in a letter that was just 33 lines long: *Vancouver International Airport Authority*, *supra* at paragraphs 16 and 17.

-III -

58 Finally, these reasons should not be taken to cast any doubt on the ability of administrative decision-makers, such as the Minister, to use policy statements, such as the Information Circular in this case, as an aid or guide to their decision-making.

59 Policy statements play a useful and important role in administration: *Thamotharem v. Canada (Minister of Citizenship & Immigration)*, 2007 FCA 198, [2008] 1 F.C.R. 385 (F.C.A.). For example, by encouraging the application of consistent principle in decisions, policy statements allow those subject to administrative decision-making to understand how discretions are likely to be exercised. With that understanding, they can better plan their affairs.

60 However, as explained in paragraphs 20-25 above, decision-makers who have a broad discretion under a law cannot fetter the exercise of their discretion by relying exclusively on an administrative policy: *Thamotharem*, *supra* at paragraph 59; *Maple Lodge Farms*, *supra* at page 6; *Dunsmuir*, *supra* (as explained in paragraph 24 above). An administrative policy is not law. It cannot cut down the discretion that the law gives to a decision-maker. It cannot amend the legislator's law. A policy can aid or guide the exercise of discretion under a law, but it cannot dictate in a binding way how that discretion is to be exercised.

61 In this case, the Minister ran afoul of these principles. Fortunately for him, however, he reached the only reasonable outcome on these facts.

E. Proposed disposition

62 For the foregoing reasons, I would dismiss the appeals. However, in light of the unreasonableness of the Minister's decisions, I would not award the respondent in each appeal its costs of the appeal.

***Marc Noël J.A.* :**

I agree.

***Johanne Trudel J.A.* :**

I agree.

Appeal dismissed.

2019 FC 817, 2019 CF 817
Federal Court

Toutsaint v. Canada (Attorney General)

2019 CarswellNat 3606, 2019 CarswellNat 5097,
2019 FC 817, 2019 CF 817, 308 A.C.W.S. (3d) 844

JOEY TOUTSAINT (Applicant) and ATTORNEY GENERAL OF CANADA (Respondent)

Richard G. Mosley J.

Heard: April 10, 2019
Judgment: June 14, 2019
Docket: T-385-19

Counsel: Deborah Charles, for Applicant
Stephen McLachlin, Thomas Bean, for Respondent

Subject: Civil Practice and Procedure; Constitutional; Criminal; Employment; Human Rights

APPLICATION by prisoner for interlocutory injunction requiring transfer to psychiatric centre until his human rights complaint was resolved.

***Richard G. Mosley J.*:**

I. Introduction

1 This case highlights once again the challenges presented by the incarceration of mentally disordered offenders in Canada's prison system. In that context, it is not surprising that the Applicant is an Indigenous man with an appalling personal history of deprivation and abuse, as they are shockingly overrepresented in our jails and, in particular, in the type of solitary confinement institutionally known as administrative segregation.

2 Other courts have determined that the prolonged use of administrative segregation in general, and especially in the case of mentally disordered offenders, contravenes Canada's *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

3 The question in this case is not, however, whether the Applicant's *Charter* rights have been infringed by his prolonged segregation, but whether the Court should intervene with the

management of his incarceration by ordering the Correctional Service of Canada (CSC) to transfer him to a penitentiary that also serves as an acute care psychiatric hospital pending the outcome of his discrimination complaint to the Canadian Human Rights Commission (CHRC).

4 For the reasons that follow, I decline to issue the mandatory interlocutory injunction the Applicant requests. This is because he has failed to meet the stringent requirements for the grant of an injunction requiring action by the opposing party. I am not persuaded that the Court should override the assessment of the mental health team at the institution in which the Applicant is presently held, namely that the transfer would be contrary to his best interests and disrupt his treatment plan.

5 A decision to transfer the Applicant to a hospital setting remains open to the Respondent and has been made to address his needs in the past. Nothing in my judgment and reasons should be interpreted as preventing such a decision from being made again. Indeed, I would urge the correctional officials responsible for the management of the Applicant's detention and care to consider whether, based on the evidence presented in this case, the time has come to once again consider his transfer to a more therapeutic setting. But, in my view, that is a decision to be made by the mental health professionals within CSC and not by the Court.

II. Background and Evidence

6 The Applicant, Mr. Joey Toutsaint, is a 32 year old Dene man from Black Lake Denesuline Nation in Saskatchewan with multiple mental and behavioural disorders, a history of personal trauma and a long history of self-harm. He was declared to be a dangerous offender in 2015 and sentenced to an indeterminate period of detention. He is currently serving his sentence as a federal maximum security inmate at Saskatchewan Penitentiary in Prince Albert, Saskatchewan.

7 On February 27, 2019, Mr. Toutsaint filed a Notice of Application, pursuant to section 44 of the *Federal Courts Act*, RSC 1985, c F-7, seeking the following relief:

> 1. An injunction pursuant to section 44 of the *Federal Courts Act*, requiring CSC to refrain from discriminating against the Applicant, and specifically requiring CSC to:
>
> > i. Transfer the Applicant immediately to the Regional Psychiatric Centre in Saskatoon, Saskatchewan;
> >
> > ii. Provide the Applicant with regular intensive one-on-one therapy to address his past trauma and grief counselling to address his past losses; and
> >
> > iii. Provide the Applicant with regular access to Dene cultural practices, including sweats and pipe ceremonies, and access to an Indigenous Elder.
>
> 2. Such other relief as this Honourable Court may deem just.

8 Pending the hearing of the application on an expedited basis, and in view of assertions that the Applicant was a suicide risk, an order was issued on March 14, 2019 requiring that the Applicant should remain as he was in the prison health care unit and was to be checked on an hourly basis, and more frequently as circumstances required. Officials at the Prince Albert penitentiary were to inform counsel and the Court of any material change in the Applicant's condition and circumstances. Further orders relating to the reporting requirement were issued on March 15, 2019, March 19, 2019 and March 26, 2019, and again on May 27, 2019.

9 The Applicant seeks to be transferred to the Regional Psychiatric Centre (RPC) in Saskatoon, Saskatchewan until his human rights complaint is resolved. RPC is a penitentiary administered by CSC. Part of it is also an acute care hospital registered under Saskatchewan's *Mental Health Services Act*, SS 1984-85-86, c M-13.1, as amended.

10 A December 2017 Report by Dr. John Bradford prepared for CSC describes the mental health challenges in dealing with the correctional population and makes a number of recommendations for managing those challenges. Dr. Bradford is an independent forensic psychiatrist with a distinguished professional and academic record and a long history of working with mentally disordered offenders. His Report provides a statistical overview comparing the mental health of prisoners and the non-offender population; the prevalence of major psychiatric disorders is much higher among the prisoner population. The Report describes the system of regional treatment centres administered by CSC and makes a series of recommendations for improving CSC's capacity to provide treatment for mentally disordered offenders. I found the Report to be very helpful in understanding the context in which this application arises. While I can't cover the full import of the Report in these reasons, I have drawn the information in the following paragraph from it.

11 CSC has five Regional Treatment Centres (RTC) located in British Columbia, the Prairies, Ontario, Quebec and the Maritimes. The Applicant has been placed in several of them during his adult correctional history. Of the five centres, the only custom built mental health treatment centre is RPC in Saskatoon, although there is a partially custom built facility in Abbotsford, B.C. and one at Bath, Ontario. The RPC has a total of 184 beds, including 60 psychiatric hospital beds. The Bradford Report points to a shortage of mental health personnel within the system, one of the consequences of which is the overuse of segregation and seclusion. Efforts to rely on transfers to provincial forensic psychiatric facilities have diminished when demands exceeded capacity. Dr. Bradford states that there is some evidence that the provision of residential programs and crisis centre units actually increased the demand for inpatient psychiatric care. He recommends a pilot project in which the number of beds at the RTC in Ontario be *reduced* by 30% and staffing levels increased. Among other concerns noted by Dr. Bradford is the integration of inmates with varying security levels in the treatment centres and the management of those with behavioural problems who cannot get along with the general population.

12 In this proceeding, the Applicant asks the Court to "require CSC to refrain from discriminating" against him and, specifically, to intervene in the transfer and treatment decision making processes within CSC to order his transfer to RPC, to order the type of therapy he would receive there and to order regular access to Dene cultural practices. The Court generally has no involvement in CSC's transfer process, other than in applications for judicial review of transfer decisions contrary to inmates' wishes. Every transfer between penitentiaries is a discretionary administrative decision: *McLeod v. Canada (Attorney General)*, 2018 FC 1148 (F.C.) at para 10. The Court also normally has no involvement in treatment decisions made by CSC health care professionals or spiritual advisors.

13 Mr. Toutsaint, like so many offenders, has had a tragic and troubled personal history. He lost his mother at a young age. He had little contact with his father while growing up and met him again as an adult only when they found themselves in the same penitentiary. That was not a positive experience. The loss of his grandmother was particularly traumatic as she had been a primary caregiver for him. His first language was Dene and he did not begin to learn English until he was placed in provincial youth custody at 16. He entered CSC custody at the age of 18 in 2005. At the time of his dangerous offender designation, he had amassed a record of 74 criminal convictions.

14 The Applicant's involvement with the criminal justice system was described in stark terms by the Saskatchewan Court of Appeal in *R. v. Toutsaint*, 2015 SKCA 117 (Sask. C.A.). The synopsis provided by the Court of Appeal, at paragraph 3, is instructive on the present application, as it points to some of the challenges faced by the correctional authorities in dealing with Mr. Toutsaint's disorders. Among other concerns, the Court noted that Mr. Toutsaint:

- Had nearly 30 convictions for violent, sexual, threatening or weapons-related offenses;
- Had spent most of his adult life in prison, and the majority of that time had been spent in segregation, on a voluntary or involuntary basis;
- Had never completed any programming geared toward his rehabilitation, had no interest in any programming that could reduce his risk factors and preferred segregation to any other proposal;
- Was uncooperative or threateningly disruptive with his health care providers; did not comply with treatment directions and had either sold or given away medications prescribed to him;
- Had denounced aboriginal elders and refused to avail himself of their assistance or advice;
- Had little or no family support and had never been visited or called by anyone while he was imprisoned;
- Had to be disarmed by fellow inmates — for their own protection — when he fashioned or acquired a weapon while residing with the general prison population.

15 The Court also noted that:

• Due to his intractable, violent behavior, CSC had considered transferring Mr. Toutsaint to the special handling unit reserved for the most unmanageable offenders in the federal correction system;

• When released from custody at warrant expiry, he had been subjected to *Criminal Code* restraining orders in the interests of public safety; and

• When released into the community, he violated or breached his bail, probation or restraining orders, usually within weeks.

16 The assessments of the psychologist and psychiatrist who provided reports to the sentencing judge were, as described in the Court of Appeal judgment at paragraphs 5 to 8, that Mr. Toutsaint remained at high risk to reoffend violently and sexually. Both noted that Mr. Toutsaint had told them that he would not participate in programming to reduce his risk of reoffending. He preferred to remain in segregation. The court appointed psychologist described Mr. Toutsaint "as highly dominant and overly aggressive" and entirely unresponsive to treatment. He concluded that his violent and threatening conduct while incarcerated was purposive — to get what he wanted. While the psychiatrist retained by Mr. Toutsaint, Dr. Mela, thought that there had been some improvement in his behavior prior to sentencing, the Court of Appeal concluded that this was based on the Applicant providing untruthful information. Among other things, the Court noted, Mr. Toutsaint had sabotaged his own treatment by selling his prescribed medication to other inmates shortly after he was assessed by the psychiatrist. The psychiatrist's report was included in the evidence the Applicant submitted in this proceeding.

17 The Applicant has glossed over this record in describing his history in the correctional system. Nonetheless, whether it was due to his own preference or to his pattern of violent and disruptive conduct, the Applicant has spent some 2,180 days, and counting, in administrative segregation. He has been frequently moved between regular living units and segregation units at his own request, or as a protective custody prisoner, and has also spent many days in observation units when threatening self-harm. The observation units are, if anything, even more isolating than segregation units, despite the constant surveillance.

18 The Applicant has, from time to time, been placed in regional psychiatric and treatment centres operated by CSC, with mixed results. On some occasions, he has regressed, refused to engage in treatment and continued to self-harm or has been aggressive and threatening towards other offenders, "muscling" or pressuring them for their medication. He has also been aggressive and threatening towards staff, including medical professionals.

19 Since the summer of 2016, the Applicant has been held at nine different institutions in six different provinces, as CSC attempted to find a facility that could cope with his treatment needs and behavioural problems. He has been at Saskatchewan Penitentiary since August 2018.

20 In this application, Mr. Toutsaint relies on his own extensive affidavit evidence, with numerous exhibits drawn from his institutional records. Other documentary evidence in support of the application was introduced through several affidavits of one of his legal representatives. In his evidence, Mr. Toutsaint describes a horrendous history of abuse at the hands of both inmates and guards in youth and adult custody. This includes sexual and physical assaults at the hands of other inmates, which he believes were facilitated by guards, as well as beatings by guards and aggressive interventions by Emergency Response Teams (ERTs). Whether accurate or not, it is clear that Mr. Toutsaint believes his recollection of these events to be true and this has made it difficult for him to trust and interact with correctional officers and some, but not all, mental health personnel.

21 Mr. Toutsaint suffers from a number of mental illnesses. The most recent assessment conducted by Dr. Alsaf Masood, Mr. Toutsaint's treating CSC psychiatrist, dated February 21, 2019 diagnosed him with the following illnesses:

(i) attention deficit hyperactivity disorder;

(ii) polysubstance use disorder;

(iii) mood disorder unspecified;

(iv) post-traumatic stress disorder [PTSD]; and

(v) mixed personality disorder (antisocial and borderline personality disorders).

22 Dr. Masood has also recognized that Mr. Toutsaint may suffer from Fetal Alcohol Spectrum Disorders, although that diagnosis has yet to be confirmed. If confirmed, Dr. Masood was of the opinion that it would not make a significant difference in the Applicant's treatment.

23 The Respondent relied on the evidence of Dr. Masood and that of Mr. Robin Finlayson, chief psychologist at Saskatchewan Penitentiary. Dr. Masood and Mr. Finlayson were cross-examined at length on their affidavits. In their assessment, Mr. Toutsaint would be better served by remaining where he has developed some degree of a relationship with the mental health team, rather than to start afresh at RPC. They maintained that position under vigorous cross-examination. Their evidence is not without inconsistencies, contradictions and other weaknesses. However, on the whole, I found it persuasive.

24 Mr. Toutsaint began to self-harm in 2006 and has since had numerous self-harming incidents, which have become more frequent in recent years. Mr. Toutsaint describes being fearful of correctional officers, especially the ERTs, which are often called in when he is threatening self-

harm and is in possession of a razor blade or other weapon. Mr. Toutsaint's evidence is that the ERT response actually increases his likelihood of self-harming, as does his continuing exposure to administrative segregation. He acknowledges often preferring segregation to being in the general population and has requested being placed in observation cells when fearful that he will self-harm.

25 Mr. Toutsaint's evidence is also that CSC has failed to allow him to engage in meaningful spiritual practices. He says that he has been deprived of Dene cultural practices in most institutions in which he has been placed, and at Saskatchewan Penitentiary, where there are Dene Elders, he contends that CSC has limited his access to both the type of practices he prefers and to a frequency that would be meaningful. For example, since his arrival in August 2018, he has yet to participate in a sweat and has only participated in five or so pipe ceremonies. He does not find smudging, or spiritual cleansing, which has been provided, to be meaningful.

26 Saskatchewan Penitentiary does have a sweat lodge in a fenced off corner of the prison yard. A photograph of it is in the 2017-2018 Correctional Investigator Report included in the record. It appears from the evidence that its use was constrained by a number of practical difficulties during Mr. Toutsaint's stay there, not the least of which was the cold northern Saskatchewan winter. But it also appears that he may have been denied a sweat because of his behavioural problems.

27 Since June 2018, Mr. Toutsaint has been asking CSC to transfer him to RPC. Mr. Toutsaint claims that he needs to be transferred to a therapeutic environment and that his mental health and spiritual needs can best be met at RPC. Mr. Toutsaint has not received any formal responses to his transfer requests but is aware that his treatment team has advised against it.

28 Mr. Toutsaint was previously transferred to RPC in 2015 for approximately 6 weeks on an emergency basis; in 2016 for approximately 6 months after a referral for treatment; and again in 2017 for approximately 2 months following a transfer between institutions. The evidence is that his time at RPC met with mixed results. Though he states that he was able to get meaningful treatment and interactions at RPC, the record is that he also self-harmed and fought with other inmates there. As noted above, he has also been placed in other treatment centres.

29 On May 6, 2018, Mr. Toutsaint filed a complaint with the CHRC in which he alleges that CSC has discriminated against him on the basis of race, national or ethnic origin, colour, religion, and disability (namely, his mental illnesses).

30 Also in May 2018, Mr. Toutsaint slashed his neck and severed his jugular vein while being held in segregation at the Quebec Regional Reception Centre. Mr. Toutsaint's evidence is that he was feeling distressed and threatened to hurt himself because the guards were giving him a hard time about him calling his legal representative. He states that while he calmed down when CSC promised not to call in the ERT, he proceeded to slash his neck after seeing ERT members crouched outside his cell. Mr. Toutsaint spent nine days in hospital recovering after emergency surgery.

31 Shortly after this incident, as part of his CHRC complaint process, Mr. Toutsaint met with Dr. Jon Wesley Boyd, a board certified psychiatrist from Massachusetts and Associate Professor at Harvard Medical School. Mr. Toutsaint's legal representative arranged this evaluation. Dr. Boyd met with Mr. Toutsaint for 2 hours on July 20, 2018 and submitted his first assessment on October 29, 2018. Dr. Boyd had an approximately 70 minute phone conversation with Mr. Toussaint on January 3, 2019 and submitted a follow-up assessment on January 19, 2019.

32 Dr. Boyd agreed with CSC's diagnoses and further diagnosed Mr. Toutsaint with Major Depressive Disorder (MDD) and PTSD. PTSD was not initially diagnosed by Dr. Masood, but he agreed with Dr. Boyd in his latest assessment. Dr. Boyd writes that these diagnoses make Mr. Toutsaint ineligible for administrative segregation under "Commissioner's Directive 709: Administrative Segregation".

33 Dr. Boyd's reports were introduced as exhibits to the affidavits of one of Mr. Toutsaint's legal representatives and as exhibits to Mr. Toutsaint's affidavits. As a result, they were not subject to cross-examination. The reports contain statements which the Court considers to be in the nature of advocacy. Dr. Boyd, for example, questioned whether the failure to diagnose Mr. Toutsaint with MDD was due to CSC policy for mental health clinicians to avoid diagnosing inmates with conditions that would be exclusionary under CD 709. There is no evidence in the record to support that allegation and it would be contrary to their ethical obligations.

34 That said, the ethical dilemmas created by dual loyalties to patient and employer in the CSC environment have been recognized. The 2017-2018 Correctional Investigator Report observed in its discussion of health care in federal corrections that CSC health services do not have true clinical independence.

35 While Dr. Masood agreed with Dr. Boyd's PTSD diagnosis, he continues to disagree that Mr. Toutsaint suffers from MDD, and that view was shared by the lead psychologist at the penitentiary, Mr. Finlayson. There are indications in the record that Mr. Toutsaint has been observed by other mental health staff to be depressed, and at least one report questions whether he suffered from MDD. But, no diagnosis exists other than Dr. Boyd's.

36 Mr. Finlayson signs off on reports stating that Mr. Toutsaint may stay in segregation under CD 709. This practice is arguably contrary to the United Nations Standard Minimum Rules for the Treatment of Prisoners, known as the Mandela Rules. The Rules prohibit medical professionals from being involved in disciplinary sanctions or restrictive measures. I make no finding on whether there has been a breach of either CD 709 or the principles. Mr. Finlayson's evidence is that he did not support the use of segregation or observation units as sanctions, but to protect Mr. Toutsaint from self-harm.

37 As noted, both Dr. Masood and Mr. Finlayson were cross-examined extensively for this application. Among other questions put to them, they were closely examined on whether their assessments of Mr. Toutsaint's treatment needs were coloured by their duties of loyalty to their employer. Both affiants denied that to be the case.

38 The Applicant also filed the affidavit of Dr. Melady Preece, a clinical psychologist and Assistant Professor in the Faculty of Medicine at the University of British Columbia. The affidavit attaches a four page report that she provided to the Applicant's legal team on March 13, 2019. Dr. Preece has expertise in mood disorders and PTSD, has worked with people who engage in self-harm and has conducted assessments of incarcerated individuals.

39 Dr. Preece had no personal interactions with Mr. Toutsaint but was provided with a number of documents relating to his institutional history a few days before she was asked to provide her report. Her report, based on the assumption that Mr. Toutsaint's affidavit is a true representation of how he experiences the environment at the penitentiary, responds to a series of questions regarding the appropriateness of the mental health treatment plan developed for Mr. Toutsaint. The report was, in my view, of limited value on this application.

40 Mr. Toutsaint submits that his transfer to RPC is necessary to prevent further harm to himself while his CHRC complaint is resolved. Specifically, he fears further harm, including a risk of suicide, further self-mutilation, psychological damage and loss of liberty. The Respondent contends that the weight of the evidence supports the conclusion that Mr. Toutsaint can presently best be cared for at Saskatchewan Penitentiary.

41 The members of his treatment team do not support a transfer to RPC at this time but recognize that this may yet again be assessed as necessary to meet his treatment needs. At the heart of this application, therefore, is the following question: who is best suited to make that determination — the Court, at Mr. Toutsaint's request, supported by the assessments of independent experts who have had limited or no contact with him, or the CSC mental health professionals who have ongoing contact with him and responsibility for his present treatment plan?

III. Issues

42 Based on the materials filed and the Parties' submissions, the Court must determine the following issues:

1. Whether the Court has jurisdiction to issue the relief sought;

2. Whether Mr. Toutsaint has satisfied the test for an interlocutory injunction.

IV. Relevant Legislation

43 *Federal Courts Act* section 44 grants this Court the jurisdiction to grant injunctions "in all cases in which it appears to the court to be just or convenient to do so":

> **Mandamus, injunction, specific performance or appointment of receiver**
>
> **44** In addition to any other relief that the Federal Court of Appeal or the Federal Court may grant or award, a mandamus, an injunction or an order for specific performance may be granted or a receiver appointed by that court in all cases in which it appears to the court to be just or convenient to do so. The order may be made either unconditionally or on any terms and conditions that the court considers just.
>
> **Mandamus, injonction, exécution intégrale ou nomination d'un séquestre**
>
> **44** Indépendamment de toute autre forme de réparation qu'elle peut accorder, la Cour d'appel fédérale ou la Cour fédérale peut, dans tous les cas où il lui paraît juste ou opportun de le faire, décerner un mandamus, une injonction ou une ordonnance d'exécution intégrale, ou nommer un séquestre, soit sans condition, soit selon les modalités qu'elle juge équitables.

44 Subsection 3(1) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA] outlines prohibited grounds of discrimination:

> **Prohibited grounds of discrimination**
>
> **3 (1)** For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.
>
> **Motifs de distinction illicite**
>
> **3 (1)** Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'identité ou l'expression de genre, l'état matrimonial, la situation de famille, les caractéristiques génétiques, l'état de personne graciée ou la déficience.

45 CHRA section 5 outlines what may constitute a discriminatory practice:

> **Denial of good, service, facility or accommodation**
>
> **5** It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or

(b) to differentiate adversely in relation to any individual,

on a prohibited ground of discrimination.

Refus de biens, de services, d'installations ou d'hébergement

5 Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public:

a) d'en priver un individu;

b) de le défavoriser à l'occasion de leur fourniture.

46 CHRA section 15 outlines the onus that a responding party must meet, once a *prima facie* case of discrimination is established, to show that they have accommodated the needs of the complainant to the point of undue hardship:

Exceptions

15 (1) It is not a discriminatory practice if

(g) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse differentiation and there is bona fide justification for that denial or differentiation.

Accommodation of needs

(2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a bona fide occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a bona fide justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

Exceptions

15 (1) Ne constituent pas des actes discriminatoires:

g) le fait qu'un fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public, ou de locaux commerciaux ou de logements en prive

un individu ou le défavorise lors de leur fourniture pour un motif de distinction illicite, s'il a un motif justifiable de le faire.

Besoins des individus

(2) Les faits prévus à l'alinéa (1)a) sont des exigences professionnelles justifiées ou un motif justifiable, au sens de l'alinéa (1)g), s'il est démontré que les mesures destinées à répondre aux besoins d'une personne ou d'une catégorie de personnes visées constituent, pour la personne qui doit les prendre, une contrainte excessive en matière de coûts, de santé et de sécurité.

47 Transfers between penitentiaries are made under paragraph 29(a) of the *Corrections and Conditional Release Act*, SC 1992, c-20 [CCRA] and are subject to the factors set out in section 28, which includes "the safety of that person and other persons in the penitentiary" and "the availability of appropriate programs and services and the person's willingness to participate in those programs."

48 The CCRA permits CSC to place an inmate in administrative segregation. The inmate is normally permitted out of his or her cell for a minimum of two hours per day, plus time for a daily shower. The purpose of administrative segregation, as explained in CCRA subsection 31(1), is "to maintain the security of the penitentiary or the safety of any person by not allowing an inmate to associate with other inmates."

49 CCRA subsection 31 (3) gives the institutional head the discretion to order administrative segregation if certain conditions are met:

Grounds for confining inmate in administrative segregation

31 (3) The institutional head may order that an inmate be confined in administrative segregation if the institutional head is satisfied that there is no reasonable alternative to administrative segregation and he or she believes on reasonable grounds that

(a) the inmate has acted, has attempted to act or intends to act in a manner that jeopardizes the security of the penitentiary or the safety of any person and allowing the inmate to associate with other inmates would jeopardize the security of the penitentiary or the safety of any person;

(b) allowing the inmate to associate with other inmates would interfere with an investigation that could lead to a criminal charge or a charge under subsection 41(2) of a serious disciplinary offence; or

(c) allowing the inmate to associate with other inmates would jeopardize the inmate's safety.

Motifs d'isolement préventif

31 (3) Le directeur du pénitencier peut, s'il est convaincu qu'il n'existe aucune autre solution valable, ordonner l'isolement préventif d'un détenu lorsqu'il a des motifs raisonnables de croire, selon le cas:

a) que celui-ci a agi, tenté d'agir ou a l'intention d'agir d'une manière compromettant la sécurité d'une personne ou du pénitencier et que son maintien parmi les autres détenus mettrait en danger cette sécurité;

b) que son maintien parmi les autres détenus nuirait au déroulement d'une enquête pouvant mener à une accusation soit d'infraction criminelle soit d'infraction disciplinaire grave visée au paragraphe 41(2);

c) que son maintien parmi les autres détenus mettrait en danger sa sécurité.

50 CCRA sections 36 and 37 deal with the rights of inmates who are placed in administrative segregation:

Visits to inmate

36 (1) An inmate in administrative segregation shall be visited at least once every day by a registered health care professional.

Idem

(2) The institutional head shall visit the administrative segregation area at least once every day and meet with individual inmates on request.

Inmate rights

37 An inmate in administrative segregation has the same rights and conditions of confinement as other inmates, except for those that

(a) can only be enjoyed in association with other inmates; or

(b) cannot be enjoyed due to

(i) limitations specific to the administrative segregation area, or

(ii) security requirements.

Visites par un professionnel de la santé

36 (1) Le détenu en isolement préventif reçoit au moins une fois par jour la visite d'un professionnel de la santé agréé.

Visites par le directeur

> **(2)** Le directeur visite l'aire d'isolement au moins une fois par jour et, sur demande, rencontre tout détenu qui s'y trouve.
>
> **Droits du détenu**
>
> **37** Le détenu en isolement préventif jouit, compte tenu des contraintes inhérentes à l'isolement et des impératifs de sécurité, des mêmes droits et conditions que ceux dont bénéficient les autres détenus du pénitencier.

51 CCRA section 87(a) requires the institutional head to consider the inmate's health, including his or her mental health, when making the decision to place or maintain the inmate in administrative segregation.

52 CCRA sections 97 and 98 authorize the creation of Rules and Commissioner's Directives, some of which govern the practice of administrative segregation. Paragraph 19 of CD 709 precludes administrative segregation for those who meet certain criteria, including those "with serious mental illness with significant impairment." The policy defines that as including symptoms associated with psychotic, major depressive and bipolar disorders resulting in significant impairment in functioning.

53 Commissioner's Directive 710-2-3, entitled "Guidelines for Inmate Transfer Processes," provides at section 43:

> Prior to a transfer for admission to psychiatric hospital care in a CSC Treatment Centre, or admission to Intermediate Mental Health Care within a Treatment Centre or other institution, the inmate must meet the clinical admission criteria in accordance with the Admission and Discharge Guidelines listed in the Integrated Mental Health Guidelines.

54 Article 10.2 of the *Integrated Mental Health Guidelines* provides that "non-emergency referrals to Psychiatric Hospital and Intermediate Mental Health Care are coordinated through the Mental Health Team at the offender's mainstream institution, who will ensure that the referral is appropriate and adheres to the admission guidelines." In this instance, as noted above, the Mental Health Team at the Applicant's institution does not support his transfer to RPC.

V. Preliminary issue

55 At the hearing of this matter on April 10, 2019, counsel for the Attorney General of Canada unexpectedly advised the Court that they were under the belief that the proceedings that day related to a motion for interlocutory relief within an application, with further proceedings on the actual application to follow. Counsel for Mr. Toutsaint responded that they had proceeded on the understanding that the hearing was on their application for a mandatory interlocutory injunction pending the determination of the CHRC complaint.

56 Counsel for the Attorney General stated that certain decisions they had made in preparation for the hearing, such as foregoing cross examinations and not questioning the Court's jurisdiction to grant relief under *Federal Courts Act* section 44, were made to accommodate the hearing of the motion on an expedited basis, and that they would not make such decisions in the broader application when "in the fullness of time that is perfected and set down for hearing." Counsel for the Attorney General also stated that they may have sought to file more evidence and may have wished to cross-examine Dr. Preece and Nicole Kief, a legal advocate for Mr. Toutsaint, on her several affidavits. They would not, however, have attempted to cross-examine the Applicant under any circumstances, given his mental disorders.

57 The confusion over the nature of the proceedings may have arisen because the originating document, filed on February 27, 2019, is a Notice of Application. It contemplated what may be described as a free-standing application for an injunction under *Federal Courts Act* section 44 and CHRA sections 3 and 5. A case management order was issued on February 28, 2019. The matter was set down for hearing as a motion at the General Sittings in Vancouver on March 5, 2019 and was then adjourned at the Respondent's request to allow it more time to prepare. A case management judge was appointed on the same date.

58 By Order dated March 14, 2019, the Court stated it was "becoming clearer that an expedited hearing process diminishes the necessity of interim injunctive relief" and that the Court had been advised "that the Respondent will forego cross examination in order to assist with an expedited hearing." I understand these words to mean that the Court had addressed the potential need for interim relief under Rule 373 of the *Federal Courts Rules*, SOR/98-106.

59 In a further order dated March 26, 2019, the Court adjourned "[t]he hearing of the application for an injunction...*sine die*." In an Order dated March 28, 2019, the Court considered that "the hearing of the injunction application was originally scheduled for March 28, 2019," and ordered that "[t]he parties [were] to make themselves available anytime during the week of April 8 to 12, 2019 for a one day hearing of the injunction application."

60 In refusing the Attorney General's request to file further affidavit evidence, the March 28, 2019 Order stated that "the injunction motion was intended to proceed as an expedited hearing." However, the Order refers to the proceeding as an "injunction application" in a number of paragraphs. Further, the Court directed on April 1, 2019, that "the injunction application will be heard on Wednesday, April 10, 2019...for a duration of one day."

61 It is not clear to the Court what the Respondent considered would be the actual application that would follow the April 10, 2019 hearing. The relief being sought was a mandatory interlocutory injunction pending the determination of the CHRC complaint. The Court does not have jurisdiction to deal with the merits of the Applicant's complaint to the CHRC, other than through an application for judicial review after a decision on the complaint has been rendered. The Court could grant an

interlocutory injunction under Rule 373 of the *Federal Courts Rules* pending the outcome of those proceedings but could not usurp the jurisdiction of the CHRC to consider the complaint, or for that matter, that of the Canadian Human Rights Tribunal (CHRT) if the complaint was referred to them for determination.

62 It appears that the Respondent may have assumed that the proceedings were in the nature of the interim relief contemplated by Rule 373. But that was clearly not the Applicant's understanding, nor that of the Court in the case management proceedings leading up to the April 10, 2019 hearing. It is regrettable that counsel for the Attorney General did not seek to clarify their understanding until the injunction hearing itself, as their understanding is not supported by the record. In any event, I am satisfied that the Respondent has suffered no prejudice by the procedure followed.

63 I advised counsel for the Attorney General at the hearing that I would take their submissions under consideration but that they should be prepared to argue the merits of the motion. They were, and they did. Counsel advised that they were "ready to oppose the application for the injunction of the relief sought in the application and in the notice of motion."

64 In the result, the Attorney General did not challenge the Court's jurisdiction to issue the remedy sought under *Federal Courts Act* section 44. This Court must still be satisfied that it has the jurisdiction to issue any remedy that Mr. Toutsaint seeks before it can proceed to determine the matter. Given the lack of a challenge on that ground, the Court can deal with it without extensive reasons.

65 This Court is empowered by Parliament to grant an injunction "in all cases in which it appears to the court to be just or convenient to do so": *Federal Courts Act*, s 44. The courts have previously accepted that section 44 gives the Federal Court jurisdiction to grant interlocutory injunctions for proceedings before the CHRC: *Colasimone v. Canada (Attorney General)*, 2017 FC 953 (F.C.) at para 7; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 (S.C.C.) at para 37, (1998), 157 D.L.R. (4th) 385 (S.C.C.).

66 In the circumstances and absent any argument to the contrary, I am satisfied that the Court has jurisdiction to grant the relief Mr. Toutsaint seeks. The question remains whether the relief should be granted.

67 I note that this proceeding differs from the motion considered in *Boulachanis c. Canada (Procureur général)*, 2019 FC 456 (F.C.), a decision brought to my attention by Applicant's counsel after the hearing. The underlying matter in that case was an application for judicial review before the Federal Court of a refusal to transfer the applicant from a male institution to a female institution. A mandatory interlocutory injunction was granted by the motions judge on a determination that the applicant had demonstrated a strong *prima facie* case of discrimination, would suffer irreparable harm if not transferred and enjoyed the balance of convenience.

68 The transfer order was appealed to the Federal Court of Appeal, which granted a stay pending the outcome of the judicial review in the Federal Court: *Boulachanis c. Canada (Procureur général)*, 2019 CAF 100 (F.C.). I note that the Court of Appeal stay decision suggests that the motions judge did not have sufficient evidence of harm and did not sufficiently consider Ms. Boulachanis's escape risk. In the circumstances, I do not consider the decision at first instance to be helpful in deciding this matter.

VI. Analysis

69 The nature of the relief Mr. Toutsaint seeks is mandatory in that, if granted, it would force the Respondent to take action in accordance with the terms of the order. At the outset, I would note that the Court will not consider Mr. Toutsaint's general claim for relief "requiring CSC to refrain from discriminating against the Applicant." This particular claim was not argued during the April 10, 2019 hearing. Further, as a government institution, CSC is obliged to respect both the *Charter* and the CHRA. It is not this Court's role to reiterate this point absent a finding of discrimination, which is the very issue currently before the CHRC. This Court's only consideration is whether Mr. Toutsaint meets the test required for the Court to grant other relief while this determination unfolds.

70 To issue an interlocutory injunction regarding the other requested relief, the Court must be satisfied that Mr. Toutsaint meets the test set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 (S.C.C.) [*RJR*].

A. Strong prima facie case

71 Under the first branch of the *RJR* test, it would have been sufficient for Mr. Toutsaint to demonstrate that there was a serious question to be tried in the underlying matter (i.e., the CHRC complaint). It would then be necessary for him to demonstrate that he would suffer irreparable harm if this Court did not grant the relief he seeks. Mr. Toutsaint would then have to show that the balance of convenience favours granting the injunction.

72 However, in *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 (S.C.C.) [*CBC 2018*], the Supreme Court of Canada clarified that in the case of an application for a mandatory interlocutory injunction, the Applicant must demonstrate that he has a strong *prima facie* case. This is because the potentially severe consequences for the Respondent require a more in depth review of the merits of the underlying matter at the interlocutory stage. Here, the grant of a mandatory interlocutory injunction would disrupt the Respondent's offender management procedures and impose additional costs. See *Colasimone*, above at para 14.

73 The Supreme Court of Canada articulated what is meant by a strong *prima facie* case at paragraph 17 of *CBC 2018*:

> 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"; a "strong and clear" or "unusually strong and clear" case; that he or she is "clearly right" or "clearly in the right"; that he or she enjoys a "high probability" or "great likelihood of success"; a "high degree of assurance" of success; a "significant prospect" of success; or "almost certain" success. 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 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.

74 In the result, to establish a strong *prima facie* case of discrimination, the Applicant must show that it is very likely that he can demonstrate that he had a characteristic protected from discrimination by the CHRA, that he experienced an adverse impact and that the protected characteristic was a factor in the adverse impact: *Serge Lafrenière c. Via Rail Canada Inc.*, 2017 CHRT 29 (Can. Human Rights Trib.) at para 22.

75 The Applicant argues that he has a strong *prima facie* case that is likely to succeed before the CHRC and the CHRT. He contends that at the relevant times, he had characteristics protected from discrimination; namely, that he is Indigenous and suffers from mental disability. Mr. Toutsaint points to his prolonged periods of administrative segregation and the resulting exacerbated symptoms of his mental illnesses as evidence of the adverse impact he has experienced. He contends that his protected characteristics were a factor in that adverse impact. In particular, they have made him unable to integrate into the general prison population in the several institutions in which he has been placed. He says that he is in need of trauma therapy in an environment where health care staff are available at all times and are trained to deal with serious mental illnesses and risks of suicide.

76 The effects of administrative segregation were addressed in an Ontario Superior Court of Justice decision: *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491 (Ont. S.C.J.). In brief, the Court found that administrative segregation:

- Amounted to a significant deprivation of liberty beyond that which necessarily flowed from imprisonment;
- Imposed psychological stress capable of causing serious permanent negative mental health effects;
- Caused sensory deprivation and can alter brain activity shortly after admission; and
- Posed a serious risk of negative psychological effects when prolonged.

77 The Superior Court held that the use of prolonged segregation breached *Charter* section 7, requiring a declaration of invalidity: at paras 272-273. On appeal, the Ontario Court of Appeal upheld the decision at first instance in part but declared that sections 31-37 of the CCRA also violated the protection against cruel and unusual treatment in *Charter* section 12, could not be justified under section 1 and were of no force and effect: 2019 ONCA 243 (Ont. C.A.) at paras 119, 126, 130, 150.

78 An extensive review of the jurisprudence relating to the placement of mentally ill inmates in administrative segregation can also be found in *Brazeau v. Attorney General (Canada)*, 2019 ONSC 1888 (Ont. S.C.J.), a case in which summary judgment was granted in a class action for breach of the class members' *Charter* section 7 rights. See also *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62 (B.C. S.C.), in which the Supreme Court of British Columbia found that CSC's administrative segregation regime perpetuates the disadvantage faced by Indigenous prisoners as they are overrepresented therein due to factors associated with their social history, including gang affiliation and entrenched violence.

79 The CHRC, in its 2015 Annual Report, advised that administrative segregation should only be used in exceptional circumstances, as a last resort, for a very brief time, and never with inmates with serious mental health issues.

80 There is no question that in his complaint to the CHRC, the Applicant will be able to point to the large body of evidence that has accumulated pointing to the adverse effects of administrative segregation, notwithstanding that it has often been his preference rather than admission to the general population of the institutions in which he has been held. The onus will then shift to the Respondent to show that it has made efforts to reasonably accommodate, and that it would cause undue hardship to eliminate the use of segregation in the Applicant's case.

81 This case is analogous, the Applicant argues, to *Tekano v. Canada (Attorney General)*, 2010 FC 818 (F.C.), in which this Court, on judicial review, quashed the CHRC's refusal to refer a complaint to the CHRT. There are factual similarities to the present matter in that Mr. Tekano resisted treatment and often preferred administrative segregation to being in living units with other prisoners. He also had a serious criminal record and was violent and threatening to other prisoners, correctional staff and medical personnel. Mr. Tekano alleged in his complaint that CSC failed to accommodate his mental disability by repeatedly placing him in segregation or isolation. He had spent time at the Pacific RTC, but he was transferred back to a maximum security institution because he had been violent towards the mental health staff. The Commission accepted the investigator's report that CSC was accommodating Mr. Tekano's disabilities. Madame Justice Gauthier held that the decision to dismiss the claim on the ground that it did not warrant further inquiry was not within the range of acceptable outcomes on the facts and the law.

82 According to the CHRC's 2015 Annual Report to Parliament, Mr. Tekano was ultimately sent again to a RTC where he was able to receive medication, therapy and treatment for his mental health issues, and where he reduced his self-harming. As far as the Court could determine from the record, this was not as a result of a mandatory interlocutory injunction but rather because of a treatment decision by CSC.

83 I accept that the weight of evidence is very much against the use of administrative segregation in general, and particularly in the case of mentally ill offenders. The evidence is that it is disproportionally used in the case of Indigenous offenders. There is no doubt, based on the evidence presented, that prolonged confinement in administrative segregation or protective isolation can have profoundly deleterious effects on inmates. The use of segregation also amounts to what is referred to in the literature and jurisprudence as a "prison within a prison." That implicates offenders' liberty interests notwithstanding that they are serving sentences in detention.

84 The Respondent contends that the case they have to answer is not about administrative segregation and that they would have approached the matter very differently if it was. The Notice of Application before the Court is not for an order to prevent the use of segregation by CSC in general or specifically in the Applicant's case, but for his mandatory transfer from Saskatchewan Penitentiary to RPC, for collateral relief relating to the nature of the treatment he receives and for access to Dene cultural practices.

85 In reply, counsel for the Applicant argued that while they had not sought an order to prevent the use of segregation, such a remedy was encompassed within the clause of "such other relief as this honourable court may deem just," included in the Notice of Application. I agree with the Respondent that a "such other relief" clause is not meant to be construed so broadly, but rather is meant to cover incidental or collateral matters related to the main relief sought. In this instance, a finding against the use of administrative segregation would be neither incidental nor collateral.

86 As noted above, while RPC as a whole is administered by CSC as a penitentiary, part of the centre is an acute care hospital licensed under provincial legislation. The evidence is that Saskatchewan Penitentiary uses both administrative segregation and observation cells, whereas RPC uses the latter when there are critical circumstances involving imminent danger. While the cells are similar, the observation cells have fewer amenities and the inmate is not permitted personal items, as they would be in segregation. The inmate under observation because of self-harming is also required to wear a simple smock, or "baby doll," instead of the normal clothing he would be permitted in segregation. At times, the treatment centres also employ physical or "Pinel" restraints to prevent inmate patients from harming themselves or others. The Applicant was confined in Pinel restraints for an extended period of time while at a centre in Quebec.

87 The Respondent's position, in essence, is that mental health care decisions, such as those mandated by the *Saskatchewan Mental Health Services Act*, should be made by mental health

care professionals who are treating the inmate patient and not by others, including this Court: *Colasimone*, above, at para 12. And where there is evidence of accommodation, as here, the Respondent argues, the Applicant fails to make out a strong *prima facie* case of discrimination.

88 I agree with the Respondent that the Applicant is asking that the Court substitute its judgment for that of the medical experts who are treating Mr. Toutsaint. Moreover, it is premature, as the Respondent argues, to conclude that the Applicant is very likely to succeed on his complaint to the CHRC. The complaint is at a very early stage of the process and has yet to result in referral to an inquiry. There is considerable evidence before the Court on this application of efforts to accommodate the very serious challenges presented by Mr. Toutsaint's mental and behavioural disorders, such as through transfers to other institutions, including RPC and other treatment centres. That these efforts to date have not proven to be successful beyond supporting brief periods of stability does not preclude a finding of reasonable accommodation. The evidence shows an active and substantial therapeutic program administered by qualified medical professionals attempting to address the Applicant's needs. Is it realistic to conclude that they will be resolved by a transfer to RPC, when that has not proven to be the answer in the past?

89 To grant the relief requested, I would be required to distinguish the judgment of my colleague, Madame Justice McDonald, in *Colasimone*, above, or disagree with it in a manner consistent with the principles of judicial comity. To issue the injunction could lead this Court into an area which it is ill-fitted to manage. As Madame Justice McDonald states in *Colasimone*, at paragraph 12, "[t]his Court is not in any position to substitute its decision for that of medical experts who have assessed the Applicant." I appreciate that the Applicant has sought to overcome that disqualification by submitting the expert views of Dr. Boyd and Dr. Preece, but for the reasons mentioned above, I am not persuaded that I should give their opinions greater weight than the CSC experts who have had greater contact with the Applicant.

90 *Colasimone*, as here, was a case seeking injunctive relief from this Court to compel the CSC to provide services to Mr. Colasimone, including a transfer to a RTC pending the resolution of his human rights complaint to the CHRC. Madame Justice McDonald concluded that Mr. Colasimone was not entitled to mandatory injunctive relief, applying the higher threshold on the serious issue branch of the tripartite test.

91 I note that in *Drennan v. Canada (Attorney General)*, 2008 FC 10 (F.C.), Madame Justice Mactavish accepted that the Court had jurisdiction to grant limited injunctive relief pending the exercise of the CHRC's screening function. She declined to grant a transfer to a different facility within CSC as had been requested. Justice Mactavish also stressed, at paragraph 24, that in the particular circumstances of that case — the offender was to be released in three weeks — she was not making a determination of whether his human rights complaint should ultimately succeed. She did find that Mr. Drennan had raised a serious issue about the accommodation provided to deal with his physical disability, quadriplegia, and that he would suffer irreparable harm in the

short time before his release because of the inadequacy of the accommodation provided. The Court was not persuaded that he would suffer irreparable harm if he was not transferred to a RTC. In the circumstances, the balance of convenience lay in his favour. Given the significant factual differences, *Drennan* is of little assistance in addressing the issues in this case.

92 The treating mental health care professionals providing care to Mr. Toutsaint are licensed under provincial legislation and subject to their regulatory bodies. Their treatment of patients within their care must adhere to the standards of the licensing bodies. As described in cross-examination by Mr. Finlayson, the lead psychologist responsible for Mr. Toutsaint's treatment at Saskatchewan Penitentiary, his loyalty is to the college that he practices under and to the clients he works with. Dr. Masood, the consultant psychiatrist who has diagnosed Mr. Toutsaint and is responsible for his overall treatment plan, gave similar evidence.

93 The evidence is that the mental health team that is actually providing treatment to Mr. Toutsaint at Saskatchewan Penitentiary does not support his transfer to RPC. They believe that it would actually be harmful to him. In their view, he is not ready in terms of engaging and participating in therapy and he requires stability. His history of prior transfers to RPC also does not support a conclusion that he would do better there. It is questionable that he would achieve a greater degree of stability at RPC given the disruption that has accompanied his prior transfers.

94 A transfer to RPC would also, in Dr. Masood's opinion, constitute negative reinforcement of the Applicant's behavioural problems. The priority was to address his self-harming behaviour through focused, trauma-based therapy and to try to improve his interpersonal relationships. The evidence from Mr. Finlayson is that they have the mental health personnel in place to carry out the treatment plan and to build what he described as a "therapeutic alliance" with Mr. Toutsaint. These arrangements are not perfect. Dr. Masood, for example, conducts his "visits" with Mr. Toutsaint by video conference, as he is based in Saskatoon. Contacts with mental health workers at Prince Albert are often through the cell door or in a booth with a barrier between the offender and the worker. Nonetheless, the weight of the evidence is that moving the Applicant would jeopardize the progress they have made thus far. There is no assurance that a transfer to RPC would achieve better results. It is not a panacea for the Applicant's problems.

95 In addition to the evidence of his treating psychiatrist and psychologist, the Respondent submitted the affidavit evidence of Lisa Barton, who directed the Aboriginal intervention program, including the Dene program, at Saskatchewan Penitentiary. Mr. Toutsaint has access to a Dene Elder from his home community of Black Lake who can conduct traditional cultural and spiritual practices. The evidence of the availability of such access is mixed. In at least one instance, a pipe ceremony being arranged was cancelled by the Elder after Mr. Toutsaint brandished a weapon. On another occasion, cold and snow interfered with plans to conduct a sweat. The Applicant objected to the use of that evidence as hearsay. In my view, the emails in which it is found are admissible under the business records exception to the hearsay rule. While the availability of such ceremonies

has clearly fallen short of Mr. Toutsaint's expectations, the evidence of the efforts to provide them may support a finding of reasonable accommodation. But that is not a matter for the Court to determine on this application.

96 Considering the Applicant's evidence and submissions, I am not persuaded that he has established a strong *prima facie* case that he is likely to succeed in the underlying complaint to the CHRC. While that conclusion is sufficient to dispose of the application before the Court, I think it appropriate to comment on the other aspects of the tripartite test.

B. Irreparable harm

97 The Applicant contends that the irreparable harms he is at risk of suffering are suicide, further self-mutilation, irreversible psychological damage and loss of liberty. These harms are irreparable, he argues, as they cannot be remedied by damages — particularly the risk of suicide. There is a very real risk that he could die before the completion of his human rights complaint if he is not transferred to a treatment centre where he feels safe and can engage in meaningful interaction and in his cultural and spiritual practices. Should he remain in a maximum security institution until the final determination of his complaint, there is a realistic probability that he will suffer further psychological deterioration that could be permanent. Moreover, each day his liberty is restricted in administrative segregation is a day he suffers irreparable harm, as the time can never be made up.

98 Both Dr. Masood and Mr. Finlayson were of the opinion that Mr. Toutsaint's risk of suicide is low. Dr. Masood's evidence was that during his contacts with Mr. Toutsaint, he was never concerned about the risk of suicide to the point that he would have considered it to be of imminent danger. Had he done so, he testified, he would have certified the Applicant under the provisions of the *Mental Health Services Act*. It is worth noting here that a transfer to RPC does not require certification.

99 The Applicant's self-harming was chronic but not done with the intention of killing himself, in Dr. Masood's view. Mr. Finlayson supported that assessment and testified that when Mr. Toutsaint had cut his own neck, the experience was extremely traumatizing. He told Mr. Finlayson that he had no intention of dying and could recall the incident in detail. In contrast to the neck slashing, which occurred at a Quebec institution, Mr. Toutsaint's self-harming at Saskatchewan Penitentiary was in the form of repeatedly cutting and reopening the same area on his arm. Mr. Finlayson described this as "non-suicidal self-injury," to which Mr. Toutsaint resorted as a method to cope with frustration and other emotions. While that in itself was considered serious and required intervention, the medical staff was confident that it could be managed. The only practical means to do so in some instances, however, was placement in an observation cell or physical restraints.

100 The use of self-harming as a coping mechanism could also be construed as a form of manipulation, as Mr. Toutsaint's counsel acknowledged during argument. Mr. Finlayson discounted that possibility during his cross-examination. But there are indications in the record

that Mr. Toutsaint resorted to self-harming or threatening self-harm or suicide when he did not get medications he preferred, access to canteen supplies rather than regular meals or some other accommodation in his favour. In a diagnostic review with Dr. Masood on October 18, 2018, the Applicant attributed the self-harming behaviour to mood instability and using those behaviours to prove a point, get heard and to bargain and achieve his demands. That also is consistent with the Saskatchewan Court of Appeal's findings in 2015 based on expert medical opinion.

101 The law governing irreparable harm was discussed by Stratas JA in *Glooscap Heritage Society v. Minister of National Revenue*, 2012 FCA 255 (F.C.A.) at para 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.
>
> [Citations omitted]

102 In *Colasimone*, above, the applicant had attempted to commit suicide on two occasions. Justice McDonald was not prepared to find a risk of irreparable harm pending the completion of the CHRC process. She concluded, at paragraph 21, that the institution had appropriate measures in place to protect the applicant from himself if he attempts self-harm.

103 In this matter, there is compelling evidence that the Applicant is likely to continue to harm himself. But it is not clear that this risk would be reduced if he were transferred to RPC as he was in the past. Moreover, given his history of institutional misbehaviour, it is equally likely that he would continue to act out at RPC and that the treatment team there would be compelled to place him in observation cells similar to those in which he spends much of his time at Saskatchewan Penitentiary.

104 In the circumstances, and despite the extensive evidence marshalled by his counsel, I am not prepared to find that the Applicant would suffer irreparable harm if the injunction sought was not granted.

C. Balance of convenience

105 The Applicant submits that the balance of convenience favours granting the injunction on the ground that his death by suicide before the final determination of his case, if the injunction were not granted, would indisputably be more inconvenient to the Applicant than transferring him would be to CSC, if the injunction were granted. Granting the injunction, the Applicant argues, would support the purposes of the CCRA, which include carrying out sentences in a safe and humane manner, and would meet CSC's obligation to provide every inmate with essential mental health care.

106 The Applicant contends that any additional cost to CSC of transferring him to RPC and providing him with treatment there until the final determination of his human rights complaint is trivial in comparison to his serious risk of death, psychological harm and further restriction of liberty. Counsel argued that CSC could simply build more capacity if the current number of available beds was insufficient.

107 The Respondent submits that the evidence of the present treatment team establishes that the risk of suicide and self-harm is better mitigated in the current environment than it could be at RPC, owing in part to the Applicant's own behavioural issues. This assessment, the Respondent argues, is based on comprehensive and day-to-day knowledge of, and interactions with, the Applicant, and it should be preferred to the Applicant's evidence.

108 In my view, the effects of ordering a transfer cannot be discounted as trivial. Among other things, the treatment relationship that the Applicant has with the mental health professionals at his present institution would be disrupted. Moreover, CSC would be required to relocate and house the Applicant at RPC, potentially displacing or preventing another inmate from having access to the treatment facilities. The transfer would not be temporary but prolonged, as it would take some time for the CHRC to determine whether to refer the complaint to an inquiry and, if referred, for the inquiry to be held and a decision rendered. The order requested is for the duration of that process.

109 The Court must also be mindful of the broader public interest, including the safety and security of CSC institutions and of all persons within those institutions. The Applicant has shown little inclination to modify his behaviour and to actively participate in a treatment regime.

110 In the circumstances, the balance of convenience rests with the Respondent.

D. Conclusion

111 As Dr. Bradford states in the introduction to his December 2017 report: "[t]he administration of a correctional facility providing mental health care is a difficult balancing act between delivering the appropriate mental health assessment and treatment services and providing a security umbrella." That balancing act is not facilitated in my view by the unnecessary intervention of the courts. The issues addressed by Dr. Bradford in his report are systemic in nature and require a systemic response.

112 The Applicant has failed to demonstrate that he has a strong *prima facie* case in the underlying complaint to the CHRC or that he would suffer irreparable harm if the injunction were not granted. Weighing the competing interests, the balance of convenience rests with the Respondent. The application is, therefore, dismissed. However, as indicated at the beginning of these reasons, I urge the correctional officials to consider whether the time has come to

reassess whether Mr. Toutsaint could benefit from another period within the RPC's therapeutic environment.

VII. Costs

113 No costs were requested.

JUDGMENT IN T-385-19

THIS COURT ORDERS that:

1. the application is dismissed, and
2. no costs are awarded.

Application dismissed.

2018 FCA 199
Federal Court of Appeal

Wenham v. Canada (Attorney General)

2018 CarswellNat 6152, 2018 C.E.B. & P.G.R. 8296 (headnote only), 2018 FCA 199, 298 A.C.W.S. (3d) 251, 429 D.L.R. (4th) 166, 48 Admin. L.R. (6th) 22

BRUCE WENHAM (Appellant) and ATTORNEY GENERAL OF CANADA (Respondent)

David Stratas, D.G. Near, J.M. Woods JJ.A.

Heard: January 9, 2018
Judgment: November 1, 2018
Docket: A-212-17

Proceedings: reversing *Wenham v. Canada (Attorney General)* (2017), 2017 CF 658, 2017 CarswellNat 8851, 2017 FC 658, 2017 CarswellNat 3265, Ann Marie McDonald J. (F.C.)

Counsel: David Rosenfeld, Brittany Tovee, for Appellant
Melanie Toolsie, Negar Hashemi, for Respondent

***David Stratas J.A.*:**

1 Mr. Wenham appeals from the order of the Federal Court (per McDonald J.): 2017 FC 658 (F.C.). The Federal Court denied Mr. Wenham's motion to certify his application for judicial review as a class proceeding.

2 In this Court, Mr. Wenham submits that the Federal Court's order is undermined by several legal errors. He asks this Court to make the order the Federal Court should have made: to certify his application as a class proceeding.

3 I agree with Mr. Wenham. I would set aside the order of the Federal Court, grant Mr. Wenham's motion and make an order certifying the application as a class proceeding.

A. Background

4 Mr. Wenham's application for judicial review seeks to quash a compensation program established by the Government of Canada for victims of the drug, Thalidomide.

5 Mr. Wenham alleges that he is one of the victims. He says his mother took Thalidomide and this caused him to be born with severe bilateral deformities to his arms. But, thus far, he has been denied compensation.

6 In the late 1950's and early 1960's many mothers took Thalidomide to combat nausea and morning sickness. Only later was it discovered that using Thalidomide in the first trimester of pregnancy could cause deformities in children.

7 In 1990, by Order in Council, the Government of Canada established the Extraordinary Assistance Plan for Thalidomide Victims: *HIV-Infected Persons and Thalidomide Victims Assistance Order*, P.C. 1990-4/872. Under this plan, qualified persons received a lump-sum payment.

8 Many considered the compensation provided under the plan to be inadequate. In response, in 2015, the Government of Canada revised the plan. Under the revised plan, the Thalidomide Survivors Contribution Program, qualifying persons received a one-time payment of $125,000 and an annual lifetime pension of $25,000 to $100,000 depending on the level of disability.

9 Under the revised plan, persons could qualify for benefits if they had received payments under the 1990 plan or if they applied before May 31, 2016 and qualified under the 1990 plan. Importantly, however, they had to satisfy certain documentary proof requirements.

10 In his application, Mr. Wenham targets these requirements. To qualify, benefits-seekers had to show the following:

- verifiable information showing a settlement with the drug company;
- listing on an existing government registry of Thalidomide victims;
- documentary proof that Thalidomide was ingested during the first trimester of pregnancy; by virtue of a later direction, the Government of Canada limited the documentary proof to the following: doctor's prescriptions, hospital or medical records, hospital birth records, or an affidavit from persons with direct knowledge, such as the physician who prescribed the drug.

11 Mr. Wenham applied under the revised plan. In support, he submitted several affidavits. One was from a geneticist who provided an expert opinion on the causal link between his deformities and Thalidomide exposure. The geneticist did not have direct knowledge and so his affidavit did not satisfy the documentary proof requirements. Accordingly, Mr. Wenham's application for benefits was rejected.

12 Mr. Wenham was not alone. In all, 168 people were rejected because they failed to satisfy the documentary proof requirements.

13 In his application for judicial review, Mr. Wenham contends that the eligibility and documentary proof requirements and the resulting rejections of applications for benefits are unreasonable in the administrative law sense.

14 Soon after he brought his application for judicial review, Mr. Wenham brought a motion to certify it as a class proceeding on behalf of all the others whose applications were rejected for failure to satisfy the documentary proof requirements.

B. The governing provisions of the Federal Courts Rules

15 The Federal Courts, unlike the courts of some other jurisdictions, allow for applications for judicial review to be prosecuted as class proceedings.

16 Rule 334.12 of the *Federal Courts Rules*, SOR/98-106 provides for this. It expressly permits a member of a class of persons to start an action or an application on behalf of the members of the class. But the class action or application, as the case may be, can only be prosecuted as a class proceeding if it is certified as such. Certification is obtained by way of motion.

17 For certification, five requirements must be met:

> (a) the pleadings disclose a reasonable cause of action;
>
> (b) there is an identifiable class of two or more persons;
>
> (c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;
>
> (d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and
>
> (e) there is an adequate representative plaintiff or applicant.

(Rule 334.16(1) of the *Federal Courts Rules*.)

18 The Federal Court found that Mr. Wenham failed to satisfy any of these requirements.

19 In this Court, Mr. Wenham submits that the Federal Court committed errors of law and palpable and overriding errors. In his view, the Federal Court should have found that he met all five requirements and, as a result, should have certified his application as a class proceeding.

C. Analysis

20 In my view, owing to legal errors, the order of the Federal Court cannot stand: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.); *Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331 (F.C.A.).

21 Applying proper legal principles, including clear holdings on point from the Supreme Court, and making the order the Federal Court should have made, I find that Mr. Wenham has satisfied all five certification requirements and so I would grant his motion for certification and certify his application as a class proceeding.

(1) Reasonable cause of action (Rule 334.16(1)(a))

22 The reasonable cause of action requirement under Rule 334.16(1)(*a*) is identical to similar requirements found in the class proceedings legislation of other jurisdictions. Cases in those jurisdictions suggest that the reasonable cause of action requirement is best expressed in the negative: if the cause of action in the proceeding sought to be certified would not survive a motion to strike, certification must be denied. This reflects the common sense position that there is no sense certifying a proceeding that is doomed to fail.

23 The Supreme Court has repeatedly confirmed this. In the words of the Supreme Court, "the requirement [in class proceedings] that the pleadings disclose a cause of action" is of course governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is "plain and obvious" that no claim exists: *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68, [2001] 3 S.C.R. 158 (S.C.C.) at para. 25; see also *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, [2011] 2 S.C.R. 261 (S.C.C.) at para. 20 and *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57, [2013] 3 S.C.R. 477 (S.C.C.) at para. 63.

24 Therefore, to determine the requirement of a reasonable cause of action under Rule 334.16(1)(*a*), we must look to the jurisprudence on when a pleading should be struck for failure to disclose a cause of action. The leading case is *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 (S.C.C.). There, the Supreme Court articulated the test as follows (at para. 17):

> This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate*; *Hunt*; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

25 This Court put it this way:

> For the purposes of the first criterion - that the pleadings disclose a reasonable cause of action - the principles are the same as those applicable on a motion to strike. The facts alleged in the statement of claim are assumed to be true, and no evidence may be considered. The test is whether it is "plain and obvious" that the pleadings, assuming the facts pleaded to be true, disclose no reasonable cause of action.

(*R. v. John Doe*, 2016 FCA 191 (F.C.A.) at para. 23.)

26 These judicial expressions of the test and Rule 334.16(1)(*a*) refer to a "reasonable cause of action." The word "reasonable" is regrettable: it has every potential to mislead.

27 Here, it misled the Federal Court. The Federal Court asked itself "whether a reasonable case exists" and whether the application "has a reasonable chance of success" (at paras. 18 and 45). Elsewhere, it described its task as making "a preliminary assessment of the strength of the proposed class proceeding" (at para. 25). These are not the tests.

28 Quite aside from the above authorities, the Supreme Court has warned that on a certification motion, a court is not to resolve conflicting facts and evidence and assess the strength of the case. Rather the task is simply a threshold one: can the proceeding go forward as a class proceeding? See *Pro-Sys Consultants*, above at paras. 99 and 102.

29 The phrase "reasonable cause of action" is not an invitation to a court to assess the odds of a cause of action ultimately succeeding, and to let it go forward if there is only, say, a 3:1 chance against evidence coming forward that will clinch the claim. Wagering on whether the cause of action will cross the finish line is no part of the court's task.

30 In *Imperial*, above, the Supreme Court spoke against such an approach (at paras. 23 and 25):

> Before us, Imperial and the other tobacco companies argued that the motion to strike should take into account, not only the facts pleaded, but the possibility that as the case progressed, the evidence would reveal more about Canada's conduct and role in promoting the use of low-tar cigarettes. This fundamentally misunderstands what a motion to strike is about. It is not about evidence, but the pleadings. The facts pleaded are taken as true. Whether the evidence substantiates the pleaded facts, now or at some future date, is irrelevant to the motion to strike. The judge on the motion to strike cannot consider what evidence adduced in the future might or might not show. To require the judge to do so would be to gut the motion to strike of its logic and ultimately render it useless.
>
> . . . . .
>
> Related to the issue of whether the motion should be refused because of the possibility of unknown evidence appearing at a future date is the issue of speculation. The judge on a motion to strike asks if the claim has any reasonable prospect of success. In the world of

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> abstract speculation, there is a mathematical chance that any number of things might happen. That is not what the test on a motion to strike seeks to determine. Rather, it operates on the assumption that the claim will proceed through the court system in the usual way — in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedent. The question is whether, considered in *the context of the law and the litigation process*, the claim has no reasonable chance of succeeding.
>
> [emphasis in original]

31 Reasonableness, as it is understood in other contexts, does not enter into it. The test is whether a cause of action has been pleaded that is not plain and obvious to fail.

32 The foregoing authorities all concern actions, not applications. The case at bar concerns an application. Is the threshold for striking an application different than that for striking an action?

33 No. In motions to strike applications for judicial review, this Court uses the same threshold. It uses the "plain and obvious" threshold commonly used in motions to strike actions, sometimes also called the "doomed to fail" standard. Taking the facts pleaded as true, the Court examines whether the application:

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

(*JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue*, 2013 FCA 250, [2014] 2 F.C.R. 557 (F.C.A.) at para. 47.)

34 To determine whether an application for judicial review discloses a cause of action, the Court must first read the notice of application to get at its "real essence" and "essential character" by "reading it holistically and practically without fastening onto matters of form": *JP Morgan* at paras. 49-50.

35 There are three distinct, analytical stages to an application for judicial review and it is useful to keep them front of mind: *Canada (Attorney General) v. Boogaard*, 2015 FCA 150, 474 N.R. 121 (F.C.A.) at paras. 35-37; *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 (F.C.A.) at paras. 26-28. Whether or not Mr. Wenham's application is certified as a class proceeding, these stages remain.

36 An application can be doomed to fail at any of the three stages:

I. *Preliminary objections*. An application not authorized under the *Federal Courts Act*, R.S.C., 1985, c. F-7 or not aimed at public law matters may be quashed at the outset: *JP Morgan* at para. 68; *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26; *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605. Applications not brought on a timely basis may be barred: section 18.1(2) of the *Federal Courts Act*. Judicial reviews that are not justiciable may also be barred: *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4, 379 D.L.R. (4th) 737. Other possible bars include res judicata, issue estoppel and abuse of process (*Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 ; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77), the existence of another available and adequate forum for relief (prematurity) (*Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, [2011] 2 F.C.R. 332; *JP Morgan* at paras. 81-90) and mootness (*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342).

II. *The merits of the review*. Administrative decisions may suffer from substantive defects, procedural defects or both. Substantive defects are evaluated using the methodology in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; procedural defects are evaluated largely by applying the factors in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193. In certain circumstances, the application is doomed to fail at this stage right at the outset. For example, an application based on procedural defects that have been waived has no chance of success: *Irving Shipbuilding Inc. v. Canada (Attorney General)*, [2010] 2 F.C.R. 488, 314 D.L.R. (4th) 340.

III. *Relief*. In some cases, the relief sought is not available in law (*JP Morgan* at paras. 92-94) and so the application can be quashed in whole or in part on that basis.

37 As part of her submissions concerning Rules 334.16(1)(*b*) through (*e*), the respondent raises the objections of justiciability and the thirty-day, extendable limitation period in subsection 18.1(2) of the *Federal Courts Act*. In particular, she emphasizes the importance of the limitation period in the Court's consideration of the "preferable procedure" requirement in Rule 334.16(1)(*d*). She does not raise these objections as part of her submissions concerning the "reasonable cause of action" requirement in Rule 334.16(1)(*a*).

38 This misconceives their analytical role in applications for judicial review. As noted above, both of these are fatal, preliminary objections to judicial review. They belong in the first stage of analysis. If these objections are established, they extinguish any asserted cause of action — in other words, if they are established, there can be no "reasonable cause of action" within the meaning of Rule 334.16(1)(*a*).

39 Therefore, these objections are properly considered under Rule 334.16(1)(*a*). Assuming they have some potential merit, further evidence is required, and the application is certified as

a class proceeding, they may potentially qualify as common issues for the Court to determine. Further, as the respondent suggests, on a certification motion, they may also bear upon the Court's consideration of Rules 334.16(1)(*b*) through (*e*), in particular "preferable procedure" under Rule 334.16(1)(*d*).

40 But first and foremost, these objections should be examined under Rule 334.16(1)(*a*) to see if they are fatal to the application.

(a) The thirty-day, extendable limitation period: Federal Courts Act, subsection 18.1(2)

41 In many cases, an application for judicial review must be commenced within thirty days after communication of the decision to the applicant: subsection 18.1(2) of the *Federal Courts Act*. But a party can move for an extension of time.

42 Extensions of time are granted when they are in the interests of justice. Where an application for judicial review is brought by one or more individual applicants, four questions guide this inquiry: see, *e.g.*, *Larkman v. Canada (Department of Indian Affairs and Northern Development)*, 2012 FCA 204, 433 N.R. 184 (F.C.A.) at para. 61 and many other cases such as *Grewal v. Canada (Minister of Employment & Immigration)*, [1985] 2 F.C. 263 (Fed. C.A.). They are:

(1) Did the moving party have a continuing intention to pursue the application?

(2) Is there some potential merit to the application?

(3) Has the Crown been prejudiced from the delay?

(4) Does the moving party have a reasonable explanation for the delay?

43 While these four questions appropriately guide the analysis and implement the policies intended by Parliament under subsection 18.1(2) when an *individual* applies for an extension of time, class proceedings are different. The nature, process and purposes of class proceedings suggest that these four questions are not suitable for class proceedings. In particular:

• A class proceeding is not a collection of individual proceedings; it is a proceeding on behalf of a class of people *instead* of individual proceedings;

• The requirement that the application have some potential merit is entirely captured by the first branch of the certification test which asks whether there is a reasonable cause of action: Rule 334.16(1)(*a)*.

• Requiring that class members demonstrate a continuing intention to pursue a class action is antithetical to the very nature of a class action. Class proceedings open the doors of justice to those who, for judicially recognized reasons, have no intention — let alone a continuing intention — to venture into the world of litigation: *Western Canadian Shopping Centres Inc.*

v. Dutton, 2001 SCC 46, [2001] 2 S.C.R. 534at para. 28; *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949at para. 27.

• Out-of-time class members would likely cite access to justice considerations as a reasonable explanation for the delay, the fourth *Larkman* question. But these access to justice considerations are already integrated into the preferability inquiry: *Fischer* at paras. 27-38. If time barred applicants cannot point to a real access to justice concern (*i.e*. a reasonable explanation for the delay), it is hard to conceive how the class proceeding will be preferable to other alternatives.

44 Thus, the accepted test for individuals seeking an extension of time to bring an application for judicial review under subsection 18.1(2) of the *Federal Courts Act* must be re-modeled for class proceedings. How do we go about this?

45 First, it is important to recognize that subsection 18.1(2) of the *Federal Courts Act* is different from many other statutory limitation periods that are hard-and-fast and non-extendable. When dealing with a hard-and-fast, non-extendable statutory limitation period, the Court will have to deal with timeliness issues on an individual basis — for instance, where the limitation period depends on when class members subjectively discovered the claim: *e.g.*, *Knight v. Imperial Tobacco Canada Ltd.*, 2006 BCCA 235, 267 D.L.R. (4th) 579 (B.C. C.A.), at paras. 33-36; *Smith v. Inco Ltd.*, 2011 ONCA 628, 107 O.R. (3d) 321 (Ont. C.A.), at paras. 164-165.

46 Subsection 18.1(2) of the *Federal Courts Act* has no constraining language requiring that an extension of time be considered on an individual-by-individual basis. Granting an extension under subsection 18.1(2) simply depends on whether "the interests of justice [will] be served" — something quite determinable on a class-wide basis.

47 To do so, we must get back to the overriding concept that governs the granting of extensions of time under the subsection — the purposes Parliament intended to be advanced by subsection 18.1(2). *Larkman* helpfully furthers our understanding of those purposes.

48 This Court has repeatedly held that the "overriding consideration is that the interests of justice be served": *Larkman* at paras, 62, 90; *Grewal v. Canada (Minister of Employment & Immigration)*, [1985] 2 F.C. 263, 63 N.R. 106 (Fed. C.A.) at pp. 278-279; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41, 359 N.R. 156 (F.C.A.) at para. 33.

49 In deciding whether to grant the extension of time, courts must weigh and balance two competing concepts: on the one hand, the advancement of access to justice, the desirability of determinations on their merits, and the fulfillment of the purposes of a class proceeding, and on the other hand, preventing potential prejudice to the Crown and the public interest represented by it.

50 Extensions of time enhance access to justice. Many applicants will be out-of-time because of the financial, psychological and/or social barriers to justice: *Fischer* at para. 27. Allowing these time-barred applicants to join a class proceeding simply opens a door to redress that would have been available and pursued in a timely fashion but for these impediments to justice. Extensions of time also further the goal of behaviour modification. If shielded by strictly enforced limitation periods, powerful public entities can ignore their obligations to Canadians, including the lawful operation of administrative regimes, and be improperly immunized from review: *Western Canadian Shopping Centres*, above at para. 29; *Canada (Citizenship and Immigration) v. Tennant*, 2018 FCA 132 (F.C.A.).

51 The greater the barriers to justice or need for behaviour modification, the more willing a court should be to grant the extension.

52 Courts must also factor in the practical realities of advancing a class proceeding. Class proceedings are complex and cannot be commenced hastily. Classes must be defined with an eye to precision, representative applicants must be selected carefully and detailed and comprehensive litigation plans need to be carefully developed. As a result, in some circumstances, delays at the outset of class proceedings will be unavoidable.

53 However, even if the nature and purposes of class actions heavily favour the granting of an extension of time in the particular circumstances of a case, countervailing interests still fall to be weighed and balanced.

54 The factors to be considered come in many varieties. *Larkman* provided a non-exhaustive list (at paras. 76-79, 87-88), and others can be discerned from the purposes underlying subsection 18.1(2) of the *Federal Courts Act*:

> • The danger of missing witnesses and documents and failing memories. However, if, in the circumstances, the Crown was on notice that a particular administrative scheme is under attack, it can prepare accordingly. For example, here, the Crown has already litigated a similar challenge to the program a little more than a year ago: *Fontaine v. Canada (Attorney General)*, 2017 FC 431.
>
> • The need for government and the public to have finality and certainty concerning decisions taken under statutory mandates. As *Larkman* put it (at para. 87), Parliament has nominated thirty days as the default deadline and when the thirty day deadline expires and no judicial review has been launched against a decision or order, parties normally ought to be able to proceed on the basis that the decision or order will stand. An out-of-time class proceeding can undercut the goals of finality and certainty.

• Whether there has been detrimental reliance on the decision under attack. After decisions are made, matters need to move forward confidently without the fear of late applications for judicial review "pop[ping] up like a jack-in-the-box, long after the parties have received the decision and have relied upon it.": *Larkman* at para. 88.

• The general effect upon the public. The broader and deeper the impact on the general public, the greater the need for finality and certainty. *Larkman* offered the example of an environmental assessment of a project of general public benefit. An all-too-permissive approach to the granting of an extension of time can interfere with the interests of the proponent of the project being assessed and the wider public who need to know whether the decision is final.

• The general effect upon the government. For example, if this class sought retroactive support payments, and this came as a surprise to the government, this may unfairly saddle it — operating a voluntary benefits scheme in good faith — with large unanticipated costs caused solely by the applicant's delay: see, in a different context, some of the parallels and discussion in *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429 . Making retroactive payments stretching back for a year or two before commencement of the judicial review may promote access to justice and behaviour modification but the scales may tip in the other direction if certain out-of-time applicants sought retroactive yearly payments dating back to ten or twenty years ago.

• The presence of good faith and good reasons for the class proceeding. The class proceeding should not be an artifice to get around the usual test for an extension of time for individuals under subsection 18.1(2) of the *Federal Courts Act*.

• The factors used for individuals under subsection 18.1(2) of the *Federal Courts Act*, such as their intentions and the circumstances behind any delay. Some of these may advance the Court's consideration whether the proceeding is consistent with purposes served by subsection 18.1(2) of the *Federal Courts Act*.

55 There may be other factors based on the purposes underlying the limitation period in subsection 18.1(2) of the *Federal Courts Act*.

56 The evidentiary record before the Court on this certification motion does not preclude the granting of an extension of time. Thus, it cannot be said that it is plain and obvious that the application cannot succeed.

57 Nevertheless, whether an extension of time should be granted under subsection 18.1(2) of the *Federal Courts Act* remains a live issue. It should be stated as a common issue and should be tried.

(b) Is the application justiciable?

58 The Federal Court held that the application was not justiciable. I disagree. The Federal Court reached its conclusion by failing to follow the controlling authorities on this point. This was an error of law and this Court must intervene. The application raises issues that are justiciable.

59 The current governing authority in this Court on justiciability is *Hupacasath*, above, which drew directly from the Supreme Court of Canada's decision in *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481 (S.C.C.). Although *Hupacasath* was cited to the Federal Court and could not be distinguished, the Federal Court did not consider or apply it. Instead, the Federal Court relied heavily upon its own authority in *Fontaine*, above, a decision based in part upon justiciability but which did not cite this Court's decision in*Hupacasath* on that point. Thus, the validity of *Fontaine* is also suspect. It is trite that decisions of this Court that cannot be distinguished, such as*Hupacasath* in this case, bind the Federal Court. By not considering *Hupacasath*, the Federal Court committed an error of law.

60 Justiciability is best understood by the term used for it in the United States: the political questions objection. Some questions are so bereft of legal content and are "so political that courts are incapable or unsuited to deal with them, or should not deal with them in light of the time-honoured demarcation of powers between the courts and the other branches of government": *Hupacasath* at para. 62.

61 Very few cases fall within that category. Cases that are the normal grist for administrative law review — cases that raise issues of constitutionality legality, *vires*, reasonableness and procedural fairness based on administrative law authorities and settled doctrine — are almost always justiciable. In*Hupacasath*, this Court put it this way (at paras. 66-67):

> In judicial review, courts are in the business of enforcing the rule of law, one aspect of which is "executive accountability to legal authority" and protecting "individuals from arbitrary [executive] action": *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 at paragraph 70. Usually when a judicial review of executive action is brought, the courts are institutionally capable of assessing whether or not the executive has acted reasonably, *i.e.*, within a range of acceptability and defensibility, and that assessment is the proper role of the courts within the constitutional separation of powers: *Crevier v. A.G. (Québec) et al.*, [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. In rare cases, however, exercises of executive power are suffused with ideological, political, cultural, social, moral and historical concerns of a sort not at all amenable to the judicial process or suitable for judicial analysis. In those rare cases, assessing whether the executive has acted within a range of acceptability and defensibility is beyond the courts' ken or capability, taking courts beyond their proper role within the separation of powers. For example, it is hard to conceive of a court reviewing in wartime a general's strategic decision to deploy military forces in a particular way. See generally [*Operation Dismantle Inc. v. Canada*,

[1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481] at pages 459-460 and 465 [S.C.R.]; *Canada (Auditor General)*, [1989] 2 S.C.R. 49 at pages 90-91; *Reference Re Canada Assistance Plan*, [1991] 2 S.C.R. 525 at page 545; [*Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215, 199 D.L.R. (4th) 228 (C.A.)] at paragraphs 50-51.

These cases show that the category of non-justiciable cases is very small. Even in judicial reviews of subordinate legislation motivated by economic considerations and other difficult public interest concerns, courts will still assess the acceptability and defensibility of government decision-making, often granting the decision-maker a very large margin of appreciation. For that reason, it is often said that in such cases an applicant must establish an "egregious" case: see, *e.g.*, *Thorne's Hardware v. Canada*, [1983] 1 S.C.R. 106 at page 111, 143 D.L.R. (3d) 577; *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810at paragraph 28. But the matter is still justiciable.

62 The narrowness of the objection of justiciability is shown by the facts of the leading Supreme Court case on point, *Operation Dismantle*, above. The applicant sought to strike down a decision by the Government of Canada to allow the testing of American cruise missiles over Canada's north. Without more, the objection of justiciability might have been live, as the decision drew upon quintessentially political factors, such as Canada's relations and defence arrangements with the United States. However, the applicant claimed that the decision affected security of the person rights under section 7 of the Charter. This transformed the proceeding from a challenge over purely political matters, something not adjudicated upon by the courts, to an adjudication of constitutional rights, something well within the bailiwick of the courts.

63 In this case, the challenge is to the reasonableness of a decision to limit the availability of benefits to a particular group of claimants and to narrow the evidence that will be considered. As explained in*Hupacasath*, these are very much the sort of things that courts in their judicial review role can assess. Indeed, several other decisions of a sort similar to the case at bar involving government policies have been seen as justiciable: see, *e.g.*, *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299, 341 D.L.R. (4th) 710 (F.C.A.); *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2, 137 D.L.R. (3d) 558 (S.C.C.); *Dassonville-Trudel (Guardian ad litem of) v. Halifax Regional School Board*, 2004 NSCA 82, 50 R.F.L. (5th) 311 (N.S. C.A.). In saying this, it is useful to remember that justiciability is different from deference and should not be confused with it.

64 Therefore, in this case, the objection based on justiciability does not lie.

65 Overall, I find that a reasonable cause of action in administrative law lies. Put negatively, it cannot be said that it is plain and obvious that this application is doomed to fail. I find that the requirement for certification under Rule 334.16(1)(*a*) is met.

(2) Identifiable class (Rule 334.16(1)(b))

66 Mr. Wenham must show that "there is an identifiable class of two or more persons." He proposed the following class definition: "all individuals whose applications to the Thalidomide Survivors Contribution Program were rejected on the basis of failing to provide the required proof of eligibility."

67 The Federal Court held that this certification requirement was not met because there was not an identifiable class "with sufficient connection to Mr. Wenham's circumstances" in order to meet the Rule 334.16(1)(*b*) requirement. Elsewhere, the Federal Court held that this requirement was not met because the relief sought by Mr. Wenham was limited to a review of the decision to refuse his eligibility (at para. 28). In the same vein, it noted that "the basis upon which the other denials [of benefits] were made is not known, and they may vary significantly from, or have no connection to, the reasons for the denial of Mr. Wenham's claim" and the "only record before this Court" is Mr. Wenham's claim and his specific circumstances (at paras. 28-29).

68 The Federal Court's requirement of "sufficient connection to Mr. Wenham's circumstances" is unknown to class actions law. Perhaps the Federal Court was conflating the test for class definition with the test for the existence of common issues. And, fairly characterized, Mr. Wenham's notice of motion for certification alleges that the grounds set out in his notice of application apply to all class members. Finally, the record before the Federal Court was much broader than the Federal Court realized and spoke of the application of the eligibility criteria for the program applying to all class members. These were all errors of law that permit us to intervene.

69 All that is required is "some basis in fact" supporting an objective class definition that bears a rational connection to the common issues and that is not dependent on the outcome of the litigation: *Western Canadian Shopping Centres*, above at para. 38; *Hollick* at paras. 19 and 25. Here, that requirement is satisfied.

(3) Common issues of law and fact (Rule 334.16(1)(c))

70 Mr. Wenham proposed two common issues:

> A. Is the establishment and/or application of the Evidentiary Criteria or Documentary Proof Requirements by Canada in the Thalidomide Contribution Program unlawful pursuant to section 18.1(4) of the *Federal Courts Act*?
>
> B. If A. is answered in the affirmative, what remedies is the Class entitled to?

71 The Federal Court rejected issue A. because of the Federal Court's *Fontaine* decision. As mentioned above, *Fontaine* was not the controlling authority.

72 Further, the task under this part of the certification determination is not to determine the common issues, especially not without a full record and full legal submissions on the issue, but

rather to assess whether the resolution of the issue is necessary to the resolution of each class member's claim. Specifically, the test is as follows:

> The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significant of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.

(*Western Canadian Shopping Centres*, above at para. 39; see also *Dell'Aniello c. Vivendi Canada inc.*, 2014 SCC 1, [2014] 1 S.C.R. 3 (S.C.C.) at paras. 41 and 44-46.)

73 The Federal Court did not apply this authority in its consideration of proposed common issues A. and B.

74 On proposed issue B., the Federal Court rejected it because it sought a remedy outside the jurisdiction of the Court. Elsewhere, it added that "the ordinary remedy, if a party is successful, would be to send the matter back for redetermination" (at para. 34). But this was the very remedy claimed by Mr. Wenham in his notice of application. Common issue B. only asks what remedy is appropriate in the circumstances.

75 Applying the law as stated by the Supreme Court to the matter before us, I conclude that common issues A. and B. are necessary, substantial components to the resolution of each class member's claim. As will been seen, in formulating the common issues, I shall tweak them to make them more closely accord with the administrative law jurisprudence relevant to the relief sought in the notice of application. But, overall, I conclude that the Rule 336.16(1)(*c*) requirement is met.

(4) Preferable procedure (Rule 334.16(1)(d))

76 The Federal Court did not refer to and did not apply the test for preferable procedure outlined by the Supreme Court of Canada. In this way, it erred in law.

77 The test, from *Hollick* at paras. 27-31, is well-summarized in Mr. Wenham's memorandum as follows:

(a) the preferability requirement has two concepts at its core:

(i) first, whether the class proceeding would be a fair, efficient and manageable method of advancing the claim; and

(ii) second, whether the class proceeding would be preferable to other reasonably available means of resolving the claims of class members;

(b) this determination requires an examination of the common issues in their context, taking into account the importance of the common issues in relation to the claim as a whole; and

(c) the preferability requirement can be met even where there are substantial individual issues; the common issues need not predominate over individual issues.

78 The preferability of a class proceeding must be "conducted through the lens of the three principal goals of class action, namely judicial economy, behaviour modification and access to justice": *Fischer* at para. 22.

79 Judicial economy is a key consideration in this case. Right now there are a number of similar judicial reviews either completed or pending: *Fontaine*, above; *Briand c. Canada (Procureur général)*, T-1584-16 [2017 CarswellNat 6575 (F.C.)]; *Rodrigue c. Canada (Procureur général)*, T-1712-16; [2018 CarswellNat 821 (F.C.)] *Declavasio v. Canada (Attorney General)*, 17-T-13; *Porto v. Canada (Attorney General)*, 17-T-14. Merging these claims into a class proceeding promotes judicial economy. Rather than have the respondent and this Court subjected to a smattering of diffuse attacks on the program all circling around the same legal and factual issues, a single proceeding can provide the applicants with one fair shot at marshaling all of the relevant jurisprudence, legal principles and documentary evidence to best advance their claim. This will avoid duplicitous proceedings, with the threat of inconsistent or conflicting judicial assessments.

80 Mr. Wenham proposes a class proceeding as the preferred procedure. Another available procedure is a test case. At first glance, a test case presents an appealing and perhaps simpler route.

81 However, the preferability analysis must also consider access to justice considerations. Here, those considerations outweigh any potential efficiencies associated with a test case.

82 What are the access to justice issues here? Like most legal proceedings, the economics of litigation are often intimidating: *Fischer* at para. 27. While there is no direct evidence of Mr. Wenham or the other applicants' economic capacities, it is uncontroversial that disabled individuals face "persistent social and economic disadvantage" placing barriers to education and the labour force and, as a result, directly impacting their earning capacity: *Eldridge v. British Columbia*

(Attorney General), [1997] 3 S.C.R. 624, 151 D.L.R. (4th) 577 (S.C.C.) at para. 56. Certainly some of the proposed class face economic barriers to pursuing this litigation.

83 And physical disability, in and of itself, has also been consistently recognized as a barrier to justice favouring the certification of a class proceeding: *Fischer* at para. 27; *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184 (S.C.C.) at para. 39; *Cloud v. Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667, 73 O.R. (3d) 401 (Ont. C.A.) at para. 87; *Pearson v. Inco Ltd.* (2005), 261 D.L.R. (4th) 629, 78 O.R. (3d) 641 (Ont. C.A.) at para. 84; *Kenney v. Canada (Attorney General)*, 2016 FC 367 (F.C.), at para. 26.

84 These access to justice concerns are better served by the class proceeding. I offer several observations.

— I —

85 I will first consider the procedural benefits of a class proceeding, namely whether a class proceeding, in contrast to a test case, offers "a fair process to resolve their claims": *Fischer* at para. 24.

86 Pooling financial resources can make litigation feasible for class members that could not otherwise pursue an individual claim: *Hollick* at para. 15. Even if some applicants could bring individual claims, a class proceeding will reduce the financial burden and allow the applicants to invest in experienced class counsel and leading medical experts who can contribute to the Court's understanding of the matter. An individual applicant, strapped by their financial circumstances, may opt for shortcuts to cut down on expenses and, as a result, fall short of meeting his or her legal or evidentiary burdens.

87 Class proceedings also benefit from a "no costs" regime shielding all parties from a costs order absent misconduct or exceptional circumstances (Rule 334.39).

— II —

88 Class proceedings come uniquely equipped with detailed and extensive procedural rules and case management powers that can ease the burdens of litigation for a vulnerable group of applicants. In theory, a class could pool its resources together for the advancement of a test case. But this would rob the applicants of the carefully designed statutory playbook for class proceedings.

89 Test cases offer no procedural safeguards against the test applicant's conflicts of interest with other would-be class members, the possibility that would-be class members never learn about the existence of the test case, or class counsel exacting an exorbitant contingency fee or agreeing to a settlement that disregards a segment of the class. In a class proceeding under the *Federal Courts*

Rules, SOR/98-106, these issues, among others, are diligently monitored by class counsel under judicial scrutiny, shifting the burden off of the individual applicants who — either because of their financial or physical limitations — may not have the litigation savvy or stamina to protect their interests: see Rules 334.16(1)(*e*)(iii) (requiring no conflicts of interest for representative applicant), 334.32 (requiring notice of certification to class members) 334.4 (approval of class counsel's fees), and 334.29 (settlement approval).

90 Class members also benefit from a different test for an extension of time under section 18.1(2) of the *Federal Courts Act*: see paras. 44-55, above. A test case would leave time-barred applicants to fend with a test for an extension of time disconnected from the purposes of class actions: access to justice, behaviour modification and judicial economy.

91 Procedural protections accrue to the respondent as well. Unlike test cases, a respondent could, with leave, examine a non-representative applicant and potentially expose a conflict, subclass or individual issue (Rule 334.22).

92 And, in the event individual issues emerge, the *Rules* empower judges with wide discretion to craft procedures for the resolution of those issues that can reflect the nature of the individual issues and the parties' capabilities and resources further facilitating access to justice (Rule 334.26).

— III —

93 So far I have focused on the procedural aspects of access to justice for the proposed class. But we must also consider the substantive aspects of access to justice in the class proceedings context, namely "whether the claimants will receive a just and effective remedy for their claims if established": *Fischer* at para. 24. Here, the potential for more just and effective remedial outcomes favours a class proceeding over a test case.

94 The sought after impact of a test case could be undercut by judicial minimalism. A judge may shy away from declaring broad principles of universal application without evidence of the circumstances of other applicants to the program. In the end, that judge may rely heavily on the particular circumstances of Mr. Wenham in deciding that the program's application to Mr. Wenham is reasonable or unreasonable. This would bring us back to square-one: a stream of contested applications for judicial review of the eligibility criteria now attempting to distinguish or analogize their facts to Mr. Wenham's circumstances.

95 Courts have preferred test cases over class actions where, for example, a class sought declaratory relief under section 52(1) of the *Constitution Act* because, in those cases, the desired result will unquestionably accrue to all members of the class: *Roach v. Canada (Attorney General)* (2009), 185 C.R.R. (2d) 215, 74 C.P.C. (6th) 22 (Ont. S.C.J.), at paras. 39-40 aff'd (2009), 84 C.P.C. (6th) 276 (Ont. Div. Ct.). While it is possible a similar outcome could be achieved in this

case if, the eligibility criteria were declared *ultra vires*, there are other outcomes which will not smoothly apply to all class members, as illustrated above.

96 A class proceeding guarantees that a wider set of facts will be put before a judge and force that judge to issue reasons with a view to broader considerations. What kind of evidence is being rejected by the program administrator? What are the common themes among those rejected? Are there exceptional circumstances causing the lack of documentary evidence in some cases? Engaging with these types of questions can ensure that any remedy ordered responds broadly to as many class members as possible.

97 Doing this also promotes judicial economy and finality. Consider one scenario where the eligibility criteria are declared unreasonable and must be re-drafted. Reasons enriched by a deeper factual background will assist Health Canada in re-drafting and re-administrating the program in a comprehensive manner. If the reasons are narrow and bare, an uninformed re-drafting process may simply spawn new applications challenging the new criteria, forcing the Federal Court to play "whack-a-mole" as new proceedings pop up on its docket.

— IV —

98 Class proceedings can also facilitate more creative and tailor-made settlement outcomes. For example, during the Indian Residential Schools settlement discussions, the government authorized an advance payment to survivors over sixty-five *prior* to a settlement agreement: Frank Iacobucci, "What Is Access to Justice in the Context of Class Actions?" (2011) 53 Sup. Ct. L.R. (2d) 17; J. Kalajdzic, ed., *Accessing Justice: Appraising Class Actions Ten Years After Dutton, Hollick & Rumley* (Toronto: Lexis Nexis Canada, 2011) at p. 22. Under the supervision and subject to the approval of a case management judge steeped in the parties' positions, class proceedings provide a fertile ground for creative yet fair outcomes.

— V —

99 As mentioned above, the objection based on subsection 18.1(2) of the *Federal Courts Act* will have to be considered in this class proceeding. In my view, this issue does not take away from the preferability of a class proceeding in this case. The issue whether this class proceeding is barred for lateness, determined by applying the test set out earlier in these reasons, can be considered on a class basis. In these circumstances, it does not work against the preferability of a class proceeding.

100 Overall, for the foregoing reasons, I consider the Rule 334.16(1)(*d*) preferable procedure requirement to be met in this case.

(5) Adequate representative applicant (Rule 334.16(1)(e))

101 The Federal Court found that Mr. Wenham would fairly and adequately represent the interests of the proposed class. However, it held that the litigation plan requirement in Rule 334.16(1)(*e*)(ii) was not met because it failed to address how the proceeding would deal with the limitation period issue and the evidentiary record.

102 The litigation plan need not deal with the limitation period issue. Following upon the above analysis, it will be a common issue to be decided at the trial of the common issues.

103 Mr. Wenham submits, and I agree, that the evidentiary record already before the Court can suffice and need not have been part of the litigation plan. In any event, the Federal Court overlooked that a litigation plan proposed in a certification motion is not cast in stone. Refusing to certify a litigation plan because of one alleged weakness is an error in law. A litigation plan is "a work in progress" and, in law, "whatever its flaws, it may be amended as the litigation proceeds": *Papassay v. Ontario*, 2017 ONSC 2023 (Ont. S.C.J.) at para. 106; see also *Cloud*, above at para. 95.

D. The certification order

104 Making the order the Federal Court should have made, I would certify Mr. Wenham's application as a class proceeding. The particular terms of the order I would propose are in the next section of these reasons.

E. Proposed disposition

105 Therefore, I would allow the appeal, set aside the order of the Federal Court, grant the motion for certification and, making the order the Federal Court should have made, grant Mr. Wenham's motion. I would order that file T-1499-16 is certified as a class proceeding on the basis of the following common issues:

> 1. Is the proceeding barred by the limitation period in subsection 18.1(2) of the *Federal Courts Act*? To the extent that an extension of time is required, should one be granted?
>
> 2. If the proceeding is not barred by 1., is the establishment and application of the evidentiary criteria or documentary proof requirements in the Thalidomide Survivors Contribution Program incorrect or unreasonable, or otherwise unlawful?
>
> 3. If the answer to 2. is yes, what remedies is the Class entitled to?

106 I would appoint Mr. Wenham the representative applicant for the class. I would approve the litigation plan proposed by Mr. Wenham. I would order that no other class proceedings based upon the facts giving rise to this proceeding may be commenced without leave. I would approve the form, content and method of dissemination of notice to the class. I would also order that the amended notice of application dated November 3, 2016 be amended by adding the heading

"Proposed Class Proceeding" pursuant to Rule 334.12(1) of the Rules. I would also direct that any further order or direction concerning the conduct of the class proceeding shall be made by the Federal Court.

***D.G. Near J.A.*:**

I agree

***J.M. Woods J.A.*:**

I agree

Appeal allowed.

2015 ONSC 4164
Ontario Superior Court of Justice (Divisional Court)

Wpd Sumac Ridge Wind Inc. v. Kawartha Lakes (City)

2015 CarswellOnt 12268, 2015 ONSC 4164, 257 A.C.W.S. (3d) 960, 43 M.P.L.R. (5th) 91, 96 C.E.L.R. (3d) 329

Wpd Sumac Ridge Wind Incorporated, Applicant and Corporation of the City of Kawartha Lakes, Respondent

Sachs, Harvison Young, Gray JJ.

Heard: April 23, 2015
Judgment: August 13, 2015 *
Docket: Toronto 37/15

Counsel: Andrew Faith, Andrew Max, for Applicant
Clifford I. Cole, Konstantine Stavrakos, for Respondent

Subject: Contracts; Environmental; Property; Public; Municipal

APPLICATION by company for judicial review of city resolution denying it access to road, and for orders directing city to consider and decide in good faith company's applications for upgrading and use of road, and for permits to allow expeditious construction and operation of wind turbine project.

***Harvison Young J.*:**

Overview

1 The applicant wpd Sumac Ridge Wind Inc. ("wpd") obtained a Renewable Energy Approval ("REA") from the Ministry of the Environment ("the Ministry") in December 2013. The REA authorized the construction of five industrial wind turbines ("IWTs") and associated infrastructure in the municipality of City of Kawartha Lakes ("the City"). In this application for judicial review, wpd claims that the City has (1) deliberately frustrated the REA and (2) acted in bad faith in denying wpd the use of a roadway, Wild Turkey Road ("WTR") which wpd characterizes as the "spine" of the project approved by the REA. It asks this court for two particular forms of relief.

2 First, it seeks an order quashing the resolution passed by the City on 25 March 2014 ("the Resolution"). The Resolution (CR2014-279) provided that

> ... any request by wpd Canada and/or future successors for use of the unopened portion of Wild Turkey Road for property access and/or other vehicular traffic to support proposed wind turbine development be refused....

3 Second, wpd seeks orders directing the City

> a. To consider and decide in good faith wpd's applications to allow for the upgrading and use of WTR;
>
> b. To consider and decide in good faith wpd's applications for any municipal permits necessary for the expeditious construction and operation of wpd's Sumac Ridge Wind Project; and
>
> c. To allow the expeditious construction and operation of wpd's Sumac Ridge Wind Project.

4 During the oral hearing, Mr. Faith for the applicant advised the court that it was not pursuing the third head of relief.

5 Two submissions lie at the core of wpd's application. The first is its claim that the City's conduct over the past few years, culminating in and evidenced by the 25 March 2014 Resolution, leaves no doubt of the City's opposition to and intention to prevent the construction of the Sumac Ridge Project ("Sumac Ridge"). The second is the claim that upgrading and using WTR is a central and integral part of the REA as sought and approved, so that the Resolution frustrates the REA.

6 The Notice of Application also submits that the City's "denials and delay" may either frustrate its FIT contract entirely, or require wpd to assume additional costs to extend that contract so that wpd can maintain its 20 year term. Although wpd sought an expedited hearing on this basis, it has since obtained an extension under the FIT contract and this issue was not emphasized during oral argument.

7 The City asserts that its decision not to permit the upgrading and opening of WTR is a lawful exercise of its jurisdiction over roads. That jurisdiction is granted by the province and, it asserts, is not diminished by the *Green Energy and Green Economy Act*, 2009 S.O. 2009 C.12 (the "GEA"). The City also argues that the Resolution does not frustrate the purpose of the GEA or the REA, because wpd has alternative access routes to the construction and maintenance sites.

> It states that its decision not to open and upgrade Wild Turkey Road was made having regard to the reports provided by its staff and outside independent consultant and further having regard to the public interest. [The City's] conduct was consistent with municipal practice and not the result of bad faith.

8 In addition, the City submits that wpd is not entitled to an order compelling Kawartha Lakes to reconsider opening and upgrading WTR: such an order is in the nature of mandamus, and the

applicable test for such relief has not been satisfied in this case. In the course of oral argument, wpd advised the court that it would be satisfied with an order similar to that ordered by this court in *East Durham Wind, Inc. v. West Grey (Municipality)*, 2014 ONSC 4669, [2014] O.J. No. 3742 (Ont. Div. Ct.) [*East Durham Wind*]. There, the municipality was directed to enter into negotiations with East Durham Wind in good faith, so as not to frustrate the REA.

9 The City also disputes wpd's assertion that its conduct jeopardized the project, given that wpd obtained an extension under its FIT contract.

10 At the outset of the hearing before this Court, the applicant clarified the relief it is seeking. On behalf of the applicant, Mr. Faith advised that wpd seeks the City's permission to use an unopened road allowance (WTR). This would not require the City to open the road, which would remain an unopened road allowance. Wpd seeks a permit to widen and use the road, at its own expense, for the purpose of the Sumac Ridge Project as authorized by the REA. Mr. Faith also advised that wpd is prepared to pay the reasonable costs of indemnifying the City with respect to costs such as liability and decommissioning costs, submitting that the record shows that the City has simply refused to enter into such negotiations.

11 While Mr. Faith conceded that the onus is on the party seeking to use the road to satisfy the requirements of the City, he argued that a decision to refuse is an exercise of municipal power over roads and must be exercised within its jurisdiction. The City's jurisdiction with respect to roads is subject to s. 14 of the Municipal Act and must therefore be exercised in a manner consistent with provincial law. While wpd agrees that the City may "bargain" with respect to issues such as liability, de-commissioning costs and the like, it submits that the City cannot simply refuse to issue a road permit or otherwise act in a manner that frustrates the REA. The City replies that it may do so in the exercise of its jurisdiction over roads.

12 For the reasons that follow I would allow wpd's application as set out above (at paras. 3 a and b) on the basis that the City's Resolution frustrates the purpose of the REA, and that in passing the Resolution the City acted in bad faith. I would emphasize that this Court has considered this application for judicial review on the basis upon which Mr. Faith framed wpd's submission above at para. 10. That is, wpd does not seek to require the city to open WTR, but only seeks permission to upgrade it for its own use as contemplated by the REA, at its own expense, and is prepared to pay the reasonable costs to indemnify the City for liability and decommissioning costs and the like.

Background

13 In September 2010 wpd initiated a project to build and operate five IWTs within City boundaries. Sumac Ridge is one of three proposed wind farms in the area. Like many other Ontario municipalities, Kawartha Lakes is "not a willing host" to wind energy projects. In February 2012, for example, the City asked the provincial government to impose "a moratorium on approvals of IWT projects in Ontario" pending further study of their impact on human health. At a Special

998
Council meeting on 5 February 2013, after hearing a series of presentations from residents opposed to wind turbines, City Council adopted a resolution calling on the provincial government to reject Sumac Ridge.

14 In December 2013, pursuant to the *GEA* and applicable Regulations, the Ministry granted wpd an REA for Sumac Ridge. Among other conditions, the REA sets a three-year deadline for the construction and installation of the turbines and a nine-month deadline for concluding a Road Users Agreement with the City of Kawartha Lakes. The use of local roads, and in particular WTR, is at the heart of this application. City Council adopted the impugned Resolution - that any requests by wpd "for property access and/or other vehicular traffic to support wind turbine development be refused" - on March 25, 2014.

15 The applicant wpd submits that it cannot build Sumac Ridge unless it obtains the City's permission to open, upgrade and use WTR. It relies on the City's February 2013 description of WTR as "a public road allowance" with no registered easements or rights of way. The City counters that wpd's own Municipal Class Environmental Assessment ("MCEA") identifies seven additional options for road access to the planned turbine sites. The City suggests that wpd insists on access to WTR, not because it is the only possible route, but because the alternatives would require the company to acquire or lease private land at a higher cost. It adds that wpd's preferred option (i.e., using WTR) would bring no benefit to Kawartha Lakes. The City has moved away from its earlier description of WTR as "an unopened road allowance established by the Crown". It now suggests that the Road is on private land, although it acknowledges that "there is no clear delineation of [WTR's] legal location". Wpd cites this change in position as an indication of bad faith.

16 Wpd says that it advised the City early in the approval process that it wished to open, upgrade and maintain Wild Turkey Road, but the City refused to consider the issue until after the Ministry decided whether to grant the REA. The City agrees that it was advised of the plan to use WTR, but says that it never made any promise to open WTR for development and that it "consistently advised that there was no public support for the opening of Wild Turkey Road". The City says that the Company's plans for WTR conflict with its long-term strategy for improving and maintaining its transportation network. It also argues that "the requested opening of [WTR] would result in a private access road, constructed solely for the benefit of wpd's commercial interests, on public property" with no public benefit.

17 The issues that arise in this case, and the disputes between the parties, may most effectively be addressed through the prisms of the relief sought as outlined above. As previously noted, the overarching issues are whether the City's actions in passing the March 25, 2014 Resolution and in relation to wpd's requests to upgrade and use WTR constitute (1) frustration of the REA and/or (2) bad faith.

Standard of Review

18 The parties agree that correctness is the appropriate standard of review for the central issue: whether the City had the jurisdiction to pass the Resolution and exercise its authority in the manner it did.

19 In *East Durham Wind*, *supra* at para. 20, this Court explained that correctness is the appropriate standard where the applicant asserts a conflict between a by-law and a provincial law:

> [t]he issue of whether the by-laws conflict with East Durham Wind's REA is a question of the *vires* of the by-laws. The question is not whether the by-laws fall within the scope of the Municipality's authority to regulate, but rather whether the by-laws conflict with a provincial instrument. The Supreme Court of Canada has made it clear that reasonableness, taking its colour from the context, is the standard to be applied when the question is the scope of the authority to regulate... Where the issue is conflict, this is more akin to the Superior Court of Justice's ability to quash a by-law for illegality under s. 273(1) of the *Municipal Act*, and therefore the standard of review is correctness... [citations omitted]

20 The City makes a few additional points with respect to the standard of review. First, it notes that reasonableness is not a basis upon which by-laws and resolutions may be challenged. Section 272 of the *Municipal Act, 2001*, S.O. 2001, c. 25 ("the Act") provides that "A by-law passed in good faith under any Act shall not be quashed or open to review in whole or in part by any court because of the unreasonableness or supposed unreasonableness of the by-law." The City submits that while questions respecting jurisdiction are reviewed on a correctness standard, courts should take a broad and deferential approach to municipal decision making: *London Taxicab Owners' and Drivers' Group Inc. v. London (City)*, 2013 ONSC 1460, [2013] O.J. No. 1039 (Ont. S.C.J.) at para. 42.

21 I agree with this articulation of the standard of review.

Law and Analysis

22 At this point, it is helpful to set out two principles that are not in dispute.

23 First, to the extent that a municipal by-law conflicts with a provincial act or approval, the by-law is without effect.

24 The Act empowers a city Council to enact by-laws regulating matters within its jurisdiction. Section 14 reads as follows:

> Conflict between by-law and statutes, etc.
>
> 14. (1) A by-law is without effect to the extent of any conflict with,

(a) a provincial or federal Act or a regulation made under such an Act; or

(b) an instrument of a legislative nature, including an order, licence or approval, made or issued under a provincial or federal Act or regulation.

Same

(2) Without restricting the generality of subsection (1), there is a conflict between a by-law of a municipality and an Act, regulation or instrument described in that subsection if the by-law frustrates the purpose of the Act, regulation or instrument.

25 As Rogers explains in *The Law of Municipal Corporations*, "it is a cardinal rule of municipal law that all by-laws are subject to the general law of the realm and are subordinate to it and any by-laws which are repugnant to or inconsistent with general provincial legislation are void and of no effect, or else superseded to the extent that the legislature has acted": see Ian Rogers, Q.C., *The Law of Municipal Corporations*, loose-leaf, 2nd ed. (Toronto: Carswell, 1971) at 63.16.

26 In addition to by-laws, all exercises of municipal power, including resolutions, are without effect to the extent that they conflict with a provincial act or legislative instrument. Section 5(3) of the *Municipal Act* requires municipal power be exercised through by-law. Thus, as this Court held in *East Durham Wind*, to the extent that the underlying by-law allows for the exercise of a power pursuant to a policy or resolution that conflicts with a provincial legislative instrument, it will be without effect. This is supported by a "basic principle of administrative law" as set out in Brown and Evans, *Judicial Review of Administrative Action in Canada*, vol. 3 loose-leaf (Toronto: Canvasback Publishing, updated 2014) at ¶15:3283:

> Like other forms of administrative legislations, a rule, policy, guideline, letter of understanding, manual, or directive will be invalid if it is inconsistent with or in conflict with a statutory provision (quoted in *East Durham Wind* at para. 26).

27 Put differently, a municipal exercise of power will be *ultra vires* if it frustrates the purpose of a provincial legislative instrument.

28 Second, in order to determine whether a municipal exercise of power frustrates the purpose of a provincial legislative instrument and is thus *ultra vires*, the court must consider (1) the purpose of the legislative instrument and (2) whether the exercise of municipal power is incompatible with this purpose.

29 The applicant must establish the purpose of the legislative instrument (here, the REA) and then prove that the municipal exercise of power (the Resolution) frustrates that purpose: *East Durham Wind* at para. 33. The standard is high. As this court stated in *East Durham Wind* at para. 33:

> In [*Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536] the Supreme Court noted that the standard for invalidating provincial legislation on the basis of frustration of federal purpose is high where federal legislation is permissive in a general sense. Similarly, the Ontario Court of Appeal has directed that courts should not "struggle to create a conflict where none exists" between a municipal by-law and provincial legislative instrument: *Brantford (City) Public Utilities Commission v. Brantford (City)* (1998), 36 O.R. (3d) 419 (Ont. C.A.). Rather, they should require a "clear demonstration" of the by-law's invalidity: [*Friends of Lansdowne Inc. v. Ottawa (City)*, 2012 ONCA 273, [2012] O.J. No. 1860] at para. 14.

30 As indicated above, wpd's first submission is that the Resolution frustrates the REA, a provincial legislative instrument, and must be quashed for that reason alone. Wpd also submits that the Resolution was passed in bad faith, as defined *in East Durham Wind* (at para. 50), and must be quashed for that reason as well.

31 Wpd relies extensively on *East Durham Wind* as authority supporting its characterization of the regulatory scheme and defining municipal authority in relation to wind turbine projects that have received an REA. While the City submits that the case is distinguishable on its facts from the present case, it does not take issue with the principles set out in *East Durham Wind* in relation to frustration and bad faith. Given the relevance of that case to the present case, it will be useful to summarize it briefly here.

32 East Durham Wind sought certain permits from the Municipality of West Grey. To construct its project, it required "'entrance permits' to connect access roads on private lands where the turbines [were to] be located to public highways in the municipality". It also required "oversize/overweight haulage permits" to allow for the conveyance of large and heavy project materials by truck along public highways (*East Durham Wind* at para 5).

33 Like Kawartha Lakes, West Grey had passed a "not a willing host" resolution. It also amended an existing by-law "to require a $100,000 performance bond for each new wind turbine constructed in the municipality" (*East Durham Wind* at para. 7). These actions predated East Durham's applications to West Grey for permits. The company submitted applications for entrance permits to the municipality in anticipation of receiving its REA, and then re-applied after the approval was granted.

34 West Grey ultimately refused the applications for the entrance permits. After receiving the first applications, the municipality changed the application form for entrance permits to add a category entitled "intended for industrial use" (as opposed to commercial, residential, field/bush or public street use). In addition, council amended the policy to make itself, not an administrative delegate of council, responsible for approving entrance permits intended for "industrial" use. Council then refused the permits on the basis of a particular interpretation of the method of

measurement used to apply the maximum width limit for any entrance, which was 8 metres. East Durham Wind disputed that interpretation.

35 West Grey's by-law with respect to oversize/overweight vehicles contemplated various conditions to be imposed on permits. Examples included restricted travel hours, the use of police escorts, and requiring modest security for damages. An appended page also contemplated that the municipality could refuse permission altogether for "Exceptional Movement Vehicles". East Durham Wind had attempted to negotiate a comprehensive "Road Use Agreement" for some time with West Grey before it submitted its applications for oversize/overweight permits. These broke down when the company refused to fund a peer-reviewed study on its proposed road use "without an express condition prohibiting the use of that study in any appeal of its forthcoming REA" (at para. 16). After receiving the permit applications, the council asked for more details about the $250,000 security which the company undertook to provide. East Durham Wind advised that it would post a performance bond. Council met and determined that a security contract would have to be negotiated with East Durham Wind before council would consider the applications and that could take 6-8 months. West Grey also revived the peer review issue but no agreement was reached. East Durham Wind then applied for judicial review of the two relevant by-laws, arguing that they conflicted with East Durham Wind's REA by frustrating its purpose. The Court noted that if there was no conflict, the secondary issue was whether the permit applications had complied with the relevant criteria and should have been granted.

36 The Court observed, first, that an REA is "an instrument of a legislative nature" within the meaning of s. 14(1) of the Act. Second, it noted that the test for conflict set out in s. 14 mirrors the two-pronged test for determining whether conflict exists between federal and provincial laws: see *East Durham Wind* at para. 30, citing *Croplife Canada v. Toronto (City)* (2005), 75 O.R. (3d) 357, [2005] O.J. No. 1896 (Ont. C.A.) at para. 63.

37 The central question in *East Durham Wind* was whether the by-laws frustrated the purpose of the REA as a provincial legislative instrument. The Court stated that East Durham Wind had to establish the purpose of the legislative instrument (the REA) and then prove that the permitting by-laws were incompatible with this purpose (see para. 26, *supra*). After reviewing the nature of the regulatory framework and the REA, the Court concluded (at paras. 37-38):

> We find that the purpose of the GEA regime as a whole is to encourage and facilitate the development of renewable energy projects in Ontario, including wind energy projects. [...]
>
> The purpose of East Durham Wind's REA in particular is to authorize "the construction, installation, operation, use and retiring" of its 14 turbine wind energy project on lands in the Municipality of West Grey. In other words, the purpose of the REA is to authorize East Durham Wind to build its particular wind energy project, which will contribute to the overall policy goals underlying the GEA regime. The project application went through the streamlined process described above and a REA was granted by the Director, having regard

> to the "public interest." The REA itself contains 20 pages of detailed terms and conditions, including three dealing with "Traffic Management Planning" that require East Durham Wind to create a Traffic Management Plan and to make reasonable efforts to reach a "Road Users Agreement" with the Municipality and Grey County based on this plan. As noted earlier, the efforts between East Durham Wind and the Municipality to reach such an agreement have proved fruitless.
>
> [Emphasis added.]

38 The Court rejected the Municipality's submission that East Durham Wind had not shown positively that the permits were required to construct the project. It concluded that such permits were necessary for both the initial construction and the subsequent maintenance of the wind turbines. Accordingly, it declared the by-laws inoperative to the extent that they frustrated the purpose of the REA, i.e. "to authorize the building of the project in furtherance of the province's goal of increasing renewable energy generation": see para. 47. It also quashed two decisions of the Municipality which had rejected two approval applications, and ordered it to reconsider those applications in a manner that does not frustrate the REA, in a manner consistent with the intent and purpose of the Municipal Act. It continued to note at paras 49-50 that "acting without a rational appreciation of that intent and purpose, or for an improper purpose, will mean it acts in bad faith, citing: *Roncarelli c. Duplessis*, 1959 CanLII 50, [1959] S.C.R. 121 (S.C.C.) at p. 143.

39 I will return to the issue of bad faith later in these reasons.

40 As this Court held in *East Durham Wind*, "there is no question that the REA in this case is 'an instrument of a legislative nature' within the meaning of s. 14(1) of the *Municipal Act*". Accordingly, to the extent that a by-law conflicts with the REA or with a provincial act such as the GEA or the Environmental Protection Act (the "EPA"), that by-law is without effect. Wpd's REA is an approval issued under the EPA. The applicant submits that *East Durham Wind* and the cases upon which it relied are directly applicable to the case at bar, and consequently the Resolution must be quashed because it frustrates the purpose of the REA. The City argues that its decision not to permit the opening or upgrading of WTR is a lawful exercise of the jurisdiction over roads bestowed upon it by the province. In addition, it submits that this jurisdiction is not altered or removed by the GEA. Finally, it submits that the court should not readily conclude that its Resolution frustrates a legislative instrument. It argues that in this case, unlike in *East Durham Wind*, the purpose of the provincial law was not frustrated because the City's position with respect to WTR does not render the implementation of the REA impossible.

41 As already noted, the applicant must first establish the purpose of the REA. In this respect, as in *East Durham Wind*, the particular purpose of the REA is to authorize the "construction, installation, operation, use and retiring of [the] Class 4" Sumac Ridge Wind Project. This approval furthers the overall policy goals underlying the *GEA* regime, as described in *East Durham Wind* at para. 37:

> The *GEA* provides a complete regime for carrying out the government's policy in this regard. It features an economic incentive for project developers (the FIT program); a comprehensive approval process to scrutinize the potential effects of each project on the health of humans, plants and animals and to identify any conditions that might be necessary to account for local conditions (the REA); and an appeal process for REAs that utilizes a specialized tribunal (the ERT) and the oversight of the courts on questions of law. To maintain this streamlined system the ability of municipalities to restrict renewable energy development through various powers under the *Planning Act* and the *Municipal Act* has been curtailed.

42 The central issue in this case is whether the Resolution frustrates the purpose just described. The City submits that the Resolution does not frustrate the REA because wpd has a number of alternatives to WTR including the use of certain private roadways. Therefore wpd's inability to use WTR would not frustrate the REA. This argument cannot succeed.

43 The REA approves the project as it was presented in wpd's application. It is not merely an abstract approval in principle. It is a detailed and specific approval granted after an extensive and comprehensive process including consultation with the City. The REA approves five IWTs at specified coordinates, as well as "on-site access roads" in accordance with the Application submitted by the company.

44 The City takes the position that "nothing in the REA Permit approves the use of Wild Turkey Road as part of the Project". However, a review of the REA, together with the mandatory components of the Application which are incorporated into the REA itself, supports wpd's position that the REA approves and requires the use and upgrading of Wild Turkey Road. The REA requires the construction of the "Facility" in accordance with the "Application" and the Approval. Condition A1 of the REA provides that

> The Company shall construct, install, use, operate, maintain and retire the Facility in accordance with the terms and conditions of this Approval and the Application and in accordance with the following schedules attached hereto...

45 The REA makes numerous references to the application and it is clear that such approvals are granted only with respect to the specific application. The REA defines "application" as the application submitted by wpd and all supporting documentation submitted with it. Wpd's mandatory application materials make extensive reference to and thoroughly consider the use and upgrading of Wild Turkey Road. Schedule A to the REA specifies that:

> The Facility shall consist of the construction, installation, operation, use and retiring of the following:

> (a) five (5) wind turbine generators... sited at the locations shown in Schedule B of this Approval; and
>
> (b) associated ancillary equipment, systems and technologies including, but not limited to, one (1) switching station, on-site access roads, below and above grade cabling, and below and above grade distribution and transmission lines,

all in accordance with the Application.

46 Schedule B sets out the exact geographic co-ordinates at which the wind turbines are to be constructed. The on-site access roads" for turbines 2, 4 and 5, which according to the REA wpd "shall" construct as part of the Facility, are set out in the Application.

47 In short, having reviewed the material before the court and heard the submissions of the parties I am satisfied on the record before this Court that the use of WTR is central to the REA as granted. The approval contemplates, assumes and approves the use of WTR to access the sites as the application clearly sought. This means that wpd would have to seek an amendment to the REA in order to obtain approval for alternate access routes.

48 In passing, I note that the City seems to have recognized that wpd would have to seek such an amendment. In the March 9, 2015 affidavit sworn by Mr. Ron Taylor in support of the City's position, Mr. Taylor states (at para. 99) that

> [s]ince the City rejected its request in March 2014, wpd has had a year to take steps to obtain Ministry approval to modify its onsite access road network. It has elected to take no steps to do so [and] wpd is solely responsible for the position it finds itself in.

49 This of course suggests that the City recognized the centrality of WTR to the REA,

50 The question of whether a legislative instrument frustrates the purpose of the REA must be considered in terms of the way the REA is as it exists, not as it might be if it were amended. The comprehensive and specialized process established under the *GEA* is designed to provide for the consideration of such issues as access routes. In my view, it would be inappropriate for this court to effectively second-guess such determinations, particularly in a proceeding which is collateral to the REA application process as established pursuant to the *GEA* regime. The City made no objections to the use of WTR during that process, or at any time prior to the issuance of wpd's REA, despite having ample occasion to do so. I will return to this below in addressing the bad faith issue.

51 When the Ministry issues an REA, it approves the specific and detailed application submitted by the proposer. Consequently, the City's argument that other access routes would be preferable to WTR is beside the point. The REA *as granted* contemplates WTR as the spine of the project. Refusing to permit its use as the Resolution purports to do, even if it were otherwise a legitimate

exercise of the municipality's jurisdiction over roadways, would frustrate the purpose of the REA. The Resolution must be declared inoperative to that extent. As previously noted, the City may legitimately require agreements with respect to indemnity, liability, decommissioning costs and the like. But it may not exceed the limits on its authority imposed by s. 14 of the Act.

52 In short, because the REA contemplated the use of WTR as the artery of the project, the Resolution purporting to refuse wpd any use of WTR frustrates the purpose of the REA and must be quashed.

Bad Faith

53 Having found that the Resolution must be quashed because it frustrates the purpose of the REA, it is not strictly speaking necessary to determine whether it should be quashed on the basis of bad faith. This issue was, however, argued before us, and addressing it here may inform further discussions and negotiations in relation to wpd's use of WTR.

54 The applicant submits that the City's actions, as a whole, demonstrate bad faith. The City acted for an improper purpose by attempting to frustrate a provincial legislative instrument. It also acted unreasonably, arbitrarily and without the requisite fairness, openness and impartiality when it enacted the Resolution. In response (as noted at para. 6, *supra*), the City submits that "its decision not to open or upgrade WTR was made having regard to the reports provided by its staff and outside independent consultant and further having regard to the public interest. Its conduct was consistent with municipal practice and not the result of bad faith". The City adds that no public interest would be served by allowing wpd to use WTR. The respondent further argues that courts are and should be unwilling to find bad faith on the part of a democratically-elected representative unless there is "no other rational conclusion" respecting their actions: see *MacMillan Bloedel Ltd. v. Galiano Island Trust Committee* (1995), 126 D.L.R. (4th) 449, [1995] B.C.J. No. 1763 (B.C. C.A.) at para 178, cited by Low J. in *Uukkivi v. Lake of Bays (Township)*, [2004] O.J. No. 4479 (Ont. S.C.J.) at para 32.

55 In *Grosvenor v. East Luther Grand Valley (Township)*, 2007 ONCA 55, 84 O.R. (3d) 346 (Ont. C.A.) at para 44, Blair J.A. considered what constitutes bad faith on the part of a municipality. He endorsed the following statement of Robins J. in *H.G. Winton Ltd. v. North York (Borough)* [1978 CarswellOnt 491 (Ont. Div. Ct.)]:

> To say that Council acted in what is characterized in law as "bad faith" is not to imply or suggest any wrongdoing or personal advantage on the part of any of its members: *Re Hamilton Powder Co. and Township of Gloucester* (1909), 13 O.W.R. 661. But it is to say, in the factual situation of this case, that Council acted unreasonably and arbitrarily and without the degree of fairness, openness, and impartiality required of a municipal government. [Underlining added by Blair J.A.].

56 Acting for an improper purpose will also constitute bad faith:

> The Municipality must discharge its public duties in accordance with the intent and purpose of the *Municipal Act*, and acting without a rational appreciation of that intent and purpose, or for an improper purpose, will mean it acts in bad faith: *Roncarelli c. Duplessis*, [1959] S.C.R. 121 (S.C.C.) at p. 143. The Municipal Act does not allow for conflict between municipal by-laws and provincial legislative instruments. (*East Durham Wind* at para. 50)

57 In my view, the record establishes that the City acted in bad faith when it passed the Resolution for an improper purpose. It was not exercising or attempting to exercise any legitimate jurisdiction over the use of roads. As noted above, that jurisdiction is curtailed by the combined effect of the *GEA* scheme and s. 14 of the Act. The record indicates that the Resolution was intended to accomplish indirectly that which the City had been unable to achieve directly through the REA process: to stop the Sumac Ridge IWT project. Given s. 14 of the Act, it was not open to the City to frustrate the REA. Exercising its powers with a view to doing so amounts to bad faith, as defined above.

58 The City clearly opposed the Sumac Ridge project. Like many other municipalities across Ontario, it passed an "unwilling host" by-law. In its consultation document, submitted as part of the REA process, the City urged the provincial government not to approve the project. The City was entitled to take these positions. However, it is not entitled to use its jurisdiction over roadways in order to thwart or frustrate Sumac Ridge as authorized by its REA.

59 It is clear from the jurisprudence that courts must be cautious about finding bad faith. But the evidence in this case leads to one inexorable conclusion: the prohibition on wpd's use of WTR in the Resolution was driven by the City's opposition to Sumac Ridge, not by the legitimate exercise of its jurisdiction over roadways. I say this for five reasons.

60 First, it is clear from the record that wpd attempted to negotiate for the use of WTR from early 2012. More generally, the company had tried to engage the City in discussions about the necessary municipal approvals for Sumac Ridge since early 2011. The evidence shows that the City rebuffed these efforts, indicating that it wished to go through the REA process first.

61 Second, the City did not express any concerns about WTR before the REA was granted in December 2013. On March 11, 2013 the City wrote to the Director and the Ministry enclosing the Municipal Consultation Form pursuant to the *Environmental Protection Act Regulation* 359/09. The letter also attached Council resolution CR2013-112 and City report PLAN2013-003. The March 11 letter and its attachments comprised the City's participation in the municipal consultation process for Sumac Ridge.

62 Nowhere in the City's response did it object to the use and upgrading of Wild Turkey Road, despite being invited to do so in the Municipal Consultation Form. Part B of that form invites municipalities to comment on proposed access routes for any renewable energy project. Section 5.2 of the form reads as follows:

> Provide comment on the proposed project's plans respecting proposed road access. Identify any issues and provide recommendations with respect to road access.
>
> Provide comment on any proposed Traffic Management Plans
>
> Identify any issues and provide any recommendations with respect to the Proposed Traffic Management Plan.

63 Under each of these items, the City wrote the same three words: "Development agreement required". No other comments related to Wild Turkey Road appear anywhere on the form.

64 The City explained what it meant by "Development agreement required" in relation to wpd's proposed road upgrades and use of WTR in its report "PLAN2013-003," submitted along with the Consultation Form. Under the heading "Consultations", the report states at pg. 8:

> Should this project be approved by the province, staff will require that the proponent enter into a development agreement to address various City interests prior to any construction activity related to this project. Those interests include but are not limited to:
>
> . . .
>
> Engineering Division
>
> The project requires upgrades to municipal roads and construction of private access roads to the turbine sites. Sight lines and grading must be confirmed by an engineer. Any entrance to and from private property will require an entrance permit. The City will not assume any roads as part of this project. Road assumption requires a petition that must contain signatures from 100% of property owners fronting the road in question. Maintenance and access should be the responsibility of the applicant. All rights of way shall be left in a condition equal to or better than existing.
>
> . . .
>
> Land Management
>
> Wild Turkey Road is a public road allowance in the former Township of Manvers. The Provincial Ministry office does not reveal any easements or rights of way in favour of an abutting landowner over Wild Turkey Road, therefore there is no easement information relevant to this road.

65 While the Report addressed various issues that would have to be considered "should [the] project be approved by the province", it made no objection whatsoever to the use of Wild Turkey Road. Nor did it suggest that there were alternate preferable routes. In particular, the City's subsequent suggestion that WTR is a nature trail in need of protection could and should have been made at that time.

66 Thus, despite its opposition to Sumac Ridge, the City did not express any objections to the use and upgrading of WTR between early 2012 - when it began to rebuff wpd's attempts to discuss the use of WTR - and the successful completion of the REA process in December 2013.

67 Third, the City's arguments for refusing to allow the use of WTR have changed. As mentioned earlier, the argument that WTR was used as a nature trail only arose in the course of this application. The City previously described WTR as "an unopened road allowance established by the Crown", but now suggests that it is on private land, although it acknowledges that there is no clear delineation of its legal location.

68 Fourth, the Report to Council that formed the basis for the Resolution supports the inference that the City was motivated by its opposition to the IWT project. It contains the following paragraphs at page 6:

> Given that City Council passed a resolution requesting the Province to refuse the project, staff is now seeking clarification from Council of the City's position respecting any changes to Wild Turkey Road to accommodate the proposed development. Should Council wish to consider the opening and use of Wild Turkey Road to accommodate the proposed wind turbine development, then the proponent would be requested to consider and address the following matters: Maintenance of the road when upgraded and opened for public use (and cost to the City to maintain)...

69 The Report went on to list a number of other matters that the City would need to address were it to consider the opening and use of WTR, including:

- any restoration or additional improvements required (enhanced drainage, for example);
- resultant impact on the surrounding road network and existing natural environment;
- alternative entrances on existing opened roads and private internal access; and
- potential for future development (severances) fronting Wild Turkey Road if opened.

70 As I will discuss below in relation to the orders sought, these considerations relate to the proper exercise of the City's jurisdiction over roadways. But it did not pursue any of these, choosing instead to pass a Resolution denying wpd the use of WTR altogether.

71 Fifth, while the REA was pending - and following wpd's approach to the City to discuss WTR - the City advised that the company would have to conduct a Municipal Class Environmental Assessment ("MCEA"). Wpd had embarked on this process when the REA was granted in December 2013. Despite assurances from counsel for the City that the results of the MCEA would be considered in making its decision about wpd's use of WTR, City Council passed the Resolution before the report could be completed.

72 It is impossible, in my view, to review the cumulative actions of the City in relation to wpd and its proposed use of WTR and conclude that its purpose in passing the Resolution was anything other than stopping the Sumac Ridge project. The City's refusal to discuss the use of WTR before the REA was granted; its failure to raise the WTR issue as part of the REA consultation process; and its subsequent position that the road should not be used - all of these actions placed wpd in an untenable position. Had the City objected to the use of WTR during the REA process, those concerns could have been addressed. So could the issues that wpd now says arise with respect to the alternative routes that the City says are available to the company. Permitting the City to take issue with the use of WTR at this stage and in these circumstances, given WTR's centrality to the project and the failure to propose alternative routes during the REA process, would permit the City to launch a collateral attack on the REA and undermine the comprehensive process set out in the GEA. This is unfair to wpd and is further evidence of improper purpose in passing the Resolution.

73 In my view, the combination of all these factors leaves no doubt that the Resolution was an attempt to stop the Sumac Ridge project and was not a legitimate exercise of municipal jurisdiction over roadways. As I have stated above, the use of WTR was central to the REA. The City's awareness of this was demonstrated by its assumption that alternate routes would require an amendment to the REA. One would have expected that the City would have marshalled any *bona fide* concerns about the use of WTR during the approval process. The fact that it only raised these issues after the REA was granted, despite wpd's prior attempts to discuss the use of WTR, reinforces the view that the Resolution was passed with the intent to frustrate the Sumac Ridge project and not for the purpose of regulating local roadways.

74 The City clearly and legally opposed the approval of the project in the course of the REA process. Once the REA was granted, however, it was not entitled to use its authority over roadways to collaterally attack the REA. Doing so amounted to bad faith: see *Grosvenor v. East Luther Grand Valley (Township)*, *supra* at paras. 42-45.

75 Accordingly, on the facts of this case, the applicant has established that the City acted in bad faith in passing the Resolution. It must be quashed on that basis, as well on the basis that it frustrated the purpose of the REA as granted.

Further relief sought

76 In its material filed on this application, wpd sought orders directing the City

> a. to consider and decide in good faith wpd's applications to allow for the upgrading and use of Wild Turkey Road;
>
> b. to consider and decide in good faith wpd's applications for any municipal permits necessary for the expeditious construction and operation of wpd's Sumac Ridge Wind Project; [and]
>
> c. to allow the expeditious construction and operation of wpd's Sumac Ridge Wind Project....

77 As I indicated at the beginning of these reasons, Mr Faith advised the court that the applicant was not pursuing the relief outlined at paragraph c. He further advised that wpd would be satisfied with the same relief that had been granted in *East Durham Wind* requiring the City to consider the applications without frustrating the REA and in good faith.

78 I agree with the City that the relief set out in paragraph c would not have been available to the applicant. As it submitted, an order of mandamus cannot compel the City to "allow the expeditious construction and operation of wpd's Sumac Ridge Wind Project". While, as discussed above, the City's jurisdiction over roadways is curtailed somewhat by the Act and the *GEA* regime, there are legitimate considerations to be applied to wpd's use of WTR, such as indemnity, liability and decommissioning costs. These are to be negotiated in good faith with wpd, without frustrating the REA and in good faith.

79 In conclusion, the March 14, 2014 Resolution (CR2014-279) is quashed and orders will issue requiring the City to

> a. consider and decide in good faith wpd's applications to allow for the upgrading and use of Wild Turkey Road; and
>
> b. consider and decide in good faith wpd's applications for any municipal permits necessary for the expeditious construction and operation of wpd's Sumac Ridge Wind Project.

80 The parties advised at the hearing before this court that they had agreed that costs should be fixed in the amount of $55,000.00 to be payable by the successful party to the unsuccessful party. Accordingly, costs are payable by the City to wpd in the amount of $55,000.00 (inclusive of HST and disbursements).

Application granted.

Footnotes

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* A corrigendum issued by the court on August 17, 2015 has been incorporated herein.

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