Court File No.: A-366-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

– and –

CANADIAN TRANSPORTATION AGENCY and BRITISH AIRWAYS PLC

Respondents

BOOK OF AUTHORITIES OF THE APPELLANT, DR. GÁBOR LUKÁCS

Dated: February 16, 2015

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TABLE OF CONTENTS

CANADA

CONSOLIDATION

CODIFICATION

Air Transportation Regulations

Règlement sur les transports aériens

SOR/88-58

DORS/88-58

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Interest

107.1 Where the Agency, by order, directs an air carrier to refund specified amounts to persons that have been overcharged by the air carrier for fares or rates in respect of its air service pursuant to paragraph 66(1)(*c*) of the Act, the amount of the refunds shall bear interest from the date of payment of the fares or rates by those persons to the air carrier to the date of the Agency's order at the rate of interest charged by the Bank of Canada on short-term loans to financial institutions plus one and one-half percent.

SOR/2001-71, s. 3.

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 aérien de rembourser des sommes à des personnes ayant versé des sommes en trop pour un service, le remboursement porte intérêt à compter de la date du paiement fait par ces personnes au transporteur jusqu'à la date de délivrance de l'ordonnance par l'Office, au taux demandé par la Banque du Canada aux institutions financières pour les prêts à court terme, majoré d'un et demi pour cent.

DORS/2001-71, art. 3.

DIVISION II

INTERNATIONAL

Application

108. Subject to paragraph 135.3(1)(*d*), this Division applies in respect of every air carrier that operates an international service, except an air carrier that operates TPCs, TPNCs or TGCs.

SOR/96-335, s. 55.

SECTION II

SERVICE INTERNATIONAL

Application

108. Sous réserve de l'alinéa 135.3(1)*d*), la présente section s'applique aux transporteurs aériens qui exploitent un service international, sauf ceux qui effectuent des VAP, des VAPNOR ou des VAM.

DORS/96-335, art. 55.

Exception

109. An air carrier that operates an international service that serves the transportation requirements of the bona fide guests, employees and workers of a lodge operation, including the transportation of luggage, materials and supplies of those guests, employees and workers is excluded, in respect of the service of those requirements, from the requirements of subsection 110(1).

Exception

109. Le transporteur aérien est exempté de l'application du paragraphe 110(1) en ce qui concerne l'exploitation d'un service international servant à répondre aux besoins de transport des véritables clients, des véritables employés et des véritables travailleurs d'un hôtel pavillonnaire, y compris le transport des bagages, du matériel et des fournitures de ces personnes.

Filing of Tariffs

110. (1) Except as provided in an international agreement, convention or arrangement respecting civil aviation, before commencing the operation of an international service, an air carrier or its agent shall file with the Agency a tariff for that service, including the terms and conditions of free and reduced rate transportation for that service, in the style, and containing the information, required by this Division.

Dépôt des tarifs

110. (1) Sauf disposition contraire des ententes, conventions ou accords internationaux en matière d'aviation civile, avant d'entreprendre l'exploitation d'un service international, le transporteur aérien ou son agent doit déposer auprès de l'Office son tarif pour ce service, conforme aux exigences de forme et de contenu énoncées dans la présente section, dans lequel sont comprises les conditions du transport à titre gratuit ou à taux réduit.

(2) Acceptance by the Agency of a tariff or an amendment to a tariff does not constitute approval of any of its provisions, unless the tariff has been filed pursuant to an order of the Agency.

(3) No air carrier shall advertise, offer or charge any toll where

(*a*) the toll is in a tariff that has been rejected by the Agency; or

(*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;

(2) L'acceptation par l'Office, pour dépôt, d'un tarif ou d'une modification apportée à celui-ci ne constitue pas l'approbation de son contenu, à moins que le tarif n'ait été déposé conformément à un arrêté de l'Office.

(3) Il est interdit au transporteur aérien d'annoncer, d'offrir ou d'exiger une taxe qui, selon le cas :

a) figure dans un tarif qui a été rejeté par l'Office;

b) a été refusée ou suspendue par l'Office.

(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*) 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.

112. (1) All air carriers having joint tolls shall establish just and reasonable divisions thereof between participating air carriers.

(2) The Agency may

(*a*) determine and fix just and equitable divisions of joint tolls between air carriers or the portion of the joint tolls to be received by an air carrier;

(*b*) require an air carrier to inform the Agency of the portion of the tolls in any joint tariff filed that it or any other carrier is to receive or has received; and

(*c*) decide that any proposed through toll is just and reasonable notwithstanding that an amount less than the amount that an air carrier would otherwise be entitled to charge may be allotted to that air carrier out of that through toll.

113. The Agency may

(*a*) suspend any tariff or portion of a tariff that appears not to conform with subsections 110(3) to (5) or section 111 or 112, or disallow any tariff or portion of

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.

112. (1) Les transporteurs aériens qui appliquent des taxes pluritransporteurs doivent établir une répartition juste et raisonnable de ces taxes entre les transporteurs aériens participants.

(2) L'Office peut procéder de la façon suivante :

a) déterminer et fixer la répartition équitable des taxes pluritransporteurs entre les transporteurs aériens, ou la proportion de ces taxes que doit recevoir un transporteur aérien;

b) enjoindre à un transporteur aérien de lui faire connaître la proportion des taxes de tout tarif pluritransporteur déposé que lui-même ou tout autre transporteur aérien est censé recevoir ou qu'il a reçue;

c) décider qu'une taxe totale proposée est juste et raisonnable, même si un transporteur aérien s'en voit attribuer une portion inférieure à la taxe qu'il serait autrement en droit d'exiger.

113. L'Office peut :

a) suspendre tout ou partie d'un tarif qui paraît ne pas être conforme aux paragraphes 110(3) à (5) ou aux articles 111 ou 112, ou refuser tout tarif qui n'est pas conforme à l'une de ces dispositions;

a tariff that does not conform with any of those provisions; and

(*b*) establish and substitute another tariff or portion thereof for any tariff or portion thereof disallowed under paragraph (*a*).

SOR/93-253, s. 2; SOR/96-335, s. 58.

113.1 If an air carrier that offers an international service fails to apply the fares, rates, charges or terms and conditions of carriage set out in the tariff that applies to that service, the Agency may direct it to

(*a*) take the corrective measures that the Agency considers appropriate; and

(*b*) pay compensation for any expense incurred by a person adversely affected by its failure to apply the fares, rates, charges or terms and conditions set out in the tariff.

SOR/2001-71, s. 4; SOR/2009-28, s. 1.

114. (1) Every tariff or amendment to a tariff shall be filed with the Agency by the air carrier or by an agent appointed by power of attorney to act on the air carrier's behalf pursuant to section 134.

(2) Every joint tariff or amendment to a joint tariff shall be filed by one of the air carriers that is a party thereto or by an agent of the air carrier appointed by power of attorney to act on the air carrier's behalf pursuant to section 134.

(3) Where an air carrier files a joint tariff pursuant to subsection (2), that air carrier shall be known as the issuing carrier.

(4) No air carrier that issues a power of attorney to another air carrier or any other agent to publish and file tolls shall include in the carrier's own tariff tolls that duplicate or conflict with tolls published under such power of attorney.

(5) Every tariff or amendment to a tariff that is on paper shall be filed with the Agency together with a filing advice in duplicate.

b) établir et substituer tout ou partie d'un autre tarif en remplacement de tout ou partie du tarif refusé en application de l'alinéa *a*).

DORS/93-253, art. 2; DORS/96-335, art. 58.

113.1 Si un transporteur aérien n'applique pas les prix, taux, frais ou conditions de transport applicables au service international qu'il offre et figurant à son tarif, l'Office peut lui enjoindre :

a) de prendre les mesures correctives qu'il estime indiquées;

b) de verser des indemnités à quiconque pour toutes dépenses qu'il a supportées en raison de la non-application de ces prix, taux, frais ou conditions de transport.

DORS/2001-71, art. 4; DORS/2009-28, art. 1.

114. (1) Les tarifs et leurs modifications doivent être déposés auprès de l'Office par le transporteur aérien ou un agent habilité par procuration à agir pour le compte de celui-ci conformément à l'article 134.

(2) Les tarifs pluritransporteurs et leurs modifications doivent être déposés par l'un des transporteurs aériens participants ou par un agent habilité par procuration à agir pour le compte de celui-ci conformément à l'article 134.

(3) Le transporteur aérien qui dépose un tarif pluritransporteur conformément au paragraphe (2) doit être désigné comme le transporteur aérien émetteur.

(4) Il est interdit à un transporteur aérien qui habilite par procuration un agent ou un autre transporteur aérien à publier et à déposer des taxes, de publier dans ses propres tarifs des taxes qui font double emploi ou sont incompatibles avec celles-ci.

(5) Les tarifs sur papier et leurs modifications doivent être déposés auprès de l'Office en deux exemplaires et être accompagnés d'un avis de dépôt fourni en double.

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; and

(*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) acceptance of children for travel,

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

(iv) passenger re-routing,

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

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

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

(viii) refusal to transport passengers or goods,

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

(x) limits of liability respecting passengers and goods,

(xi) exclusions from liability respecting passengers and goods, and

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 ayant une déficience,

(ii) l'admission des enfants,

(iii) les indemnités pour refus d'embarquement à cause de sur réservation,

(iv) le réacheminement des passagers,

(v) l'inexécution du service et le non-respect de l'horaire,

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

(vii) la réservation, l'annulation, la confirmation, la validité et la perte des billets,

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

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

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

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

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

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

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 fully defined at the beginning of the tariff.

SOR/96-335, s. 66.

Reference to Orders

126. Every tariff or portion thereof published pursuant to an order of the Agency shall make reference therein to the number and date of the order.

Disallowance

127. (1) [Repealed, SOR/96-335, s. 67]

(2) Where a tariff or any portion thereof is disallowed, the CTA(A) number, supplement number or revised page number shall not be used again.

(3) A tariff or any portion thereof issued in substitution for a disallowed tariff or portion thereof shall make reference to the disallowed tariff or portion.

(4) Where any tariff or portion thereof of an air carrier operating a scheduled international service or operating a non-scheduled international service that is operated at a toll per unit of traffic, that contains through tolls applicable to the transportation of traffic between a point in

(xii) la marche à suivre ainsi que les délais fixés pour les réclamations.

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

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.

Renvoi à un arrêté

126. Tout tarif ou partie de tarif publié en exécution d'un arrêté de l'Office doit mentionner le numéro et la date de cet arrêté.

Refus

127. (1) [Abrogé, DORS/96-335, art. 67]

(2) Lorsque tout ou partie d'un tarif est refusé, ni le numéro OTC(A) ni le numéro de supplément ou de page révisée ne peuvent être réutilisés.

(3) Tout ou partie d'un tarif qui est publié en remplacement de tout ou partie d'un tarif refusé doit mentionner le tarif ou la partie du tarif refusé.

(4) Lorsque le transporteur aérien exploitant un service international régulier ou exploitant un service international à la demande moyennant une taxe unitaire applicable au trafic se voit refuser, par les autorités compétentes d'un pays étranger, tout ou partie de son ta-

8

CANADA

CONSOLIDATION

CODIFICATION

Canada Evidence Act

Loi sur la preuve au Canada

R.S.C., 1985, c. C-5

L.R.C. (1985), ch. C-5

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by the court, it shall have the same effect as if it were taken under oath.

2005, c. 32, s. 27.

Judicial Notice

Imperial Acts, etc.

17. Judicial notice shall be taken of all Acts of the Imperial Parliament, of all ordinances made by the Governor in Council, or the lieutenant governor in council of any province or colony that, or some portion of which, now forms or hereafter may form part of Canada, and of all the Acts of the legislature of any such province or colony, whether enacted before or after the passing of the *Constitution Act, 1867*.

R.S., c. E-10, s. 17.

Acts of Canada

18. Judicial notice shall be taken of all Acts of Parliament, public or private, without being specially pleaded.

R.S., c. E-10, s. 18.

Documentary Evidence

Copies by Queen's Printer

19. Every copy of any Act of Parliament, public or private, published by the Queen's Printer, is evidence of that Act and of its contents, and every copy purporting to be published by the Queen's Printer shall be deemed to be so published, unless the contrary is shown.

R.S., 1985, c. C-5, s. 19; 2000, c. 5, s. 52.

Imperial proclamations, etc.

20. Imperial proclamations, orders in council, treaties, orders, warrants, licences, certificates, rules, regulations or other Imperial official records, Acts or documents may be proved

(*a*) in the same manner as they may from time to time be provable in any court in England;

(*b*) by the production of a copy of the *Canada Gazette*, or a volume of the Acts of Parliament purporting to contain a copy of the same or a notice thereof; or

(*c*) by the production of a copy of them purporting to be published by the Queen's Printer.

R.S., 1985, c. C-5, s. 20; 2000, c. 5, s. 53.

Proclamations, etc., of Governor General

21. Evidence of any proclamation, order, regulation or appointment, made or issued by the Governor General or by the Governor in Council, or by or under the authority of any minister or head of any department of the Gov-

Admission d'office

Lois impériales, etc.

17. Sont admises d'office les lois du Parlement impérial, les ordonnances rendues par le gouverneur en conseil ou par le lieutenant-gouverneur en conseil de toute province ou colonie qui fait, ou dont une partie fait, ou pourra faire, partie du Canada, et les lois de la législature d'une telle province ou colonie, qu'elles aient été édictées avant ou après la sanction de la *Loi constitutionnelle de 1867*.

S.R., ch. E-10, art. 17.

Lois fédérales

18. Sont admises d'office les lois fédérales, d'intérêt public ou privé, sans que ces lois soient spécialement plaidées.

S.R., ch. E-10, art. 18.

Preuve documentaire

Exemplaires de l'imprimeur de la Reine

19. Tout exemplaire d'une loi fédérale, qu'elle soit publique ou privée, publiée par l'imprimeur de la Reine, fait preuve de cette loi et de son contenu. Tout exemplaire donné comme publié par l'imprimeur de la Reine est réputé avoir été ainsi publié, sauf preuve contraire.

L.R. (1985), ch. C-5, art. 19; 2000, ch. 5, art. 52.

Proclamations impériales, etc.

20. Les proclamations, décrets, traités, ordonnances, arrêtés, mandats, licences, certificats, règles, règlements ou autres pièces officielles, lois ou documents impériaux peuvent être prouvés :

a) soit de la même manière qu'ils peuvent l'être devant les tribunaux en Angleterre;

b) soit par la production d'un exemplaire de la *Gazette du Canada* ou d'un volume des lois fédérales, donné comme en contenant une copie ou un avis;

c) soit par la production d'un exemplaire de ces documents donné comme publié par l'imprimeur de la Reine.

L.R. (1985), ch. C-5, art. 20; 2000, ch. 5, art. 53.

Proclamations, etc. du gouverneur général

21. La preuve de toute proclamation, de tout décret ou règlement pris, ou de toute nomination faite par le gouverneur général ou par le gouverneur en conseil, ou par un ministre ou chef de tout ministère du gouvernement du

ernment of Canada and evidence of a treaty to which Canada is a party, may be given in all or any of the following ways:

(*a*) by the production of a copy of the *Canada Gazette*, or a volume of the Acts of Parliament purporting to contain a copy of the treaty, proclamation, order, regulation or appointment, or a notice thereof;

(*b*) by the production of a copy of the proclamation, order, regulation or appointment, purporting to be published by the Queen's Printer;

(*c*) by the production of a copy of the treaty purporting to be published by the Queen's Printer;

(*d*) by the production, in the case of any proclamation, order, regulation or appointment made or issued by the Governor General or by the Governor in Council, of a copy or extract purporting to be certified to be true by the clerk or assistant or acting clerk of the Queen's Privy Council for Canada; and

(*e*) by the production, in the case of any order, regulation or appointment made or issued by or under the authority of any minister or head of a department of the Government of Canada, of a copy or extract purporting to be certified to be true by the minister, by his deputy or acting deputy, or by the secretary or acting secretary of the department over which he presides.

R.S., 1985, c. C-5, s. 21; 2000, c. 5, s. 54.

Canada, ou sous leur autorité, de même que la preuve d'un traité auquel le Canada est partie, peut être faite par les moyens ou l'un des moyens suivants :

a) la production d'un exemplaire de la *Gazette du Canada*, ou d'un volume des lois fédérales, présenté comme contenant une copie ou un avis du traité, de la proclamation, du décret, du règlement ou de la nomination;

b) la production d'un exemplaire de la proclamation, du décret, du règlement ou de l'acte de nomination, donné comme publié par l'imprimeur de la Reine;

c) la production d'un exemplaire du traité, donné comme publié par l'imprimeur de la Reine;

d) s'il s'agit d'une proclamation, d'un décret ou règlement pris par le gouverneur général ou le gouverneur en conseil, ou d'une nomination faite par lui, la production d'une expédition ou d'un extrait présenté comme certifié conforme par le greffier, le greffier adjoint ou le greffier suppléant du Conseil privé de la Reine pour le Canada;

e) s'il s'agit d'un décret ou d'un règlement pris, ou d'une nomination faite par l'autorité ou sous l'autorité d'un tel ministre ou chef de ministère, la production d'une expédition ou d'un extrait donné comme certifié conforme par le ministre, ou son sous-ministre ou sous-ministre suppléant, ou par le secrétaire ou le secrétaire suppléant du ministère qu'il préside.

L.R. (1985), ch. C-5, art. 21; 2000, ch. 5, art. 54.

Proclamations, etc., of lieutenant governor

22. (1) Evidence of any proclamation, order, regulation or appointment made or issued by a lieutenant governor or lieutenant governor in council of any province, or by or under the authority of any member of the executive council, being the head of any department of the government of the province, may be given in all or any of the following ways:

(*a*) by the production of a copy of the official gazette for the province purporting to contain a copy of the proclamation, order, regulation or appointment, or a notice thereof;

(*b*) by the production of a copy of the proclamation, order, regulation or appoint-

Proclamations, etc. des lieutenants-gouverneurs

22. (1) La preuve de toute proclamation, de tout décret ou règlement pris, ou de toute nomination faite par le lieutenant-gouverneur ou le lieutenant-gouverneur en conseil d'une province, ou par un des membres du conseil exécutif qui est aussi chef d'un ministère du gouvernement de la province, ou sous l'autorité de ce membre, peut se faire par les moyens ou l'un des moyens suivants :

a) la production d'un exemplaire de la gazette officielle de la province, donné comme contenant une copie ou un avis de la proclamation, du décret, du règlement ou de la nomination;

CANADA

CONSOLIDATION

CODIFICATION

Canada Transportation Act

Loi sur les transports au Canada

S.C. 1996, c. 10

L.C. 1996, ch. 10

Current to November 26, 2013

À jour au 26 novembre 2013

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Appeal from Agency

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.

Appel

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.

Time for making appeal

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

Délai

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

Powers of Court

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

Pouvoirs de la cour

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

Agency may be heard

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

Plaidoirie de l'Office

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

Report of Agency

Rapport de l'Office

Agency's report

42. (1) Each year the Agency shall, before the end of July, make a report on its activities for the preceding year and submit it, through the Minister, to the Governor in Council describing briefly, in respect of that year,

(*a*) applications to the Agency and the findings on them; and

(*b*) the findings of the Agency in regard to any matter or thing respecting which the Agency has acted on the request of the Minister.

Rapport de l'Office

42. (1) Chaque année, avant la fin du mois de juillet, l'Office présente au gouverneur en conseil, par l'intermédiaire du ministre, un rapport de ses activités de l'année précédente résumant :

a) les demandes qui lui ont été présentées et ses conclusions à leur égard;

b) ses conclusions concernant les questions ou les objets à l'égard desquels il a agi à la demande du ministre.

Assessment of Act

(2) The Agency shall include in every report referred to in subsection (1) the Agency's assessment of the operation of this Act and any difficulties observed in the administration of this Act.

Évaluation de la loi

(2) L'Office joint à ce rapport son évaluation de l'effet de la présente loi et des difficultés rencontrées dans l'application de celle-ci.

Tabling of report

(3) The Minister shall have a copy of each report made under this section laid before each House of Parliament on any of the first thirty

Dépôt

(3) Dans les trente jours de séance de chaque chambre du Parlement suivant la réception du rapport par le ministre, celui-ci le fait déposer devant elle.

1996, ch. 10, art. 42; 2013, ch. 31, art. 2.

Adaptation orders

(2) Wherever by reason of insolvency, sale under mortgage or any other cause, a transportation undertaking or a portion of a transportation undertaking is operated, managed or held otherwise than by the carrier, the Agency or the Minister may make any order it considers proper for adapting and applying the provisions of this Act.

Modification

(2) L'Office ou le ministre peut, par arrêté, adapter les dispositions de la présente loi si, notamment pour insolvabilité ou vente hypothécaire, une entreprise de transport échappe, en tout ou en partie, à la gestion, à l'exploitation ou à la possession du transporteur en cause.

PART II

AIR TRANSPORTATION

Interpretation and Application

PARTIE II

TRANSPORT AÉRIEN

Définitions et champ d'application

Definitions

55. (1) In this Part,

Définitions

55. (1) Les définitions qui suivent s'appliquent à la présente partie.

"aircraft" «*aéronef*»

"aircraft" has the same meaning as in subsection 3(1) of the *Aeronautics Act*;

«aéronef» S'entend au sens du paragraphe 3(1) de la *Loi sur l'aéronautique*.

«aéronef» "*aircraft*"

"air service" «*service aérien*»

"air service" means a service, provided by means of an aircraft, that is publicly available for the transportation of passengers or goods, or both;

«Canadien» Citoyen canadien ou résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés*; la notion englobe également les administrations publiques du Canada ou leurs mandataires et les personnes ou organismes, constitués au Canada sous le régime de lois fédérales ou provinciales et contrôlés de fait par des Canadiens, dont au moins soixante-quinze pour cent — ou tel pourcentage inférieur désigné par règlement du gouverneur en conseil — des actions assorties du droit de vote sont détenues et contrôlées par des Canadiens.

«Canadien» "*Canadian*"

"basic fare" «*prix de base*»

"basic fare" means

(*a*) the fare in the tariff of the holder of a domestic licence that has no restrictions and represents the lowest amount to be paid for one-way air transportation of an adult with reasonable baggage between two points in Canada, or

(*b*) where the licensee has more than one such fare between two points in Canada and the amount of any of those fares is dependent on the time of day or day of the week of travel, or both, the highest of those fares;

«document d'aviation canadien» S'entend au sens du paragraphe 3(1) de la *Loi sur l'aéronautique*.

«document d'aviation canadien» "*Canadian aviation document*"

"Canadian" «*Canadien*»

"Canadian" means a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*, a government in Canada or an agent of such a government or a corporation or other entity that is incorporated or formed under the laws of Canada or a province, that is controlled in fact by Canadians and of which at least seventy-five per cent, or such lesser percentage as the Governor in Council may by regulation specify, of the voting interests are owned and controlled by Canadians;

«licencié» Titulaire d'une licence délivrée par l'Office en application de la présente partie.

«licencié» "*licensee*"

«prix de base»

a) Prix du tarif du titulaire d'une licence intérieure qui est sans restriction et qui constitue le montant le moins élevé à payer pour le transport aller, entre deux points situés au Canada, d'un adulte accompagné d'une quantité normale de bagages;

b) dans les cas où un tel prix peut varier selon le moment du jour ou de la semaine, ou des deux, auquel s'effectue le voyage, le montant le plus élevé de ce prix.

«prix de base» "*basic fare*"

"Canadian aviation document" «*document d'aviation canadien*»

"Canadian aviation document" has the same meaning as in subsection 3(1) of the *Aeronautics Act*;

«règlement» Règlement pris au titre de l'article 86.

«règlement» "*prescribed*"

"domestic licence" *Version anglaise seulement*

"domestic licence" means a licence issued under section 61;

«service aérien» Service offert, par aéronef, au public pour le transport des passagers, des marchandises, ou des deux.

«service aérien» "*air service*"

"domestic service" «*service intérieur*»

"domestic service" means an air service between points in Canada, from and to the same point in Canada or between Canada and a point outside Canada that is not in the territory of another country;

«service intérieur» Service aérien offert soit à l'intérieur du Canada, soit entre un point qui y est situé et un point qui lui est extérieur sans pour autant faire partie du territoire d'un autre pays.

«service intérieur» "*domestic service*"

"international service" «*service international*»

"international service" means an air service between Canada and a point in the territory of another country;

«service international» Service aérien offert entre le Canada et l'étranger.

«service international» "*international service*"

"licensee" «*licencié*»

"licensee" means the holder of a licence issued by the Agency under this Part;

«service international à la demande» Service international autre qu'un service international régulier.

«service international à la demande» "*non-scheduled international service*"

"non-scheduled international licence" *Version anglaise seulement*

"non-scheduled international licence" means a licence issued under subsection 73(1);

«service international régulier» Service international exploité à titre de service régulier aux termes d'un accord ou d'une entente à cet effet dont le Canada est signataire ou sous le régime d'une qualification faite en application de l'article 70.

«service international régulier» "*scheduled international service*"

"non-scheduled international service" «*service international à la demande*»

"non-scheduled international service" means an international service other than a scheduled international service;

"prescribed" «*règlement*»

"prescribed" means prescribed by regulations made under section 86;

«tarif» Barème des prix, taux, frais et autres conditions de transport applicables à la prestation d'un service aérien et des services connexes.

«tarif» "*tariff*"

"scheduled international licence" *Version anglaise seulement*

"scheduled international licence" means a licence issued under subsection 69(1);

«texte d'application» Arrêté ou règlement pris en application de la présente partie ou de telle de ses dispositions.

«texte d'application» *French version only*

"scheduled international service" «*service international régulier*»

"scheduled international service" means an international service that is a scheduled service pursuant to

(*a*) an agreement or arrangement for the provision of that service to which Canada is a party, or

(*b*) a determination made under section 70;

"tariff" «*tarif*»

"tariff" means a schedule of fares, rates, charges and terms and conditions of carriage applicable to the provision of an air service and other incidental services.

Affiliation

(2) For the purposes of this Part,

(*a*) one corporation is affiliated with another corporation if

(i) one of them is a subsidiary of the other,

(ii) both are subsidiaries of the same corporation, or

(iii) both are controlled by the same person;

(2) Pour l'application de la présente partie :

a) des personnes morales sont du même groupe si l'une est la filiale de l'autre, si toutes deux sont des filiales d'une même personne morale ou si chacune d'elles est contrôlée par la même personne;

b) si deux personnes morales sont du groupe d'une même personne morale au même mo-

Groupe

deal with the complaint in accordance with the provisions of this Part under which the complaint has been made.

Further proceedings

(4) A member of the Agency or any person authorized to act on the Agency's behalf who has been involved in attempting to resolve or mediate the complaint under this section may not act in any further proceedings before the Agency in respect of the complaint.

Extension of time

(5) The period of 120 days referred to in subsection 29(1) shall be extended by the period taken by the Agency or any person authorized to act on the Agency's behalf to review and attempt to resolve or mediate the complaint under this section.

Part of annual report

(6) The Agency shall, as part of its annual report, indicate the number and nature of the complaints filed under this Part, the names of the carriers against whom the complaints were made, the manner complaints were dealt with and the systemic trends observed.

2000, c. 15, s. 7.1; 2007, c. 19, s. 25.

REGULATIONS

Regulations

86. (1) The Agency may make regulations

(*a*) classifying air services;

(*b*) classifying aircraft;

(*c*) prescribing liability insurance coverage requirements for air services or aircraft;

(*d*) prescribing financial requirements for each class of air service or aircraft;

(*e*) respecting the issuance, amendment and cancellation of permits for the operation of international charters;

(*f*) respecting the duration and renewal of licences;

(*g*) respecting the amendment of licences;

(*h*) respecting traffic and tariffs, fares, rates, charges and terms and conditions of carriage for international service and

(i) providing for the disallowance or suspension by the Agency of any tariff, fare, rate or charge,

(ii) providing for the establishment and substitution by the Agency of any tariff, fare, rate or charge disallowed by the Agency,

miner la plainte conformément aux dispositions de la présente partie en vertu desquelles elle a été déposée.

Inhabilité

(4) Le membre de l'Office ou le délégué qui a tenté de régler l'affaire ou joué le rôle de médiateur en vertu du présent article ne peut agir dans le cadre de procédures ultérieures, le cas échéant, devant l'Office à l'égard de la plainte en question.

Prolongation

(5) La période de cent vingt jours prévue au paragraphe 29(1) est prolongée de la durée de la période durant laquelle l'Office ou son délégué agit en vertu du présent article.

Inclusion dans le rapport annuel

(6) L'Office inclut dans son rapport annuel le nombre et la nature des plaintes déposées au titre de la présente partie, le nom des transporteurs visés par celles-ci, la manière dont elles ont été traitées et les tendances systémiques qui se sont manifestées.

2000, ch. 15, art. 7.1; 2007, ch. 19, art. 25.

RÈGLEMENTS

Pouvoirs de l'Office

86. (1) L'Office peut, par règlement :

a) classifier les services aériens;

b) classifier les aéronefs;

c) prévoir les exigences relatives à la couverture d'assurance responsabilité pour les services aériens et les aéronefs;

d) prévoir les exigences financières pour chaque catégorie de service aérien ou d'aéronefs;

e) régir la délivrance, la modification et l'annulation des permis d'affrètements internationaux;

f) fixer la durée de validité et les modalités de renouvellement des licences;

g) régir la modification des licences;

h) prendre toute mesure concernant le trafic et les tarifs, prix, taux, frais et conditions de transport liés au service international, notamment prévoir qu'il peut :

(i) annuler ou suspendre des tarifs, prix, taux ou frais,

(ii) établir de nouveaux tarifs, prix, taux ou frais en remplacement de ceux annulés,

(iii) authorizing the Agency to direct a licensee or carrier to take corrective measures that the Agency considers appropriate and to pay compensation for any expense incurred by a person adversely affected by the licensee's or carrier's failure to apply the fares, rates, charges or terms or conditions of carriage applicable to the service it offers that were set out in its tariffs, and

(iv) requiring a licensee or carrier to display the terms and conditions of carriage for its international service on its Internet site, if the site is used for selling the international service of the licensee or carrier;

(*i*) requiring licensees to file with the Agency any documents and information relating to activities under their licences that are necessary for the purposes of enabling the Agency to exercise its powers and perform its duties and functions under this Part and respecting the manner in which and the times at which the documents and information are to be filed;

(*j*) requiring licensees to include in contracts or arrangements with travel wholesalers, tour operators, charterers or other persons associated with the provision of air services to the public, or to make those contracts and arrangements subject to, terms and conditions specified or referred to in the regulations;

(*k*) defining words and expressions for the purposes of this Part;

(*l*) excluding a person from any of the requirements of this Part;

(*m*) prescribing any matter or thing that by this Part is to be prescribed; and

(*n*) generally for carrying out the purposes and provisions of this Part.

Exclusion not to provide certain relief

(2) No regulation shall be made under paragraph (1)(*l*) that has the effect of relieving a person from any provision of this Part that requires a person to be a Canadian and to have a Canadian aviation document and prescribed liability insurance coverage in respect of an air service.

(3) [Repealed, 2007, c. 19, s. 26]

1996, c. 10, s. 86; 2000, c. 15, s. 8; 2007, c. 19, s. 26.

(iii) enjoindre à tout licencié ou transporteur de prendre les mesures correctives qu'il estime indiquées et de verser des indemnités aux personnes lésées par la non-application par le licencié ou transporteur des prix, taux, frais ou conditions de transport applicables au service et qui figuraient au tarif,

(iv) obliger tout licencié ou transporteur à publier les conditions de transport du service international sur tout site Internet qu'il utilise pour vendre ce service;

i) demander aux licenciés de déposer auprès de lui les documents ainsi que les renseignements relatifs aux activités liées à leurs licences et nécessaires à l'exercice de ses attributions dans le cadre de la présente partie, et fixer les modalités de temps ou autres du dépôt;

j) demander aux licenciés d'inclure dans les contrats ou ententes conclus avec les grossistes en voyages, voyagistes, affréteurs ou autres personnes associées à la prestation de services aériens au public les conditions prévues dans les règlements ou d'assujettir ces contrats ou ententes à ces conditions;

k) définir les termes non définis de la présente partie;

l) exempter toute personne des obligations imposées par la présente partie;

m) prendre toute mesure d'ordre réglementaire prévue par la présente partie;

n) prendre toute autre mesure d'application de la présente partie.

Exception

(2) Les obligations imposées par la présente partie relativement à la qualité de Canadien, au document d'aviation canadien et à la police d'assurance responsabilité réglementaire en matière de service aérien ne peuvent faire l'objet de l'exemption prévue à l'alinéa (1)*l*).

(3) [Abrogé, 2007, ch. 19, art. 26]

1996, ch. 10, art. 86; 2000, ch. 15, art. 8; 2007, ch. 19, art. 26.

Date: 20090323

Docket: A-412-08

Citation: 2009 FCA 95

CORAM: **DESJARDINS J.A.**
NOËL J.A.
TRUDEL J.A.

BETWEEN:

AIR CANADA

Appellant

and

CANADIAN TRANSPORTATION AGENCY
and PETER GRIFFITHS

Respondents

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on March 23, 2009)

DESJARDINS J.A.

[1] We are all of the view that the Canadian Transportation Agency (the Agency) ignored the balancing test which it itself outlined at the beginning of its analysis at paragraph 20 of its reasons (see also the Agency's decisions in *Del Anderson* No. 666-C-A-2001, *Zuker* No. 680-C-A-2001, *Morgan* No. 38-C-A-2002, *Bass* No. 37-C-A-2002 & *Clark* No. 55-C-A-2002 where the same test was applied.)

[2] In particular, it was incumbent upon the Agency to take into account and weigh the reasons for the Air Canada's tariff revisions against the inconveniences to the respondent Peter Griffiths.

[3] That, the Agency did not do.

[4] This appeal will be allowed, the decision of the Agency will be set aside and the matter will be returned to the Agency for a redetermination so that the balancing exercise be conducted on the basis of the existing record.

[5] As no costs are sought, none will be awarded.

"Alice Desjardins"

J.A.

Canadian Transportation Agency

Decision No. 666-C-A-2001

December 24, 2001

IN THE MATTER OF a complaint by Del Anderson against Air Canada concerning denied boarding policy applicable to transportation between points in Canada.

File No. M4370/A74/00-625

COMPLAINT

On October 9, 2000, Del Anderson filed with the Air Travel Complaints Commissioner (hereinafter the ATCC) the complaint set out in the title. However, due to the regulatory nature of the complaint, it was referred to the Canadian Transportation Agency (hereinafter the Agency).

On December 29, 2000, Agency staff requested that Air Canada address the complaint within the context of subsection 67.2(1) of the *Canada Transportation Act*, S.C., 1996, c. 10 (hereinafter the CTA).

By letter dated January 29, 2001, Air Canada requested an extension of time until February 5, 2001 to file its answer to the complaint, and by Decision No. LET-A-54-2001 dated February 8, 2001, the Agency granted this extension. On February 5, 2001, Air Canada filed its answer, and on February 14, 2001, Mr. Anderson filed his reply to Air Canada's answer.

Pursuant to subsection 29(1) of the CTA, the Agency is required to make its decision no later than 120 days after the application is received unless the parties agree to an extension. In this case, the parties have agreed to an indefinite extension of the deadline.

ISSUE

The issue to be addressed is whether Air Canada's denied boarding policy applicable to transportation between points in Canada is unreasonable or unduly discriminatory within the meaning of subsection 67.2 (1) of the CTA.

POSITIONS OF THE PARTIES

Mr. Anderson submits that Air Canada's denied boarding policy is not equitable. He states that it is "clearly unfair" to compensate all passengers the same sum regardless of the fare paid, and that fewer

22 cancellations would result if the denied boarding compensation were made fairer. Further, he maintains that Air Canada should develop a denied boarding policy that allows for the "displacement of the lowest fare travellers first".

In its October 24, 2000 answer to the ATCC's request for comments, Air Canada indicates that it maintains sophisticated computer systems that track "no-show" data and that the carrier's number of denied boardings is relatively small. Air Canada advises that overbooking standards are constantly reviewed and reservations systems are adjusted accordingly to allow for any new booking patterns.

In reply, Mr. Anderson alleges that there is a "gross inequity" in current Air Canada "bumping" procedures given that such procedures permit deep discount fare passengers to travel, while full fare passengers are "displaced". He states that Air Canada must develop a denied boarding policy that gives priority to full fare passengers, and that these passengers should be bumped only after the discounted passengers have been denied boarding. He further submits that the current flat compensation fee is "unfair".

By letter dated December 29, 2000, Agency staff requested the parties to the complaint to address the matter in the context of subsection 67.2(1) of the CTA.

In its answer, Air Canada states that its denied boarding policy is neither unreasonable nor unduly discriminatory within the meaning of subsection 67.2(1) of the CTA. Such policy provides that, in the event of insufficient volunteers, denied boarding proceeds according to an established boarding priority. First class and economy class passengers are accommodated prior to all other passengers, in the order in which they present themselves for check-in and boarding. Exceptions to this boarding priority are made in the case of passengers with a disability or unaccompanied children under the age of twelve.

Further, Air Canada argues that it offers equitable denied boarding compensation, as all passengers denied boarding are extended the same compensation of $100.00 cash or a $300.00 travel voucher. Air Canada submits it is "unreasonable and unworkable" to implement the complainant's request that the compensation be made proportionate to the fare paid. The carrier suggests that a "melee" would result if higher compensation were offered to full economy passengers than to deep discount passengers, as both types of passengers would not be equally rewarded for experiencing the same inconvenience.

With respect to whether its policy is "unduly discriminatory", Air Canada submits that, by treating Mr. Anderson the same as all other passengers that have been denied boarding, it has not shown "undue discrimination".

In his reply, Mr. Anderson states that Air Canada's denied boarding policy is contrary to subsection 67.2(1) of the CTA. He maintains his previous claim that Air Canada's boarding compensation policy is neither fair nor equitable, and that compensation based on a percentage of the fare price paid is "reasonable, realistic and workable". He further states that the current denied boarding policy is discriminatory, and that, as full fare passengers receive the same flat sum as deep discount passengers, the full fare passengers are"limited in the benefits available to others" and their compensation is not "fair and rational".

ANALYSIS AND FINDINGS

In making its findings, the Agency has carefully reviewed and considered all of the evidence submitted by the parties. The Agency has also examined Air Canada's denied boarding policy, specifically its policies with respect to denied boarding priority and denied boarding compensation, set out in Rule 245 of Air Canada's domestic tariff.

The Agency's jurisdiction over complaints concerning domestic tariffs is set out in sections 67, 67.1 and 67.2 of the CTA. Pursuant to subsection 67.2(1) of the CTA, the Agency may take certain remedial action following receipt of a complaint where 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. More particularly, subsection 67.2(1) states that:

> 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.

The Agency notes that Air Canada's denied boarding policy provides that, subject to certain exceptions, full fare passengers are to be given boarding priority over lower fare passengers, and that all passengers who are denied boarding are entitled to the same amount of compensation, regardless of the amount of the fare paid by a particular passenger. More specifically, Rules 245(C)(1) and (2) of Air Canada's domestic tariff state:

> 1. If a flight is oversold, no passenger may be involuntarily denied boarding until AC has first requested volunteers to relinquish their seats.
>
> 2. In the event there are not enough volunteers, other passengers may be involuntarily denied boarding in accordance with AC's boarding priority policy. Passengers with confirmed reservations who have not received a boarding pass, will be permitted to board in the following order until all available seats are occupied:
>
> (A) Physically handicapped passengers, unaccompanied children under 12 years of age and others for whom, in AC's assessment, failure to carry would cause severe hardship.
>
> (B) Passengers paying First (F), Executive (J) or Full Economy (Y) class fares.
>
> (C) All other passengers, including tour conductors accompanying a group. These passengers will be accommodated in the order in which they present themselves for check-in and boarding.

Rule 245(E)(2) of Air Canada's domestic tariff provides, in part, that:

24

> ... AC will tender liquidated damages in the amount of $100.00 cash or a credit voucher (good for future travel on Air Canada) in the amount of $300.00. If accepted by the passenger, such tender will constitute full compensation for all actual or anticipatory damages, incurred or to be incurred.

Is Air Canada's denied boarding policy applicable to transportation between points in Canada "unreasonable" within the meaning of subsection 67.2(1) of the CTA?

According to the principles of statutory interpretation, words of a statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the statute as well as the intention of Parliament. As stated by M. Justice Rouleau of the Federal Court Trial Division in *ECG Canada Inc.* v. *M.N.R.*, [1987] 2 F.C. 415:

> There is no question that the literal approach is a well established one in statutory interpretation. Nevertheless, it is always open to the Court to look to the object or purpose of a statute, not for the purpose of changing what was said by Parliament, but in order to understand and determine what was said. The object of a statute and its factual setting are always relevant considerations and are not to be taken into account only in cases of doubt.

The term "unreasonable" is not defined in either the CTA or the *Air Transportation Regulations*, SOR/88-58, as amended (hereinafter the ATR), and it has not been considered by the Agency in the context of an air carrier's domestic tariff. The Canadian Oxford Dictionary defines the word "unreasonable" as "going beyond the limits of what is reasonable or equitable; not guided by or listening to reason". Black's Law Dictionary defines "unreasonable" as meaning "irrational; foolish; unwise; absurd; silly; preposterous; senseless; stupid".

Although the scope of the word "unreasonable" as it relates to terms and conditions of carriage has not been judicially considered in Canada, the meaning of the word has repeatedly been examined by the courts in contexts such as judicial review[1] or the review of a discretionary decision based on irrelevant consideration, improper purpose or bad faith[2]. While it is difficult to extrapolate distinct principles on the meaning of the word "unreasonable" from these cases, the courts have consistently held that:

1. The meaning of the word cannot be determined by recourse to a dictionary;
2. A contextual meaning must be given to the word; and
3. In general terms, the word means "without a rational basis".

Subsection 67.2(1) of the CTA appears under the heading entitled "Licence for Domestic Service" found in Part II of the CTA, "Air Transportation". This heading encompasses 10 statutory provisions which provide

specific statutory remedies to the travelling public, while imposing obligations on domestic licensees as part of an effort to redress instances where a fare, rate, charge or term or condition of carriage unilaterally established by an air carrier is alleged to be unreasonable, unduly discriminatory or not applied by the carrier. In the Agency's opinion, the specific wording of subsection 67.2(1) of the CTA reflects a recognition by Parliament that regulation was needed in order to attain the stated objective of the national transportation policy found in section 5 of the CTA which provides, in part, that:

> ... each carrier or mode of transportation, as far as is practical, 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,

This position is also in harmony with section 12 of the *Interpretation Act*, R.S.C., 1985, c. I-21 which provides that:

> Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

In determining whether a term or condition of carriage applied by a carrier is "unreasonable" within the meaning of subsection 67.2(1) of the CTA, the Agency must, therefore, ensure that it does not interpret the provision in such a way that impairs or jeopardizes the ability of the travelling public to efficiently use the recourse put in place by Parliament to protect it against the unilateral setting of terms and conditions of carriage by air carriers.

Conversely, the Agency must also take into account:

1. the operational and commercial obligations of the particular air carrier which is the subject of the complaint;
2. the other consumer protection provisions found under Part II of the CTA which compel air carriers to publish, display or make available for public inspection tariffs that contain the information required by the ATR and only apply the terms and conditions of carriage set out in those tariffs; and
3. the fact that air carriers are required to establish and apply terms and conditions of carriage designed to apply collectively to all passengers as opposed to one particular passenger.

The Agency is, therefore, of the opinion that, in order to determine whether a term or condition of carriage applied by a domestic carrier is "unreasonable" within the meaning of subsection 67.2(1) of the CTA, a balance must be struck between the rights of the passengers to be subject to reasonable terms and conditions of carriage, and the particular air carrier's statutory, commercial and operational obligations.

26 Air Canada's policy with respect to denied boarding is designed and implemented to compensate passengers who have been denied boarding as a result of the overbooking of an aircraft. This type of provision is commonly found in various types of commercial contracts where compensation is predetermined and is not based on the actual amount of the contract or damage that one party suffers if the other party does not respect, partially or entirely, the terms and conditions of the contract. Contrary to an air carrier's policies on refunds for services purchased but not used, whereby the fare paid by a passenger is inherently linked to the design and implementation of the compensation, the fare paid by a passenger is unrelated to the amount of compensation that the passenger is entitled to receive upon being denied boarding. Further, any passenger who is denied boarding is entitled to compensation; evidence of specific damages suffered need not be provided.

In light of the foregoing, the Agency finds that, Rules 245(C)(1), (C)(2) and (E)(2) of Air Canada's domestic tariff are not, in this case, "unreasonable" within the meaning of subsection 67.2(1) of the CTA.

Is Air Canada's denied boarding policy applicable to transportation between points in Canada "unduly discriminatory" within the meaning of subsection 67.2(1) of the CTA?

As with the word "unreasonable", the phrase "unduly discriminatory" is not defined in the CTA or the ATR, and it has not been considered by the Agency in the context of an air carrier's domestic tariff.

With respect to the meaning of the word "discriminatory", the Supreme Court of Canada, in *Andrews* v. *Law Society (British Columbia)*, [1989] 1 S.C.R. 143, held that "discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burden, obligation, or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits, and advantages, available to other members of society".

Further, in *O'Connell* v. *Canadian Broadcasting Corp*. (1988), 88 C.L.L.C. 17, 017, the Canadian Human Rights Tribunal held that: "a practice or rule may be found to be discriminatory, whether it involves ... "direct discrimination" (a practice or rule which is on the face of it discrimination) or "adverse impact" (a practice or rule which is on the face of it neutral, applying equally to all employees, but which has a discriminatory effect upon a discriminatory ground on an individual employee or group of employees).".

The above judicial interpretations of the word "discrimination" are well recognized in Canada and have been used by various courts and tribunals[3] . The Agency notes, however, that, contrary to the human rights and labour relations contexts in which those decisions were rendered, where the overriding principle is that no discrimination is tolerated, the CTA provides that "discriminatory" terms or conditions of carriage may be tolerated provided that they are not "**unduly** discriminatory".

The determination of whether a term or condition of carriage applied by a carrier on a domestic route is "unduly discriminatory" is, therefore, a two step process. In the first place, the Agency must determine

whether the term or condition of carriage applied is "discriminatory". In the absence of discrimination, the Agency need not pursue its investigation. If, however, the Agency finds that the term or condition of carriage applied by the domestic carrier is "discriminatory", the Agency must then determine whether such discrimination is "undue".

The meaning of the word "undue" was the subject of a detailed analysis by the Federal Court of Appeal in *Via Rail Canada Inc.* v. *National Transportation Agency and Jean Lemonde*, [2001] 2 F.C. 25. In that case, the Court stated that:

> While "undue" is a word of common usage which does not have a precise technical meaning the Supreme Court has variously defined "undue" to mean "improper, inordinate, excessive or oppressive" or to express "a notion of seriousness or significance". To this list of synonyms, the Concise Oxford Dictionary adds "disproportionate".
>
> What is clear from all of these terms is that undue-ness is a relative concept. I agree with the position expressed by Cartwright J., as he then was:
>
> "Undue" and "unduly" are not absolute terms whose meaning is self-evident. Their use presupposes the existence of a rule or standard defining what is "due". Their interpretation does not appear to me to be assisted by substituting the adjectives "improper", "inordinate", excessive", "oppressive" or "wrong", or the corresponding adverbs, in the absence of a statement as to what, in this connection, is proper, ordinate, permissible or right.
>
> The proper approach to determine if something is "undue", then, is a contextual one. Undue-ness must be defined in light of the aim of the relevant enactment. It can be useful to assess the consequences or effect if the undue thing is allowed to remain in place.
>
> The Supreme Court has also recognized that the term implies a requirement to balance the interests of the various parties. In a case dealing with whether an employer had accommodated an employee's right to exercise his religion beliefs up to the point of undue hardship, Wilson J., writing for the majority, found it helpful to list some of the factors relevant to such an appraisal. She concluded by stating: "This list is not intended be exhaustive and the result which will obtain from a balancing of these factors against the right of the employee to be free of discrimination will necessarily vary from case to case".

The Agency is, therefore, of the opinion that, in determining whether a term or condition of carriage applied by a domestic carrier is "unduly discriminatory" within the meaning of subsection 67.2(1) of the CTA, it must adopt a contextual approach which balances the rights of the travelling public not to be subject to terms and conditions of carriage that are discriminatory, with the statutory, operational and commercial obligations of air carriers operating in Canada. This position is also in harmony with the national transportation policy found in section 5 of the CTA.

28 The first question for the Agency to consider, then, in determining whether a term or condition of carriage applied by an air carrier is "unduly discriminatory" within the meaning of subsection 67.2(1) of the CTA is whether the term or condition of carriage is discriminatory.

After careful consideration of the complainant's submissions and examination of Rules 245 (C)(1), (C)(2) and (E)(2) of Air Canada's domestic tariff, the Agency finds that Air Canada's policy with respect to denied boarding is not, in this case, "discriminatory" within the meaning of subsection 67.2(1) of the CTA for the following reasons. Firstly, the Agency notes that Rules 245(C)(1), (C)(2) and (E)(2) of Air Canada's domestic tariff apply equally to all passengers. While the Agency acknowledges that discrimination may result from a term or condition of carriage which applies equally to all passengers, in order to constitute discrimination, it must be demonstrated that a burden, obligation, or disadvantage has been imposed on one person or group which is not imposed on others. Accordingly, it could be argued that Air Canada's denied boarding policy discriminates against passengers paying higher fares as such passengers are entitled to the same amount of compensation for denied boarding as passengers paying lower fares for the same service. The Agency is of the opinion, however, that the fare paid by a passenger is in no way connected to any burden or disadvantage that may be imposed on that passenger as a result of being denied boarding. The Agency is, therefore, of the opinion that applying denied boarding compensation equally to all passengers in no way discriminates against passengers paying higher fares.

Given that the Agency has determined that Rules 245(C)(1), (C)(2) and (E)(2) of Air Canada's domestic tariff are not, in this case, "discriminatory" within the meaning of subsection 67.2(1) of the CTA, the Agency need not examine the question of whether Air Canada's policy with respect to denied boarding set out in those tariff provisions is "unduly" discriminatory.

CONCLUSION

Based on the above findings, the Agency hereby dismisses the complaint.

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1. *C.U.P.E.* v. *New Brunswick Liquor Corporation*, [1979] 2 R.C.S. 227 ↑
2. *Associated Provincial Picture Houses* v. *Wednesbury Corporation*, [1948] 1 K.B. 233; *City of Montréal* v. *Beauvais*, (1909) 42 S.C.R. 211; Canadian Transportation Agency Decision No. 445-R-2000 dated June 30, 2000 ↑
3. *Brooks* v. *Canada Safeway Ltd.*, [1989] 4 W.W.R. 193; *Canada (Attorney General)* v. *George*, [1991] 1 F.C. 344; *Headley* v. *Canada (Public Service Commission)*, [1987] 2 F.C. 235. ↑

Indexed as:

Dunsmuir v. New Brunswick

David Dunsmuir, Appellant;
v.
Her Majesty the Queen in Right of the Province of New Brunswick as represented by Board of Management, Respondent.

[2008] 1 S.C.R. 190

[2008] S.C.J. No. 9

2008 SCC 9

File No.: 31459.

Supreme Court of Canada

Heard: May 15, 2007;
Judgment: March 7, 2008.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

(173 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

Catchwords:

Administrative law -- Judicial review -- Standard of review -- Proper approach to judicial review of administrative decision makers -- Whether judicial review should include only two standards: correctness and reasonableness.

Administrative law -- Judicial review -- Standard of review -- Employee holding office "at pleasure" in provincial civil service dismissed without alleged cause with four months' pay in lieu of

notice -- Adjudicator interpreting enabling statute as conferring jurisdiction to determine whether discharge was in fact for cause -- Adjudicator holding employer breached duty of procedural fairness and ordering reinstatement -- Whether standard of reasonableness applicable to adjudicator's decision on statutory interpretation issue -- Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25, ss. 97(2.1), 100.1(5) -- Civil Service Act, S.N.B. 1984, c. C-5.1, s. 20.

Administrative law -- Natural justice -- Procedural fairness -- Dismissal of public office holders -- Employee holding office "at pleasure" in provincial civil service dismissed without alleged cause with four months' pay in lieu of notice -- Employee not informed of reasons for termination or provided with opportunity to respond -- Whether employee entitled to procedural fairness -- Proper approach to dismissal of public employees.

[page191]

Summary:

D was employed by the Department of Justice for the Province of New Brunswick. He held a position under the *Civil Service Act* and was an office holder "at pleasure". His probationary period was extended twice and the employer reprimanded him on three separate occasions during the course of his employment. On the third occasion, a formal letter of reprimand was sent to D warning him that his failure to improve his performance would result in further disciplinary action up to and including dismissal. While preparing for a meeting to discuss D's performance review the employer concluded that D was not right for the job. A formal letter of termination was delivered to D's lawyer the next day. Cause for the termination was explicitly not alleged and D was given four months' pay in lieu of notice.

D commenced the grievance process under s. 100.1 of the *Public Service Labour Relations Act* ("*PSLRA*"), alleging that the reasons for the employer's dissatisfaction were not made known, that he did not receive a reasonable opportunity to respond to the concerns, that the employer's actions in terminating him were without notice, due process or procedural fairness, and that the length of the notice period was inadequate. The grievance was denied and then referred to adjudication. A preliminary issue of statutory interpretation arose as to whether, where dismissal was with notice or pay in lieu thereof, the adjudicator was authorized to determine the reasons underlying the province's decision to terminate. The adjudicator held that the referential incorporation of s. 97(2.1) of the *PSLRA* into s. 100.1(5) of that Act meant that he could determine whether D had been discharged or otherwise disciplined for cause. Ultimately, the adjudicator made no finding as to whether the discharge was or was not for cause. In his decision on the merits, he found that the termination letter effected termination with pay in lieu of notice and that the termination was not disciplinary. As D's employment was hybrid in character, the adjudicator held that D was entitled to and did not receive procedural fairness in the employer's decision to terminate his employment. He

declared that the termination was void *ab initio* and ordered D reinstated as of the date of dismissal, adding that in the event that his reinstatement order was quashed on judicial review, he would find the appropriate notice period to be eight months.

On judicial review, the Court of Queen's Bench applied the correctness standard and quashed the adjudicator's preliminary decision, concluding that the adjudicator did not have jurisdiction to inquire into the [page192] reasons for the termination, and that his authority was limited to determining whether the notice period was reasonable. On the merits, the court found that D had received procedural fairness by virtue of the grievance hearing before the adjudicator. Concluding that the adjudicator's decision did not stand up to review on a reasonableness *simpliciter* standard, the court quashed the reinstatement order but upheld the adjudicator's provisional award of eight months' notice. The Court of Appeal held that the proper standard with respect to the interpretation of the adjudicator's authority under the *PSLRA* was reasonableness *simpliciter*, not correctness, and that the adjudicator's decision was unreasonable. It found that where the employer elects to dismiss with notice or pay in lieu of notice, s. 97(2.1) of the *PSLRA* does not apply and the employee may only grieve the length of the notice period. It agreed with the reviewing judge that D's right to procedural fairness had not been breached.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Bastarache, LeBel, Fish and Abella JJ.: Despite its clear, stable constitutional foundations, the system of judicial review in Canada has proven to be difficult to implement. It is necessary to reconsider both the number and definitions of the various standards of review, and the analytical process employed to determine which standard applies in a given situation. Notwithstanding the theoretical differences between the standards of patent unreasonableness and reasonableness *simpliciter*, any actual difference between them in terms of their operation appears to be illusory. There ought to be only two standards of review: correctness and reasonableness. [para. 32] [para. 34] [para. 41]

When applying the correctness standard in respect of jurisdictional and some other questions of law, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question and decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable. Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. It is a deferential standard which requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations [page193] that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system. [paras. 47-50]

An exhaustive analysis is not required in every case to determine the proper standard of review. Courts must first ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded to a decision maker with regard to a particular category of question. If the inquiry proves unfruitful, courts must analyze the factors making it possible to identify the proper standard of review. The existence of a privative clause is a strong indication of review pursuant to the reasonableness standard, since it is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. It is not, however, determinative. Where the question is one of fact, discretion or policy, or where the legal issue is intertwined with and cannot be readily separated from the factual issue, deference will usually apply automatically. Deference will usually result where a decision maker is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity. While deference may also be warranted where an administrative decision maker has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context, a question of law that is of central importance to the legal system as a whole and outside the specialized area of expertise of the administrative decision maker will always attract a correctness standard. So will a true question of *vires*, a question regarding the jurisdictional lines between two or more competing specialized tribunals, and a constitutional question regarding the division of powers between Parliament and the provinces in the *Constitution Act, 1867*. [paras. 52-62]

The standard of reasonableness applied on the issue of statutory interpretation. While the question of whether the combined effect of ss. 97(2.1) and 100.1 of the *PSLRA* permits the adjudicator to inquire into the employer's reason for dismissing an employee with notice or pay in lieu of notice is a question of law, it is not one that is of central importance to the legal system and outside the specialized expertise of the adjudicator, who was in fact interpreting his enabling statute. Furthermore, s. 101(1) of the *PSLRA* includes a full privative clause, and the nature of the regime favours the standard of reasonableness. Here, the adjudicator's [page194] interpretation of the law was unreasonable and his decision does not fall within the range of acceptable outcomes that are defensible in respect of the facts and the law. The employment relationship between the parties in this case was governed by private law. The combined effect of ss. 97(2.1) and 100.1 of the *PSLRA* cannot, on any reasonable interpretation, remove the employer's right, under the ordinary rules of contract, to discharge an employee with reasonable notice or pay in lieu thereof without asserting cause. By giving the *PSLRA* an interpretation that allowed him to inquire into the reasons for discharge, the adjudicator adopted a reasoning process that was fundamentally inconsistent with the employment contract and, thus, fatally flawed. [paras. 66-75]

On the merits, D was not entitled to procedural fairness. Where a public employee is employed under a contract of employment, regardless of his or her status as a public office holder, the applicable law governing his or her dismissal is the law of contract, not general principles arising out of public law. Where a dismissal decision is properly within the public authority's powers and is taken pursuant to a contract of employment, there is no compelling public law purpose for imposing a duty of fairness. The principles expressed in *Knight v. Indian Head School Division No. 19* in

relation to the general duty of fairness owed by public authorities when making decisions that affect the rights, privileges or interests of individuals are valid and important. However, to the extent that *Knight* ignored the important effect of a contract of employment, it should not be followed. In the case at bar, D was a contractual employee in addition to being a public office holder. Section 20 of the *Civil Service Act* provided that as a civil servant he could only be dismissed in accordance with the ordinary rules of contract. To consider a public law duty of fairness issue where such a duty exists falls squarely within the adjudicator's task to resolve a grievance. Where, as here, the relationship is contractual, it was unnecessary to consider any public law duty of procedural fairness. By imposing procedural fairness requirements on the respondent over and above its contractual obligations and ordering the full "reinstatement" of D, the adjudicator erred and his decision was therefore correctly struck down. [paras. 76-78] [para. 81] [para. 84] [para. 106] [para. 114] [para. 117]

Per Binnie J.: The majority reasons for setting aside the adjudicator ruling were generally agreed with, however the call of the majority to re-evaluate the pragmatic and functional test and to re-assess "the structure and characteristics of the system of judicial review as a whole" and to develop a principled framework that is [page195] "more coherent and workable" invites a broader reappraisal. Judicial review is an idea that has lately become unduly burdened with law office metaphysics. Litigants find the court's attention focussed not on their complaints, or the government's response, but on lengthy and arcane discussions of something they are told is the pragmatic and functional test. The Court should at least (i) establish some presumptive rules and (ii) get the parties away from arguing about the tests and back to arguing about the substantive merits of their case. [paras. 119-122] [para. 133] [para. 145]

The distinction between "patent unreasonableness" and reasonableness *simpliciter* is now to be abandoned. The repeated attempts to explain the difference between the two, was in hindsight, unproductive and distracting. However, a broad reappraisal of the system of judicial review should explicitly address not only administrative tribunals but issues related to other types of administrative bodies and statutory decision makers including mid-level bureaucrats and, for that matter, Ministers. If logic and language cannot capture the distinction in one context, it must equally be deficient elsewhere in the field of judicial review. [paras. 121-123] [paras. 134-135] [para. 140]

It should be presumed that the standard of review of an administrative outcome on grounds of substance is reasonableness. In accordance with the ordinary rules of litigation, it should also be presumed that the decision under review is reasonable until the applicant shows otherwise. An applicant urging the non-deferential "correctness" standard should be required to demonstrate that the decision rests on an error in the determination of a legal issue not confided (or which constitutionally could not be confided) to the administrative decision maker to decide, whether in relation to jurisdiction or the general law. The logic of the constitutional limitation is obvious. If the limitation did not exist, the government could transfer the work of the courts to administrative bodies that are not independent of the executive and by statute immunize the decisions of these bodies from effective judicial review. Questions of law outside the administrative decision maker's

home statute and closely related rules or statutes which require his or her expertise should also be reviewable on a "correctness" standard whether or not it meets the majority's additional requirement that it be "of central importance to the legal system as a whole". The standard of correctness should also apply to the requirements of "procedural fairness", which will vary with the type of decision maker and the type of decision under review. Nobody should have his or her rights, [page196] interests or privileges adversely dealt with by an unjust process. [paras. 127-129] [paras. 146-147]

On the other hand when the application for judicial review challenges the substantive outcome of an administrative action, the judge is invited to cross the line into second-guessing matters that lie within the function of the administrator. This is controversial because it is not immediately obvious why a judge's view of the reasonableness of an administrative policy or the exercise of an administrative discretion should be preferred to that of the administrator to whom Parliament or a legislature has allocated the decision, unless there is a full statutory right of appeal to the courts, or it is otherwise indicated in the conferring legislation that a "correctness" standard is intended. [para. 130]

Abandonment of the distinction between reasonableness *simpliciter* and patent unreasonableness has important implications. The two different standards addressed not merely "the magnitude or the immediacy of the defect" in the administrative decision but recognized that different administrative decisions command different degrees of deference, depending on who is deciding what. [para. 135]

"Contextualizing" a single standard of "reasonableness" review will shift the courtroom debate from choosing between two standards of reasonableness that each represented a different level of deference to a debate within a single standard of reasonableness to determine the appropriate level of deference. [para. 139]

Thus a single "reasonableness" standard will now necessarily incorporate both the degree of deference owed to the decision maker formerly reflected in the distinction between patent unreasonableness and reasonableness *simpliciter*, and an assessment of the range of options reasonably open to the decision maker in the circumstances. The judge's role is to identify the outer boundaries of reasonable outcomes within which the administrative decision maker is free to choose. [para. 141] [para. 149]

A single "reasonableness" standard is a big tent that will have to accommodate a lot of variables that inform and limit a court's review of the outcome of administrative decision making. "Contextualizing" the reasonableness standard will require a reviewing court to consider the precise nature and function of the decision maker including its expertise, the terms and objectives [page197] of the governing statute (or common law) conferring the power of decision including the existence of a privative clause and the nature of the issue being decided. Careful consideration of these matters will reveal the extent of the discretion conferred. In some cases the court will have to recognize that the decision maker was required to strike a proper balance (or achieve proportionality) between the adverse impact of a decision on the rights and interests of the applicant

or others directly affected weighed against the public purpose which is sought to be advanced. In each case careful consideration will have to be given to the reasons given for the decision. This list of "contextual" considerations is non-exhaustive. A reviewing court ought to recognize throughout the exercise that fundamentally the "reasonableness" of the administrative outcome is an issue given to another forum to decide. [para. 144] [paras. 151-155]

Per Deschamps, Charron and Rothstein JJ.: Any review starts with the identification of the questions at issue as questions of law, questions of fact or questions of mixed fact and law. In the adjudicative context, decisions on questions of fact, whether undergoing appellate review or administrative law review, always attract deference. When there is a privative clause, deference is owed to the administrative body that interprets the legal rules it was created to interpret and apply. If the body oversteps its delegated powers, if it is asked to interpret laws in respect of which it does not have expertise or if Parliament or a legislature has provided for a statutory right of review, deference is not owed to the decision maker. Finally, when considering a question of mixed fact and law, a reviewing court should show an adjudicator the same deference as an appeal court would show a lower court. [paras. 158-164]

Here, the employer's common law right to dismiss without cause was the starting point of the analysis. Since the adjudicator does not have specific expertise in interpreting the common law, the reviewing court can proceed to its own interpretation of the applicable rules and determine whether the adjudicator could enquire into the cause of the dismissal. The applicable standard of review is correctness. The distinction between the common law rules of employment and the statutory rules applicable to a unionized employee is essential if s. 97(2.1) of the *PSLRA* is to be applied *mutatis mutandis* to the case of a non-unionized employee as required by s. 100.1(5) of the *PSLRA*. The adjudicator's failure to inform himself of this crucial difference led him to look for a cause for the dismissal, which was not relevant. Even if deference had been owed to the adjudicator, his interpretation could not have stood. Employment security is so fundamental to an employment relationship [page198] that it could not have been granted by the legislature by providing only that the *PSLRA* was to apply *mutatis mutandis* to non-unionized employees. [paras. 168-171]

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By Bastarache and LeBel JJ.

Referred to: *Chalmers (Dr. Everett) Hospital v. Mills* (1989), 102 N.B.R. (2d) 1; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653; *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727, 2004 SCC 28; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; *Executors of the Woodward Estate v. Minister of Finance*, [1973] S.C.R. 120; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1; *Mount Sinai Hospital Center v. Quebec*

(Minister of Health and Social Services), [2001] 2 S.C.R. 281, 2001 SCC 41; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29; *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, [2007] 1 S.C.R. 650, 2007 SCC 15; *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, 2004 SCC 23; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487; *McLeod v. Egan*, [1975] 1 S.C.R. 517; *Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672, 2004 SCC 26; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322; *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19; *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14; *Quebec (Commission des [page199] droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] 2 S.C.R. 185, 2004 SCC 39; *Canada Safeway Ltd. v. RWDSU, Local 454*, [1998] 1 S.C.R. 1079; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11; *Ridge v. Baldwin*, [1963] 2 All E.R. 66; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Reglin v. Creston (Town)* (2004), 34 C.C.E.L. (3d) 123, 2004 BCSC 790; *Gismondi v. Toronto (City)* (2003), 64 O.R. (3d) 688; *Seshia v. Health Sciences Centre* (2001), 160 Man. R. (2d) 41, 2001 MBCA 151; *Rosen v. Saskatoon District Health Board* (2001), 202 D.L.R. (4th) 35, 2001 SKCA 83; *Hanis v. Teevan* (1998), 111 O.A.C. 91; *Gerrard v. Sackville (Town)* (1992), 124 N.B.R. (2d) 70; *Malloch v. Aberdeen Corp.*, [1971] 2 All E.R. 1278; *Hughes v. Moncton (City)* (1990), 111 N.B.R. (2d) 184, aff'd (1991), 118 N.B.R. (2d) 306; *Rosen v. Saskatoon District Health Board*, [2000] 4 W.W.R. 606, 2000 SKQB 40; *Wells v. Newfoundland*, [1999] 3 S.C.R. 199; *School District No. 5 (Southeast Kootenay) and B.C.T.F. (Yellowaga) (Re)* (2000), 94 L.A.C. (4th) 56; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701.

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Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817; *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, 2001 SCC 41; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322; *Law Society of [page200] New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29; *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

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History and Disposition:

APPEAL from a judgment of the New Brunswick Court of Appeal (Turnbull, Daigle and Robertson JJ.A.) (2006), 297 N.B.R. (2d) 151, 265 D.L.R. (4th) 609, 44 Admin. L.R. (4th) 92, 48 C.C.E.L. (3d) 196, 2006 CLLC para. 220-030, [2006] N.B.J. No. 118 (QL), 2006 CarswellNB 155, 2006 NBCA 27, affirming a judgment of Rideout J. (2005), 293 N.B.R. (2d) 5, 43 C.C.E.L. (3d) 205, [2005] N.B.J. No. 327 (QL), 2005 CarswellNB 444, 2005 NBQB 270, quashing a preliminary ruling and quashing in part an award made by an adjudicator. Appeal dismissed.

Counsel:

J. Gordon Petrie, Q.C., and *Clarence L. Bennett*, for the appellant.

C. Clyde Spinney, Q.C., and *Keith P. Mullin*, for the respondent.

The judgment of McLachlin C.J. and Bastarache, LeBel, Fish and Abella JJ. was delivered by

BASTARACHE and LeBEL JJ.:--

I. Introduction

1 This appeal calls on the Court to consider, once again, the troubling question of the approach to be taken in judicial review of decisions of administrative tribunals. The recent history of judicial review in Canada has been marked by ebbs and flows of deference, confounding tests and new words for old problems, but no solutions that provide real guidance for litigants, counsel, administrative decision [page202] makers or judicial review judges. The time has arrived for a reassessment of the question.

A. *Facts*

2 The appellant, David Dunsmuir, was employed by the Department of Justice for the Province of New Brunswick. His employment began on February 25, 2002, as a Legal Officer in the Fredericton Court Services Branch. The appellant was placed on an initial six-month probationary term. On March 14, 2002, by Order-in-Council, he was appointed to the offices of Clerk of the Court of Queen's Bench, Trial Division, Administrator of the Court of Queen's Bench, Family Division, and Clerk of the Probate Court of New Brunswick, all for the Judicial District of Fredericton.

3 The employment relationship was not perfect. The appellant's probationary period was extended twice, to the maximum 12 months. At the end of each probationary period, the appellant was given a performance review. The first such review, which occurred in August 2002, identified four specific areas for improvement. The second review, three months later, cited the same four areas for development, but noted improvements in two. At the end of the third probationary period, the Regional Director of Court Services noted that the appellant had met all expectations and his employment was continued on a permanent basis.

4 The employer reprimanded the appellant on three separate occasions during the course of his employment. The first incident occurred in July 2002. The appellant had sent an email to the Chief Justice of the Court of Queen's Bench objecting to a request that had been made by the judge of the Fredericton Judicial District for the preparation of a practice directive. The Regional Director issued a reprimand letter to the appellant, explaining that the means he had used to raise his concerns were inappropriate and exhibited serious error in judgment. In the event that a similar concern arose in the future, he was directed to discuss the matter [page203] first with the Registrar or the Regional Director. The letter warned that failure to comply would lead to additional disciplinary measures and, if necessary, to dismissal.

5 A second disciplinary measure occurred when, in April 2004, it came to the attention of the Assistant Deputy Minister that the appellant was being advertised as a lecturer at legal seminars offered in the private sector. The appellant had inquired previously into the possibility of doing legal work outside his employment. In February 2004, the Assistant Deputy Minister had informed him that lawyers in the public service should not practise law in the private sector. A month later, the appellant wrote a letter to the Law Society of New Brunswick stating that his participation as a non-remunerated lecturer had been vetted by his employer, who had voiced no objection. On June 3, 2004, the Assistant Deputy Minister issued to the appellant written notice of a one-day suspension with pay regarding the incident. The letter also referred to issues regarding the appellant's work performance, including complaints from unnamed staff, lawyers and members of the public regarding his difficulties with timeliness and organization. This second letter concluded with the statement that "[f]uture occurrences of this nature and failure to develop more efficient organized work habits will result in disciplinary action up to and including dismissal."

6 Third, on July 21, 2004, the Regional Director wrote a formal letter of reprimand to the appellant regarding three alleged incidents relating to his job performance. This letter, too, concluded with a warning that the appellant's failure to improve his organization and timeliness would result in further disciplinary action up to and including dismissal. The appellant responded to the letter by informing the Regional Director that he would be seeking legal advice and, until that time, would not meet with her to discuss the matter further.

7 A review of the appellant's work performance had been due in April 2004 but did not take place. The appellant met with the Regional Director on a [page204] couple of occasions to discuss backlogs and organizational problems. Complaints were relayed to her by staff but they were not documented and it is unknown how many complaints there had been. The Regional Director notified the appellant on August 11, 2004, that his performance review was overdue and would occur by August 20. A meeting had been arranged for August 19 between the appellant, the Regional Director, the Assistant Deputy Minister and counsel for the appellant and the employer. While preparing for that meeting, the Regional Director and the Assistant Deputy Minister concluded that the appellant was not right for the job. The scheduled meeting was cancelled and a termination notice was faxed to the appellant. A formal letter of termination from the Deputy Minister was delivered to the appellant's lawyer the next day. The letter terminated the appellant's employment with the Province of New Brunswick, effective December 31, 2004. It read, in relevant part:

> I regret to advise you that I have come to the conclusion that your particular skill set does not meet the needs of your employer in your current position, and that it is advisable to terminate your employment on reasonable notice, pursuant to section 20 of the *Civil Service Act*. You are accordingly hereby advised that your employment with the Province of New Brunswick will

> terminate on December 31, 2004. Cause for termination is not alleged.
> To aid in your search for other employment, you are not required to report to work during the notice period and your salary will be continued until the date indicated or for such shorter period as you require either to find a job with equivalent remuneration, or you commence self-employment.
>
> ...
>
> In the circumstances, we would request that you avoid returning to the workplace until your departure has been announced to staff, and until you have returned your keys and government identification to your supervisor, Ms. Laundry as well as any other property of the employer still in your possession ... .

8 On February 3, 2005, the appellant was removed from his statutory offices by order of the Lieutenant-Governor in Council.

[page205]

9 The appellant commenced the grievance process under s. 100.1 of the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25 ("*PSLRA*"; see Appendix), by letter to the Deputy Minister on September 1, 2004. That provision grants non-unionized employees of the provincial public service the right to file a grievance with respect to a "discharge, suspension or a financial penalty" (s. 100.1(2)). The appellant asserted several grounds of complaint in his grievance letter, in particular, that the reasons for the employer's dissatisfaction were not made known; that he did not receive a reasonable opportunity to respond to the employer's concerns; that the employer's actions in terminating him were without notice, due process or procedural fairness; and that the length of the notice period was inadequate. The grievance was denied. The appellant then gave notice that he would refer the grievance to adjudication under the *PSLRA*. The adjudicator was selected by agreement of the parties and appointed by the Labour and Employment Board .

10 The adjudication hearing was convened and counsel for the appellant produced as evidence a volume of 169 documents. Counsel for the respondent objected to the inclusion of almost half of the documents. The objection was made on the ground that the documents were irrelevant since the appellant's dismissal was not disciplinary but rather was a termination on reasonable notice. The preliminary issue therefore arose of whether, where dismissal was with notice or pay in lieu thereof, the adjudicator was authorized to assess the reasons underlying the province's decision to terminate.

Following his preliminary ruling on that issue, the adjudicator heard and decided the merits of the grievance.

B. *Decisions of the Adjudicator*

(1) Preliminary Ruling (January 10, 2005)

11 The adjudicator began his preliminary ruling by considering s. 97(2.1) of the *PSLRA*. He reasoned that because the appellant was not included in a bargaining unit and there was no collective agreement or arbitral award, the section ought to be [page206] interpreted to mean that where an adjudicator determines that an employee has been discharged for cause, the adjudicator may substitute another penalty for the discharge as seems just and reasonable in the circumstances. The adjudicator considered and relied on the decision of the New Brunswick Court of Appeal in *Chalmers (Dr. Everett) Hospital v. Mills* (1989), 102 N.B.R. (2d) 1.

12 Turning to s. 100.1 of the *PSLRA*, he noted the referential incorporation of s. 97 in s. 100.1(5). He stated that such incorporation "necessarily means that an adjudicator has jurisdiction to make the determination described in s. 97(2.1), i.e. that an employee has been discharged or otherwise disciplined for cause" (p. 5). The adjudicator noted that an employee to whom s. 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1 (see Appendix), applies may be discharged for cause, with reasonable notice or with pay in lieu of reasonable notice. He concluded by holding that an employer cannot avoid an inquiry into its real reasons for dismissing an employee by stating that cause is not alleged. Rather, a grieving employee is entitled to an adjudication as to whether a discharge purportedly with notice or pay in lieu thereof was in fact for cause. He therefore held that he had jurisdiction to make such a determination.

(2) Ruling on the Merits (February 16, 2005)

13 In his decision on the merits, released shortly thereafter, the adjudicator found that the termination letter of August 19 effected termination with pay in lieu of notice. The employer did not allege cause. Inquiring into the reasons for dismissal the adjudicator was satisfied that, on his view of the evidence, the termination was not disciplinary. Rather, the decision to terminate was based on the employer's concerns about the appellant's work performance and his suitability for the positions he held.

14 The adjudicator then considered the appellant's claim that he was dismissed without procedural fairness in that the employer did not inform him of the reasons for its dissatisfaction and did not give him an opportunity to respond. The adjudicator [page207] placed some responsibility on the employer for cancelling the performance review scheduled for August 19. He also opined that the employer was not so much dissatisfied with the appellant's quality of work as with his lack of organization.

15 The adjudicator's decision relied on *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, for the relevant legal principles regarding the right of "at pleasure" office holders to procedural fairness. As the appellant's employment was "hybrid in character" (para. 53) he was both a Legal Officer under the *Civil Service Act* and, as Clerk, an office holder "at pleasure" the adjudicator held that the appellant was entitled to procedural fairness in the employer's decision to terminate his employment. He declared that the termination was void *ab initio* and ordered the appellant reinstated as of August 19, 2004, the date of dismissal.

16 The adjudicator added that in the event that his reinstatement order was quashed on judicial review, he would find the appropriate notice period to be eight months.

C. *Judicial History*

(1) Court of Queen's Bench of New Brunswick (2005), 293 N.B.R. (2d) 5, 2005 NBQB 270

17 The Province of New Brunswick applied for judicial review of the adjudicator's decision on numerous grounds. In particular, it argued that the adjudicator had exceeded his jurisdiction in his preliminary ruling by holding that he was authorized to determine whether the termination was in fact for cause. The Province further argued that the adjudicator had acted incorrectly or unreasonably in deciding the procedural fairness issue. The application was heard by Rideout J.

18 The reviewing judge applied a pragmatic and functional analysis, considering the presence of a full privative clause in the *PSLRA*, the [page208] relative expertise of adjudicators appointed under the *PSLRA*, the purposes of ss. 97(2.1) and 100.1 of the *PSLRA* as well as s. 20 of the *Civil Service Act*, and the nature of the question as one of statutory interpretation. He concluded that the correctness standard of review applied and that the court need not show curial deference to the decision of an adjudicator regarding the interpretation of those statutory provisions.

19 Regarding the preliminary ruling, the reviewing judge noted that the appellant was employed "at pleasure" and fell under s. 20 of the *Civil Service Act*. In his view, the adjudicator had overlooked the effects of s. 20 and had mistakenly given ss. 97(2.1) and 100.1 of the *PSLRA* a substantive, rather than procedural, interpretation. Those sections are procedural in nature. They provide an employee with a right to grieve his or her dismissal and set out the steps that must be followed to pursue a grievance. The adjudicator is bound to apply the contractual provisions as they exist and has no authority to change those provisions. Thus, in cases in which s. 20 of the *Civil Service Act* applies, the adjudicator must apply the ordinary rules of contract. The reviewing judge held that the adjudicator had erred in removing the words "and the collective agreement or arbitral award does not contain a specific penalty for the infraction that resulted in the employee being discharged or otherwise disciplined" from s. 97(2.1). Those words limit s. 97(2.1) to employees who are not employed "at pleasure". In the view of the reviewing judge, the adjudicator did not have jurisdiction to inquire into the reasons for the termination. His authority was limited to

determining whether the notice period was reasonable. Having found that the adjudicator had exceeded his jurisdiction, the reviewing judge quashed his preliminary ruling.

20 With respect to the adjudicator's award on the merits, the reviewing judge commented that some aspects of the decision are factual in nature and should be reviewed on a patent unreasonableness standard, while other aspects involve questions [page209] of mixed fact and law which are subject to a reasonableness *simpliciter* standard. The reviewing judge agreed with the Province that the adjudicator's reasons do not stand up to a "somewhat probing examination" (para. 76). The reviewing judge held that the adjudicator's award of reinstatement could not stand as he was not empowered by the *PSLRA* to make Lieutenant-Governor in Council appointments. In addition, by concluding that the decision was void *ab initio* owing to a lack of procedural fairness, the adjudicator failed to consider the doctrine of adequate alternative remedy. The appellant received procedural fairness by virtue of the grievance hearing before the adjudicator. The adjudicator had provisionally increased the notice period to eight months that provided an adequate alternative remedy. Concluding that the adjudicator's decision did not stand up to review on a reasonableness *simpliciter* standard, the reviewing judge quashed the reinstatement order but upheld the adjudicator's provisional award of eight months' notice.

(2) Court of Appeal of New Brunswick (2006), 297 N.B.R. (2d) 151, 2006 NBCA 27

21 The appellant appealed the decision of the reviewing judge. The Court of Appeal, Robertson J.A. writing, held that the proper standard with respect to the interpretation of the adjudicator's authority under the *PSLRA* was reasonableness *simpliciter* and that the reviewing judge had erred in adopting the correctness standard. The court reached that conclusion by proceeding through a pragmatic and functional analysis, placing particular emphasis on the presence of a full privative clause in the *PSLRA* and the relative expertise of an adjudicator in the labour relations and employment context. The court also relied on the decision of this Court in *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727, 2004 SCC 28. However, the court noted that the adjudicator's interpretation of the *Mills* decision warranted no deference and that "correctness is the proper review standard when it comes to the interpretation and application of caselaw" (para. 17).

[page210]

22 Applying the reasonableness *simpliciter* standard, the court held that the adjudicator's decision was unreasonable. Robertson J.A. began by considering s. 20 of the *Civil Service Act* and noted that under the ordinary rules of contract, an employer holds the right to dismiss an employee with cause or with reasonable notice or with pay in lieu of notice. Section 20 of the *Civil Service Act* limits the Crown's common law right to dismiss its employees without cause or notice. Robertson J.A.

reasoned that s. 97(2.1) of the *PSLRA* applies in principle to non-unionized employees, but that it is only where an employee has been discharged or disciplined *for cause* that an adjudicator may substitute such other penalty as seems just and reasonable in the circumstances. Where the employer elects to dismiss with notice or pay in lieu of notice, however, s. 97(2.1) does not apply. In such circumstances, the employee may only grieve the length of the notice period. The only exception is where the employee alleges that the decision to terminate was based on a prohibited ground of discrimination.

23 On the issue of procedural fairness, the court found that the appellant exercised his right to grieve, and thus a finding that the duty of fairness had been breached was without legal foundation. The court dismissed the appeal.

II. Issues

24 At issue, firstly is the approach to be taken in the judicial review of a decision of a particular adjudicative tribunal which was seized of a grievance filed by the appellant after his employment was terminated. This appeal gives us the opportunity to re-examine the foundations of judicial review and the standards of review applicable in various situations.

25 The second issue involves examining whether the appellant who held an office "at pleasure" in the civil service of New Brunswick, had the right to procedural fairness in the employer's decision to terminate him. On this occasion, we will reassess the rule that has found formal expression in *Knight*.

[page211]

26 The two types of judicial review, on the merits and on the process, are therefore engaged in this case. Our review of the system will therefore be comprehensive, which is preferable since a holistic approach is needed when considering fundamental principles.

III. Issue 1: Review of the Adjudicator's Statutory Interpretation Determination

A. *Judicial Review*

27 As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of

the matters delegated to administrative bodies by Parliament and legislatures.

28 By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

29 Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, [page212] the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at p. 234; also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 21.

30 In addition to the role judicial review plays in upholding the rule of law, it also performs an important constitutional function in maintaining legislative supremacy. As noted by Justice Thomas Cromwell, "the rule of law is affirmed by assuring that the courts have the final say on the jurisdictional limits of a tribunal's authority; second, legislative supremacy is affirmed by adopting the principle that the concept of jurisdiction should be narrowly circumscribed and defined according to the intent of the legislature in a contextual and purposeful way; third, legislative supremacy is affirmed and the court-centric conception of the rule of law is reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law" ("Appellate Review: Policy and Pragmatism", in *2006 Isaac Pitblado Lectures, Appellate Courts: Policy, Law and Practice*, V-1, at p. V-12). In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent.

31 The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect (*Executors of the Woodward Estate v. Minister of Finance*, [1973] S.C.R. 120, at p. 127 [page213]). The inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867*: *Crevier*. As noted by Beetz J. in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1090, "[t]he role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection". In short, judicial review is

constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits. As Laskin C.J. explained in *Crevier*:

> Where ... questions of law have been specifically covered in a privative enactment, this Court, as in *Farrah*, has not hesitated to recognize this limitation on judicial review as serving the interests of an express legislative policy to protect decisions of adjudicative agencies from external correction. Thus, it has, in my opinion, balanced the competing interests of a provincial Legislature in its enactment of substantively valid legislation and of the courts as ultimate interpreters of the *British North America Act* and s. 96 thereof. The same considerations do not, however, apply to issues of jurisdiction which are not far removed from issues of constitutionality. It cannot be left to a provincial statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review. [pp. 237-38]

See also D. J. Mullan, *Administrative Law* (2001), at p. 50.

32 Despite the clear, stable constitutional foundations of the system of judicial review, the operation of judicial review in Canada has been in a constant state of evolution over the years, as courts have attempted to devise approaches to judicial review that are both theoretically sound and effective in practice. Despite efforts to refine and clarify it, the present system has proven to be difficult to implement. The time has arrived to re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable.

[page214]

33 Although the instant appeal deals with the particular problem of judicial review of the decisions of an adjudicative tribunal, these reasons will address first and foremost the structure and characteristics of the system of judicial review as a whole. In the wake of *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, 2001 SCC 41, and *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29, it has become apparent that the present system must be simplified. The comments of LeBel J. in *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86, at paras. 190 and 195, questioning the applicability of the "pragmatic and functional approach" to the decisions and actions of all kinds of administrative actors, illustrated the need for change.

B. *Reconsidering the Standards of Judicial Review*

34 The current approach to judicial review involves three standards of review, which range from

correctness, where no deference is shown, to patent unreasonableness, which is most deferential to the decision maker, the standard of reasonableness *simpliciter* lying, theoretically, in the middle. In our view, it is necessary to reconsider both the number and definitions of the various standards of review, and the analytical process employed to determine which standard applies in a given situation. We conclude that there ought to be two standards of review correctness and reasonableness.

35 The existing system of judicial review has its roots in several landmark decisions beginning in the late 1970s in which this Court developed the theory of substantive review to be applied to determinations of law, and determinations of fact and of mixed law and fact made by administrative tribunals. In *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 ("*CUPE*") [page215], Dickson J. introduced the idea that, depending on the legal and administrative contexts, a specialized administrative tribunal with particular expertise, which has been given the protection of a privative clause, if acting within its jurisdiction, could provide an interpretation of its enabling legislation that would be allowed to stand unless "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review" (p. 237). Prior to *CUPE*, judicial review followed the "preliminary question doctrine", which inquired into whether a tribunal had erred in determining the scope of its jurisdiction. By simply branding an issue as "jurisdictional", courts could replace a decision of the tribunal with one they preferred, often at the expense of a legislative intention that the matter lie in the hands of the administrative tribunal. *CUPE* marked a significant turning point in the approach of courts to judicial review, most notably in Dickson J.'s warning that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233). Dickson J.'s policy of judicial respect for administrative decision making marked the beginning of the modern era of Canadian administrative law.

36 *CUPE* did not do away with correctness review altogether and in *Bibeault*, the Court affirmed that there are still questions on which a tribunal must be correct. As Beetz J. explained, "the jurisdiction conferred on administrative tribunals and other bodies created by statute is limited, and ... such a tribunal cannot by a misinterpretation of an enactment assume a power not given to it by the legislator" (p. 1086). *Bibeault* introduced the concept of a "pragmatic and functional analysis" to determine the jurisdiction of a tribunal, abandoning the "preliminary question" theory. In arriving at the appropriate standard of review, courts were to consider a number of factors including the wording of the provision conferring jurisdiction on the tribunal, the purpose of the enabling statute, the reason for the existence of the tribunal, the expertise of its [page216] members, and the nature of the problem (p. 1088). The new approach would put "renewed emphasis on the superintending and reforming function of the superior courts" (p. 1090). The "pragmatic and functional analysis", as it came to be known, was later expanded to determine the appropriate degree of deference in respect of various forms of administrative decision making.

37 In *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, a third standard of review was introduced into Canadian administrative law. The legislative context of

that case, which provided a statutory right of appeal from the decision of a specialized tribunal, suggested that none of the existing standards was entirely satisfactory. As a result, the reasonableness *simpliciter* standard was introduced. It asks whether the tribunal's decision was reasonable. If so, the decision should stand; if not, it must fall. In *Southam*, Iacobucci J. described an unreasonable decision as one that "is not supported by any reasons that can stand up to a somewhat probing examination" (para. 56) and explained that the difference between patent unreasonableness and reasonableness *simpliciter* is the "immediacy" or "obviousness" of the defect in the tribunal's decision (para. 57). The defect will appear on the face of a patently unreasonable decision, but where the decision is merely unreasonable, it will take a searching review to find the defect.

38 The three standards of review have since remained in Canadian administrative law, the approach to determining the appropriate standard of review having been refined in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982.

39 The operation of three standards of review has not been without practical and theoretical difficulties, neither has it been free of criticism. One major problem lies in distinguishing between the [page217] patent unreasonableness standard and the reasonableness *simpliciter* standard. The difficulty in distinguishing between those standards contributes to the problem of choosing the right standard of review. An even greater problem lies in the application of the patent unreasonableness standard, which at times seems to require parties to accept an unreasonable decision.

40 The definitions of the patent unreasonableness standard that arise from the case law tend to focus on the magnitude of the defect and on the immediacy of the defect (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63, at para. 78, *per* LeBel J.). Those two hallmarks of review under the patent unreasonableness standard have been used consistently in the jurisprudence to distinguish it from review under the standard of reasonableness *simpliciter*. As it had become clear that, after *Southam*, lower courts were struggling with the conceptual distinction between patent unreasonableness and reasonableness *simpliciter*, Iacobucci J., writing for the Court in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, attempted to bring some clarity to the issue. He explained the different operations of the two deferential standards as follows, at paras. 52-53:

> [A] patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" ... . A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.
>
> A decision may be unreasonable without being patently unreasonable when

> the defect in the decision is less obvious and might only be discovered after "significant searching or testing" (*Southam*, *supra*, at para. 57). Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did.

41 As discussed by LeBel J. at length in *Toronto (City) v. C.U.P.E.*, notwithstanding the increased [page218] clarity that *Ryan* brought to the issue and the theoretical differences between the standards of patent unreasonableness and reasonableness *simpliciter*, a review of the cases reveals that any actual difference between them in terms of their operation appears to be illusory (see also the comments of Abella J. in *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, [2007] 1 S.C.R. 650, 2007 SCC 15, at paras. 101-3). Indeed, even this Court divided when attempting to determine whether a particular decision was "patently unreasonable", although this should have been self-evident under the existing test (see *C.U.P.E. v. Ontario (Minister of Labour)*). This result is explained by the fact that both standards are based on the idea that there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported. Looking to either the magnitude or the immediacy of the defect in the tribunal's decision provides no meaningful way in practice of distinguishing between a patently unreasonable and an unreasonable decision. As Mullan has explained:

> [T]o maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality *simpliciter* will not is to make a nonsense of the law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality.

See D. J. Mullan, "Recent Developments in Standard of Review", in Canadian Bar Association (Ontario), *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (2000), at p. 25.

42 Moreover, even if one could conceive of a situation in which a clearly or highly irrational decision were distinguishable from a merely irrational decision, it would be unpalatable to require parties to accept an irrational decision simply because, on a deferential standard, the irrationality of the decision is not clear *enough*. It is also inconsistent with the rule of law to retain an irrational decision. As [page219] LeBel J. explained in his concurring reasons in *Toronto (City) v. C.U.P.E.*, at para. 108:

> In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision,

> regardless of whether the standard applied is reasonableness *simpliciter* or patent unreasonableness ... .

See also *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, 2004 SCC 23, at paras. 40-41, *per* LeBel J.

C. *Two Standards of Review*

43 The Court has moved from a highly formalistic, artificial "jurisdiction" test that could easily be manipulated, to a highly contextual "functional" test that provides great flexibility but little real on-the-ground guidance, and offers too many standards of review. What is needed is a test that offers guidance, is not formalistic or artificial, and permits review where justice requires it, but not otherwise. A simpler test is needed.

(1) Defining the Concepts of Reasonabless and Correctness

44 As explained above, the patent unreasonableness standard was developed many years prior to the introduction of the reasonableness *simpliciter* standard in *Southam*. The intermediate standard was developed to respond to what the Court viewed as problems in the operation of judicial review in Canada, particularly the perceived all-or-nothing approach to deference, and in order to create a more finely calibrated system of judicial review (see also L. Sossin and C. M. Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law" (2007), 57 U.T.L.J. 581). However, the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently [page220] greater flexibility of having multiple standards of review. Though we are of the view that the three-standard model is too difficult to apply to justify its retention, now, several years after *Southam*, we believe that it would be a step backwards to simply remove the reasonableness *simpliciter* standard and revert to pre-*Southam* law. As we see it, the problems that *Southam* attempted to remedy with the introduction of the intermediate standard are best addressed not by three standards of review, but by two standards, defined appropriately.

45 We therefore conclude that the two variants of reasonableness review should be collapsed into a single form of "reasonableness" review. The result is a system of judicial review comprising two standards correctness and reasonableness. But the revised system cannot be expected to be simpler and more workable unless the concepts it employs are clearly defined.

46 What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?

47 Reasonableness is a deferential standard animated by the principle that underlies the

development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of [page221] justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

48 The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at p. 596, *per* L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, *per* L'Heureux-Dubé J.; *Ryan*, at para. 49).

49 Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree [page222] of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

50 As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids

inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

(2) Determining the Appropriate Standard of Review

51 Having dealt with the nature of the standards of review, we now turn our attention to the method for selecting the appropriate standard in individual cases. As we will now demonstrate, questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.

[page223]

52 The existence of a privative or preclusive clause gives rise to a strong indication of review pursuant to the reasonableness standard. This conclusion is appropriate because a privative clause is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. This does not mean, however, that the presence of a privative clause is determinative. The rule of law requires that the constitutional role of superior courts be preserved and, as indicated above, neither Parliament nor any legislature can completely remove the courts' power to review the actions and decisions of administrative bodies. This power is constitutionally protected. Judicial review is necessary to ensure that the privative clause is read in its appropriate statutory context and that administrative bodies do not exceed their jurisdiction.

53 Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Mossop*, at pp. 599-600; *Dr. Q*, at para. 29; *Suresh*, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

54 Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a

specific statutory context: *Toronto (City) v. C.U.P.E.*, at para. 72. Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan*, [1975] 1 S.C.R. 517, where it was held that an administrative decision [page224] maker will always risk having its interpretation of an external statute set aside upon judicial review.

55 A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:

- A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
- A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
- The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

56 If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.

57 An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness [page225] standard (*Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672, 2004 SCC 26). This simply means that the analysis required is already deemed to have been performed and need not be repeated.

58 For example, correctness review has been found to apply to constitutional questions regarding the division of powers between Parliament and the provinces in the *Constitution Act, 1867*: *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322. Such questions, as well as other constitutional issues, are necessarily subject to correctness review because of the unique role of s. 96 courts as interpreters of the Constitution: *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54; Mullan, *Administrative Law*, at p. 60.

59 Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the

jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 14-3 to 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, *per* Bastarache J.). That case involved the decision-making powers of a municipality [page226] and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

60 As mentioned earlier, courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (*Toronto (City) v. C.U.P.E.*, at para. 62, *per* LeBel J.). Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers. Such was the case in *Toronto (City) v. C.U.P.E.*, which dealt with complex common law rules and conflicting jurisprudence on the doctrines of *res judicata* and abuse of process issues that are at the heart of the administration of justice (see para. 15, *per* Arbour J.).

61 Questions regarding the jurisdictional lines between two or more competing specialized tribunals have also been subject to review on a correctness basis: *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] 2 S.C.R. 185, 2004 SCC 39.

62 In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[page227]

63 The existing approach to determining the appropriate standard of review has commonly been referred to as "pragmatic and functional". That name is unimportant. Reviewing courts must not get fixated on the label at the expense of a proper understanding of what the inquiry actually entails.

Because the phrase "pragmatic and functional approach" may have misguided courts in the past, we prefer to refer simply to the "standard of review analysis" in the future.

64 The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

D. *Application*

65 Returning to the instant appeal and bearing in mind the foregoing discussion, we must determine the standard of review applicable to the adjudicator's interpretation of the *PSLRA*, in particular ss. 97(2.1) and 100.1, and s. 20 of the *Civil Service Act*. That standard of review must then be applied to the adjudicator's decision. In order to determine the applicable standard, we will now examine the factors relevant to the standard of review analysis.

(1) Proper Standard of Review on the Statutory Interpretation Issue

66 The specific question on this front is whether the combined effect of s. 97(2.1) and s. 100.1 of the *PSLRA* permits the adjudicator to inquire into the employer's reason for dismissing an employee with notice or pay in lieu of notice. This is a question of law. The question to be answered is therefore whether in light of the privative clause, the regime under which the adjudicator acted, and the nature of the question of law involved, a standard of correctness should apply.

[page228]

67 The adjudicator was appointed and empowered under the *PSLRA*; s. 101(1) of that statute contains a full privative clause, stating in no uncertain terms that "every order, award, direction, decision, declaration or ruling of ... an adjudicator is final and shall not be questioned or reviewed in any court". Section 101(2) adds that "[n]o order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, judicial review, or otherwise, to question, review, prohibit or restrain ... an adjudicator in any of its or his proceedings." The inclusion of a full privative clause in the *PSLRA* gives rise to a strong indication that the reasonableness standard of review will apply.

68 The nature of the regime also favours the standard of reasonableness. This Court has often recognized the relative expertise of labour arbitrators in the interpretation of collective agreements, and counselled that the review of their decisions should be approached with deference: *CUPE*, at pp. 235-36; *Canada Safeway Ltd. v. RWDSU, Local 454*, [1998] 1 S.C.R. 1079, at para. 58; *Voice*

Construction, at para. 22. The adjudicator in this case was, in fact, interpreting his enabling statute. Although the adjudicator was appointed on an *ad hoc* basis, he was selected by the mutual agreement of the parties and, at an institutional level, adjudicators acting under the *PSLRA* can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions. See *Alberta Union of Provincial Employees v. Lethbridge Community College*. This factor also suggests a reasonableness standard of review.

69 The legislative purpose confirms this view of the regime. The *PSLRA* establishes a time- and cost-effective method of resolving employment disputes. It provides an alternative to judicial determination. Section 100.1 of the *PSLRA* defines the adjudicator's powers in deciding a dispute, but it also provides remedial protection for employees who are not unionized. The remedial nature of s. 100.1 and its provision for timely and binding [page229] settlements of disputes also imply that a reasonableness review is appropriate.

70 Finally, the nature of the legal question at issue is not one that is of central importance to the legal system and outside the specialized expertise of the adjudicator. This also suggests that the standard of reasonableness should apply.

71 Considering the privative clause, the nature of the regime, and the nature of the question of law here at issue, we conclude that the appropriate standard is reasonableness. We must now apply that standard to the issue considered by the adjudicator in his preliminary ruling.

(2) Was the Adjudicator's Interpretation Unreasonable?

72 While we are required to give deference to the determination of the adjudicator, considering the decision in the preliminary ruling as a whole, we are unable to accept that it reaches the standard of reasonableness. The reasoning process of the adjudicator was deeply flawed. It relied on and led to a construction of the statute that fell outside the range of admissible statutory interpretations.

73 The adjudicator considered the New Brunswick Court of Appeal decision in *Chalmers (Dr. Everett) Hospital v. Mills* as well as amendments made to the *PSLRA* in 1990 (S.N.B. 1990, c. 30). Under the former version of the Act, an employee could grieve "with respect to ... disciplinary action resulting in discharge, suspension or a financial penalty" (s. 92(1)). The amended legislation grants the right to grieve "with respect to discharge, suspension or a financial penalty" (*PSLRA*, s. 100.1(2)). The adjudicator reasoned that the referential incorporation of s. 97(2.1) in s. 100.1(5) "necessarily means that an adjudicator has jurisdiction to make the determination described in subsection 97(2.1), i.e. that an employee has been discharged or otherwise disciplined for cause" (p. 5). He further stated that an employer "cannot avoid an inquiry into its real reasons for a discharge, or exclude resort to subsection 97(2.1), by simply stating that cause is not alleged" (*ibid.* (emphasis added)). The [page230] adjudicator concluded that he could determine whether a discharge purportedly with notice or pay in lieu of notice was in reality for cause.

74 The interpretation of the law is always contextual. The law does not operate in a vacuum. The adjudicator was required to take into account the legal context in which he was to apply the law. The employment relationship between the parties in this case was governed by private law. The contractual terms of employment could not reasonably be ignored. That is made clear by s. 20 of the *Civil Service Act*. Under the ordinary rules of contract, the employer is entitled to discharge an employee for cause, with notice or with pay in lieu of notice. Where the employer chooses to exercise its right to discharge with reasonable notice or pay in lieu thereof, the employer is not required to assert cause for discharge. The grievance process cannot have the effect of changing the terms of the contract of employment. The respondent chose to exercise its right to terminate without alleging cause in this case. By giving the *PSLRA* an interpretation that allowed him to inquire into the reasons for discharge where the employer had the right not to provide or even have such reasons, the adjudicator adopted a reasoning process that was fundamentally inconsistent with the employment contract and, thus, fatally flawed. For this reason, the decision does not fall within the range of acceptable outcomes that are defensible in respect of the facts and the law.

75 The decision of the adjudicator treated the appellant, a non-unionized employee, as a unionized employee. His interpretation of the *PSLRA*, which permits an adjudicator to inquire into the reasons for discharge where notice is given and, under s. 97(2.1), substitute a penalty that he or she determines just and reasonable in the circumstances, creates a requirement that the employer show cause before dismissal. There can be no justification for this; no reasonable interpretation can lead to that result. Section 100.1(5) incorporates s. 97(2.1) by reference into the determination of grievances brought by non-unionized employees. [page231] The employees subject to the *PSLRA* are usually unionized and the terms of their employment are determined by collective agreement; s. 97(2.1) explicitly refers to the collective agreement context. Section 100.1(5) referentially incorporates s. 97(2.1) *mutatis mutandis* into the non-collective agreement context so that non-unionized employees who are discharged *for cause and without notice* have the right to grieve the discharge and have the adjudicator substitute another penalty as seems just and reasonable in the circumstances. Therefore, the combined effect of s. 97(2.1) and s. 100.1 cannot, on any reasonable interpretation, remove the employer's right under contract law to discharge an employee with reasonable notice or pay in lieu of notice.

76 The interpretation of the adjudicator was simply unreasonable in the context of the legislative wording and the larger labour context in which it is embedded. It must be set aside. Nevertheless, it must be acknowledged that his interpretation of the *PSLRA* was ultimately inconsequential to the overall determination of the grievance, since the adjudicator made no finding as to whether the discharge was or was not, in fact, for cause. The decision on the merits, which resulted in an order that the appellant be reinstated, instead turned on the adjudicator's decision on a separate issue whether the appellant was entitled to and, if so, received procedural fairness with regard to the employer's decision to terminate his employment. This issue is discrete and isolated from the statutory interpretation issue, and it raises very different considerations.

IV. Issue 2: Review of the Adjudicator's Procedural Fairness Determination

77 Procedural fairness has many faces. It is at issue where an administrative body may have prescribed rules of procedure that have been breached. It is also concerned with general principles involving the right to answer and defence where one's rights are affected. In this case, the appellant raised in his grievance letter that the reasons for the employer's dissatisfaction were not specified and that he did not have a reasonable opportunity to respond to the employer's concerns. There was, [page232] in his view, lack of due process and a breach of procedural fairness.

78 The procedural fairness issue was dealt with only briefly by the Court of Appeal. Robertson J.A. mentioned at the end of his reasons that a duty of fairness did not arise in this case since the appellant had been terminated with notice and had exercised his right to grieve. Before this Court, however, the appellant argued that he was entitled to procedural fairness as a result of this Court's jurisprudence. Although ultimately we do not agree with the appellant, his contention raises important issues that need to be examined more fully.

A. *Duty of Fairness*

79 Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. Thus stated the principle is easy to grasp. It is not, however, always easy to apply. As has been noted many times, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case" (*Knight*, at p. 682; *Baker*, at para. 21; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11, at paras. 74-75).

80 This case raises the issue of the extent to which a duty of fairness applies to the dismissal of a public employee pursuant to a contract of employment. The grievance adjudicator concluded that the appellant had been denied procedural fairness because he had not been granted a hearing by the employer before being dismissed with four months' pay in lieu of notice. This conclusion was said to flow from this Court's decision in *Knight*, where it was held that the holder of an office "at pleasure" was entitled to be given the reasons for his or her dismissal and an opportunity to be heard before being dismissed (p. 683).

81 We are of the view that the principles established in *Knight* relating to the applicability of a duty of fairness in the context of public employment [page233] merit reconsideration. While the majority opinion in *Knight* properly recognized the important place of a general duty of fairness in administrative law, in our opinion, it incorrectly analyzed the effects of a contract of employment on such a duty. The majority in *Knight* proceeded on the premise that a duty of fairness based on public law applied unless expressly excluded by the employment contract or the statute (p. 681), without consideration of the terms of the contract with regard to fairness issues. It also upheld the distinction between office holders and contractual employees for procedural fairness purposes (pp. 670-76). In our view, what matters is the nature of the employment relationship between the public employee and the public employer. Where a public employee is employed under a contract of

employment, regardless of his or her status as a public office holder, the applicable law governing his or her dismissal is the law of contract, not general principles arising out of public law. What *Knight* truly stands for is the principle that there is always a recourse available where the employee is an office holder and the applicable law leaves him or her without any protection whatsoever when dismissed.

82 This conclusion does not detract from the general duty of fairness owed by administrative decision makers. Rather it acknowledges that in the specific context of dismissal from public employment, disputes should be viewed through the lens of contract law rather than public law.

83 In order to understand why a reconsideration of *Knight* is warranted, it is necessary to review the development of the duty of fairness in Canadian administrative law. As we shall see, its development in the public employment context was intimately related to the distinction between public office holders and contractual employees, a distinction which, in our view, has become increasingly difficult to maintain both in principle and in practice.

(1) The Preliminary Issue of Jurisdiction

84 Before dealing with the scope of the duty of fairness in this case, a word should be said about the respondent's preliminary objection to the jurisdiction of the adjudicator under the *PSLRA* [page234] to consider procedural fairness. The respondent argues that allowing adjudicators to consider procedural fairness risks granting them the inherent powers of a court. We disagree. We can see nothing problematic with a grievance adjudicator considering a public law duty of fairness issue where such a duty exists. It falls squarely within the adjudicator's task to resolve a grievance. However, as will be explained below, the proper approach is to first identify the nature of the employment relationship and the applicable law. Where, as here, the relationship is contractual, a public law duty of fairness is not engaged and therefore should play no role in resolving the grievance.

(2) The Development of the Duty of Fairness in Canadian Public Law

85 In Canada, the modern concept of procedural fairness in administrative law was inspired by the House of Lords' landmark decision in *Ridge v. Baldwin*, [1963] 2 All E.R. 66, a case which involved the summary dismissal of the chief constable of Brighton. The House of Lords declared the chief constable's dismissal a nullity on the grounds that the administrative body which had dismissed him had failed to provide the reasons for his dismissal or to accord him an opportunity to be heard in violation of the rules of natural justice. Central to the reasoning in the case was Lord Reid's distinction between (i) master-servant relationships (i.e. contractual employment), (ii) offices held "at pleasure", and (iii) offices where there must be cause for dismissal, which included the chief constable's position. According to Lord Reid, only the last category of persons was entitled to procedural fairness in relation to their dismissal since both contractual employees and office holders employed "at pleasure" could be dismissed without reason (p. 72). As the authors Wade and Forsyth note that, after a period of retreat from imposing procedural fairness requirements on administrative

decision makers, *Ridge v. Baldwin* "marked an important change of judicial policy, indicating that natural justice was restored to favour and would be applied on a wide basis" (W. Wade and C. Forsyth, *Administrative Law* (8th ed. 2000), at p. 438).

[page235]

86 The principles established by *Ridge v. Baldwin* were followed by this Court in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311. *Nicholson*, like its U.K. predecessor, marked the return to a less rigid approach to natural justice in Canada (see Brown and Evans, at pp. 7-5 to 7-9). *Nicholson* concerned the summary dismissal of a probationary police officer by a regional board of police commissioners. Laskin C.J., for the majority, at p. 328, declared the dismissal void on the ground that the officer fell into Lord Reid's third category and was therefore entitled to the same procedural protections as in *Ridge v. Baldwin*.

87 Although *Ridge v. Baldwin* and *Nicholson* were concerned with procedural fairness in the context of the dismissal of public office holders, the concept of fairness was quickly extended to other types of administrative decisions (see e.g. *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735). In *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, Le Dain J. stated that the duty of fairness was a general principle of law applicable to all public authorities:

> This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual ... . [p. 653]
> (See also *Baker*, at para. 20.)

88 In *Knight*, the Court relied on the statement of Le Dain J. in *Cardinal v. Director of Kent Institution* that the existence of a general duty to act fairly will depend on "(i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the [page236] individual; and (iii) the effect of that decision on the individual's rights" (*Knight*, at p. 669).

89 The dispute in *Knight* centred on whether a board of education had failed to accord procedural fairness when it dismissed a director of education with three months' notice pursuant to his contract of employment. The main issue was whether the director's employment relationship with the school board was one that attracted a public law duty of fairness. L'Heureux-Dubé J., for the majority, held that it did attract such a duty on the ground that the director's position had a "strong 'statutory flavour'" and could thus be qualified as a public office (p. 672). In doing so, she specifically recognized that, contrary to Lord Reid's holding in *Ridge v. Baldwin*, holders of an office "at

pleasure", were also entitled to procedural fairness before being dismissed (pp. 673-74). The fact that the director's written contract of employment specifically provided that he could be dismissed with three months' notice was held not to be enough to displace a public law duty to act fairly (p. 681).

90 From these foundational cases, procedural fairness has grown to become a central principle of Canadian administrative law. Its overarching purpose is not difficult to discern: administrative decision makers, in the exercise of public powers, should act fairly in coming to decisions that affect the interests of individuals. In other words, "[t]he observance of fair procedures is central to the notion of the 'just' exercise of power" (Brown and Evans, at p. 7-3). What is less clear, however, is whether this purpose is served by imposing public law procedural fairness requirements on public bodies in the exercise of their contractual rights as employers.

(3) Procedural Fairness in the Public Employment Context

91 *Ridge v. Baldwin* and *Nicholson* established that a public employee's right to procedural fairness [page237] depended on his or her status as an office holder. While *Knight* extended a duty of fairness to office holders during pleasure, it nevertheless upheld the distinction between office holders and contractual employees as an important criterion in establishing whether a duty of fairness was owed. Courts have continued to rely on this distinction, either extending or denying procedural protections depending on the characterization of the public employee's legal status as an office holder or contractual employee (see e.g. *Reglin v. Creston (Town)* (2004), 34 C.C.E.L. (3d) 123, 2004 BCSC 790; *Gismondi v. Toronto (City)* (2003), 64 O.R. (3d) 688 (C.A.); *Seshia v. Health Sciences Centre* (2001), 160 Man. R. (2d) 41, 2001 MBCA 151; *Rosen v. Saskatoon District Health Board* (2001), 202 D.L.R. (4th) 35, 2001 SKCA 83; *Hanis v. Teevan* (1998), 111 O.A.C. 91; *Gerrard v. Sackville (Town)* (1992), 124 N.B.R. (2d) 70 (C.A.)) .

92 In practice, a clear distinction between office holders and contractual employees has been difficult to maintain:

> Although the law makes such a sharp distinction between office and service in theory, in practice it may be difficult to tell which is which. For tax purposes "office" has long been defined as a "subsisting, permanent substantive position which has an existence independent of the person who fills it", but for the purposes of natural justice the test may not be the same. Nor need an office necessarily be statutory, although nearly all public offices of importance in administrative law are statutory. A statutory public authority may have many employees who are in law merely its servants, and others of higher grades who are office-holders.

(Wade and Forsyth, at pp. 532-33)

93 Lord Wilberforce noted that attempting to separate office holders from contractual employees

> involves the risk of a compartmental approach which, although convenient as a solvent, may lead to narrower distinctions than are appropriate to the broader issues of administrative law. A comparative list of situations in which persons have been held entitled or not entitled to a hearing, or to observation of rules of natural [page238] justice, according to the master and servant test, looks illogical and even bizarre.
>
> (*Malloch v. Aberdeen Corp.*, [1971] 2 All E.R. 1278 (H.L.), at p. 1294)

94 There is no reason to think that the distinction has been easier to apply in Canada. In *Knight*, as has been noted, the majority judgment relied on whether the public employee's position had a "strong 'statutory flavour'" (p. 672), but as Brown and Evans observe, "there is no simple test for determining whether there is a sufficiently strong 'statutory flavour' to a job for it to be classified as an 'office'" (p. 7-19). This has led to uncertainty as to whether procedural fairness attaches to particular positions. For instance, there are conflicting decisions on whether the position of a "middle manager" in a municipality is sufficiently important to attract a duty of fairness (compare *Gismondi*, at para. 53, and *Hughes v. Moncton (City)* (1990), 111 N.B.R. (2d) 184 (Q.B.), aff'd (1991), 118 N.B.R. (2d) 306 (C.A.)). Similarly, physicians working in the public health system may or may not be entitled to a duty of fairness (compare *Seshia* and *Rosen v. Saskatoon District Health Board*, [2000] 4 W.W.R. 606, 2000 SKQB 40).

95 Further complicating the distinction is the fact that public employment is for the most part now viewed as a regular contractual employment relationship. The traditional position at common law was that public servants were literally "servants of the Crown" and could therefore be dismissed at will. However, it is now recognized that most public employees are employed on a contractual basis: *Wells v. Newfoundland*, [1999] 3 S.C.R. 199.

96 *Wells* concerned the dismissal without compensation of a public office holder whose position had been abolished by statute. The Court held that, while Wells' position was created by statute, his employment relationship with the Crown was contractual and therefore he was entitled to be compensated for breach of contract according [page239] to ordinary private law principles. Indeed, *Wells* recognized that most civil servants and public officers are employed under contracts of employment, either as members of unions bound by collective agreements or as non-unionized employees under individual contracts of employment (paras. 20-21 and 29-32). Only certain officers, like ministers of the Crown and "others who fulfill constitutionally defined state roles", do not have a contractual relationship with the Crown, since the terms of their positions cannot be modified by agreement (*Wells*, at paras. 29-32).

97 The effect of *Wells*, as Professors Hogg and Monahan note, is that

> [t]he government's common law relationship with its employees will now be governed, for the most part, by the general law of contract, in the same way as

> private employment relationships. This does not mean that governments cannot provide for a right to terminate employment contracts at pleasure. However, if the government wishes to have such a right, it must either contract for it or make provision (expressly or by necessary implication) by way of statute.
>
> (P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000), at p. 240)

The important point for our purposes is that *Wells* confirmed that most public office holders have a contractual employment relationship. Of course, office holders' positions will also often be governed by statute and regulations, but the essence of the employment relationship is still contractual. In this context, attempting to make a clear distinction between office holders and contractual employees for the purposes of procedural fairness becomes even more difficult.

98 If the distinction has become difficult to maintain in practice, it is also increasingly hard to justify in principle. There would appear to be three main reasons for distinguishing between office holders and contractual employees and for extending procedural fairness protections only to the former, all of which, in our view, are problematic.

99 First, historically, offices were viewed as a form of property, and thus could be recovered by [page240] the office holder who was removed contrary to the principles of natural justice. Employees who were dismissed in breach of their contract, however, could only sue for damages, since specific performance is not generally available for contracts for personal service (Wade and Forsyth, at pp. 531-32). This conception of public office has long since faded from our law: public offices are no longer treated as a form of private property.

100 A second and more persuasive reason for the distinction is that dismissal from public office involves the exercise of delegated statutory power and should therefore be subject to public law controls like any other administrative decision (*Knight*, at p. 675; *Malloch*, at p. 1293, *per* Lord Wilberforce). In contrast, the dismissal of a contractual employee only implicates a public authority's private law rights as an employer.

101 A third reason is that, unlike contractual employees, office holders did not typically benefit from contractual rights protecting them from summary discharge. This was true of the public office holders in *Ridge v. Baldwin* and *Nicholson*. Indeed, in both cases the statutory language purported to authorize dismissal without notice. The holders of an office "at pleasure" were in an even more tenuous position since by definition they could be dismissed without notice *and* without reason (*Nicholson*, at p. 323; *Black's Law Dictionary* (8th ed. 2004), at p. 1192 "pleasure appointment"). Because of this relative insecurity it was seen to be desirable to impose minimal procedural requirements in order to ensure that office holders were not deprived of their positions arbitrarily (*Nicholson*, at pp. 322-23; *Knight*, at pp. 674-75; Wade and Forsyth, at pp. 536-37).

102 In our view, the existence of a contract of employment, not the public employee's status as an

office holder, is the crucial consideration. Where a public office holder is employed under a contract of employment the justifications for imposing a public law duty of fairness with respect to his or her dismissal lose much of their force.

[page241]

103 Where the employment relationship is contractual, it becomes difficult to see how a public employer is acting any differently in dismissing a public office holder and a contractual employee. In both cases, it would seem that the public employer is merely exercising its private law rights as an employer. For instance, in *Knight*, the director's position was terminated by a resolution passed by the board of education pursuant to statute, but it was done in accordance with the contract of employment, which provided for dismissal on three months' notice. Similarly, the appellant in this case was dismissed pursuant to s. 20 of the New Brunswick *Civil Service Act*, but that section provides that the ordinary rules of contract govern dismissal. He could therefore only be dismissed for just cause or on reasonable notice, and any failure to do so would give rise to a right to damages. In seeking to end the employment relationship with four months' pay in lieu of notice, the respondent was acting no differently than any other employer at common law. In *Wells*, Major J. noted that public employment had all of the features of a contractual relationship:

> A common-sense view of what it means to work for the government suggests that these relationships have all the hallmarks of contract. There are negotiations leading to agreement and employment. This gives rise to enforceable obligations on both sides. The Crown is acting much as an ordinary citizen would, engaging in mutually beneficial commercial relations with individual and corporate actors. Although the Crown may have statutory guidelines, the result is still a contract of employment. [Emphasis added; para. 22.]

If the Crown is acting as any other private actor would in hiring its employees, then it follows that the dismissal of its employees should be viewed in the same way.

104 Furthermore, while public law is rightly concerned with preventing the arbitrary exercise of delegated powers, the good faith exercise of the contractual rights of an employer, such as the right [page242] to end the employment relationship on reasonable notice, cannot be qualified as arbitrary. Where the terms of the employment contract were explicitly agreed to, it will be assumed that procedural fairness was dealt with by the parties (see, for example, in the context of collective agreements: *School District No. 5 (Southeast Kootenay) and B.C.T.F. (Yellowaga) (Re)* (2000), 94 L.A.C. (4th) 56). If, however, the contract of employment is silent, the fundamental terms will be supplied by the common law or the civil law, in which case dismissal may only be for just cause or on reasonable notice.

105 In the context of this appeal, it must be emphasized that dismissal with reasonable notice is not unfair *per se*. An employer's right to terminate the employment relationship with due notice is simply the counterpart to the employee's right to quit with due notice (G. England, *Employment Law in Canada* (4th ed. (loose-leaf)), at para. 13.3). It is a well-established principle of the common law that, unless otherwise provided, both parties to an employment contract may end the relationship without alleging cause so long as they provide adequate notice. An employer's right to terminate on reasonable notice must be exercised within the framework of an employer's general obligations of good faith and fair dealing: *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 95 . But the good faith exercise of a common law contractual right to dismiss with notice does not give rise to concerns about the illegitimate exercise of public power. Moreover, as will be discussed below, where public employers do act in bad faith or engage in unfair dealing, the private law provides a more appropriate form of relief and there is no reason that they should be treated differently than private sector employers who engage in similar conduct.

106 Of course, a public authority must abide by any statutory restrictions on the exercise of its discretion as an employer, regardless of the terms of an employment contract, and failure to do so may give rise to a public law remedy. A public authority cannot contract out of its statutory duties. But where a dismissal decision is properly within the public authority's powers and is taken pursuant to [page243] a contract of employment, there is no compelling public law purpose for imposing a duty of fairness.

107 Nor is the protection of office holders a justification for imposing a duty of fairness when the employee is protected from wrongful dismissal by contract. The appellant's situation provides a good illustration of why this is so. As an office holder, the appellant was employed "at pleasure", and could therefore be terminated without notice or reason (*Interpretation Act*, R.S.N.B. 1973, c. I-13, s. 20). However, he was also a civil servant and, pursuant to s. 20 of the *Civil Service Act*, his dismissal was governed by the ordinary rules of contract. If his employer had dismissed him without notice and without cause he would have been entitled to claim damages for breach of contract. Even if he was dismissed with notice, it was open to him to challenge the length of notice or amount of pay in lieu of notice given. On the facts, the respondent gave the appellant four months' worth of pay in lieu of notice, which he was successful in having increased to eight months before the grievance adjudicator.

108 It is true that the remedy of reinstatement is not available for breach of contract at common law. In this regard, it might be argued that contractual remedies, on their own, offer insufficient protection to office holders (see *de Smith, Woolf & Jowell: Judicial Review of Administrative Action* (5th ed. 1995), at p. 187). However, it must be kept in mind that breach of a public law duty of fairness also does not lead to full reinstatement. The effect of a breach of procedural fairness is to render the dismissal decision void *ab initio* (*Ridge v. Baldwin*, at p. 81). Accordingly, the employment is deemed to have never ceased and the office holder is entitled to unpaid wages and benefits from the date of the dismissal to the date of judgment (see England, at para. 17.224). However, an employer is free to follow the correct procedure and dismiss the office holder again. A

breach of the duty of fairness simply requires that the dismissal decision be retaken. It therefore is incorrect to equate it to reinstatement (see *Malloch*, at p. 1284).

[page244]

109 In addition, a public law remedy can lead to unfairness. The amount of unpaid wages and benefits an office holder is entitled to will be a function of the length of time the judicial process has taken to wend its way to a final resolution rather than criteria related to the employee's situation. Furthermore, in principle, there is no duty to mitigate since unpaid wages are not technically damages. As a result, an employee may recoup much more than he or she actually lost (see England, at para. 17.224).

110 In contrast, the private law offers a more principled and fair remedy. The length of notice or amount of pay in lieu of notice an employee is entitled to depends on a number of factors including length of service, age, experience and the availability of alternative employment (see *Wallace*, at paras. 81 ff.). The notice period may be increased if it is established that the employer acted in bad faith or engaged in unfair dealing when acting to dismiss the employee (*Wallace*, at para. 95). These considerations aim at ensuring that dismissed employees are afforded some measure of protection while looking for new employment.

111 It is important to note as well that the appellant, as a public employee employed under a contract of employment, also had access to all of the same statutory and common law protections that surround private sector employment. He was protected from dismissal on the basis of a prohibited ground of discrimination under the *Human Rights Act*, R.S.N.B. 1973, c. H-11. His employer was bound to respect the norms laid down by the *Employment Standards Act*, S.N.B. 1982, c. E-7.2. As has already been mentioned, if his dismissal had been in bad faith or he had been subject to unfair dealing, it would have been open to him to argue for an extension of the notice period pursuant to the principles laid down in *Wallace*. In short, the appellant was not without legal protections or remedies in the face of his dismissal.

(4) The Proper Approach to the Dismissal of Public Employees

112 In our view, the distinction between office holder and contractual employee for the purposes [page245] of a public law duty of fairness is problematic and should be done away with. The distinction is difficult to apply in practice and does not correspond with the justifications for imposing public law procedural fairness requirements. What is important in assessing the actions of a public employer in relation to its employees is the nature of the employment relationship. Where the relationship is contractual, it should be viewed as any other private law employment relationship regardless of an employee's status as an office holder.

113 The starting point, therefore, in any analysis, should be to determine the nature of the

employment relationship with the public authority. Following *Wells*, it is assumed that most public employment relationships are contractual. Where this is the case, disputes relating to dismissal should be resolved according to the express or implied terms of the contract of employment and any applicable statutes and regulations, without regard for whether the employee is an office holder. A public authority which dismisses an employee pursuant to a contract of employment should not be subject to any additional public law duty of fairness. Where the dismissal results in a breach of contract, the public employee will have access to ordinary contractual remedies.

114 The principles expressed in *Knight* in relation to the general duty of fairness owed by public authorities when making decisions that affect the rights, privileges or interests of individuals are valid and important. However, to the extent that the majority decision in *Knight* ignored the important effect of a contract of employment, it should not be followed. Where a public employee is protected from wrongful dismissal by contract, his or her remedy should be in private law, not in public law.

115 The dismissal of a public employee should therefore generally be viewed as a typical employment law dispute. However, there may be occasions where a public law duty of fairness will still apply. We can envision two such situations at present. The first occurs where a public employee is not, in fact, [page246] protected by a contract of employment. This will be the case with judges, ministers of the Crown and others who "fulfill constitutionally defined state roles" (*Wells*, at para. 31). It may also be that the terms of appointment of some public office holders expressly provide for summary dismissal or, at the very least, are silent on the matter, in which case the office holders may be deemed to hold office "at pleasure" (see e.g. New Brunswick *Interpretation Act*, s. 20; *Interpretation Act*, R.S.C. 1985, c. I-21, s. 23(1)). Because an employee in this situation is truly subject to the will of the Crown, procedural fairness is required to ensure that public power is not exercised capriciously.

116 A second situation occurs when a duty of fairness flows by necessary implication from a statutory power governing the employment relationship. In *Malloch*, the applicable statute provided that dismissal of a teacher could only take place if the teacher was given three weeks' notice of the motion to dismiss. The House of Lords found that this necessarily implied a right for the teacher to make representations at the meeting where the dismissal motion was being considered. Otherwise, there would have been little reason for Parliament to have provided for the notice procedure in the first place (p. 1282). Whether and what type of procedural requirements result from a particular statutory power will of course depend on the specific wording at issue and will vary with the context (*Knight*, at p. 682).

B. *Conclusion*

117 In this case, the appellant was a contractual employee of the respondent in addition to being a public office holder. Section 20 of the *Civil Service Act* provided that, as a civil servant, he could only be dismissed in accordance with the ordinary rules of contract. In these circumstances it was

unnecessary to consider any public law duty of procedural fairness. The respondent was fully within its rights [page247] to dismiss the appellant with pay in lieu of notice without affording him a hearing. The respondent dismissed the appellant with four months' pay in lieu of notice. The appellant was successful in increasing this amount to eight months. The appellant was protected by contract and was able to obtain contractual remedies in relation to his dismissal. By imposing procedural fairness requirements on the respondent over and above its contractual obligations and ordering the full "reinstatement" of the appellant, the adjudicator erred in his application of the duty of fairness and his decision was therefore correctly struck down by the Court of Queen's Bench.

V. Disposition

118 We would dismiss the appeal. There will be no order for costs in this Court as the respondent is not requesting them.

The following are the reasons delivered by

119 BINNIE J.:-- I agree with my colleagues that the appellant's former employment relationship with the respondent is governed by contract. The respondent chose to exercise its right to terminate the employment without alleging cause. The adjudicator adopted an unreasonable interpretation of s. 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1, and of ss. 97(2.1) and 100.1 of the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25. The appellant was a non-unionized employee whose job was terminated in accordance with contract law. Public law principles of procedural fairness were not applicable in the circumstances. These conclusions are enough to dispose of the appeal.

120 However, my colleagues Bastarache and LeBel JJ. are embarked on a more ambitious mission, stating that:

> Although the instant appeal deals with the particular problem of judicial review of the decisions of [page248] an adjudicative tribunal, these reasons will address first and foremost the structure and characteristics of the system of judicial review as a whole.
>
> ...
>
> ... The time has arrived to re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable. [Emphasis added; paras. 33 and 32.]

121 The need for such a re-examination is widely recognized, but in the end my colleagues' reasons for judgment do not deal with the "system as a whole". They focus on administrative tribunals. In that context, they reduce the applicable standards of review from three to two ("correctness" and "reasonableness"), but retain the pragmatic and functional analysis, although

now it is to be called the "standard of review analysis" (para. 63). A broader reappraisal is called for. Changing the name of the old pragmatic and functional test represents a limited advance, but as the poet says:

> What's in a name? that which we call a rose By any other name would smell as sweet;
>
> (*Romeo and Juliet*, Act II, Scene ii)

122 I am emboldened by my colleagues' insistence that "a holistic approach is needed when considering fundamental principles" (para. 26) to express the following views. Judicial review is an idea that has lately become unduly burdened with law office metaphysics. We are concerned with substance not nomenclature. The words themselves are unobjectionable. The dreaded reference to "functional" can simply be taken to mean that generally speaking courts have the last word on what *they* consider the correct decision on legal matters (because deciding legal issues is their "function"), while administrators should generally have the last word within *their* function, which is to decide administrative matters. The word "pragmatic" not only signals a distaste for formalism but recognizes that a conceptually tidy division of functions has to be tempered by [page249] practical considerations: for example, a labour board is better placed than the courts to interpret the intricacies of provisions in a labour statute governing replacement of union workers; see e.g. *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227.

123 Parliament or a provincial legislature is often well advised to allocate an administrative decision to someone other than a judge. The judge is on the outside of the administration looking in. The legislators are entitled to put their trust in the viewpoint of the designated decision maker (particularly as to what constitutes a reasonable outcome), not only in the case of the administrative tribunals of principal concern to my colleagues but (taking a "holistic approach") also in the case of a minister, a board, a public servant, a commission, an elected council or other administrative bodies and statutory decision makers. In the absence of a full statutory right of appeal, the court ought generally to respect the exercise of the administrative discretion, particularly in the face of a privative clause.

124 On the other hand, a court is right to insist that *its* view of the correct opinion (i.e. the "correctness" standard of review) is accepted on questions concerning the Constitution, the common law, and the interpretation of a statute other than the administrator's enabling statute (the "home statute") or a rule or statute closely connected with it; see generally D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at para. 14:2210.

125 Thus the law (or, more grandly, the "rule of law") sets the boundaries of potential administrative action. It is sometimes said by judges that an administrator acting within his or her discretion [page250] "has the right to be wrong". This reflects an unduly court-centred view of the

universe. A disagreement between the court and an administrator does not necessarily mean that the administrator is wrong.

A. *Limits on the Allocation of Decision Making*

126 It should not be difficult in the course of judicial review to identify legal questions requiring disposition by a judge. There are three basic legal limits on the allocation of administrative discretion.

127 Firstly, the Constitution restricts the legislator's ability to allocate issues to administrative bodies which s. 96 of the *Constitution Act, 1867* has allocated to the courts. The logic of the constitutional limitation is obvious. If the limitation did not exist, the government could transfer the work of the courts to administrative bodies that are not independent of the executive and by statute immunize the decisions of these bodies from effective judicial review. The country would still possess an independent judiciary, but the courts would not be available to citizens whose rights or interests are trapped in the administration.

128 Secondly, administrative action must be founded on statutory or prerogative (i.e. common law) powers . This too is a simple idea. No one can exercise a power they do not possess. Whether or not the power (or jurisdiction) exists is a question of law for the courts to determine, just as it is for the courts (not the administrators) to have the final word on questions of general law that may be relevant to the resolution of an administrative issue. The instances where this Court has deferred to an administrator's conclusion of law *outside* his or her home statute, or a statute "intimately" connected thereto, are exceptional. We should say so. Instead, my colleagues say the court's view of the law will prevail

> where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise". [para. 60]

It is, with respect, a distraction to unleash a debate in the reviewing judge's courtroom about whether or not a particular question of law is "of central importance to the legal system as a whole". It should be sufficient to frame a rule exempting from the correctness standard the provisions of the home statute and closely related statutes which require the expertise of the administrative decision maker (as in the labour board example). Apart from that exception, we should prefer clarity to needless complexity and hold that the last word on questions of general law should be left to judges.

[page251]

129 Thirdly, a fair procedure is said to be the handmaiden of justice. Accordingly, procedural limits are placed on administrative bodies by statute and the common law. These include the

requirements of "procedural fairness", which will vary with the type of decision maker and the type of decision under review. On such matters, as well, the courts have the final say. The need for such procedural safeguards is obvious. Nobody should have his or her rights, interests or privileges adversely dealt with by an unjust process. Nor is such an unjust intent to be attributed easily to legislators. Hansard is full of expressions of concern by Ministers and Members of Parliament regarding the fairness of proposed legislative provisions. There is a dated *hauteur* about judicial pronouncements such as that the "justice of the common law will supply the omission of the legislature" (*Cooper v. Wandsworth Board of Works* (1863), 14 C.B. (N.S.) 180, 143 E.R. 414 (C.P.), at p. 420). Generally speaking, legislators and judges in this country are working with a common set of basic legal and constitutional values. They share a belief in the rule of law. Constitutional considerations aside, however, statutory protections can nevertheless be repealed and common law protections can be modified by statute, as was demonstrated in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor [page252] Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52.

B. *Reasonableness of Outcome*

130 At this point, judicial review shifts gears. When the applicant for judicial review challenges the substantive *outcome* of an administrative action, the judge is invited to cross the line into second-guessing matters that lie within the function of the administrator. This is controversial because it is not immediately obvious why a judge's view of the reasonableness of an administrative policy or the exercise of an administrative discretion should be preferred to that of the administrator to whom Parliament or a legislature has allocated the decision, unless there is a full statutory right of appeal to the courts, or it is otherwise indicated in the conferring legislation that a "correctness" standard is intended.

131 In *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, Beetz J. adopted the view that "[t]o a large extent judicial review of administrative action is a specialized branch of statutory interpretation" (p. 1087 (emphasis deleted)). Judicial intervention in administrative decisions on grounds of substance (in the absence of a constitutional challenge) has been based on presumed legislative intent in a line of cases from *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*, [1947] 2 All E.R. 680 (C.A.) ("you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority" (p. 683)) to *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp*. ("was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation ... ?" (p. 237)). More recent examples are *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (para. 53), and *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [page253] [2001] 2 S.C.R. 281, 2001 SCC 41 (paras. 60-61). Judicial review proceeds on the justified presumption that legislators do not intend results that depart from *reasonable* standards.

C. *The Need to Reappraise the Approach to Judicial Review*

132 The present difficulty, it seems, does not lie in the component parts of judicial review, most of which are well entrenched in decades of case law, but in the current methodology for putting those component parts into action. There is afoot in the legal profession a desire for clearer guidance than is provided by lists of principles, factors and spectrums. It must be recognized, of course, that complexity is inherent in all legal principles that must address the vast range of administrative decision making. The objection is that our present "pragmatic and functional" approach is more complicated than is required by the subject matter.

133 People who feel victimized or unjustly dealt with by the apparatus of government, and who have no recourse to an administrative appeal, should have access to an independent judge through a procedure that is quick and relatively inexpensive. Like much litigation these days, however, judicial review is burdened with undue cost and delay. Litigants understandably hesitate to go to court to seek redress for a perceived administrative injustice if their lawyers cannot predict with confidence even what standard of review will be applied. The disposition of the case may well *turn* on the choice of standard of review. If litigants do take the plunge, they may find the court's attention focussed not on their complaints, or the government's response, but on lengthy and arcane discussions of something they are told is the pragmatic and functional test. Every hour of a lawyer's preparation and court time devoted to unproductive "lawyer's talk" poses a significant cost to the applicant. If the challenge is unsuccessful, the unhappy applicant may also [page254] face a substantial bill of costs from the successful government agency. A victory before the reviewing court may be overturned on appeal because the wrong "standard of review" was selected. A small business denied a licence or a professional person who wants to challenge disciplinary action should be able to seek judicial review without betting the store or the house on the outcome. Thus, in my view, the law of judicial review should be pruned of some of its unduly subtle, unproductive, or esoteric features.

D.

Standards of Review

134 My colleagues conclude that three standards of review should be reduced to two standards of review. I agree that this simplification will avoid some of the arcane debates about the point at which "unreasonableness" becomes "patent unreasonableness". However, in my view the repercussions of their position go well beyond administrative tribunals. My colleagues conclude, and I agree:

> Looking to either the magnitude or the immediacy of the defect in the tribunal's decision provides no meaningful way in practice of distinguishing between a patently unreasonable and an unreasonable decision. [para. 41]

More broadly, they declare that "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having

multiple standards of review" (para. 44), and "any actual difference between them in terms of their operation appears to be illusory" (para. 41). A test which is incoherent when applied to administrative tribunals does not gain in coherence or logic when applied to other administrative decision makers such as mid-level bureaucrats or, for that matter, Ministers. If logic and language cannot capture the distinction in one context, it must equally be deficient elsewhere in the field of judicial review. I therefore proceed on the basis that the distinction between "patent unreasonableness" and "reasonableness *simpliciter*" has been declared by the Court [page255] to be abandoned. I propose at this point to examine what I see as some of the implications of this abandonment.

E. *Degrees of Deference*

135 The distinction between reasonableness *simpliciter* and patent unreasonableness was not directed merely to "the magnitude or the immediacy of the defect" in the administrative decision (para. 41). The distinction also recognized that different administrative decisions command different degrees of deference, depending on who is deciding what.

136 A minister making decisions under the *Extradition Act*, R.S.C. 1985, c. E-23, to surrender a fugitive, for example, is said to be "at the extreme legislative end of the *continuum* of administrative decision-making" (*Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, at p. 659). On the other hand, a ministerial delegate making a deportation decision according to ministerial guidelines was accorded considerably less deference in *Baker* (where the "reasonableness *simpliciter*" standard was applied). The difference does not lie only in the judge's view of the perceived immediacy of the defect in the administrative decision. In *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, a unanimous Court adopted the caution in the context of counter-terrorism measures that "[i]f the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove" (para. 33). Administrative decision makers generally command respect more for their expertise than for their prominence in the administrative food chain. Far more numerous are the lesser officials who reside in the bowels and recesses of government departments adjudicating pension benefits or the granting or withholding of licences, or municipal boards poring over budgets or allocating costs of local improvements. Then there are the Cabinet and Ministers of the Crown who make broad decisions of public policy such as testing cruise missiles, *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, or policy decisions [page256] arising out of decisions of major administrative tribunals, as in *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, at p. 753, where the Court said: "The very nature of the body must be taken into account in assessing the technique of review which has been adopted by the Governor in Council."

137 Of course, the degree of deference also depends on the nature and content of the question. An adjudicative tribunal called on to approve pipelines based on "public convenience and necessity" (*Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322) or simply to take a decision in the "public interest" is necessarily accorded more room to manoeuvre than is a

professional body, given the task of determining an appropriate sanction for a member's misconduct (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20).

138 In our recent jurisprudence, the "nature of the question" before the decision maker has been considered as one of a number of elements to be considered in choosing amongst the various standards of review. At this point, however, I believe it plays a more important role in terms of substantive review. It helps to define the range of reasonable outcomes within which the administrator is authorized to choose.

139 The judicial sensitivity to different levels of respect (or deference) required in different situations is quite legitimate. "Contextualizing" a single standard of review will shift the debate (slightly) from choosing *between* two standards of reasonableness that each represent a different level of deference to a debate *within* a single standard of reasonableness to determine the appropriate level of deference. In practice, the result of today's decision may be like the bold innovations of a traffic engineer that in the end do no more than shift rush hour congestion from one road intersection to another [page257] without any overall saving to motorists in time or expense.

140 That said, I agree that the repeated attempts to define and explain the difference between reasonableness *simpliciter* and "patent" unreasonableness can be seen with the benefit of hindsight to be unproductive and distracting. Nevertheless, the underlying issue of degrees of deference (which the two standards were designed to address) remains.

141 Historically, our law recognized "patent" unreasonableness before it recognized what became known as reasonableness *simpliciter*. The adjective "patent" initially underscored the level of respect that was due to the designated decision maker, and signalled the narrow authority of the courts to interfere with a particular administrative *outcome* on substantive grounds. The reasonableness *simpliciter* standard was added at a later date to recognize a reduced level of deference. Reducing three standards of review to two standards of review does not alter the reality that at the high end "patent" unreasonableness (in the sense of manifestly indefensible) was not a bad description of the hurdle an applicant had to get over to have an administrative decision quashed on a ground of substance. The danger of labelling the most "deferential" standard as "reasonableness" is that it may be taken (wrongly) as an invitation to reviewing judges not simply to identify the usual issues, such as whether irrelevant matters were taken into consideration, or relevant matters were not taken into consideration, but to reweigh the input that resulted in the administrator's decision as if it were the judge's view of "reasonableness" that counts. At this point, the judge's role is to identify the outer boundaries of reasonable outcomes within which the administrative decision maker is free to choose.

F. *Multiple Aspects of Administrative Decisions*

142 Mention should be made of a further feature that also reflects the complexity of the subject [page258] matter of judicial review. An applicant may advance several grounds for quashing an administrative decision. He or she may contend that the decision maker has misinterpreted the

general law. He or she may argue, in the alternative, that even if the decision maker got the general law straight (an issue on which the court's view of what is correct will prevail), the decision maker did not properly apply it to the facts (an issue on which the decision maker is entitled to deference). In a challenge under the *Canadian Charter of Rights and Freedoms* to a surrender for extradition, for example, the minister will have to comply with the Court's view of *Charter* principles (the "correctness" standard), but if he or she correctly appreciates the applicable law, the court will properly recognize a wide discretion in the application of those principles to the particular facts. The same approach is taken to less exalted decision makers (*Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11). In the jargon of the judicial review bar, this is known as "segmentation".

G. *The Existence of a Privative Clause*

143 The existence of a privative clause is currently subsumed within the "pragmatic and functional" test as one factor amongst others to be considered in determining the appropriate standard of review, where it supports the choice of the patent unreasonableness standard. A single standard of "reasonableness" cannot mean that the degree of deference is unaffected by the existence of a suitably worded privative clause. It is certainly a relevant contextual circumstance that helps to calibrate the intrusiveness of a court's review. It signals the level of respect that must be shown. Chief Justice Laskin during argument once memorably condemned the quashing of a labour board decision protected by a strong privative clause, by saying "what's wrong with these people [the judges], can't they read?" A system of judicial review based on the rule of law ought not to treat a privative clause as conclusive, but it is more than just another "factor" in the hopper of pragmatism and functionality. Its existence should presumptively foreclose judicial review on the basis of *outcome* on substantive grounds unless the applicant can show that the [page259] clause, properly interpreted, permits it or there is some legal reason why it cannot be given effect.

H. *A Broader Reappraisal*

144 "Reasonableness" is a big tent that will have to accommodate a lot of variables that inform and limit a court's review of the outcome of administrative decision making.

145 The theory of our recent case law has been that once the appropriate standard of review is selected, it is a fairly straightforward matter to apply it. In practice, the criteria for selection among "reasonableness" standards of review proved to be undefinable and their application unpredictable. The present incarnation of the "standard of review" analysis requires a threshold debate about the four factors (non-exhaustive) which critics say too often leads to unnecessary delay, uncertainty and costs as arguments rage before the court about balancing expertise against the "real" nature of the question before the administrator, or whether the existence of a privative clause trumps the larger statutory purpose, and so on. And this is all mere *preparation* for the argument about the actual substance of the case. While a measure of uncertainty is inherent in the subject matter and unavoidable in litigation (otherwise there wouldn't be any), we should at least (i) establish some

presumptive rules and (ii) get the parties away from arguing about the tests and back to arguing about the substantive merits of their case.

146 The going-in presumption should be that the standard of review of any administrative outcome on grounds of substance is not correctness but reasonableness ("contextually" applied). The fact that the legislature designated someone other than the court as the decision maker calls for deference to (or judicial respect for) the outcome, absent a broad statutory right of appeal. Administrative decisions generally call for the exercise of discretion. Everybody recognizes in such cases that there is *no* single "correct" outcome. It should also be [page260] presumed, in accordance with the ordinary rules of litigation, that the decision under review *is* reasonable until the applicant shows otherwise.

147 An applicant urging the non-deferential "correctness" standard should be required to demonstrate that the decision under review rests on an error in the determination of a *legal* issue not confided (or which constitutionally *could* not be confided) to the administrative decision maker to decide, whether in relation to jurisdiction or the general law. Labour arbitrators, as in this case, command deference on legal matters within their enabling statute or on legal matters intimately connected thereto.

148 When, then, should a decision be deemed "unreasonable"? My colleagues suggest a test of *irrationality* (para. 46), but the editors of de Smith point out that "many decisions which fall foul of [unreasonableness] have been coldly rational" (*de Smith, Woolf & Jowell: Judicial Review of Administrative Action* (5th ed. 1995), at para. 13-003). A decision meeting this description by this Court is *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29, where the Minister's appointment of retired judges with little experience in labour matters to chair "interest" arbitrations (as opposed to "grievance" arbitrations) between hospitals and hospital workers was "coldly rational" in terms of the Minister's own agenda, but was held by a majority of this Court to be patently unreasonable in terms of the history, object and purpose of the authorizing legislation. He had not used the appointment power for the purposes for which the legislature had conferred it.

149 Reasonableness rather than rationality has been the traditional standard and, properly interpreted, it works. That said, a single "reasonableness" standard will now necessarily incorporate *both* the degree of deference formerly reflected in the distinction between patent unreasonableness and reasonableness *simpliciter, and* an assessment [page261] of the range of options reasonably open to the decision maker in the circumstances, in light of the reasons given for the decision. Any reappraisal of our approach to judicial review should, I think, explicitly recognize these different dimensions to the "reasonableness" standard.

I. *Judging "Reasonableness"*

150 I agree with my colleagues that "reasonableness" depends on the context. It must be calibrated to fit the circumstances. A driving speed that is "reasonable" when motoring along a four-lane interprovincial highway is not "reasonable" when driving along an inner city street. The

standard ("reasonableness") stays the same, but the reasonableness assessment will vary with the relevant circumstances.

151 This, of course, is the nub of the difficulty. My colleagues write:

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [para. 47]

I agree with this summary but what is required, with respect, is a more easily applied framework into which the judicial review court and litigants can plug in the relevant context. No one doubts that in order to overturn an administrative outcome on grounds of substance (i.e. leaving aside errors of fairness or law which lie within the supervising "function" of the courts), the reviewing court must be satisfied that the outcome was outside the scope of reasonable responses open to the decision maker under its grant of authority, usually a statute. "[T]here is always a perspective", observed Rand J., "within which a statute is intended [by the legislature] to operate": *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140. How is that "perspective" to be ascertained? The reviewing judge will obviously want to consider the precise nature and function of the decision maker including its expertise, the terms and objectives of the governing statute (or common law) conferring the power of decision, including [page262] the existence of a privative clause and the nature of the issue being decided. Careful consideration of these matters will reveal the extent of the discretion conferred, for example, the extent to which the decision formulates or implements broad public policy. In such cases, the range of permissible considerations will obviously be much broader than where the decision to be made is more narrowly circumscribed, e.g., whether a particular claimant is entitled to a disability benefit under governmental social programs. In some cases, the court will have to recognize that the decision maker was required to strike a proper balance (or achieve proportionality) between the adverse impact of a decision on the rights and interests of the applicant or others directly affected weighed against the public purpose which is sought to be advanced. In each case, careful consideration will have to be given to the reasons given for the decision. To this list, of course, may be added as many "contextual" considerations as the court considers relevant and material.

152 Some of these indicia were included from the outset in the pragmatic and functional test itself (see *Bibeault*, at p. 1088). The problem, however, is that under *Bibeault*, and the cases that followed it, these indicia were used to choose among the different standards of review, which were themselves considered more or less fixed. In *Law Society of New Brunswick v. Ryan*, for example, the Court *rejected* the argument that "it is sometimes appropriate to apply the reasonableness standard more deferentially and sometimes less deferentially depending on the circumstances" (para. 43). It seems to me that collapsing everything beyond "correctness" into a single "reasonableness" standard will require a reviewing court to do exactly that.

153 The Court's adoption in this case of a single "reasonableness" standard that covers both the degree of deference assessment and the reviewing court's evaluation, in light of the appropriate degree of deference, of whether the decision falls within a range of reasonable administrative choices will require a reviewing court to juggle a number of variables that are necessarily to be considered [page263] together. Asking courts to have regard to more than one variable is not asking too much, in my opinion. In other disciplines, data are routinely plotted simultaneously along both an *X* axis and a *Y* axis, without traumatizing the participants.

154 It is not as though we lack guidance in the decided cases. Much has been written by various courts about deference and reasonableness in the particular contexts of different administrative situations. Leaving aside the "pragmatic and functional" test, we have ample precedents to show when it is (or is not) appropriate for a court to intervene in the outcome of an administrative decision. The problem is that courts have lately felt obliged to devote too much time to multi-part threshold tests instead of focussing on the who, what, why and wherefor of the litigant's complaint on its merits.

155 That having been said, a reviewing court ought to recognize throughout the exercise that fundamentally the "reasonableness" of the outcome is an issue given to others to decide. The exercise of discretion is an important part of administrative decision making. Adoption of a single "reasonableness" standard should not be seen by potential litigants as a lowering of the bar to judicial intervention.

J. *Application to This Case*

156 Labour arbitrators often have to juggle different statutory provisions in disposing of a grievance. The courts have generally attached great importance to their expertise in keeping labour peace. In this case, the adjudicator was dealing with his "home statute" plus other statutes intimately linked to public sector relations in New Brunswick. He was working on his "home turf", and the legislature has made clear in the privative clause that it intended the adjudicator to determine the outcome of the appellant's grievance. In this field, quick and cheap justice (capped by finality) advances the achievement of the legislative scheme. Recourse to judicial review is discouraged. I would therefore apply a reasonableness standard to the adjudicator's [page264] interpretation of his "home turf" statutory framework.

157 Once under the flag of reasonableness, however, the salient question before the adjudicator in this case was essentially legal in nature, as reflected in the reasons he gave for his decision. He was not called on to implement public policy; nor was there a lot of discretion in dealing with a non-unionized employee. The basic facts were not in dispute. He was disposing of a *lis* which he believed to be governed by the legislation. He was right to be conscious of the impact of his decision on the appellant, but he stretched the law too far in coming to his rescue. I therefore join with my colleagues in dismissing the appeal.

The reasons of Deschamps, Charron and Rothstein JJ. were delivered by

158 DESCHAMPS J.:-- The law of judicial review of administrative action not only requires repairs, it needs to be cleared of superfluous discussions and processes. This area of the law can be simplified by examining the *substance* of the work courts are called upon to do when reviewing any case, whether it be in the context of administrative or of appellate review. Any review starts with the identification of the questions at issue as questions of law, questions of fact or questions of mixed fact and law. Very little else needs to be done in order to determine whether deference needs to be shown to an administrative body.

159 By virtue of the Constitution, superior courts are the only courts that possess inherent jurisdiction. They are responsible both for applying the laws enacted by Parliament and the legislatures and for insuring that statutory bodies respect their legal boundaries. Parliament and the legislatures cannot totally exclude judicial oversight without overstepping the division between legislative or executive powers and judicial powers. Superior courts are, in the end, the protectors of the integrity of the rule of law and the justice system. [page265] Judicial review of administrative action is rooted in these fundamental principles and its boundaries are largely informed by the roles of the respective branches of government.

160 The judicial review of administrative action has, over the past 20 years, been viewed as involving a preliminary analysis of whether deference is owed to an administrative body based on four factors: (1) the nature of the question, (2) the presence or absence of a privative clause, (3) the expertise of the administrative decision maker and (4) the object of the statute. The process of answering this preliminary question has become more complex than the determination of the substantive questions the court is called upon to resolve. In my view, the analysis can be made plainer if the focus is placed on the issues the parties need to have adjudicated rather than on the nature of the judicial review process itself. By focusing first on "the nature of the question", to use what has become familiar parlance, it will become apparent that all four factors need not be considered in every case and that the judicial review of administrative action is often not distinguishable from the appellate review of court decisions.

161 Questions before the courts have consistently been identified as either questions of fact, questions of law or questions of mixed fact and law. Whether undergoing appellate review or administrative law review, decisions on questions of fact always attract deference. The use of different terminology -- "palpable and overriding error" versus "unreasonable decision" -- does not change the substance of the review. Indeed, in the context of appellate review of court decisions, this Court has recognized that these expressions as well as others all encapsulate the same principle of deference with respect to a trial judge's findings of fact: *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, at paras. 55-56. Therefore, when the issue is limited to questions of fact, there is no need to enquire into any other factor in order to determine that deference is owed to an administrative decision maker.

162 Questions of law, by contrast, require more thorough scrutiny when deference is evaluated, [page266] and the particular context of administrative decision making can make judicial review

different than appellate review. Although superior courts have a core expertise to interpret questions of law, Parliament or a legislature may have provided that the decision of an administrative body is protected from judicial review by a privative clause. When an administrative body is created to interpret and apply certain legal rules, it develops specific expertise in exercising its jurisdiction and has a more comprehensive view of those rules. Where there is a privative clause, Parliament or a legislature's intent to leave the final decision to that body cannot be doubted and deference is usually owed to the body.

163 However, privative clauses cannot totally shield an administrative body from review. Parliament, or a legislature, cannot have intended that the body would be protected were it to overstep its delegated powers. Moreover, if such a body is asked to interpret laws in respect of which it does not have expertise, the constitutional responsibility of the superior courts as guardians of the rule of law compels them to insure that laws falling outside an administrative body's core expertise are interpreted correctly. This reduced deference insures that laws of general application, such as the Constitution, the common law and the *Civil Code*, are interpreted correctly and consistently. Consistency of the law is of prime societal importance. Finally, deference is not owed on questions of law where Parliament or a legislature has provided for a statutory right of review on such questions.

164 The category of questions of mixed fact and law should be limited to cases in which the determination of a legal issue is inextricably intertwined with the determination of facts. Often, an administrative body will first identify the rule and then apply it. Identifying the contours and the content of a legal rule are questions of law. Applying the rule, however, is a question of mixed fact and law. When considering a question of mixed fact and law, a reviewing court should show an adjudicator the same deference as an appeal court would show a lower court.

[page267]

165 In addition, Parliament or a legislature may confer a discretionary power on an administrative body. Since the case at bar does not concern a discretionary power, it will suffice for the purposes of these reasons to note that, in any analysis, deference is owed to an exercise of discretion unless the body has exceeded its mandate.

166 In summary, in the adjudicative context, the same deference is owed in respect of questions of fact and questions of mixed fact and law on administrative review as on an appeal from a court decision. A decision on a question of law will also attract deference, provided it concerns the interpretation of the enabling statute and provided there is no right of review.

167 I would be remiss were I to disregard the difficulty inherent in any exercise of deference. In *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63, LeBel J. explained why a distinction between the standards of patent unreasonableness and unreasonableness *simpliciter* is

untenable. I agree. The problem with the definitions resides in attempts by the courts to enclose the concept of reasonableness in a formula fitting all cases. No matter how this Court defines this concept, any context considered by a reviewing court will, more often than not, look more like a rainbow than a black and white situation. One cannot change this reality. I use the word "deference" to define the contours of reasonableness because it describes the attitude adopted towards the decision maker. The word "reasonableness" concerns the decision. However, neither the concept of reasonableness nor that of deference is particular to the field of administrative law. These concepts are also found in the context of criminal and civil appellate review of court decisions. Yet, the exercise of the judicial supervisory role in those fields has not given rise to the complexities encountered in administrative law. The process of stepping back and taking an *ex post facto* look at the decision to determine whether there is an error justifying intervention should not be more [page268] complex in the administrative law context than in the criminal and civil law contexts.

168 In the case at bar, the adjudicator was asked to adjudicate the grievance of a non-unionized employee. This meant that he had to identify the rules governing the contract. Identifying those rules is a question of law. Section 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1, incorporates the rules of the common law, which accordingly become the starting point of the analysis. The adjudicator had to decide whether those rules had been ousted by the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25 ("*PSLRA*"), as applied, *mutatis mutandis*, to the case of a non-unionized employee (ss. 97(2.1), 100.1(2) and 100.1(5)). The common law rules relating to the dismissal of an employee differ completely from the ones provided for in the *PSLRA* that the adjudicator is regularly required to interpret. Since the common law, not the adjudicator's enabling statute, is the starting point of the analysis, and since the adjudicator does not have specific expertise in interpreting the common law, the reviewing court does not have to defer to his decision on the basis of expertise. This leads me to conclude that the reviewing court can proceed to its own interpretation of the rules applicable to the non-unionized employee's contract of employment and determine whether the adjudicator could enquire into the cause of the dismissal. The applicable standard of review is correctness.

169 It is clear from the adjudicator's reasoning that he did not even consider the common law rules. He said:

> An employee to whom section 20 of the *Civil Service Act* and section 100.1 of the *PSLR Act* apply may be discharged for cause, with reasonable notice or with severance pay in lieu of reasonable notice. A discharge for cause may be for disciplinary or non-disciplinary reasons. [p. 5]

170 The employer's common law right to dismiss without cause is not alluded to in this key passage of the decision. Unlike a unionized employee, a non-unionized employee does not have employment security. His or her employment may be terminated without cause. The corollary of the [page269] employer's right to dismiss without cause is the employee's right to reasonable notice or to compensation in lieu of notice. The distinction between the common law rules of employment

and the statutory rules applicable to a unionized employee is therefore essential if s. 97(2.1) is to be applied *mutatis mutandis* to the case of a non-unionized employee as required by s. 100.1(5). The adjudicator's failure to inform himself of this crucial difference led him to look for a cause, which was not relevant in the context of a dismissal without cause. In a case involving dismissal without cause, only the amount of the compensation or the length of the notice is relevant. In a case involving dismissal for cause, the employer takes the position that no compensation or notice is owed to the employee. This was not such a case. In the case at bar, the adjudicator's role was limited to evaluating the length of the notice. He erred in interpreting s. 97(2.1) in a vacuum. He overlooked the common law rules, misinterpreted s. 100.1(5) and applied s. 97(2.1) literally to the case of a non-unionized employee.

171 This case is one where, even if deference had been owed to the adjudicator, his interpretation could not have stood. The legislature could not have intended to grant employment security to non-unionized employees while providing only that the *PSLRA* was to apply *mutatis mutandis*. This right is so fundamental to an employment relationship that it could not have been granted in so indirect and obscure a manner.

172 In this case, the Court has been given both an opportunity and the responsibility to simplify and clarify the law of judicial review of administrative action. The judicial review of administrative action need not be a complex area of law in itself. Every day, reviewing courts decide cases raising multiple questions, some of fact, some of mixed fact and law and some purely of law; in various contexts, the first two of these types of questions tend to require deference, while the third often does not. Reviewing courts are already amply equipped to resolve such questions and do not need a specialized analytical toolbox in order to review administrative decisions.

[page270]

173 On the issue of natural justice, I agree with my colleagues. On the result, I agree that the appeal should be dismissed.

* * * * *

APPENDIX

Relevant Statutory Provisions

Civil Service Act, S.N.B. 1984, c. C-5.1

> **20** Subject to the provisions of this Act or any other Act, termination of the employment of a deputy head or an employee shall be governed by the ordinary rules of contract.

Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25

92(1) Where an employee has presented a grievance up to and including the final level in the grievance process with respect to

(*a*) the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award, or

(*b*) disciplinary action resulting in discharge, suspension or a financial penalty, and his grievance has not been dealt with to his satisfaction, he may, subject to subsection (2), refer the grievance to adjudication.

Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25, as amended

97(2.1) Where an adjudicator determines that an employee has been discharged or otherwise disciplined by the employer for cause and the collective agreement or arbitral award does not contain a specific penalty for the infraction that resulted in the employee being discharged or otherwise disciplined, the adjudicator may substitute such other penalty for the discharge or discipline as to the adjudicator seems just and reasonable in all the circumstances.

...

100.1(2) An employee who is not included in a bargaining unit may, in the manner, form and within such time as may be prescribed, present to the employer a [page271] grievance with respect to discharge, suspension or a financial penalty.

100.1(3) Where an employee has presented a grievance in accordance with subsection (2) and the grievance has not been dealt with to the employee's satisfaction, the employee may refer the grievance to the Board who shall, in the manner and within such time as may be prescribed, refer the grievance to an adjudicator appointed by the Board.

...

100.1(5) Sections 19, 97, 98.1, 101, 108 and 111 apply *mutatis mutandis* to an adjudicator to whom a grievance has been referred in accordance with subsection (3) and in relation to any decision rendered by such adjudicator.

...

101(1) Except as provided in this Act, every order, award, direction, decision, declaration or ruling of the Board, an arbitration tribunal or an adjudicator is final and shall not be questioned or reviewed in any court.

101(2) No order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, judicial review, or otherwise, to question, review, prohibit or restrain the Board, an arbitration tribunal or an adjudicator in any of its or his proceedings.

Solicitors:

Solicitors for the appellant: Stewart McKelvey, Fredericton.

Solicitor for the respondent: Attorney General of New Brunswick, Fredericton.

cp/e/qllls

Canadian Transportation Agency

Decision No. 268-C-A-2007

May 25, 2007

IN THE MATTER of a complaint filed by Stephen Kirkham alleging that Air Canada failed to apply the terms and conditions of its tariff in respect of denied boarding for Flight No. AC569 from Los Angeles, California, United States of America to Calgary, Alberta, Canada on August 20, 2005, and to make its tariffs available for inspection.

File No. M4370/07-00030

COMPLAINT

[1] On September 6, 2005, Stephen Kirkham filed with the Complaints Investigation Division (hereinafter the CID) the complaint set out in the title.

[2] Given that the parties were unable to reach a satisfactory agreement, Mr. Kirkham advised on January 5, 2007, that he wished to pursue this matter formally before the Canadian Transportation Agency (hereinafter the Agency).

[3] In a letter dated January 17, 2007, the parties were advised of the Agency's jurisdiction in this matter. In that same letter, the parties were requested to advise whether they agreed that the comments that they had filed with the CID be considered as pleadings before the Agency.

[4] On January 24, 2007, Air Canada advised that it wished to file additional comments or documents in response to Mr. Kirkham's complaint, and therefore did not agree that its comments filed with the CID be considered as pleadings before the Agency. On that same day, Mr. Kirkham filed a further submission.

[5] Pleadings were opened on February 13, 2007.

[6] On March 13, 2007, Air Canada requested a 30-day extension to file its answer. In Decision No. LET-C-A-47-2007 dated March 16, 2007, the Agency granted an extension until March 23, 2007 only and on March 22, 2007, Air Canada filed its answer.

[7] On April 2, 2007, Mr. Kirkham confirmed that his comments filed with the CID should be considered as pleadings before the Agency. Mr. Kirkham also submitted additional comments.

[8] Pursuant to subsection 29(1) of the *Canada Transportation Act*, S.C., 1996, c. 10 (hereinafter the CTA), the Agency is required to make its decision no later than 120 days after the application is received

88 unless the parties agree to an extension. In this case, the parties have agreed to an extension of the deadline until May 26, 2007.

ISSUES

[9] The issues to be addressed are whether:

1. Air Canada has applied the terms and conditions of carriage relating to failure to operate according to schedule and denied boarding, respectively, appearing in the *Canadian General Rules Tariff No. CGR-1, NTA(A) No. 241*, Airline Tariff Publishing Company Agent (hereinafter the Tariff), as required by subsection 110(4) of the *Air Transportation Regulations*, SOR/88-58, as amended (hereinafter the ATR);
2. Air Canada has complied with section 116 of the ATR relating to availability of and access to tariffs.

FACTS

[10] Mr. Kirkham purchased through Air Canada's Web site a non-refundable ticket for carriage on Air Canada Flight No. AC4023 on August 19, 2005, a code-share flight that was to be operated by United Air Lines, Inc. (hereinafter United) from San Francisco, California, United States of America to Calgary. The purpose of the trip was to attend a family wedding. After Mr. Kirkham boarded the flight, the aircraft encountered mechanical difficulties and although another aircraft was substituted, the flight was ultimately cancelled as the crew had exceeded their legal working hours. United re-routed Mr. Kirkham to Los Angeles for onward transportation to Calgary on United Flight No. UA8612, operated under a code-share as Air Canada Flight No. AC569, on August 20, 2005. United arranged for overnight accommodation in Los Angeles for Mr. Kirkham.

[11] Mr. Kirkham was holding a confirmed reservation for Air Canada Flight No. AC569, but was not permitted to travel. In Los Angeles, Mr. Kirkham was not provided with compensation for denied boarding, out-of-pocket expenses or alternate transportation. Mr. Kirkham subsequently purchased a one-way ticket from WestJet to travel from Los Angeles to Calgary.

[12] Mr. Kirkham is seeking compensation in the amount of CAD$371.19 for his original Air Canada ticket, US$371.10 for the WestJet ticket, CAD$90.20 for a cancelled Hertz car rental reservation, US$25 for two meals, and US$25 in cellular telephone charges.

POSITIONS OF THE PARTIES

[13] Mr. Kirkham states that when he arrived at the check-in counter for Air Canada Flight No. AC569, the agent refused to check him in because the flight was oversold. Mr. Kirkham adds that he was not allowed to stand by for the flight, that in response to his request, Air Canada indicated that it was not possible to request passengers to voluntarily relinquish their seats, and that the Air Canada agent advised him to

speak with United as it had made the changes to his travel arrangements. Mr. Kirkham asserts that Air Canada's failure to ask passengers to voluntarily relinquish their seats, to deny boarding on the basis of reverse order of check-in, to offer compensation for denied boarding, and to provide him with a written notice relating to denied boarding, constitute a contravention of the carrier's Tariff.

[14] Mr. Kirkham submits that he approached United regarding his inability to board Air Canada Flight No. AC569. United stated that the only seats available to Calgary that day were on Air Canada in Business Class on a flight leaving shortly after noon, and that Mr. Kirkham should go back to Air Canada as his ticket had been purchased from Air Canada.

[15] Mr. Kirkham submits that while waiting for assistance from United, he checked with WestJet and was advised that seats were available on its next flight at 11:25 a.m. that day.

[16] Mr. Kirkham states then when he returned to the Air Canada counter he was advised that the next available seats to Calgary were not until the following morning. Mr. Kirkham maintains that his request to Air Canada to be booked on WestJet was denied due to the fact that Air Canada and WestJet do not have an agreement in place to handle passengers in situations similar to Mr. Kirkham's.

[17] Mr. Kirkham asserts that, subsequent to his travel, he attempted on several occasions to obtain or inspect Air Canada's Tariff, but to no avail. Mr. Kirkham submits that Air Canada's Web site does not contain the relevant tariff information, that the carrier's telephone reservation line simply refers consumers seeking tariff information to the carrier's Web site, and that in response to his inquiries, he was told that the information is not available or does not exist. Mr. Kirkham maintains that Air Canada personnel at the Calgary and Edmonton airports were either unaware of the carrier's tariffs or were unable to produce a copy of such tariffs for inspection.

[18] Air Canada maintains that although Mr. Kirkham did have a confirmed reservation, he did not have an assigned seat on Flight No. AC569. Air Canada submits that it is impossible to reconstruct the events that unfolded more than 18 months ago but it believes that the flight was not overbooked. Although its records indicate that Flight No. AC569 departed full, there were "no denied boarding passengers on the flight". In spite of this assertion, in a letter dated April 5, 2006 from Beverly England of Air Canada Customer Solutions to the CID, it is stated, in part:

> In reviewing our records Mr. Kirkham did have a confirmed booking for UA8612 operated as AC569 on August 20 to Calgary however this flight was full when Mr. Kirkham presented himself at check-in and as he did not have assigned seating he was unfortunately denied boarding. I have not been able to determine why he was not provided with the denied boarding compensation as per our tariff, however I will now send Mr. Kirkham the USD200.00 travel voucher that should have been issued.

[19] Air Canada submits that it provided Mr. Kirkham with a travel voucher in the amount of CAD$200 in lieu of denied boarding compensation, that it credited CAD$173.32 to Mr. Kirkham for the unused portion of his ticket, that in accordance with the Tariff, it offered a CAD$346.64 refund to Mr. Kirkham, an amount representing 200 percent of the value of the unused portion of the Air Canada ticket, provided that Mr.

90 Kirkham return the travel voucher, and that as a gesture of goodwill, 25,000 Aeroplan miles were credited to his account. Air Canada points out that Mr. Kirkham has failed to return the travel voucher and the refund of CAD$346.64 was therefore not issued by Air Canada.

[20] Air Canada submits that neither its Web site nor reservation line constitutes a "business office" as they do not qualify as a "place" within the meaning of section 2 of the ATR. Air Canada points out that Mr. Kirkham received assistance regarding the carrier's tariffs from Air Canada's Customer Relation Department and its office at the Edmonton airport and was provided with a copy of the Tariff. Air Canada further notes that its tariffs are available at the Calgary airport. Air Canada filed affidavits by some of its personnel based in Alberta, attesting to the availability of tariffs.

[21] Mr. Kirkham maintains that the Tariff eventually provided to him at the Edmonton airport did not contain all the pages which set out the rules he was interested in, that Air Canada failed to post a notice at the Edmonton airport advising as to where tariffs are kept and when they may be inspected, and that a copy of the Tariff that Air Canada later provided him was outdated.

APPLICABLE LEGISLATIVE AND REGULATORY PROVISIONS

[22] The Agency's jurisdiction in the present matter is set out in section 2, subsection 110(4), section 113.1 and section 116 of the ATR.

[23] Section 2 of the ATR includes the following definition:

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

[24] Subsection 110(4) of the ATR provides that:

> 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.

[25] Section 113.1 of the ATR states:

> Where a licensee fails to apply the fares, rates, charges, terms or conditions of carriage applicable to the international service it offers that were set out in its tariffs, the Agency may

(*a*) direct the licensee to take corrective measures that the Agency considers appropriate; and

(*b*) direct the licensee to pay compensation for any expense incurred by a person adversely affected by the licensee's failure to apply the fares, rates, charges, terms or conditions of carriage applicable to the international service it offers that were set out in its tariffs.

[26] Section 116 of the ATR states:

(1) Every air carrier shall, immediately on filing a tariff with the Agency and thereafter while the tariff remains in effect, keep available for public inspection at each of its business offices a true copy of every tariff in which the air carrier participates that applies to the international services to or from the point where the business office is situated.

(2) Every air carrier shall, in a prominent location in each of the carrier's business offices, post a notice

(*a*) directing attention to the place where the tariffs are kept; and

(*b*) indicating the business hours during which the tariffs may be inspected by members of the public.

(3) Every air carrier shall, for a period of three years after the date of any cancellation of a tariff participated in by the carrier, keep a copy of that tariff at the principal place of business in Canada of the carrier or at the place of business in Canada of the carrier's agent.

The Tariff provisions

[27] The terms and conditions of carriage set out in Rules 240 and 245 of the Tariff provide, in part:

Rule 240AC FAILURE TO OPERATE ON SCHEDULE (Applicable to confirmed and Ticketed Reservations)

(A) **General** The provisions of this rule apply only to a passenger who holds a confirmed reservation and has a ticket which he does not use for one/any of the reasons contained in this rule.

(B) **Definitions**

For the purpose of this rule, the following definitions apply:

(1) Comparable air transportation is that which is provided by air carriers holding certificates of public convenience and necessity.

92

...

(9) In the event the carrier is a codeshare carrier and the operating carrier fails to operate according to schedule, fails to stop at a point to which the passenger is destined or is ticketed to stopover, substitutes a different type of equipment or class or service, is unable to provide previously confirmed space, causes a passenger to miss a connecting flight on which he holds a reservation, or the passenger is refused or removed in accordance with Rule 0035 (Refusal to Transport) carrier will as the passenger's sole remedy, if the operating carrier fails to do so,

(a) carry the passenger on another of its passenger aircraft on which space is available without additional change regardless of the class of service; or

(b) endorse to another carrier or transportation service, the unused portion of the ticket for purposes of re-routing; or

(c) reroute the passenger to the destination named on the ticket or applicable portion thereof by its own or other transportation services; and if the fare for the revised routing or class of service is higher than the refund value of the ticket or applicable portion thereof as determined from Rule 260 (Refunds, Involuntary), carrier will require no additional payment from the passenger but will refund the difference if it is lower; or

(d) Make involuntary refund in accordance with Rule 260 (Refunds, Involuntary).

Rule 245AC DENIED BOARDING COMPENSATION - PART I

(Applicable for transportation from a point in the United States to the point of destination or first point of stopover in Canada.)

When the carrier is unable to provide previously confirmed space due to more passengers holding confirmed reservations and tickets on a flight than there are available seats on that flight, the carrier will take the actions specified in the provisions of this rule.

(A) DEFINITIONS

For the purpose of this rule, definitions of the following terms are as indicated.

...

(2) **Alternate transportation** means air transportation provided by an airline licensed by the C.A.B. or other transportation used by the passenger which, at the time of the arrangement is made, is planned to arrive at the passengers next scheduled stopover (of 4 hours or longer) or destination no later than 4 hours after the passengers originally scheduled arrival time.

(3) **Carrier** means (a) a direct air carrier, except a helicopter operator, holding a certificate issued by the Board pursuant to Section 401(d)(1), 401(d)(2), 401(d)(5), or 401(d)(8) of the Act or a Class 1, 2, 3, 8, 9-2 or 9-3 Commercial Air Service License

issued by the CTC(A) pursuant to Section 16(3) of the Aeronautics Act authorizing the transportation of persons; or (b) a foreign route air carrier holding a permit issued by the Board pursuant to Section 402 of the Act, or an exemption from Section 402 of the Act, Class 8, 9, 9-2 or 9-3 Commercial Air Service License issued by the CTC(A) pursuant to Section 16(3) of the Aeronautics Act, authorizing the transportation of persons.

(4) **Comparable Air Transportation** means transportation provided to passengers at no extra cost by a carrier as defined above.

...

(B) REQUEST FOR VOLUNTEERS

The carrier will request passengers who are willing to do so, to voluntarily relinquish their confirmed reserved space in exchange for compensation in an amount determined by the carrier. If a passenger is asked to volunteer, the carrier will not later deny boarding to that passenger involuntarily unless that passenger was informed at the time he was asked to volunteer that there was a possibility of being denied boarding involuntarily and of the amount of compensation to which he would have been entitled in that event. The request for volunteers and the selection of such persons to be denied space shall be in a manner determined solely by the carrier.

NOTE: Passengers who volunteer to relinquish their confirmed reserved space will be offered a miscellaneous charges order ticket for free air transportation issued in the name of the passenger who volunteered and valid for 365 days from the date of issuance. The miscellaneous charges order/ticket is nontransferable, has no refund value, and may be voluntarily rerouted and reissued by AC. The value of the miscellaneous charges order/ticket will be equal to the value of the coupon(s) remaining to on-line or interline destinations or next stopover point.

(C) BOARDING PRIORITIES

If a flight is oversold (more passengers hold confirmed reservations than there are seats available), no one may be denied boarding against his will until airline personnel first ask for volunteers who will give up their reservations willingly, in exchange for a payment of the airline's choosing.

If there are not enough volunteers, other passenger may be denied boarding involuntarily, beginning with the last passenger to arrive at the ticket lift point, except passengers travelling due to death or illness or(sic) a member of the passenger's family, aged passengers or unaccompanied children.

(D) TRANSPORTATION FOR PASSENGER DENIED BOARDING

When the carrier is unable to provide previously confirmed space the carrier causing the passenger to be delayed will provide transportation to persons who have been

94

denied boarding, whether voluntarily or involuntarily, in accordance with the provisions below.

(1) Carrier will transport the passenger without stopover on its next flight on which space is available at no additional cost to the passenger regardless of class of service.

(2) If the carrier causing such delay is unable to provide onward transportation acceptable to the passenger, any other carrier or combination of carriers, at the request of the passenger, will transport the passenger without stopover on its (their) next flight(s) in the same class of service as the passenger's original outbound flight, or if space is available on a flight(s) of a different class of service acceptable to the passenger, such flight(s) will be used without stopover at no additional cost to the passenger only if it (they) will provide an earlier arrival at the passenger's destination, next stopover point, or transfer point.

(E) COMPENSATION FOR INVOLUNTARY DENIED BOARDING

In addition to providing transportation as described in paragraph (D) above, when the passenger who is delayed has not voluntarily relinquished confirmed reserved space in accordance with provisions in paragraph (B) above, the carrier causing the delay will compensate the delayed passenger for the carrier's failure to provide confirmed space. Compensation will be made in accordance with the provisions below.

(1) **Conditions for Payment**

(a) The passenger holding a ticket for confirmed reserved space must present himself for carriage at the appropriate time and place, having complied fully with the carrier's requirements as to ticketing, check-in, and reconfirmation procedures and having met all requirements for acceptance for transportation published in carrier's tariff.

(b) The flight for which the passenger holds confirmed space must be unable to accommodate the passenger and departs without him.

EXCEPTION 1: The passenger will not be eligible for compensation if he is offered accommodations or is seated in a section of the aircraft other than that specified on his ticket at no extra charge. If a passenger is seated in a section for which a lower fare applies the passenger shall be entitled to an appropriate refund.

EXCEPTION 2: The passenger will not be eligible for compensation if his reservation has been cancelled pursuant to Rule 135(C) **Airport Check-In Time Limits**.

EXCEPTION 3: The passenger will not be eligible for compensation if the flight on which he holds confirmed reserved space is unable to accommodate him because the flight is cancelled.

EXCEPTION 4: The passenger will not be eligible for denied boarding compensation if:

(i) the flight for which the passenger holds confirmed reserved space is unable to accommodate him because of substitution of equipment of lesser capacity when required by operational or safety reasons, or

(ii) the carrier arranges comparable air transportation, or other transportation used by the passenger at no extra cost to the passenger, that at the time such arrangements are made is planned to arrive at the passenger's next stopover or, if none, final destination within one hour after the scheduled arrival time of the passenger's original flight or flights.

(2) (a) Amount of Compensation

Subject to the provisions of (E)(1) above, the carrier will tender liquidated damages in the amount of 200% of the sum of the values of the passengers remaining flight coupons of the ticket to the passenger's next stopover or, if none, to his destination, but not more than USD 400.00 or CAD X. However, the compensation shall be 50% of the amount described above, but not more than USD 200.00 or CAD X if the carrier arranges for comparable air transportation, or for other transportation that is accepted, that is, used, by the passenger, which, at the time either arrangement is made, is planned to arrive at the airport of the passenger's next stopover, or if none, at the airport of the passenger's destination not later than four hours after the planned arrival at the airport of the passenger's next point of stopover, or, if there is no next point of stopover, at the airport of the passenger's destination, of the flight on which the passenger holds a confirmed reservation.

NOTE 1: If the offer of compensation is made by the carrier and accepted by the passenger, such payment shall constitute full compensation for all actual or anticipatory damages incurred or to be incurred by the passenger as a result of the carrier's failure to provide passenger with confirmed reserved space.

NOTE 2: Subject to the passenger's approval, carrier will compensate the passenger with credit valid for the purchase of transportation in lieu of monetary compensation. The credit issued will be for a value equal to or greater than the monetary compensation. Such credit will be non-transferable, non-refundable and valid for one year from the date of issue.

(3) Time of Offer of Compensation

The offer of compensation will be made by the carrier on the day and at the place where the failure to provide confirmed reserved space occurs, and, if accepted, will be receipted for by the passenger. Provided, however, that when the carrier arranges, for the passenger's convenience, alternate means of transportation that departs prior to the time the offer can be made to the passenger, the offer shall be

96

made by mail or other means within 24 hours after the time the denied boarding occurs.

(F) NOTICE PROVIDED PASSENGERS (*sic*)

The following written notice shall be provided all passengers who are denied boarding involuntarily on flights on which they hold confirmed reserved space. Blanks that appear in parentheses in the notice below will be completed in the actual notice provided passengers, with the full name of the applicable carrier and with specific boarding priorities for each carrier, as is appropriate.

...

ANALYSIS AND FINDINGS

[28] In making its findings, the Agency has considered all of the evidence submitted by the parties during the pleadings. The Agency has also reviewed the applicable terms and conditions of carriage specified in Air Canada's Tariff.

1. Have the terms and conditions of Air Canada's Tariff relating to failure to operate on schedule been properly applied, as required by subsection 110(4) of the ATR?

[29] Air Canada Flight No. AC4023, operated by United, experienced mechanical difficulties prior to its anticipated departure from San Francisco. A replacement aircraft was subsequently arranged, but the flight was ultimately cancelled because the flight crew had exceeded their maximum hours on duty.

[30] United was unable to provide direct service from San Francisco to Calgary that was acceptable to Mr. Kirkham, but was able to provide acceptable transportation on United to Los Angeles with a connection the following morning to Calgary on Air Canada Flight No. AC569.

[31] Subparagraph (B)(9) of Rule 240AC of the Tariff sets out the terms and conditions of carriage that apply when there is a failure to operate according to schedule. The Agency is of the opinion that in providing acceptable transportation to Mr. Kirkham for carriage from San Francisco, this provision has been properly applied.

97

2. Did Air Canada properly apply the terms and conditions of the Tariff with respect to denied boarding and denied boarding compensation, as required by subsection 110(4) of the ATR?

a) Was Mr. Kirkham denied boarding?

[32] Rule 245AC of the Tariff states that denied boarding occurs "When, the carrier is unable to provide previously confirmed space due to more passengers holding confirmed reservations and tickets on a flight than there are available seats on that flight...".

[33] Air Canada submitted that Mr. Kirkham had a confirmed reservation for Flight No. UA8612, operated by Air Canada as Flight No. AC569, departing from Los Angeles on August 20, 2005, but that he did not have a seat assignment. Air Canada could not confirm that the aforementioned flight was overbooked. The carrier's records indicate that the flight was full, but there is no indication that it was overbooked.

[34] The Agency has carefully considered this matter and is of the opinion that, based on the evidence on file, and with particular reference to Beverly England's letter dated April 5, 2006, Mr. Kirkham was denied boarding on August 20, 2005 for Flight No. AC569. As such, the Agency finds that Air Canada failed to apply the terms and conditions of carriage relating to denied boarding, as set out in Rule 245AC of the Tariff thereby contravening subsection 110(4) of the ATR.

b) What compensation is due Mr. Kirkham?

[35] Subparagraph (E)(2)(a) of Rule 245AC of the Tariff provides that, in the event of denied boarding, Air Canada will tender to the passenger a payment equal to the sum of 200 percent of the face value of the ticket, up to a maximum of US$400. As Air Canada has determined that the face value of the unused ticket coupon is CAD$173.32, the Agency finds that Mr. Kirkham is entitled to denied boarding compensation in the amount of CAD$346.64.

[36] The evidence on file does not indicate that Air Canada followed the procedures relating to denied boarding that are set out in Rule 245AC cited above, including requesting volunteers to relinquish their seats, denying boarding on the basis of reverse order of check-in, and arranging alternate transportation.

[37] Mr. Kirkham submitted that as a result of Air Canada's failure to follow these procedures, he incurred the following expenses: US$371.10 for a WestJet ticket, CAD$90.20 for a cancelled Hertz car rental reservation, US$25 for two meals, and US$25 in cellular telephone charges.

[38] The Agency finds that as a result of Air Canada's failure to properly apply the terms and conditions of the Tariff, Mr. Kirkham incurred the expense of US$371.10 for the WestJet ticket that he purchased for one-way travel from Los Angeles to Calgary on August 20, 2005. The Agency also finds that the expenses that Mr. Kirkham incurred for two meals, totalling an amount of US$25, and for cellular telephone charges, amounting to US$25, constitute expenses that arose as a result of Air Canada's failure to apply the Tariff

98 and that these expenses, for which receipts were not provided, are not unreasonable. With respect to the claim in the amount of CAD$90.20 for a cancelled Hertz car rental reservation, Mr. Kirkham did not provide the Agency with any evidence to substantiate this expense and therefore the Agency dismisses this claim.

[39] The Agency notes that Air Canada has already credited CAD$173.32 to Mr. Kirkham, an amount that represents the value of the unused portion of his ticket and provided a voucher in the amount of US$200.

[40] In view of the foregoing, the Agency finds that Mr Kirkham is entitled to compensation for being denied boarding in the amount of CAD$346.64, and expenses covering air transportation, meals and telephone services in the amount of CAD$510.33, less the refund of CAD$173.32 that Air Canada has already provided to Mr. Kirkham, for a total amount of CAD$683.65.

3. Did Air Canada make its tariffs available for inspection as required by subsection 116(1) of the ATR?

[41] Mr. Kirkham stated that he had unsuccessfully attempted to obtain or inspect Air Canada tariffs through Air Canada's Web site, its telephone reservation line and the carrier's offices at the Calgary and Edmonton airports.

[42] Air Canada submitted that its Customer Relations department provided Mr. Kirkham with a copy of the carrier's tariffs. Furthermore, it provided sworn affidavits from employees who are based at the airports in question, stating that the tariffs are available for inspection.

[43] The Agency is of the opinion that the evidence on file relating to the availability of tariffs at Calgary and Edmonton airports is inconsistent. As such, the Agency is unable to make a determination respecting the matter.

[44] Air Canada maintained that its Web site and telephone reservation line are not business offices as neither qualifies as a "place" within the meaning of the definition of "business office" appearing in section 2 of the ATR, and therefore it is not obligated to post its tariffs on the Web site or make the tariffs available through the telephone reservation line.

[45] The Agency finds Air Canada's interpretation as to what constitutes a "business office" is unreasonable in light of the fact that Mr. Kirkham's ticket was purchased through the carrier's Web site. The Agency therefore finds that a Web site and a reservation line are places whereby a passenger may purchase a ticket for air transportation and as such constitute a "business office" within the meaning of section 2 of the ATR.

[46] Further, Bill C-11, an *Act to amend the Canada Transportation Act and the Railway Safety Act and to make consequential amendments to other Acts*, which is currently before the Parliament of Canada, includes a proposed amendment that requires carriers to set out their terms and conditions of carriage on any Internet site used by the carriers for selling the services that such carriers offer.

CONCLUSION

[47] In view of the foregoing, the Agency hereby directs Air Canada to, within thirty days of the date of this Decision, provide monetary compensation to Mr. Kirkham in the amount of CAD$683.65, upon the return by Mr. Kirkham of the US$200 voucher that Air Canada previously issued to him. In the event that Mr. Kirkham fails to return the voucher, the compensation due Mr. Kirkham shall be CAD$441.26.

[48] Air Canada is directed to advise the Agency when the carrier has compensated Mr. Kirkham.

[49] With respect to the matter of availability of the tariffs, and possible contraventions of section 116 of the ATR, this matter is being referred to the Agency's Enforcement Division for investigation and appropriate action.

Members

- Raymon J. Kaduck
- Beaton Tulk

Case Name:

Lukács v. Canada (Transportation Agency)

Between
Dr. Gábor Lukács, Appellant, and
Canadian Transportation Agency, Respondent

[2014] F.C.J. No. 301

2014 FCA 76

456 N.R. 186

Docket: A-279-13

Federal Court of Appeal
Halifax, Nova Scotia

Dawson and Webb JJ.A. and Blanchard J.A. (ex officio)

Heard: January 29, 2014.
Judgment: March 19, 2014.

(63 paras.)

Administrative law -- Judicial review and statutory appeal -- Standard of review -- Reasonableness -- Appeal by Lukacs from Agency's decision to enact quorum rule dismissed -- Without approval of Governor in Council, Agency enacted rule that provided that in all proceedings before Agency, one members constituted quorum -- Agency's decision to enact quorum rule pursuant to rule-making power, which did not require approval of Governor in Council, was reasonable given contextual and purposive interpretation of Act -- Governor in Council's prior approval of rules did not mean approval of quorum rule was required as approval of rules was unnecessary step and quorum rule did not vary or rescind any rule that had been approved.

Administrative law -- Bodies under review -- Nature of body -- Types -- Regulatory agencies -- Powers or functions -- Types -- Appeal by Lukacs from Agency's decision to enact quorum rule dismissed -- Without approval of Governor in Council, Agency enacted rule that provided that in all proceedings before Agency, one members constituted quorum -- Agency's decision to enact quorum rule pursuant to rule-making power, which did not require approval of Governor in Council, was

reasonable given contextual and purposive interpretation of Act -- Governor in Council's prior approval of rules did not mean approval of quorum rule was required as approval of rules was unnecessary step and quorum rule did not vary or rescind any rule that had been approved.

Statutory interpretation -- Statutes -- Construction -- By context -- Legislative intent -- Appeal by Lukacs from Agency's decision to enact quorum rule dismissed -- Without approval of Governor in Council, Agency enacted rule that provided that in all proceedings before Agency, one members constituted quorum -- Agency's decision to enact quorum rule pursuant to rule-making power, which did not require approval of Governor in Council, was reasonable given contextual and purposive interpretation of Act -- Governor in Council's prior approval of rules did not mean approval of quorum rule was required as approval of rules was unnecessary step and quorum rule did not vary or rescind any rule that had been approved.

Appeal by Lukacs from the Canada Transportation Agency's decision to enact a rule (the "quorum rule") that provided that in all proceedings before the Agency, one member constituted a quorum. Prior to the enactment of the quorum rule, two members of the Agency constituted a quorum. The quorum rule was not made with the approval of the Governor in Council. The appellant took the position that the rules governing the conduct of the proceedings before the Agency were regulations within the meaning of s. 36(1) of the Canada Transportation Act and as such could only be made with the approval of the Governor in Council and that as the rules were originally approved by the Governor in Council, they could not be amended without the approval of the Governor in Council. The Agency argued that the quorum rule was a rule respecting the number of members that were required to hear any matter or perform any function of the Agency and, as such, it could be enacted by the Agency pursuant to the Agency's rule-making power in s. 17 of the Act.

HELD: Appeal dismissed. The appropriate standard of review was reasonableness as the issue was whether the Agency properly interpreted its rule-making power contained in its home statute. The Agency's decision to enact the quorum rule pursuant to its rule-making power, so that the approval of the Governor in Council was not required, was reasonable. A contextual analysis of the Canada Transportation Act suggested that rules held a subsidiary position to orders or regulations, which was consistent with the view that rules were created by the Agency on its own initiative, while order came at the end of an adjudicative process and regulations must be approved by the Governor in Council. Furthermore, the interpretation of "rules" as a subset of "regulation" violated the presumption against tautology. Moreover, whenever "rule" appeared in the Act, it was in the context of internal procedural or non-adjudicative administrative matters and wherever "regulation" appeared in the Act it referred to more than internal, procedural matters. In addition, since the Act specifically required Federal Court judges to receive approval from the Governor in Council when establishing rules of procedure but there was no express requirement for the Agency to do so, the application of the expressio unius maxim was consistent with the interpretation that the Agency's rules were not subject to that requirement. Furthermore, under the former Act, the predecessor of the Agency had the power to make rules with the approval of the Governor in Council. Interpreting

the Act so as to not include rules as a subset of regulations (so as to allow the Agency to enact rules without Governor in Council approval) was consistent with the purpose of the Agency as envisioned in the Act. The fact that the Governor in Council had approved the Rules in 2005 did not mean that the approval of the Governor in Council was required to amend the rules. Firstly, Governor in Council approval in 2005 was an unnecessary step. Secondly, the quorum rule was new and did not rescind or vary any provision of the rules that was previously approved by the Governor in Council.

Statutes, Regulations and Rules Cited:

Canada Transportation Act, S.C. 1996, c. 10, s. 4(1), s. 16(1), s. 17, s. 17(a), s. 17(b), s. 17(c), s. 25, s. 25.1(4), s. 29(1), ss. 34-36, s. 34(1), s. 34(2), s. 36(1), s. 36(2), s. 41, s. 54, s. 86(1), s. 86.1, s. 92(3), s. 109, s. 117(2), s. 128(1), s. 163(1), s. 169.36(1), s. 170

Canadian Transportation Agency General Rules, SOR/2005-35, Rule 2.1

Interpretation Act, R.S.C. 1985, c. I-21, s. 2(1), s. 3(3), s. 15(2)(b), s. 35(1)

National Transportation Act, 1987, c. 28 (3rd Supp.), s. 22, s. 22(1)

Statutory Instruments Act, R.S.C. 1985, c. S-22, s. 2(1)

Counsel:

Dr. Gábor Lukács, the Appellant (on his own behalf).

Simon-Pierre Lessard, for the Respondent.

The judgment of the Court was delivered by

1 DAWSON J.A.:-- This is an appeal on a question of law, brought with leave of this Court pursuant to section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10 (Act). The question concerns the validity of a rule amending the *Canadian Transportation Agency General Rules*, SOR/2005-35 (Rules). The amendment added a single section to the Rules: Rule 2.1 (Quorum Rule). The Quorum Rule is brief, and states 'In all proceedings before the Agency, one member constitutes a quorum". The Quorum Rule was published in the Canada Gazette Part II as SOR/2013-133. Prior to the enactment of the Quorum Rule, two members of the Agency constituted a quorum.

2 The evidentiary basis for the appeal is simple and undisputed: the Quorum Rule was not made

with the approval of the Governor in Council.

3 The appellant argues that the rules governing the conduct of proceedings before the Agency, including the Quorum Rule, are regulations within the meaning of subsection 36(1) of the Act. As such, the Quorum Rule could only be made with the approval of the Governor in Council. Additionally, the appellant argues that the Rules were originally approved by the Governor in Council. It follows, the appellant argues, that the Rules could not be amended without the approval of the Governor in Council.

4 The Agency responds that the Quorum Rule is a rule respecting the number of members that are required to hear any matter or perform any of the functions of the Agency. Accordingly, the Agency could enact the Quorum Rule pursuant to its rule-making power found in section 17 of the Act.

5 Notwithstanding the appellant's able submissions, for the reasons that follow I have concluded that the Agency's decision to enact the Quorum Rule pursuant to its rule-making power (so that the approval of the Governor in Council was not required) was reasonable.

The Applicable Legislation

6 The Act contains a quorum provision that is expressly subjected to the Agency's rules:

> 16. (1) Subject to the Agency's rules, two members constitute a quorum.
>
> * * *
>
> 16. (1) Sous réserve des règles de l'Office, le quorum est constitué de deux membres.

7 The Agency's rule-making power is as follows:

> 17. The Agency may make rules respecting
>
> (*a*) the sittings of the Agency and the carrying on of its work;
>
> (*b*) the manner of and procedures for dealing with matters and business before the Agency, including the circumstances in which hearings may be held in private; and
>
> (*c*) the number of members that are required to hear any matter or perform any of the functions of the Agency under this Act or any other Act of Parliament. [Emphasis added.]

* * *

17. L'Office peut établir des règles concernant :

a) ses séances et l'exécution de ses travaux;

b) la procédure relative aux questions dont il est saisi, notamment pour ce qui est des cas de huis clos;

c) le nombre de membres qui doivent entendre les questions ou remplir telles des fonctions de l'Office prévues par la présente loi ou une autre loi fédérale. [Le souligné est de moi.]

8 The relevant provision of the Act dealing with regulations states:

36. (1) Every regulation made by the Agency under this Act must be made with the approval of the Governor in Council.
(2) The Agency shall give the Minister notice of every regulation proposed to be made by the Agency under this Act.

* * *

36. (1) Tout règlement pris par l'Office en vertu de la présente loi est subordonné à l'agrément du gouverneur en conseil.
(2) L'Office fait parvenir au ministre un avis relativement à tout règlement qu'il entend prendre en vertu de la présente loi.

The Standard of Review

9 The parties disagree about the standard of review to be applied.

10 The appellant argues that the issue of whether the Agency was authorized to enact the Quorum Rule without the approval of the Governor in Council is a true question of jurisdiction, or *vires*. As a result, he submits the applicable standard of review is correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 59). In oral argument, the appellant also argued that a quorum requirement is a question of law that is both of central importance to the legal system as a whole and outside the Agency's specialized area of expertise so that the validity of the Quorum Rule should be reviewed on the standard of correctness.

11 The respondent counters that in more recent jurisprudence the Supreme Court of Canada has held that true questions of jurisdiction are narrow and exceptional, and that an administrative

tribunal's interpretation of its own statute should be presumed to be reviewable on the standard of reasonableness (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paragraphs 33 and 39).

12 I agree that what is at issue is whether the Agency properly interpreted its rule-making power contained in its home statute. Pursuant to *Alberta Teachers'*, the presumption of reasonableness review applies. In my view, the presumption of reasonableness review has not been rebutted.

13 As recently discussed by the Supreme Court in *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, 452 N.R. 340, at paragraphs 32 and 33, legislatures do not always speak with clarity. As a result, applying the principles of statutory interpretation may not always provide a single, clear interpretation of a provision. The resolution of unclear language in an administrative agency's home statute is usually best left to the agency, because the choice between competing reasonable interpretations will often involve policy considerations the legislature presumably wanted the agency to decide.

14 For two reasons I reject the assertion that a quorum rule raises a general question of law of central importance to the legal system outside the expertise of the Agency.

15 First, while conceptually quorum requirements are of importance to the fair administration of justice, it does not follow that the Agency's choice between a quorum of one or two members is a question of central importance to the legal system as a whole. In my view, it is not. The Quorum Rule does not seek to define quorum requirements for any other body than the Agency itself.

16 Second, the Supreme Court has rejected such a narrow view of the expertise of an administrative agency or tribunal. It is now recognized that courts may not be as well-qualified as a given agency to provide an interpretation of the agency's home statute that makes sense in the broad policy context in which the agency operates (*McLean*, at paragraphs 30 and 31, citing, among other authorities, *Council of Canadians with Disabilities v. Via Rail, Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at paragraph 92 and *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at paragraph 25.

17 It follows that the Agency's interpretation of its rule-making authority is a question reviewable on the standard of reasonableness.

18 Before leaving the issue of the standard of review I will deal with two authorities raised by the appellant in reply, which were, as a result, the subject of supplementary written submissions.

19 The two authorities are *Council of Independent Community Pharmacy Owners v. Newfoundland and Labrador*, 2013 NLCA 32, 360 D.L.R. (4th) 286, and *Yates v. Newfoundland and Labrador (Regional Appeal Board)*, 2013 NLTD(G) 173, 344 Nfld. & P.E.I.R. 317.

20 In my view both decisions are distinguishable. At issue in the first case was whether

regulations enacted by the Lieutenant-Governor in Council were *ultra vires*. In the second case, the Court's attention was not drawn to the decisions of the Supreme Court in *Alberta Teachers'* and *McLean*. I am not persuaded either case supports the appellant's position.

The Applicable Principles of Statutory Interpretation

21 Whether rules made under section 17 of the Act must be approved by the Governor in Council depends upon the interpretation to be given to the word "regulation" as used in subsection 36(1) of the Act.

22 The preferred approach to statutory interpretation has been expressed in the following terms by the Supreme Court:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraph 21. See also: *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867 at paragraph 29.

23 The Supreme Court restated this principle in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at paragraph 10:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

24 This formulation of the proper approach to statutory interpretation was repeated in *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3 at paragraph 21, and *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306 at paragraph 27.

25 Inherent in the contextual approach to statutory interpretation is the understanding that the grammatical and ordinary sense of a provision is not determinative of its meaning. A court must consider the total context of the provision to be interpreted "no matter how plain the disposition may seem upon initial reading" (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 at paragraph 48). From the text and this wider context the interpreting court aims to ascertain legislative intent, "[t]he most significant element of this analysis" (*R. v. Monney*, [1999] 1 S.C.R. 652 at paragraph 26).

Application of the Principles of Statutory Interpretation

26 I therefore turn to the required textual, contextual and purposive analysis required to answer this question.

(i) Textual Analysis

27 The appellant argues that the definitions of"regulation" found in the *Interpretation Act*, R.S.C. 1985, c. I-21 and the *Statutory Instruments Act*, R.S.C. 1985, c. S-22 decide the meaning of "rules" under the Act. The appellant's argument relies on paragraph 15(2)(*b*) of the *Interpretation Act*, which states:

> 15. (2) Where an enactment contains an interpretation section or provision, it shall be read and construed
>
> [...]
>
> (*b*) as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.
>
> * * *
>
> 15. (2) Les dispositions définitoires ou interprétatives d'un texte :
>
> ...
>
> *b*) s'appliquent, sauf indication contraire, aux autres textes portant sur un domaine identique.

28 Subsection 2(1) of the *Interpretation Act* provides that:

> 2. (1) In this Act,

"regulation" includes an order, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established

(*a*) in the execution of a power conferred by or under the authority of an Act, or

(*b*) by or under the authority of the Governor in Council. [Emphasis added.]

* * *

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

"règlement" Règlement proprement dit, décret, ordonnance, proclamation, arrêté, règle judiciaire ou autre, règlement administratif, formulaire, tarif de droits, de frais ou d'honoraires, lettres patentes, commission, mandat, résolution ou autre acte pris :

a) soit dans l'exercice d'un pouvoir conféré sous le régime d'une loi fédérale;

b) soit par le gouverneur en conseil ou sous son autorité. [Le souligné est de moi.]

29 Similarly, subsection 2(1) of the *Statutory Instruments Act* provides:

2. (1) In this Act,

"regulation" means a statutory instrument

(*a*) made in the exercise of a legislative power conferred by or under an Act of Parliament, or

(*b*) for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament,

and includes a rule, order or regulation governing the practice or procedure in any proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament, and any instrument described as a regulation in any other Act of Parliament. [Emphasis added.]

* * *

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

"règlement" Texte réglementaire :

a) soit pris dans l'exercice d'un pouvoir législatif conféré sous le régime d'une loi fédérale;

b) soit dont la violation est passible d'une pénalité, d'une amende ou d'une peine d'emprisonnement sous le régime d'une loi fédérale.

Sont en outre visés par la présente définition les règlements, décrets, ordonnances, arrêtés ou règles régissant la pratique ou la procédure dans les instances engagées devant un organisme judiciaire ou quasi judiciaire constitué sous le régime d'une loi fédérale, de même que tout autre texte désigné comme règlement par une autre loi fédérale. [Le souligné est de moi.]

30 In the alternative, even if the definitions of "regulation"do not formally apply to the Act, the appellant submits that they are declaratory of the usual and ordinary meaning of the word "regulation". It follows, the appellant argues, that the word "regulation" found in subsection 36(1) of the Act includes "rules" made under section 17, so that the Agency was required to obtain the Governor in Council's approval of the Quorum Rule.

31 There are, in my view, a number of difficulties with these submissions.

32 First, the definition of "regulation" in subsection 2(1) of the *Interpretation Act* is preceded by the phrase "In this Act". This is to be contrasted with subsection 35(1) of the *Interpretation Act* which contains definitions that are to be applied "[i]n every enactment". As the word "regulation" is not found in subsection 35(1), the logical inference is that the definition found in subsection 2(1) is not to be applied to other enactments.

33 Similarly, the word "regulation" is defined in the *Statutory Instruments Act* only for the

purpose of that Act.

34 Second, paragraph 15(2)(*b*) of the *Interpretation Act* is subject to the caveat "unless a contrary intention" is evidenced in the enactment under consideration. For reasons developed in the contextual analysis, I am of the view that the Act does demonstrate such a contrary intention.

35 Third, subsection 3(3) of the *Interpretation Act* states that "[n]othing in this Act excludes the application to an enactment of a rule of construction applicable to that enactment and not inconsistent with this Act." This further limits the application of paragraph 15(2)(*b*) of the *Interpretation Act*.

36 Notwithstanding these difficulties, I agree that there is some potential ambiguity in the plain meaning of the word "regulation"in that in some contexts it can include a "rule". Where the word "regulation"can support more than one ordinary meaning, the meaning of the word plays a lesser role in the interpretive process. I therefore turn to the contextual analysis to read the provisions of the Act as a harmonious whole.

(ii) Contextual Analysis

37 An electronic search of the Act discloses that the word "rule" is used in the order of 11 different provisions, while "regulation"is found in over 30 provisions. In no case are the words used interchangeably. For example, at subsection 4(1) of the Act, "orders and regulations" made under the Act relating to transportation matters take precedence over any "rule, order or regulation" made under any other Act of Parliament. Similarly, under section 25 of the Act, the Agency is granted all powers vested in superior courts to, among other things, enforce "orders and regulations" made under the Act. The absence of reference to "rules" in both provisions suggests rules hold a subsidiary position to orders or regulations. This interpretation is consistent with the view that rules are created by the Agency on its own initiative, while orders come at the end of an adjudicative process and regulations must be approved by the Governor in Council.

38 Other provisions relevant to the contextual analysis are sections 34 and 36 of the Act. Subsection 34(2) requires the Agency to give to the Minister notice of every rule proposed under subsection 34(1) (which deals with the fixing of license and permit fees). Subsection 36(2) similarly requires the Agency to give the Minister notice of every regulation proposed to be made under the Act. If rules are a subset of regulations, subsection 34(2) would be redundant, because the Minister must be notified of all proposed regulations. The interpretation of "rules" as a subset of "regulation" would violate the presumption against tautology, where Parliament is presumed to avoid speaking in vain *(Quebec (Attorney General) v. Carrières Ste. Thérèse Ltée*, [1985] 1 S.C.R. 831, at page 838.

39 Moreover, whenever "rule" appears in the Act it is in the context of internal procedural or non-adjudicative administrative matters. See:

* subsection 16(1): dealing with the quorum requirement;
* subsection 17(*a*): dealing with sittings of the Agency and the carrying on of its work;
* subsection 17(*b*): concerning procedures and business before the Agency, including the circumstances in which hearings may be held in private;
* subsection 17(*c*) dealing with a number of members required to hear any matter or perform any of the functions of the Agency;
* subsection 25.1(4): dealing with the Agency's right to make rules specifying a scale under which costs are taxed;
* subsection 34(1): dealing with fixing fees for, among other things, applications, licenses and permits;
* section 109: dealing with the right of judges of the Federal Court to, with the approval of the Governor in Council, make general rules regarding the practice and procedure of the Court in relation to insolvent railways;
* subsection 163(1): providing that in the absence of agreement to the contrary, the Agency's rules of procedure apply to arbitrations; and
* subsection 169.36(1): dealing with the right of the Agency to make rules of procedure for an arbitration.

40 In contrast, the Act's use of the word"regulations" generally refers to more than merely internal, procedural matters. For example:

* subsection 86(1): the Agency can make regulations relating to air services;
* section 86.1: the Agency shall make regulations respecting advertising of prices for air services within or originating in Canada;
* subsection 92(3): the Agency can make regulations concerning the adequacy of liability insurance for a railway;
* subsection 117(2): the Agency may make regulations with respect to information to be contained in a railway tariff;
* subsection 128(1): the Agency can make regulations relating to the interswitching of rail traffic; and
* section 170: the Agency can make regulations for the purpose of eliminating undue obstacles in the transportation network to the mobility of persons with disabilities.

41 The dichotomy between internal/procedural matters on one hand and external/substantive on the other is reflected in section 54 of the Act, which provides that the appointment of receivers or managers does not relieve them from complying with the Act and with the "orders, regulations, and directions made or issued under this Act". The absence of "rules" from this listing is consistent with the interpretation that, in the context of the Act, rules only apply to procedural matters and not the substantive operations that a receiver or manager would be charged with. This interpretation also accords with the presumption of consistent expression, since it is generally inferred that "[w]hen an

Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning" (*Peach Hill Management Ltd. v. Canada*, [2000] F.C.J. No. 894, 257 N.R. 193, at paragraph 12 (F.C.A.).

42 Another relevant provision is section 109, which requires Federal Court judges to seek approval from the Governor in Council when establishing rules of procedure for matters relating to insolvent railways. Two possible conclusions may be taken from this provision. First, it could imply that the Agency's rules are also subject to Governor in Council approval. Second, it could imply that since Federal Court judges are explicitly required to seek such approval, the absence of that same requirement under section 17 is indicative of Parliament's intent that the Agency is not required to seek such approval.

43 The latter interpretation is, in my view, the better view. It is in accordance with the maxim of statutory interpretation *expressio unius exclusio alterius*, which in essence states that consistent drafting requires that some legislative silences should be seen as deliberate. While this maxim should be approached with caution, the Supreme Court has relied on similar reasoning to find Parliament's inclusion of express limitations in some sections of an act as evidence Parliament did not intend those limitations to be included in other provisions where the exceptions are not explicitly stated (*Ulybel Enterprises* at paragraph 42).

44 In the present case, since the Act specifically requires Federal Court judges to receive approval from the Governor in Council when establishing rules of procedure, the application of the *exclusio unius* maxim is consistent with the interpretation that the Agency's rules are not subject to this requirement.

45 There is a further, final contextual aid, found in the legislative evolution of the Act. In *Ulybel Enterprises* at paragraph 33, the Supreme Court noted that prior enactments may throw light on Parliament's intent when amending or adding to a statute.

46 The predecessor to the Agency, the National Transportation Agency (NTA), was governed by the *National Transportation Act,1987*, c. 28 (3rd Supp.) (former Act).

47 Pursuant to subsection 22(1) of the former Act, the NTA had the power to make rules with the approval of the Governor in Council:

> 22. (1) The Agency may, with the approval of the Governor in Council, make rules respecting
>
> (*a*) the sittings of the Agency and the carrying on of its work;
>
> (*b*) the manner of and procedures for dealing with matters and business

before the Agency, including the circumstances in which in camera hearings may be held; and

(*c*) the number of members of the Agency that are required to hear any matter or exercise any of the functions of the Agency under this Act or any other Act of Parliament.

(2) Subject to the rules referred to in subsection (1), two members of the Agency constitute a quorum. [Emphasis added.]

* * *

22. (1) L'Office peut, avec l'approbation du gouverneur en conseil, établir des règles concernant:

a) ses séances et l'exécution de ses travaux;

b) la procédure relative aux questions dont il est saisi, notamment pour ce qui est des cas de huis clos;

c) le nombre de membres qui doivent connaître des questions ou remplir telles des fonctions de l'Office prévues par la présente loi ou une autre loi fédérale.

(2) Sous réserve des règles visées au paragraphe (1), le quorum est constitué de deux membres. [Le souligné est de moi.]

48 In 1996, the former Act was replaced with the current regime. Section 22 of the former Act was replaced by nearly identical provisions contained in subsection 16(1) and section 17 of the current Act. There was one significant difference: the requirement to obtain Governor in Council approval for the rules was removed. In my view, this demonstrates that Parliament intended that the Agency not be required to obtain Governor in Council approval when making rules pursuant to section 17 of the Act.

49 Before leaving the contextual analysis, for completeness, I note that at the hearing of this appeal counsel for the Agency indicated that he no longer relied on the clause-by-cause analysis of section 17 of the Act as an aid to interpretation. As such, it has formed no part of my analysis.

(iii) Purposive Analysis

50 The Agency has a broad mandate in respect of all transportation matters under the legislative authority of Parliament. The Agency performs two key functions.

51 First, in its role as a quasi-judicial tribunal, it resolves commercial and consumer transportation-related disputes. Its mandate was increased to include resolving accessibility issues for persons with disabilities.

52 Second, the Agency functions as an economic regulator, making determinations and issuing licenses and permits to carriers which function within the ambit of Parliament's authority. In both roles the Agency may be called to deal with matters of significant complexity.

53 Subsection 29(1) of the Act requires the Agency to make its decision in any proceeding before it as expeditiously as possible, but no later than 120 days after the originating documents are received (unless the parties agree otherwise or the Governor in Council shortens the time frame by regulation).

54 The mandate of the Agency when viewed through the lens that it must act with celerity requires an efficient decision-making process. Efficient processes are the result of a number of factors, not the least of which are rules of procedure that establish efficient procedures and that are flexible and able to react to changing circumstances.

55 In my view, interpreting subsection 36(1) of the Act to not include rules as a subset of regulations (so as to allow the Agency to enact rules without Governor in Council approval) is consistent with the purpose of the Agency as envisioned in the Act.

(iv) Conclusion of Statutory Interpretation Analysis

56 Having conducted the required textual, contextual and purposive analysis, I am satisfied the Agency's interpretation of the Act was reasonable. While there may be a measure of ambiguity in the text of the Act, the Act's context and purpose demonstrate that the Agency's interpretation fell within a range of acceptable outcomes.

57 There remains to consider the appellant's final argument.

<u>What, if anything, is the Effect of Governor in Council Approval of the Rules in 2005?</u>

58 As noted above, the appellant argues that because the Rules were approved by the Governor in Council, they could not be amended without Governor in Council approval.

59 In my view, there are two answers to this argument.

60 First, while the Regulatory Impact Analysis Statement which accompanied the Rules in 2005

stated that Governor in Council approval was required for the enactment of the Rules, such a statement does not bind this Court. Regulatory Impact Analysis Statements do not form part of the substantive enactment (*Astral Media Radio Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2010 FCA 16, [2011] 1 F.C.R. 347, at paragraph 23). As the Agency later reasonably concluded that Governor in Council approval was not required to enact the Quorum Rule, it follows that Governor in Council approval in 2005 was an unnecessary step that does not limit or bind the Agency now or in the future.

61 Second, the Quorum Rule is new. It does not vary or rescind any provision in the Rules that could be said to be previously approved by the Governor in Council.

Conclusion

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

63 In the event the parties are unable to reach agreement on the disbursements, they shall be assessed.

DAWSON J.A.
WEBB J.A.:-- I agree.
BLANCHARD J.A. (*ex officio*):-- I agree.

DECISION NO. 227-C-A-2013

June 12, 2013

COMPLAINT by Gábor Lukács against WestJet.

File No. M4120-3/13-01286

INTRODUCTION

[1] On February 27, 2013, Gábor Lukács filed a complaint with the Canadian Transportation Agency (Agency) alleging that:

- Rule 110(B), governing denied boarding compensation, appearing in WestJet's *International Passenger Rules and Fares Tariff No. WS-1, Airline Tariff Publishing Company, Agent, NTA(A) No. 518* (Tariff), contradicts Rule 75 of the Tariff, which relates to cancellation, changes and refunds, and is therefore unclear, contrary to paragraph 122(*c*) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR);

- Tariff Rule 110(B) is unreasonable, contrary to subsection 111(1) of the ATR;

- Part of Tariff Rule 110(E), setting out the amount of denied boarding compensation tendered by WestJet, is unreasonable, contrary to subsection 111(1) of the ATR; and,

- Tariff Rule 110(G), respecting a passenger's options, is unreasonable, contrary to subsection 111(1) of the ATR.

[2] WestJet filed its answer on March 12, 2013, and Mr. Lukács submitted his reply on March 13, 2013. In its answer, WestJet proposed certain revised Tariff provisions, and did not provide any submissions specifically responding to those provided by Mr. Lukács.

ISSUES

[3] With respect to the Existing Tariff Rules:

1. Does Existing Tariff Rule 110(B) conflict with Existing Tariff Rule 75, rendering the application of Existing Tariff Rule 110(B) unclear, contrary to paragraph 122(*c*) of the ATR?

2. Is Existing Tariff Rule 110(B) unreasonable, contrary to subsection 111(1) of the ATR?

3. Is part of Existing Tariff Rule 110(E) unreasonable, contrary to subsection 111(1) of the ATR? and,

4. Is Existing Tariff Rule 110(G) unclear, contrary to paragraph 122(*c*) of the ATR, and unreasonable, contrary to subsection 111(1) of the ATR?

[4] With respect to the Proposed Tariff Rules:

1. Does Proposed Tariff Rule 110(B) conflict with Existing Tariff Rule 75, rendering the application of Proposed Tariff Rule 110(B) unclear, contrary to paragraph 122(*c*) of the ATR?

2. Is Proposed Tariff Rule 110(B) unreasonable, contrary to subsection 111(1) of the ATR?

3. Is part of Proposed Tariff Rule 110(E) unreasonable, contrary to subsection 111(1) of the ATR? and,

4. Is Proposed Tariff Rule 110(G) unclear, contrary to paragraph 122(*c*) of the ATR, and unreasonable, contrary to subsection 111(1) of the ATR?

RELEVANT STATUTORY AND TARIFF EXTRACTS

[5] The existing and proposed Tariff provisions and the statutory extracts relevant to this Decision are set out in the Appendix.

CLARITY AND REASONABLENESS OF TARIFF PROVISIONS

Clarity

[6] As recently stated by the Agency in Decision No. 248-C-A-2012 (*Lukács v. Air Transat*), a carrier meets its tariff obligation of clarity when, in the opinion of a reasonable person, the rights and obligations of both the carrier and the passengers are stated in such a way as to exclude any reasonable doubt, ambiguity or uncertain meaning.

Reasonableness

[7] To assess whether a term or condition of carriage is "unreasonable", the Agency has traditionally applied a balancing test, which requires that a balance be struck between the rights of passengers to be subject to reasonable terms and conditions of carriage, and the particular air carrier's statutory, commercial and operational obligations. This test was first established in Decision No. 666-C-A-2001 (*Anderson v. Air Canada*) and was most recently applied in Decision No. 150-C-A-2013 (*Forsythe v. Air Canada*).

[8] The terms and conditions of carriage are set out by an air carrier unilaterally without any input from passengers. The air carrier sets its terms and conditions of carriage on the basis of its own interests, which may have their basis in purely commercial requirements. There is no presumption that a tariff is reasonable.

[9] When balancing the passengers' rights against the carrier's obligations, the Agency must consider the whole of the evidence and the submissions presented by both parties and make a determination on the reasonableness or unreasonableness of the term or condition of carriage based on which party has presented the more compelling and persuasive case.

EXISTING TARIFF RULES

Issue 1: Does Existing Tariff Rule 110(B) conflict with Existing Tariff Rule 75, rendering the application of Existing Tariff Rule 110(B) unclear, contrary to paragraph 122(*c*) of the ATR?

[10] Mr. Lukács submits that Existing Tariff Rule 75, which was previously Rule 15, imposes several obligations on WestJet relating to passengers who are denied boarding, and that Existing Tariff Rule 75(F) explicitly recognizes that the rights of passengers are also governed by Article 19 of the *Convention for the Unification of Certain Rules for International Carriage by Air – Montreal Convention* (Convention). He points out that the provisions of Existing Tariff Rule 75 were addressed in Decision No. 249-C-A-2012 (*Lukács v. WestJet*).

[11] Mr. Lukács asserts that in sharp contrast with the obligations set out in Existing Tariff Rule 75, Existing Tariff Rule 110(B) provides, in part, that "[t]he Carrier shall not be liable to any passenger in respect of such overbooking, whether or not resulting from an Event of Force Majeure."

[12] Mr. Lukács maintains that the blanket exclusion of liability in Existing Tariff Rule 110(B) contradicts and negates the provisions of Existing Tariff Rule 75, which recognize WestJet's liability.

Analysis and findings

[13] As stated by Mr. Lukács, Existing Tariff Rule 75, which was addressed in Decision No. 249-C-A-2012, sets out certain obligations assumed by WestJet in the event that a passenger is denied boarding, and reflects the rights of passengers under the Convention. The Agency agrees with Mr. Lukács' submission that Rule 110(B) fully exempts WestJet from liability for passengers who are affected by denied boarding, which contradicts Existing Tariff Rule 75. Given this contradiction, the Agency finds that Existing Tariff Rule 110(B) is unclear because it is stated in such a manner as to create a reasonable doubt and ambiguity regarding its application.

Issue 2: Is Existing Tariff Rule 110(B) unreasonable, contrary to subsection 111(1) of the ATR?

[14] Mr. Lukács asserts that the effect of Existing Tariff Rule 110(B) is to relieve WestJet from liability for denied boarding if it provides a full refund or future credit to the passenger. He adds that, as noted by the Agency in Decision No. 249-C-A-2012, and incorporated in the Tariff as Existing Tariff Rule 75(F), most cases of denied boarding fall within the scope of Article 19 of the Convention, which imposes a regime of strict liability on WestJet. Mr. Lukács contends that, as a contractual provision tending to relieve WestJet from liability for delay under Article 19 of the Convention, Existing Tariff Rule 110(B) is null and void pursuant to Article 26 of the Convention. He also contends that Existing Tariff Rule 110(B) represents a blanket exclusion of liability that is inconsistent with the legal principles of the Convention, and therefore it is unreasonable even for itineraries where the Convention is not applicable.

Analysis and finding

[15] Existing Tariff Rule 110(B) exempts WestJet from liability for overbooking a flight, irrespective of whether that overbooking occurred as a result of force majeure, provided that WestJet furnishes the passenger with a travel credit or a full refund. The Agency is of the opinion that this exemption represents a blanket exclusion from liability and is inconsistent with Article 19 of the Convention. The Agency is also of the opinion that, in respect of itineraries where the Convention does not apply, Existing Tariff Rule 110(B) is inconsistent with the principles of Article 19. Therefore, the Agency finds Existing Tariff Rule 110(B) to be unreasonable, contrary to subsection 111(1) of the ATR.

Issue 3: Is part of Existing Tariff Rule 110(E) unreasonable, contrary to subsection 111(1) of the ATR?

[16] Mr. Lukács challenges the reasonableness of that part of Existing Tariff Rule 110(E) which states:

> For flights to/from Canada (except flights from USA), as WestJet does not commercially oversell its aircraft, no denied boarding compensation will be provided.

[17] Mr. Lukács points out that the Agency considered the principles governing the amount of denied boarding compensation payable to passengers in Decision No. 666-C-A-2001, and held, in part, that any passenger who is denied boarding is entitled to compensation and evidence of specific damages suffered need not be provided.

[18] Mr. Lukács submits that the above quoted part of Existing Tariff Rule 110(E) violates the principle that any passenger who is denied boarding is entitled to compensation, and that, as such, that part is inconsistent with the Agency's finding in Decision No. 666-C-A-2001, and is therefore unreasonable.

[19] Mr. Lukács maintains that there are two components to the obligations of a carrier to a passenger who is denied boarding: denied boarding compensation (which is equal for all passengers) and compensation for damages specific to the passenger's situation (such as meals, accommodation, transportation by another carrier, etc.) He submits that denied boarding compensation is not meant to replace or displace the carrier's liability for reasonable out-of-pocket expenses incurred by passengers. In this regard, Mr. Lukács points out that in Decision No. 268-C-A-2007 (*Kirkham v. Air Canada*), the Agency directed Air Canada to reimburse the complainant's reasonable out-of-pocket expenses and to tender the denied boarding compensation prescribed by its tariff.

[20] Mr. Lukács submits that it is unclear how the obligation of paying denied boarding compensation would affect WestJet's ability to meet its statutory, commercial and operational obligations, given that WestJet represents in Existing Tariff Rule 110(E) that it does not engage in the practice of overselling its flights. Mr. Lukács argues that if WestJet's representation were true, then it would never have to pay any compensation to passengers, and the introduction of reasonable monetary compensation would not have any impact on WestJet at all. Mr. Lukács maintains that if WestJet does occasionally overbook its flights, perhaps inadvertently and/or as a result of a computer malfunction, then Existing Tariff Rule 110(E) deprives the passengers of being compensated for denied boarding.

Analysis and finding

[21] As pointed out by Mr. Lukács, the Agency, in Decision No. 666-C-A-2001, held, in part, that any passenger who is denied boarding is entitled to compensation. Given that Existing Tariff Rule 110(E) does not provide for that compensation for flights to and from Canada, it is inconsistent with Decision No. 666-C-A-2001. The Agency finds, therefore, that Existing Tariff Rule 110(E) is unreasonable.

Issue 4: Is Existing Tariff Rule 110(G) unclear, contrary to paragraph 122(*c*) of the ATR, and unreasonable, contrary to subsection 111(1) of the ATR?

[22] Mr. Lukács submits that, in Decision No. 249-C-A-2012, the Agency disallowed a rule similar to Existing Tariff Rule 110(G), which read:

> If a passenger accepts the alternative remedies offered by the Carrier, that acceptance shall be in full and final satisfaction of all claims the passenger may have had against the Carrier by reason of the overbooking or cancellation.

[23] Mr. Lukács points out that the Agency determined that rule to be unreasonable, and stated:

> [154] WestJet has argued that obtaining a release, in itself, is permissible under the Convention. However, it has not demonstrated why unilaterally imposing the terms of a release in its tariff does not tend to relieve it from liability under Article 26 of the Convention. The Agency is therefore of the opinion that WestJet has not shown that Proposed Tariff Rule 15.6 is consistent with Article 26 of the Convention.

> [155] Accordingly, the Agency finds that this provision would be considered unreasonable under the ATR if filed with the Agency.

[24] Mr. Lukács contends that subparagraph 122(*c*)(iii) of the ATR requires carriers to clearly state their policies with respect to denied boarding compensation. He adds that in Decision No. 666-C-A-2001, the Agency held that any passenger who is denied boarding is entitled to compensation for specific damages.

[25] Mr. Lukács submits that given the disparity between the negotiating powers, positions and resources of a carrier and the passengers affected by denied boarding, permitting a carrier to condition payment of denied boarding compensation upon release of the carrier from any further liability to the passenger undermines the purpose of the obligation to pay denied boarding compensation. Mr. Lukács points out that the Agency confirmed in Decision No. 666-C-A-2001 that the purpose of denied boarding compensation is to address, in a standardized manner, damage that is common to all passengers affected by denied boarding, and it is not subject to the requirement of proof of specific damages suffered.

[26] Mr. Lukács argues that a carrier's obligation to pay denied boarding compensation is independent of its obligation to compensate passengers for out-of-pocket expenses or other damages specific to the passenger's circumstances. He claims that it is unreasonable for WestJet to unilaterally impose a release from liability as a precondition for payment of denied boarding compensation.

[27] According to Mr. Lukács, Existing Tariff Rule 110(G) is not necessary for WestJet to meet its statutory, commercial and operational obligations.

Analysis and findings

[28] The first part of Existing Tariff Rule 110(G) purports to relieve WestJet from further liability should a passenger who is denied boarding accept the compensation offered by WestJet. The second part of Existing Tariff Rule 110(G) leaves the impression that a passenger can only seek to recover damages in a court of law or in some other manner if the payment offered by WestJet is declined. As indicated by Mr. Lukács, in Decision No. 249-C-A-2012, the Agency found a similar rule to be unreasonable because it established a limit of liability lower than that provided for under the Convention. The Agency finds, therefore, that the first part of Existing Tariff Rule 110(G) is unreasonable. With respect to the second part of that Rule, the Agency is of the opinion that even if a payment is accepted by a passenger, that passenger can still seek to recover damages in a court of law or in some other manner. The Agency finds, therefore, that the second part of Existing Tariff Rule 110(G) is unclear, contrary to paragraph 122(*c*) of the ATR, and unreasonable, contrary to subsection 111(1) of the ATR.

PROPOSED TARIFF RULES

Issue 1: Does Proposed Tariff Rule 110(B) conflict with Existing Tariff Rule 75, rendering the application of Proposed Tariff Rule 110(B) unclear, contrary to paragraph 122(*c*) of the ATR?

[29] Mr. Lukács submits that Proposed Tariff Rule 110(B), by allowing WestJet to choose the form of payment it offers to a passenger who is denied boarding, contradicts Existing Tariff Rule 75(B), which states that "[i]n cases where the passenger is offered alternative remedies, the choice among the alternatives shall rest with the passenger."

[30] Mr. Lukács points out that Existing Tariff Rule 75(B)(3) provides for "monetary payment in an amount to be defined by the Carrier which shall in no case be less than the value of the unused portion of the passenger's ticket."

[31] In addition, Mr. Lukács points out that Existing Tariff Rule 75(D) provides that:

> In defining the alternative remedies to be offered, the Carrier will consider, to the extent they are known to the Carrier, the circumstances of the passenger affected by the overbooking or cancellation, including any expenses which the passenger, acting reasonably, may have incurred as a result of the overbooking or cancellation as, for example, **costs incurred for accommodation, meals or additional transportation**. [Emphasis added by Mr. Lukács]

[32] Mr. Lukács maintains that Proposed Tariff Rule 110(B) contradicts Existing Tariff Rules 75(B)(3) and 75(D) in that Proposed Tariff Rule 110(B) precludes reimbursement for out-of-pocket expenses for accommodation, meals or additional transportation, and a refund for segments that no longer serve any purpose with respect to the passenger's travel plans.

Analysis and finding

[33] The Agency agrees with Mr. Lukács' submission that, with respect to the party with whom the choice rests regarding alternative remedies, the application of Proposed Tariff Rule 110(B) is unclear given the contradiction between that Proposed Tariff Rule and Existing Tariff Rule 75(B). The Agency also agrees with Mr. Lukács' assertion that Proposed Tariff Rule 110(B) contradicts Existing Tariff Rules 75(B)(3) and 75(D) for the reason he has stated. As such, the Agency finds that Proposed Tariff Rule 110(B) would be unclear if it were to be filed with the Agency because it is worded in such a fashion as to create reasonable doubt and ambiguity respecting its application.

Issue 2: Is Proposed Tariff Rule 110(B) unreasonable, contrary to subsection 111(1) of the ATR?

[34] Mr. Lukács submits that Proposed Tariff Rule 110(B) appears, implicitly, to preclude reimbursement of passengers for out-of-pocket expenses for accommodation, meals or additional transportation, and purports to cap WestJet's liability in the case of denied boarding at the

amount of fare paid by the passenger. He maintains that in the vast majority of cases, this liability cap is substantially lower than the limit of 4,694 SDRs set out in Article 22(1) of the Convention. Mr. Lukács claims, therefore, that Proposed Tariff Rule 110(B) establishes a limit of liability lower than that provided for in the Convention, and as such, it is null and void pursuant to Article 26 of the Convention.

[35] Mr. Lukács points out that in Decision No. LET-C-A-83-2011 (*Lukács v. WestJet*), the Agency held that any compensation paid in accordance with the tariff is to be paid in the form of cash, cheque, credit to a passenger's credit card, or any other form acceptable to the passenger. He asserts that Proposed Tariff Rule 110(B) appears to allow WestJet to decide whether it compensates passengers by a cash payment or a travel credit, contrary to the Agency's findings in Decision No. LET-C-A-83-2011.

Analysis and findings

[36] WestJet's Proposed Tariff Rule 110(B) involves the deletion of the provision, appearing in Existing Tariff Rule 110(B), which relieves WestJet from liability for overbooking, irrespective of whether an event of force majeure occurred. The condition of carriage that provides that WestJet will tender, at its discretion, a travel credit or a full refund to passengers who have been denied boarding is retained. As indicated by Mr. Lukács, the retention of that condition of carriage implies that certain reimbursement (for example, for expenses incurred for accommodation and meals), will not be tendered, and that WestJet's maximum liability will be limited to the amount of the fare paid by the passenger. The Agency is of the opinion that Proposed Tariff Rule 110(B) establishes a limit of liability lower than that required under Article 22(1) of the Convention and, as such, the Agency finds that Proposed Tariff Rule 110(B) would be considered unreasonable if it were to be filed with the Agency.

[37] With respect to the form of payment to be offered to passengers affected by denied boarding, the Agency concurs with Mr. Lukács' submission that WestJet's restriction of payment to either a travel credit or refund of the fare paid is inconsistent with the Agency's findings in Decision No. LET-C-A-83-2011. As such, the Agency finds that Proposed Tariff Rule 110(B) would be considered unreasonable if it were to be filed with the Agency.

Issue 3: Is part of Proposed Tariff Rule 110(E) unreasonable, contrary to subsection 111(1) of the ATR?

[38] Mr. Lukács submits that while WestJet proposes to remove a provision that explicitly deprives passengers travelling to and from Canada of their rights to denied boarding compensation, Proposed Tariff Rule 110(E) provides denied boarding compensation only to passengers departing from the United States of America. He asserts that this situation is inconsistent with the Agency's findings in Decision No. 666-C-A-2001, and that WestJet has failed to explain how paying denied boarding compensation would affect its ability to meet its statutory, commercial and operational obligations.

Analysis and finding

[39] Although WestJet proposes to revise Existing Tariff Rule 110(E) by deleting text that provides that denied boarding compensation will not be tendered for flights to and from Canada, Proposed Tariff Rule 110(E) only sets out compensation due to passengers who are denied boarding for flights from the United States of America. The failure to establish conditions governing denied boarding compensation for flights to and from Canada is contrary to Decision No. 666-C-A-2001. Therefore, the Agency finds that if Proposed Tariff Rule 110(E) were to be filed with the Agency, it would be considered unreasonable.

Issue 4: Is Proposed Tariff Rule 110(G) unclear, contrary to paragraph 122(*c*) of the ATR, and unreasonable, contrary to subsection 111(1) of the ATR?

[40] Mr. Lukács points out that Proposed Tariff Rule 110(G) states, in part, that "[t]he passenger may decline the payment and seek to recover damages in a court of law or in some other manner."

[41] Mr. Lukács maintains that this proposed provision is unclear because although the conjunctive language (using "and") suggests that a passenger must decline the payment in order to seek recovery in a court of law, the provision does not state so explicitly.

[42] Mr. Lukács also asserts that the proposed provision is unreasonable because it still appears to require passengers to decline any payment in order to retain their right to seek redress in a court of law. He indicates that this issue has already been settled by the Agency's disallowance of a similar provision in Decision No. 249-C-A-2012.

Analysis and findings

[43] With respect to the clarity of Proposed Tariff Rule 110(G), the Agency agrees with Mr. Lukács' submission that the phrasing of that Rule, without being explicit, suggests that the availability of the option of seeking payment in a court of law is predicated on the passenger first declining payment offered by WestJet. The Agency finds, therefore, that Proposed Tariff Rule 110(G) would be considered unclear if it were to be filed with the Agency given that it is phrased in such a manner as to create reasonable doubt and ambiguity respecting its application.

[44] As to the reasonableness of Proposed Tariff Rule 110(G), the Agency concurs with Mr. Lukács' submission that the Rule seems to indicate that for a person to retain a right to legal redress, that person must first reject any payment offered by WestJet, and that a similar provision was deemed to be unreasonable in Decision No. 249-C-A-2012. The Agency finds that if Proposed Tariff Rule 110(G) were to be filed with the Agency, it would also be determined to be unreasonable.

Additional comments

[45] On June 28, 2012, the Agency, in Decision No. 249-C-A-2012, ordered WestJet to make certain revisions to its Tariff. The appropriate revisions were filed shortly afterwards. As evident by this complaint, several provisions appearing in Rule 110 of the Tariff conflicted with the revisions made in response to Decision No. 249-C-A-2012. The Agency is of the opinion that WestJet has

been irresponsible in failing to ensure that consequential tariff revisions were not promptly made in relation to the revisions filed respecting that Decision. In the future, WestJet should exercise greater care in considering Agency decisions and in ensuring that its tariffs are amended in the appropriate manner, not only to conform to those decisions, but also to address inconsistencies.

CONCLUSION

[46] In light of the foregoing, the Agency concludes the following:

Existing Tariff Rules

1. With respect to the clarity of Existing Tariff Rule 110(B)

[47] The Agency has determined that the application of the tariff provision is unclear, contrary to paragraph 122(*c*) of the ATR.

2. With respect to the reasonableness of Existing Tariff Rule 110(B)

[48] The Agency has determined that the tariff provision is unreasonable, contrary to subsection 111(1) of the ATR.

3. With respect to Existing Tariff Rule 110(E)

[49] The Agency has determined that the tariff provision is unreasonable, contrary to subsection 111(1) of the ATR.

4. With respect to the clarity and reasonableness of Existing Tariff Rule 110(G)

[50] The Agency has determined that the tariff provision is unclear, contrary to paragraph 122(*c*) of the ATR, and unreasonable, contrary to subsection 111(1) of the ATR.

Proposed Tariff Rules

1. With respect to the clarity of Proposed Tariff Rule 110(B)

[51] The Agency has determined that if Proposed Tariff Rule 110(B) were to be filed with the Agency, the application of that Rule would be determined to be unclear, contrary to paragraph 122(*c*) of the ATR.

2. With respect to the reasonableness of Proposed Tariff Rule 110(B)

[52] The Agency has determined that if Proposed Tariff Rule 110(B) were to be filed with the Agency, that Rule would be determined to be unreasonable, contrary to subsection 111(1) of the ATR.

3. With respect to Proposed Tariff Rule 110(E)

[53] The Agency has determined that if Proposed Tariff Rule 110(E) were to be filed with the Agency, that Rule would be determined to be unreasonable, contrary to subsection 111(1) of the ATR.

4. With respect to the clarity and reasonableness of Proposed Tariff Rule 110(G)

[54] The Agency has determined that if Proposed Tariff Rule 110(G) were to be filed with the Agency, the application of that Rule would be determined to be unclear, contrary to paragraph 122(*c*) of the ATR, and the Rule would be determined to be unreasonable, contrary to subsection 111(1) of the ATR.

ORDER

[55] The Agency disallows Existing Tariff Rules 110(B), 110(E) and 110(G).

[56] The Agency orders WestJet, by no later than July 15, 2013, to revise Existing Tariff Rules 110(B), 110(E) and 110(G) to conform to the findings set out in this Decision.

[57] Pursuant to paragraph 28(1)(*b*) of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended, the disallowance of Existing Tariff Rules 110(B), 110(E) and 110(G) shall come into force when WestJet complies with the above or on July 15, 2013, whichever is sooner.

(signed)

Geoffrey C. Hare
Member

(signed)

J. Mark MacKeigan
Member

RELEVANT TARIFF EXTRACTS

WestJet's *International Passenger Rules and Fares Tariff No. WS-1, Airline Tariff Publishing Company, Agent, NTA(A) No. 518*

Rule 75

CARRIER CANCELLATION, CHANGE, AND REFUND TERMS (See Rules 60, 100, 105 and 110 for additional Information)

(A) The provisions of this Rule are not intended to make the Carrier responsible in all cases for the acts of nature, or for the acts of third parties that are not deemed servants and/or agents of the Carrier per applicable law or international conventions and all the rights here described are subject to the following exception:

The Carrier shall not be liable for damage occasioned by overbooking or cancellation if it, and its employees and agents, took all measures that could reasonably be reasonably be required to avoid the damage or if it was impossible for the Carrier, and its employees or agents, to take such measures.

(B) Subject to the exception stated in (A), if a flight is overbooked or cancelled, with the result that a ticketed passenger is not transported on a flight for which he held confirmed space, the Carrier will define a remedy or remedies to mitigate the impact of the overbooking or cancellation upon the passenger. In defining the remedy or remedies appropriate in a particular case, the Carrier will consider the transportation needs of the passenger and any damages the passenger may have suffered by reason of the overbooking or cancellation. In cases where the passenger is offered alternative remedies, the choice among the alternatives shall rest with the passenger. In particular, the Carrier will offer one or more of the following remedies:

(1) Transportation, without further charge and within a reasonable time, to the passenger's intended destination on a transportation service which service will be identified by the Carrier;

(2) Transportation, without further charge and within a reasonable time, to the passenger's point of origin on a transportation service which service will be identified by the Carrier;

(3) A monetary payment in an amount to be defined by the Carrier which shall in no case be less than the value of the unused portion of the passenger's ticket;

(4) A credit, to be defined by the Carrier, towards the purchase of future transportation on a service operated by the Carrier.

(C) In identifying the transportation service to be offered to the passenger, the Carrier will not limit itself to considering its own services or the services of carriers with which it has interline agreements.

(D) In defining the alternative remedies to be offered, the Carrier will consider, to the extent they are known to the Carrier, the circumstances of the passenger affected by the overbooking or cancellation, including any expenses which the passenger, acting reasonably, may have incurred

as a result of the overbooking or cancellation as, for example, costs incurred for accommodation, meals or additional transportation.
(E) In defining the alternative remedies to be offered, the Carrier will make a good faith effort to fairly recognize, and appropriately mitigate, the impact of the overbooking or cancellation upon the passenger.

(F) The rights of a passenger against the Carrier in the event of overbooking or cancellation are, in most cases of international carriage, governed by an international convention known as the Montreal Convention, 1999. Article 19 of that convention provides that an air carrier is liable for damage caused by delay in the carriage of passengers and goods unless it proves that it did everything it could be reasonable expected to do to avoid the damage. There are some exceptional cases of international carriage in which the rights of passengers are not governed by an international convention. In such cases only a court of competent jurisdiction can determine which system of laws must be consulted to determine what those rights are.

(G) For the purpose of this Rule, a passenger whose journey is interrupted by a flight cancellation or overbooking, and to whom the Carrier is not able to present a reasonable transportation option which takes into account all known circumstances, may surrender the unused portion of his/her ticket. In such a case the value of that unused portion shall be calculated as follows:

(1) When no portion of the trip has been made, when due to a cancellation or denied boarding within the Carrier's control, if the passenger chooses to no longer travel and return to the point of origin, the amount of refund will be the fare and charges paid.

(2) When a portion of the trip has been made, the refund will be calculated as follows: Either an amount equal to the one-way fare less the same rate of discount, if any, that was applied in calculating the original one-way fare, or on round-trip tickets, one half of the round-trip fare and charges applicable to the unused transportation from the point of termination to the destination or stopover point named on the ticket.

Existing Tariff Rule 110

DENIED BOARDING COMPENSATION

[...]

(B) The Carrier shall not be liable to any passenger in respect of such overbooking, whether or not resulting from an Event of Force Majeure; provided that, the Carrier will, at the carrier's discretion, provide any passengers affected by such denied boarding with:

(1) A credit, valid for one year from the cancellation date, towards the provision of a fare relating to a future flight or flights if booked as a round trip and the originating sector is cancelled, which credit shall be equal to the original fare(s) which was/were cancelled; or

(2) To otherwise refund to such passenger, an amount which shall not be greater than the fare paid by the passenger in respect of that flight or flights if booked as a round trip and the originating sector is cancelled.

[...]

(E) AMOUNT OF DENIED BOARDING COMPENSATION

Passengers who are eligible for denied boarding compensation for flights departing from the US must be offered a payment equal to 200% the sum of the fare values of their ticket coupons, with a $650 USD maximum if WestJet is able to place you on another flight or flights that are planned to each your final destination or first stopover less than four hours of the scheduled arrival of your original flight. However, if WestJet cannot arrange "alternate transportation (see below) the passenger must be offered a payment equal to 400% the sum of the fare values of their ticket coupons, with a $1,300 USD maximum. For flights to/from Canada (except flights from USA), as WestJet does not commercially oversell its aircraft, no denied boarding compensation will be provided. "Alternate transportation" is air transportation (by an airline licensed by the D.O.T.) or transportation used by the passenger which, at the time the arrangement is made, is planned to arrive at the passenger's next scheduled stopover (of 4 hours or longer) (for international flights) after the passenger's originally scheduled arrival time.

[...]

(G) PASSENGER'S OPTIONS

Acceptance of the compensation (by endorsing the cheque or draft within 30 days) relieves WestJet from any further liability to the passenger caused by the failure to honour the confirmed reservation. However, the passenger may decline the payment and seek to recover damages in a court of law or in some other manner.

Proposed Tariff Rule 110

DENIED BOARDING COMPENSATION

[...]

(B) The Carrier will, at the carrier's discretion, provide any passengers affected by denied boarding with:

(1) A credit, valid for one year from the cancellation date, towards the provision of a fare relating to a future flight or flights if booked as a round trip and the originating sector is cancelled, which credit shall be equal to the original fare(s) which was/were cancelled; or

(2) To otherwise refund to such passenger, an amount which shall not be greater than the fare paid by the passenger in respect of that flight or flights if booked as a round trip and the originating sector is cancelled.

[...]

(E) AMOUNT OF DENIED BOARDING COMPENSATION

Passengers who are eligible for denied boarding compensation for flights departing from the US must be offered a payment equal to 200% the sum of the fare values of their ticket coupons, with a $650 USD maximum if WestJet is able to place you on another flight or flights that are planned to each your final destination or first stopover less than four hours of the scheduled arrival of your original flight. However, if WestJet cannot arrange "alternate transportation (see below) the passenger must be offered a payment equal to 400% the sum of the fare values of their ticket coupons, with a $1,300 USD maximum. "Alternate transportation" is air transportation (by an airline licensed by the D.O.T.) or transportation used by the passenger which, at the time the arrangement is made, is planned to arrive at the passenger's next scheduled stopover (of 4 hours or longer) (for international flights) after the passenger's originally scheduled arrival time.

[...]

(G) PASSENGER'S OPTIONS

The passenger may decline the payment and seek to recover damages in a court of law or in some other manner.

RELEVANT STATUTORY EXTRACTS

***Air Transportation Regulations*, SOR/88-58, as amended**

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.

122. Every tariff shall contain

[...]

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

[...]

Indexed as:

Mission Institution v. Khela

Diane Knopf, Warden of Mission Institution, and Harold Massey, Warden of Kent Institution, Appellants;
v.
Gurkirpal Singh Khela, Respondent, and Canadian Association of Elizabeth Fry Societies, John Howard Society of Canada, Canadian Civil Liberties Association and British Columbia Civil Liberties Association, Interveners.

[2014] 1 S.C.R. 502

[2014] 1 R.C.S. 502

[2014] S.C.J. No. 24

[2014] A.C.S. no 24

2014 SCC 24

File No.: 34609.

Supreme Court of Canada

Heard: October 16, 2013;
Judgment: March 27, 2014.

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

(99 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Catchwords:

Courts -- Jurisdiction -- Habeas corpus -- Transfer of federal inmate from medium security institution to maximum security institution on emergency and involuntary basis -- Scope of provincial superior court's review power on application for habeas corpus with certiorari in aid in respect of detention in federal penitentiary -- Whether on application for habeas corpus a provincial superior court is entitled to examine reasonableness of administrative decision to transfer offender to higher security institution or whether reasonableness of decision must be determined in Federal Court on judicial review.

Administrative law -- Prisons -- Procedural fairness -- Duty to disclose -- Scope of duty to disclose -- Transfer of federal inmate from medium security institution to maximum security institution on emergency and involuntary basis -- Whether transfer decision meeting [page503] statutory requirements related to duty of procedural fairness -- Corrections and Conditional Release Act, S.C. 1992, c. 20, ss. 27 to 29 -- Corrections and Conditional Release Regulations, SOR/92-620, ss. 5, 13.

Summary:

K is a federal inmate serving a life sentence for first degree murder at Kent Institution in British Columbia. After three years at this maximum security facility, he was transferred to Mission Institution, a medium security facility. In 2009, an inmate was stabbed at Mission Institution. Roughly one week after the stabbing, the Security Intelligence Office at Mission received information implicating K in the incident. A Security Intelligence Report was completed which contained information that K had hired two other inmates to carry out the stabbing in exchange for three grams of heroin. As a result, K was involuntarily transferred back to the maximum security facility on an emergency basis after the Warden reassessed his security classification. It is this transfer that was the subject of K's initial *habeas corpus* application. He claimed that this transfer to a higher security institution was both unreasonable and procedurally unfair, and therefore unlawful. Both the British Columbia Supreme Court and, on appeal, the British Columbia Court of Appeal agreed K's *habeas corpus* application should be granted.

Held: The appeal should be dismissed.

The question before the Court is whether on an application for *habeas corpus* a provincial superior court may rule on the reasonableness of an administrative decision to transfer an inmate to a higher security institution or whether the reasonableness of the decision must be dealt with by the Federal Court on an application for judicial review. An inmate can choose either to challenge the reasonableness of the decision by applying for judicial review in the Federal Court or to have the decision reviewed for reasonableness by means of an application for *habeas corpus*. "Reasonableness" is therefore a legitimate ground upon which to question the legality of a deprivation of liberty in an application for *habeas corpus*.

Given the flexibility and the importance of the writ of *habeas corpus*, as well as the underlying

reasons why the jurisdiction of the provincial superior courts is concurrent with that of the Federal Court, it is clear that a review [page504] for lawfulness will sometimes require an assessment of the decision's reasonableness. Including a reasonableness assessment in the scope of the review is consistent with this Court's case law. In particular, allowing provincial superior courts to assess reasonableness in the review follows logically from how this Court has framed the remedy and from the limits the courts have placed on the avenues through which the remedy can be obtained. This Court has recognized in its decisions that *habeas corpus* should develop over time to ensure that the law remains consistent with the remedy's underlying goals: no one should be deprived of their liberty without lawful authority.

Many of the same principles which weigh in favour of concurrent jurisdiction between provincial superior courts and the Federal Court apply to the determination of the scope of a provincial superior court's review power. First, each applicant should be entitled to choose his or her avenue of relief. If a court hearing a *habeas corpus* application cannot review the reasonableness of the underlying decision, then a prisoner who has been deprived of his or her liberty as a result of an unreasonable decision does not have a choice of avenues through which to obtain redress but must apply to the Federal Court. Second, there is no reason to assume that the Federal Court is more expert than the superior courts in determining whether a deprivation of liberty is lawful. Third, if inmates are not able to obtain review of their potentially unreasonable loss of liberty under an application for *habeas corpus*, they will have to wade through the lengthy grievance procedure available under the statute in order to have their concerns heard. Fourth, the fact that inmates have local access to relief in the form of *habeas corpus* also weighs in favour of including a review for reasonableness. Fifth, the non-discretionary nature of *habeas corpus* and the traditional onus on an application for that remedy favour an inmate who claims to have been unlawfully deprived of his or her liberty. If the inmate were forced to apply to the Federal Court to determine whether the deprivation was unreasonable, the remedy would be a discretionary one. Further, on an application for judicial review, the onus would be on the applicant to show that the transfer decision was unreasonable. Lastly, requiring inmates to challenge the reasonableness of a transfer decision in the Federal Court could result in a waste of judicial resources.

[page505]

A transfer decision that does not fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law will be unlawful. Similarly, a decision that lacks justification, transparency, and intelligibility will be unlawful. For it to be lawful, the reasons for and record of the decision must in fact or in principle support the conclusion reached. A decision will be unreasonable, and therefore unlawful, if an inmate's liberty interests are sacrificed absent any evidence or on the basis of unreliable or irrelevant evidence, or evidence that cannot support the conclusion. Deference will be shown to a determination that evidence is reliable, but the authorities will nonetheless have to explain that determination. A review to determine whether a decision was reasonable, and therefore lawful, necessarily requires deference. An involuntary transfer decision is

nonetheless an administrative decision made by a decision maker with expertise in the environment of a particular penitentiary. To apply any standard other than reasonableness in reviewing such a decision could well lead to the micromanagement of prisons by the courts. The application of a standard of review of reasonableness, however, should not change the basic structure or benefits of the writ of *habeas corpus*. First, the traditional onuses associated with the writ will remain unchanged. Second, the writ remains non-discretionary as far as the decision to review the case is concerned. Third, the ability to challenge a decision on the basis that it is unreasonable does not necessarily change the standard of review that applies to other flaws in the decision or in the decision-making process. For instance, the standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be "correctness".

In this case, it is not necessary to determine whether the decision made by the Warden in the instant case was unlawful on the basis of unreasonableness. The decision was unlawful because it was procedurally unfair. The statute at issue in this case, the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("*CCRA*"), outlines the disclosure that is required for a reviewing court to find a transfer decision fair, and therefore lawful. Section 27 of the *CCRA* guides the decision maker and elaborates on the resulting procedural rights. In order to guarantee fairness in the process leading up to a transfer decision, s. 27(1) provides that the inmate should be given all the information that was considered in the [page506] taking of the decision, or a summary of that information. This disclosure must be made within a reasonable time before the final decision is made. The onus is on the decision maker to show that s. 27(1) was complied with.

The statutory scheme allows for some exemptions from the onerous disclosure requirement of s. 27(1) and (2). Section 27(3) provides that where the Commissioner has reasonable grounds to believe that disclosure of information under s. 27(1) or (2) would jeopardize (a) the safety of any person, (b) the security of a penitentiary, or (c) the conduct of a lawful investigation, he or she may authorize the withholding from the inmate of as much information as is strictly necessary in order to protect the interest that would be jeopardized. A decision to withhold information pursuant to s. 27(3) is necessarily reviewable by way of an application for *habeas corpus.* Such a decision is not independent of the transfer decision made under s. 29 of the *CCRA*. If the correctional authorities failed to comply with s. 27 as a whole, a reviewing court may find that the transfer decision was procedurally unfair, and the deprivation of the inmate's liberty will not be lawful. If the Commissioner, or a representative of the Commissioner, chooses to withhold information from the inmate on the basis of s. 27(3), the onus is on the decision maker to invoke the provision and prove that there were reasonable grounds to believe that disclosure of that information would jeopardize one of the listed interests.

Here, it is clear from the record that the Warden, in making the transfer decision, considered information that she did not disclose to K. Nor did she give him an adequate summary of the missing information. The withholding of this information was not justified under s. 27(3). If s. 27(3) is never invoked, pled, or proven, there is no basis to find that the Warden was justified in withholding information that was considered in the transfer decision from the inmate. As a result,

the Warden's decision did not meet the statutory requirements related to the duty of procedural fairness. The decision to transfer K from Mission Institution to Kent Institution was therefore unlawful. The British Columbia Supreme Court properly granted *habeas corpus* and K was properly returned to a medium security institution.

[page507]

Cases Cited

Applied: *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *R. v. Miller*, [1985] 2 S.C.R. 613; *Morin v. National Special Handling Unit Review Committee*, [1985] 2 S.C.R. 662; **referred to:** *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Bushell's Case* (1670), Vaughan 135, 124 E.R. 1006; *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75; *Mitchell v. The Queen*, [1976] 2 S.C.R. 570; *R. v. Gamble*, [1988] 2 S.C.R. 595; *R. v. J.P.G.* (2000), 130 O.A.C. 343; *Jones v. Cunningham*, 371 U.S. 236 (1962); *Peiroo v. Canada (Minister of Employment and Immigration)* (1989), 69 O.R. (2d) 253; *Libo-on v. Alberta (Fort Saskatchewan Correctional Centre)*, 2004 ABQB 416, 32 Alta. L.R. (4th) 128; *Goldhar v. The Queen*, [1960] S.C.R. 431; *Re Sproule* (1886), 12 S.C.R. 140; *Re Trepanier* (1885), 12 S.C.R. 111; *R. v. Secretary of State for the Home Department, ex parte Cheblak*, [1991] 2 All E.R. 319; *R. v. Secretary of State for the Home Department, Ex parte Muboyayi*, [1992] 1 Q.B. 244; *R. v. Governor of Brixton Prison, Ex parte Armah*, [1968] A.C. 192; *R. v. Secretary of State for the Home Department, Ex parte Khawaja*, [1984] 1 A.C. 74; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711; *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3; *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 S.C.R. 326.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 9.

Corrections and Conditional Release Act, S.C. 1992, c. 20, ss. 27, 28, 29.

Corrections and Conditional Release Regulations, SOR/92-620, ss. 5(1)(*b*), 13.

Criminal Code, R.S.C. 1985, c. C-46.

Criminal Rules of the Supreme Court of British Columbia, SI/97-140, r. 4.

[page508]

Federal Court Rules, SOR/98-106, rr. 301 to 314.

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Habeas Corpus Act, 1679 (Engl.), 31 Cha. 2, c. 2.

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History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Smith, Chiasson and Groberman JJ.A.), 2011 BCCA 450, 312 B.C.A.C. 217, 531 W.A.C. 217, 246 C.R.R. (2d) 277, 27 Admin. L.R. (5th) 41, 90 C.R. (6th) 149, [2011] B.C.J. No. 2111 (QL), 2011 CarswellBC 3095, setting aside in part a decision of Bruce J., 2010 BCSC 721, [page509] 210 C.R.R. (2d) 251, 19 Admin. L.R. (5th) 173, [2010] B.C.J. No. 971 (QL), 2010 CarswellBC 1288. Appeal dismissed.

Counsel:

Anne M. Turley and *Jan Brongers*, for the appellants.

Bibhas D. Vaze and *Michael S. A. Fox*, for the respondent.

Allan Manson and *Elizabeth Thomas*, for the interveners the Canadian Association of Elizabeth Fry Societies and the John Howard Society of Canada.

D. Lynne Watt, for the intervener the Canadian Civil Liberties Association.

Michael Jackson, Q.C., and *Joana G. Thackeray*, for the intervener the British Columbia Civil Liberties Association.

The judgment of the Court was delivered by

LeBEL J.:--

I. Introduction

1 This case arises from a decision of correctional authorities to transfer a federal inmate from a

medium security institution to a maximum security institution on an emergency and involuntary basis. In response to the transfer decision, the inmate filed an application for relief in the form of *habeas corpus* on the grounds that the decision taken was unreasonable and that it was procedurally unfair.

2 At issue in this case is the state of the law with respect to the writ of *habeas corpus*. In particular, this Court must clarify the scope of a provincial superior court's review power on an application for *habeas corpus* made by a prison inmate. The first question before the Court is whether on such an application a provincial superior court may rule on the reasonableness of an administrative decision to transfer an inmate to a higher security institution or whether the reasonableness of the decision must [page510] be dealt with by the Federal Court on an application for judicial review. The second question concerns the information that must be disclosed to ensure that a transfer decision is procedurally fair.

3 In my view, superior courts are entitled to review an inmate transfer decision for reasonableness on an application for *habeas corpus* with *certiorari* in aid. If a decision is unreasonable, it will be unlawful. Support for this conclusion can be found in the nature of the writ, in past court decisions regarding the writ, and in the importance of swift access to justice for those who have been unlawfully deprived of their liberty.

4 Moreover, it is well established that a superior court hearing a *habeas corpus* application may also review a transfer decision for procedural fairness. The statute at issue in this case, the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("*CCRA*"), outlines the disclosure that is required for a reviewing court to find such a decision fair, and therefore lawful.

5 In this case, the correctional authorities did not comply with the statutory disclosure requirements. The breach of the statutory requirements rendered the decision procedurally unfair, and therefore unlawful. Given this finding, I would dismiss the appeal. The judgments of both the British Columbia Supreme Court and the British Columbia Court of Appeal are well founded.

II. Background Facts

6 The respondent, Mr. Khela, is a federal inmate. He began serving a life sentence for first degree murder at Kent Institution in British Columbia in 2004. After three years at this maximum security facility, he was transferred to Mission Institution, a medium security facility. In February 2010, however, Mr. Khela was involuntarily transferred back to the maximum security facility on an "emergency basis" after the Warden reassessed his security classification. It is this transfer that was the subject of [page511] Mr. Khela's initial *habeas corpus* application. Mr. Khela claimed that this transfer to a higher security institution was both unreasonable and procedurally unfair, and therefore unlawful.

7 The events that led up to the transfer in question are as follows. On September 23, 2009, an inmate was stabbed several times at Mission Institution. Roughly one week after the stabbing, the

Security Intelligence Office at Mission received information implicating Mr. Khela in the incident. On February 2, 2010, that office completed a Security Intelligence Report ("Security Report"), which contained information that Mr. Khela had hired two other inmates to carry out the stabbing in exchange for three grams of heroin. As a result of the Security Report, Mr. Khela was immediately transferred back to the maximum security prison.

8 On February 4, 2010, Mr. Khela received an "Assessment for Decision" ("Assessment") and a "Notice of Emergency Involuntary Transfer Recommendation" ("Notice"). The Assessment indicated that "[t]he primary reason for Mr. Khela's emergency transfer [was the] Security Intelligence Report ... and the culmination of information [it] contained", including the identification of Mr. Khela as the person responsible for organizing the stabbing. The Assessment stated that the Warden came to this conclusion on the basis of "source" and "kite", i.e. anonymous, information received from "three separate and distinct sources". The Assessment did not contain detailed information with respect to the sources' names, what they said or why they might be considered reliable.

9 The Notice confirmed that although his security classification had been determined, on the basis of the Correctional Service of Canada ("CSC") Security Reclassification Scale ("SRS"), to be "medium security", his case management team had recommended that this classification be overridden so as to be increased to "maximum security".

[page512]

10 On February 26, 2010, Mr. Khela submitted a written rebuttal in response to his transfer. Mr. Khela asked that the scoring matrix used to determine his ranking in accordance with the SRS be disclosed to him together with the Security Report, and with information on why the "sources" should be considered reliable and how the Warden had determined that they were reliable.

11 On March 15, 2010, Mr. Khela received a response to his rebuttal in the form of a "Referral Decision Sheet" that informed him that the Warden's final decision was to transfer him to the maximum security facility. In it, the Warden explained, among other things, why Mr. Khela's "medium" security rating had been overridden by his case management team. She also noted, in response to Mr. Khela's questioning of the credibility of the sources, that "the information received and assessed by the [Security Intelligence Officer was] believed reliable despite the Assessment ... only referring to the information as 'source' information" because of the expertise and policies of the security intelligence officers.

12 On April 27, 2010, Mr. Khela filed a notice that he would be making a *habeas corpus* application in the British Columbia Supreme Court. The application was heard by Bruce J. on May 11, 2010. Ten days later, Bruce J. granted the writ and ordered that Mr. Khela be returned to the general population of Mission Institution, the medium security facility. This appeal concerns the

lawfulness of that transfer decision.

A. *Mootness*

13 It is important to note that this appeal is now factually moot. On July 23, 2010, the Warden of Mission Institution made another decision to reclassify Mr. Khela as requiring maximum security. As a result of that decision, Mr. Khela was transferred back to Kent Institution, the maximum security facility. This second transfer was the subject of another *habeas corpus* application, which was dismissed by a judge of the British Columbia Supreme Court [page513] (2011 BCSC 577, 237 C.R.R. (2d) 15, at paras. 1, 58 and 89). Mr. Khela did not appeal the dismissal of that application. The lawfulness of his current incarceration is therefore not before this Court.

14 Despite being moot, this appeal merits a decision in the circumstances of this case. The nature of *habeas corpus* applications involving the transfer and segregation of inmates is such that the factual circumstances of a given application can change quickly, before an appellate court can review the application judge's decision. This means that such cases will often be moot before making it to the appellate level, and are therefore "capable of repetition, yet evasive of review" (*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at p. 364). As was true in *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, at para. 14, and *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 652, the points in issue here are sufficiently important, and they come before appellate courts as "live" issues so rarely, that the law needs to be clarified in the instant case.

III. Judicial History

A. *British Columbia Supreme Court, 2010 BCSC 721, 210 C.R.R. (2d) 251*

15 The British Columbia Supreme Court granted Mr. Khela *habeas corpus* (para. 64). Bruce J. first determined that on a *habeas corpus* application, a provincial superior court has jurisdiction to review a warden's transfer decision for reasonableness. Relying on this Court's decisions in *May* and in the "*Miller* trilogy" (*R. v. Miller*, [1985] 2 S.C.R. 613; *Cardinal*; *Morin v. National Special Handling Unit Review Committee*, [1985] 2 S.C.R. 662), she found that provincial superior courts, when hearing *habeas corpus* applications, have concurrent jurisdiction with the Federal Court (para. 37), which means that it is open to a superior court to determine whether the decision in question is reasonable. Bruce J. explained that the discretion to refuse to hear a *habeas corpus* application can only be exercised "where by statute a court of appeal is [page514] vested with exclusive authority to hear an appeal or where there is a complete internal process for review of an administrative decision" (para. 38). She found that a challenge based on reasonableness falls into neither of these categories, which means that reasonableness is a legitimate ground for review (paras. 38-40). Ultimately, however, Bruce J. held that it was unnecessary to address Mr. Khela's argument that the transfer decision was unreasonable, because she had already found the transfer to be unlawful on the basis of insufficient disclosure.

16 Bruce J. found that the statutory obligation to disclose under s. 27(1) of the *CCRA* is "onerous,

substantial and extensive", and that it is "underscored by the common law duty of fairness" (para. 44). In addition, she noted that *Commissioner's Directive 710-2*, "Transfer of Offenders", requires specific disclosure of the details of the incidents and the information that prompted the transfer recommendation. Bruce J. concluded that the Warden had failed to prove that she had fulfilled her obligation to make disclosure "to the greatest extent possible" (paras. 46 and 59). In particular, she found that the Warden had unjustifiably failed to disclose the specific statements made by the anonymous sources, information concerning the reliability of these anonymous sources, and the scoring matrix relied upon for the SRS calculation (paras. 51 and 56).

17 Bruce J. also held that s. 27(3) of the *CCRA* grants the authority to withhold information only when strictly necessary to protect the safety of a person, the security of the penitentiary, or the conduct of a lawful investigation. She stated that a warden who withholds information for one of these reasons must invoke that provision and present evidence to the court to show that the information was properly withheld. Bruce J. noted that the Warden had failed [page515] to invoke s. 27(3) and had presented no evidence to justify the withholding of the information. Thus, Mr. Khela had not been given "all the information to be considered". As a result of this failure to disclose, Bruce J. declared the Warden's decision "null and void for want of jurisdiction" (para. 64). She ordered Mr. Khela's return to the general population of Mission Institution.

B. *British Columbia Court of Appeal, 2011 BCCA 450, 312 B.C.A.C. 217*

18 The British Columbia Court of Appeal allowed the appeal, but only to the extent of limiting Bruce J.'s order to read that *habeas corpus* was granted and that Mr. Khela should be returned to a medium security institution (at para. 95). Chiasson J.A. found that it was unnecessary and undesirable to state that the transfer was "null and void for want of jurisdiction". In substance, however, the Court of Appeal largely agreed with Bruce J.'s decision.

19 The Court of Appeal held that an inmate transferred from a medium to a maximum security facility may apply for *habeas corpus* in a provincial superior court on the ground that the transfer decision was unreasonable. In Chiasson J.A.'s view, an unreasonable decision is an unlawful decision, and *habeas corpus* is therefore available (para. 66). Chiasson J.A. further explained that where a *habeas corpus* application concerns the substance of the underlying decision, the standard of review is reasonableness, with considerable deference to those charged with the administration of penal institutions (paras. 69-70).

20 The Court of Appeal also addressed the issue of disclosure. Chiasson J.A. held that a warden [page516] is statutorily obliged to provide an applicant in Mr. Khela's position with all the information he or she considered in making the decision, or with a summary of that information (para. 42). However, he did not agree that the warden has to provide the substance and details of the events leading up to the decision "to the greatest extent possible" (para. 43). Rather, Chiasson J.A. found that all that is required is an outline of the basic facts of the incident leading to the transfer that would be sufficient for the inmate to know the case he or she must meet (para. 43). He added

that s. 27(3) of the *CCRA* provides a basis for justifying non-compliance. But he noted that it also requires the warden to invoke this provision and establish that he or she had reasonable grounds to believe that withholding the information was necessary in the circumstances.

21 Applying this statutory standard, Chiasson J.A. determined that Mr. Khela had not been provided with adequate disclosure given the statutory and the common law requirements (para. 55). In particular, he found that Bruce J. had not erred in concluding that Mr. Khela should have been given additional information concerning the sources of information considered by the Warden. Chiasson J.A. accordingly found that the Warden had not met her statutory obligation and that, as a result, the transfer was procedurally unfair and therefore unlawful. He agreed with Bruce J.'s decision to grant *habeas corpus*.

IV. Issues and Positions of the Parties

22 This case revolves around three core issues:

(a) What is the scope of the review on an application for *habeas corpus* with *certiorari* in aid in respect of detention in a federal penitentiary? In particular, does the scope of the review on such an application include an assessment of reasonableness?

[page517]

(b) What is the scope of the duty of disclosure under s. 27 of the *CCRA*?

(c) In this case, were there grounds for finding that the decision was unlawful and granting the writ of *habeas corpus*?

23 With regard to the first issue, the appellants argue that on an application for *habeas corpus* in this context, the scope of a provincial superior court's review is limited to an assessment of whether the decision was "lawful". In the appellants' view, the merits of the underlying decision are irrelevant to that assessment. Only the Federal Court can assess the reasonableness of federal administrative decisions. The respondent argues, on the contrary, that it is open to a superior court on an application for *habeas corpus* to review the reasonableness of a correctional decision which resulted in a deprivation of liberty.

24 The interveners largely support Mr. Khela on this issue. The British Columbia Civil Liberties Association ("BCCLA") argues that to determine whether a decision was "lawful", a provincial superior court hearing a *habeas corpus* application must be able to conduct a robust review. It nevertheless cautions against allowing a superior court to conduct a "wholesale review for 'reasonableness'". According to the Canadian Civil Liberties Association ("CCLA"), *habeas corpus*,

as a *Canadian Charter of Rights and Freedoms* remedy, should be interpreted in a manner that is responsive to the particular needs of an individual who has been unlawfully deprived of his or her liberty. For this purpose, a superior court must be able to consider the merits of the underlying decision. Finally, the John Howard Society of Canada and the Canadian Association of Elizabeth Fry Societies submit that the appellants' interpretation of the scope of *habeas corpus* is too restrictive, but that "*Dunsmuir* reasonableness" cannot apply as a standard of review on a *habeas corpus* application (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190).

[page518]

25 As for the second issue, the appellants contend that disclosure will be sufficient when, as a matter of logic and common sense, it enables the inmate to know the case he or she has to meet. They further argue that if information is withheld pursuant to s. 27(3) of the *CCRA*, the decision to withhold it cannot be impugned by means of an application for *habeas corpus*, but must be challenged in the Federal Court on judicial review. The respondent counters that s. 27(1) indicates, in plain language, that the decision maker must disclose all the information considered in the taking of a decision or a summary of that information. He adds that if information is withheld from an inmate pursuant to s. 27(3), the onus is on the warden to demonstrate that there were reasonable grounds to believe that the safety of a person, the security of the institution or the conduct of an investigation would have been jeopardized had the information been disclosed. All four interveners (the CCLA, the BCCLA, the Canadian Association of Elizabeth Fry Societies together with the John Howard Society of Canada) are in substantial agreement with the respondent.

26 Finally, on the third issue, the appellants submit that the courts below erred in granting Mr. Khela's *habeas corpus* application. First, they argue that the courts below erred in holding that it is acceptable for a provincial superior court to review the merits of a transfer decision for reasonableness. Second, they argue that the courts below erred in finding that the Warden's disclosure constituted a denial of procedural fairness. In their opinion, the information disclosed to Mr. Khela was sufficient for him to know the case to be met. The respondent contends that the Warden did not disclose all the information she had considered, and that she provided no evidentiary basis for withholding it as she was required to do in the context of s. 27. The decision to transfer Mr. Khela was accordingly unlawful for want of procedural fairness.

[page519]

V. Analysis

A. *Habeas Corpus: The History and Nature of the Remedy*

27 W. Blackstone, in his *Commentaries on the Laws of England* (1768), vol. III, c. 8, at p. 131, asserted that *habeas corpus* is "the great and efficacious writ in all manner of illegal confinement" (cited by D. Parkes, "The 'Great Writ' Reinvigorated? *Habeas Corpus* in Contemporary Canada" (2012), 36 Man. L.J. 351, at p. 352; *May*, at para. 19; W. F. Duker, *A Constitutional History of Habeas Corpus* (1980), at p. 3). In an earlier incarnation, *habeas corpus* was a means to ensure that the defendant in an action was brought physically before the Court (Duker, at p. 4; J. Farbey, R. J. Sharpe and S. Atrill, *The Law of Habeas Corpus* (3rd ed. 2011), at p. 16; P. D. Halliday, *Habeas Corpus: From England to Empire* (2010), at p. 2). Over time, however, the writ was transformed into a vehicle for reviewing the justification for a person's imprisonment (Duker, at p. 4). Indeed, by the late 17th century, Vaughan C.J. of the Court of Common Pleas stated that "[t]he Writ of *habeas corpus* is now the most usual remedy by which a man is restored again to his liberty, if he have been against law deprived of it" (Duker, at p. 54, citing *Bushell's Case* (1670), Vaughan 135, 124 E.R. 1006, at p. 1007).

28 The first legislation respecting *habeas corpus* was enacted in 1641. The remedy was subsequently codified a second time in the *Habeas Corpus Act* of 1679 (Engl.), 31 Cha. 2, c. 2 (T. Cromwell, "Habeas Corpus and Correctional Law - An Introduction" (1997), 3 Queen's L.J. 295, at p. 298), the many purposes of which included addressing problematic delays in obtaining the writ, ensuring that prisoners were provided with copies of their warrants so that they would know the grounds for their detention, and ensuring that prisoners "would not be taken to places beyond the reach of the writ" (Farbey, Sharpe and Atrill, at p. 16; Halliday, at pp. 239-40).

29 Through both the *Charter* and the common law, Canada has attempted to maintain and uphold [page520] many of the goals of the *Habeas Corpus Act*, which embodied the evolving purposes and principles of the writ. *Habeas corpus* has become an essential remedy in Canadian law. In *May*, this Court emphasized the importance of *habeas corpus* in the protection of two of our fundamental rights:

> (1) the right to liberty of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice (s. 7 of the *Charter*); and (2) the right not to be arbitrarily detained or imprisoned (s. 9 of the *Charter*). [para. 22]

These rights belong to everyone in Canada, including those serving prison sentences (*May*, at paras. 23-25). *Habeas corpus* is in fact the strongest tool a prisoner has to ensure that the deprivation of his or her liberty is not unlawful. In articulating the scope of the writ both in the *Miller* trilogy and in *May*, the Court has ensured that the rule of law continues to run within penitentiary walls (*Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, at p. 622) and that any deprivation of a prisoner's liberty is justified.

30 To be successful, an application for *habeas corpus* must satisfy the following criteria. First, the applicant must establish that he or she has been deprived of liberty. Once a deprivation of liberty

is proven, the applicant must raise a legitimate ground upon which to question its legality. If the applicant has raised such a ground, the onus shifts to the respondent authorities to show that the deprivation of liberty was lawful (Farbey, Sharpe and Atrill, at pp. 84-85; *May*, at paras. 71 and 74).

B. *Court Oversight of Penal Institutions*

31 Both the Federal Court and provincial superior courts are tasked with reviewing decisions made within federal prison walls. Section 18 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 ("*FCA*"), confers exclusive original jurisdiction on the Federal Court to issue an injunction, writ of *certiorari*, writ of prohibition, writ of mandamus or writ of *quo warranto*, or grant declaratory relief against [page521] any federal board, commission or other tribunal. In *Martineau* this Court held that the writ of *certiorari* is available if an administrative decision was unfair, regardless of whether the decision was "judicial or quasi-judicial" (pp. 628-29 and 634). Dickson J. (as he then was) stated, in minority concurring reasons, that under s. 18, *certiorari* is available in the Federal Court whenever "a public body has power to decide any matter affecting the rights, interests, property, privileges, or liberties of any person" (pp. 622-23).

32 However, *habeas corpus* was "deliberately omit[ted]" from the list of writs set out in s. 18 of the *FCA*. This means that although the Federal Court has a general review jurisdiction, it cannot issue the writ of *habeas corpus* (*Miller*, at pp. 624-26). Jurisdiction to grant *habeas corpus* with regard to inmates remains with the provincial superior courts.

33 The jurisdiction of the provincial superior courts over prisoners in federal institutions was explained by this Court in the 1985 *Miller* trilogy and confirmed more recently in *May*. In the trilogy, Le Dain J. held that a provincial superior court has jurisdiction to hear an application for *habeas corpus* in order to review the validity of a detention authorized by a federal decision maker, despite the fact that alternative remedies are available in the Federal Court (*Miller*, at pp. 626 and 640-41). Le Dain J. concluded in *Miller*:

> ... *habeas corpus* should lie to determine the validity of a particular form of confinement in a penitentiary notwithstanding that the same issue may be determined upon *certiorari* in the Federal Court. The proper scope of the availability of *habeas corpus* must be considered first on its own merits, apart from the possible problems arising from concurrent or overlapping jurisdiction. The general importance of [*habeas corpus*] as the traditional means of challenging deprivations of liberty is such that its proper development and adaptation to the modern realities of confinement in a prison setting should not be compromised by concerns about conflicting jurisdiction. [Emphasis added; pp. 640-41.]

[page522]

Thus, the availability of the writ is more important than the possibility of hypothetical issues arising as a result of concurrent jurisdiction.

34 Le Dain J. also held in *Miller* that relief in the form of *habeas corpus* is available in a provincial superior court to an inmate whose "residual liberty" has been reduced by a decision of the prison authorities, and that this relief is distinct from a possible decision to release the inmate entirely from the correctional system (*Miller*, at p. 641). Decisions which might affect an offender's residual liberty include, but are not limited to, administrative segregation, confinement in a special handling unit and, as in the case at bar, a transfer to a higher security institution.

35 Finally, *Miller* enhanced the effectiveness of *habeas corpus* by confirming that inmates may apply for *certiorari* in aid of *habeas corpus*. Without *certiorari* in aid, a court hearing a *habeas corpus* application would consider only the "facts as they appear[ed] on the face of [the] return" or on the "face" of the decision, as the case may be, in determining whether the deprivation of liberty was lawful (D. A. C. Harvey, *The Law of Habeas Corpus in Canada* (1974), at p. 103). But *certiorari* in aid brings the record before the reviewing judge so that he or she may examine it to determine whether the challenged decision was lawful (*Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75, at para. 117). *Certiorari* in aid therefore operates to make *habeas corpus* more effective by requiring production of the record of the proceedings that resulted in the decision in question (*Miller*, at p. 624; Laskin C.J. in *Mitchell v. The Queen*, [1976] 2 S.C.R. 570, at p. 578).

36 It should be noted that *certiorari* applied for in aid of *habeas corpus* is different from *certiorari* applied for on its own. The latter is often used to quash an order, and it is only available in the Federal Court to an applicant challenging a federal administrative decision. In the context of a *habeas corpus* application, what is in issue is only the writ of *certiorari* employed to "inform the [c]ourt" and assist it in making the correct determination in a specific case, and not the [page523] writ of *certiorari* used to bring the record before the decision maker in order to "have it quashed" as would be done on an application for judicial review in the Federal Court (Cromwell, at p. 321).

37 This being said, there are, from a functional standpoint, many similarities between a proceeding for *habeas corpus* with *certiorari* in aid and a judicial review proceeding in the Federal Court. After all, "judicial review", "[i]n its broadest sense", simply refers to the supervisory role played by the courts to ensure that executive power is exercised in a manner consistent with the rule of law (Farbey, Sharpe and Atrill, at pp. 18 and 56). This is also the purpose of *habeas corpus*, if distilled to its essence (see generally, Farbey, Sharpe and Atrill, at pp. 18 and 52-56).

38 Despite the functional similarities between *certiorari* applied for in aid of *habeas corpus* in a provincial superior court and *certiorari* applied for on its own under the *FCA*, however, there are major remedial and procedural differences between them. These differences include (a) the remedies available in each forum, (b) the burden of proof and (c) the non-discretionary nature of *habeas corpus*.

39 In the Federal Court, a wide array of relief can be sought in an application for judicial review of a CSC decision (see s. 18.1(3)(*b*) of the *FCA*). But all a provincial superior court can do is determine that the detention is unlawful and then rule on a motion for discharge.

40 Further, on an application for judicial review, it is the applicant who must show that the federal decision maker made an error (*May*, at para. 71, citing to s. 18.1(4) of the *FCA*), whereas, on an application for *habeas corpus*, the legal burden rests with the detaining authorities once the prisoner has established a deprivation of liberty and raised a legitimate ground upon which to challenge its legality (*May*, at para. 71; Farbey, Sharpe and Atrill, at pp. 84-86). This particular shift in onus is unique to the writ of *habeas corpus*. Shifting [page524] the legal burden onto the detaining authorities is compatible with the very foundation of the law of *habeas corpus*, namely that a deprivation of liberty is permissible only if the party effecting the deprivation can demonstrate that it is justified. The shift is particularly understandable in the context of an emergency or involuntary inmate transfer, as an individual who has been deprived of liberty in such a context will not have the requisite resources or the ability to discover why the deprivation has occurred or to build a case that it was unlawful. On an application for judicial review, on the other hand, the onus remains on the individual challenging the impugned decision to show that the decision was unreasonable.

41 Finally, judicial review is an inherently discretionary remedy (C. Ford, "Dogs and Tails: Remedies in Administrative Law", in C. M. Flood and L. Sossin, eds., *Administrative Law in Context* (2nd ed. 2013), 85, at pp. 107-9). On an application for judicial review, the court has the authority to determine at the beginning of the hearing whether the case should proceed (D. J. Mullan, *Administrative Law* (2001), at p. 481). In contrast, a writ of *habeas corpus* issues as of right if the applicant proves a deprivation of liberty and raises a legitimate ground upon which to question the legality of the deprivation. In other words, the matter *must* proceed to a hearing if the inmate shows some basis for concluding that the detention is unlawful (*May*, at paras. 33 and 71; Farbey, Sharpe and Atrill, at pp. 52-54).

42 Twenty years after the *Miller* trilogy, in *May*, this Court stressed the importance of having superior courts hear *habeas corpus* applications. The majority in *May* unambiguously upheld the *ratio* of *Miller*: "*... habeas corpus* jurisdiction should not be declined merely because of the existence of an alternative remedy" (para. 34). In *May*, the Court established that, in light of the historical purposes of the writ, provincial superior courts should decline jurisdiction to hear *habeas corpus* applications in only two very limited circumstances:

[page525]

> ... where (1) a statute such as the *Criminal Code*, R.S.C. 1985, c. C-46, confers

> jurisdiction on a court of appeal to correct the errors of a lower court and release the applicant if need be or (2) the legislator has put in place complete, comprehensive and expert procedure for review of an administrative decision. [para. 50]

As was true in *May*, the first exception does not apply to the instant case. As for the second exception, the appellants have offered no argument to suggest that the transfer and review process of CSC has, since *May*, become a "complete, comprehensive and expert procedure" (paras. 50-51).

43 The majority in *May* set out five factors that provided further support for the position that provincial superior courts should hear *habeas corpus* applications from federal prisoners regardless of whether relief is available in the Federal Court.

44 First, given their vulnerability and the realities of confinement in prisons, inmates should, despite concerns about conflicting jurisdiction, have the ability to choose between the forums and remedies available to them (*May*, at paras. 66-67). As this Court very succinctly put it in *May*, "[t]he [remedial] option belongs to the applicant" (para. 44).

45 Second, there is no reason to suppose that the Federal Court is more expert than the provincial superior courts when it comes to inmates' fundamental rights. The Federal Court is of course well acquainted with administrative decisions and administrative procedure. The superior courts, on the other hand, are eminently familiar with the application of *Charter* principles and values, which are directly in issue when an inmate claims to have been unlawfully deprived of liberty (*May*, at para. 68).

46 Third, a hearing of a *habeas corpus* application in a superior court can be obtained more rapidly than a hearing of a judicial review application in the Federal Court. For example, according to Rule 4 of the *Criminal Rules of the Supreme Court [page526] of British Columbia*, SI/97-140, a hearing of a *habeas corpus* application requires only six days' notice. This is minimal in comparison with the timeline for having a judicial review application heard in the Federal Court. In that court, if the parties take the full time allotted to them at each step of the procedure, the request that a date be set for the hearing of the application will be filed 160 days after the challenged decision (s. 18.1(2) of the *FCA* and Rules 301 to 314 of the *Federal Court Rules*, SOR/98-106, cited at para. 69 of *May*).

47 Fourth, inmates have greater local access to a provincial superior court. This Court recognized the importance of local access in both *Miller*, at pp. 624-26, and *R. v. Gamble*, [1988] 2 S.C.R. 595, at pp. 634-35, as well as in *May*, at para. 70.

48 Fifth, as I mentioned above, the non-discretionary nature of *habeas corpus* and the burden of proof on an application for this remedy both favour the applicant.

49 These factors all weigh against acceptance of a bifurcated jurisdiction. The history and nature

of the remedy, combined with what this Court has said on this issue in the past, unequivocally support a finding that favours access to justice for prisoners, namely that of concurrent jurisdiction. As the majority stated in *May*, "[t]imely judicial oversight, in which provincial superior courts must play a concurrent if not predominant role, is still necessary to safeguard the human rights and civil liberties of prisoners" (para. 72).

50 The cases discussed above form the basis for the approach the Court must take to the first issue.

C. *Scope of the Review*

51 In essence, the effect of the *Miller* trilogy and *May* is that an inmate who has been deprived of his or her liberty as a result of an unlawful [page527] decision of a federal board, commission, or tribunal can apply to a provincial superior court for relief in the form of *habeas corpus*. What must now be done is to establish the scope of that court's review power.

52 As I mentioned above, on an application for *habeas corpus*, the basic question before the court is whether or not the decision was lawful. Thus far, it is clear that a decision will not be lawful if the detention is not lawful, if the decision maker lacks jurisdiction to order the deprivation of liberty (see, for example, *R. v. J.P.G.* (2000), 130 O.A.C. 343), or if there has been a breach of procedural fairness (see *May*, *Miller* and *Cardinal*). However, given the flexibility and the importance of the writ, as well as the underlying reasons why the jurisdiction of the provincial superior courts is concurrent with that of the Federal Court, it is clear that a review for lawfulness will sometimes require an assessment of the decision's reasonableness.

53 Including a reasonableness assessment in the scope of the review is consistent with this Court's case law. In particular, allowing provincial superior courts to assess reasonableness in the review follows logically from how this Court has framed the remedy and from the limits the courts have placed on the avenues through which the remedy can be obtained.

54 This Court has recognized in its decisions that *habeas corpus* should develop over time to ensure that the law remains consistent with the remedy's underlying goals: no one should be deprived of their liberty without lawful authority. The significance of *habeas corpus* to those who have been deprived of their liberty means that it must be developed in a meaningful way (*Miller*, at pp. 640-41). In *May*, the Court quoted with approval the statement by Black J. of the United States Supreme Court that *habeas corpus* is "not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose - the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty" (*May*, at para. 21; *Jones v. Cunningham*, 371 U.S. 236 (1962), at p. 243; see also the preface to [page528] R. J. Sharpe's *The Law of Habeas Corpus* (2nd ed. 1989)). This remedy is crucial to those whose residual liberty has been taken from them by the state, and this alone suffices to ensure that it is rarely subject to restrictions.

55 This Court has been reluctant to place limits on the avenues through which an individual may apply for the remedy. As I mentioned above, the Court confirmed in *Miller* that *habeas corpus* will remain available to federal inmates in the superior courts regardless of the existence of other avenues for redress (pp. 640-41). Similarly, Wilson J. stated in *Gamble* that courts have not bound themselves, nor should they do so, to limited categories or definitions of review where the review concerns the subject's liberty (pp. 639-40). In *May*, the Court confirmed that there are in fact only two instances in which a provincial superior court should decline to hear a *habeas corpus* application: (1) where the *Peiroo* exception applies (that is, where the legislature has put in place a complete, comprehensive and expert procedure) (*Peiroo v. Canada (Minister of Employment and Immigration)* (1989), 69 O.R. (2d) 253 (C.A.)), and (2) where a statute such as the *Criminal Code*, R.S.C. 1985, c. C-46, confers jurisdiction on a court of appeal to correct errors of a lower court and release the applicant if need be (*May*, at paras. 44 and 50). Reviews of decisions of correctional authorities for reasonableness do not fall into either of these exceptions, and in accordance with *May*, they therefore can and should be considered by a provincial superior court.

56 Many of the same principles which weighed in favour of concurrent jurisdiction in *May* apply to the determination of the scope of a provincial superior court's review power. First, each applicant should be entitled to choose his or her avenue of relief. If a court hearing a *habeas corpus* application cannot review the reasonableness of the underlying decision, then a prisoner who has been deprived of his or her liberty as a result of an unreasonable decision does not have a choice of avenues through [page529] which to obtain redress but must apply to the Federal Court.

57 Second, there is no reason to assume that the Federal Court is more expert than the superior courts in determining whether a deprivation of liberty is lawful. While it is true that the Federal Court may regularly be asked to determine whether decisions regarding a "mere loss of privileges" are reasonable, when a loss of liberty is involved, the superior courts are well versed in the *Charter* rights that apply when an inmate is transferred to a higher security facility (ss. 7 and 9).

58 Third, if inmates are not able to obtain review of their potentially unreasonable loss of liberty under an application for *habeas corpus*, they will have to wade through the lengthy grievance procedure available under the statute in order to have their concerns heard. If, for example, an inmate has lost his or her liberty as a result of a decision that was made on the basis of irrelevant evidence or was completely unsupported by the evidence, he or she is entitled to apply for and obtain a speedy remedy.

59 In the instant case, the appellants have filed an affidavit suggesting that *habeas corpus* proceedings are becoming increasingly time-consuming as superior court judges review the records of prison decision makers. There is a difficulty, however, with accepting this affidavit as convincing evidence that a *habeas corpus* application in a superior court no longer provides quicker relief than an application for judicial review in the Federal Court. Although the affidavit outlines how long it has taken to obtain decisions on *habeas corpus* applications in *certain* circumstances, it does not compare this with the length of time it takes to obtain decisions from the Federal Court on

applications for judicial review in similar circumstances.

60 The case at bar itself provides compelling evidence against the proposition advanced in the appellants' affidavit. Mr. Khela, after receiving [page530] the final decision with respect to his transfer on March 15, 2010, filed a notice of application in the British Columbia Supreme Court on April 27, 2010. The notice stated that the application would be made on May 11, 2010. A decision was rendered only ten days later by Bruce J. of that court.

61 Moreover, the affidavit failed to take into account the structure of the grievance procedure provided for in the *Corrections and Conditional Release Regulations*, SOR/92-620 ("*CCRR*"). Mr. Khela could not have challenged the decision in the Federal Court for want of procedural fairness and for unreasonableness without first going through an internal review process required by the statutory scheme. According to the statutory scheme, Mr. Khela would have had to submit a complaint. According to *Commissioner's Directive 081*, "Offender Complaints and Grievances", such complaints have multiple levels. The Directive indicates that grievors who are dissatisfied with the "decision rendered at the final level ... may seek judicial review of the decision at the Federal Court" (s. 15 (emphasis added)). However, even if an inmate's complaint is designated as a high priority, it can take as long as 90 days after the complaint was made before the inmate receives the final decision. Mr. Khela would not have been able to apply for judicial review until after he had received a decision at that level. Given the structure of this grievance procedure, an application for *habeas corpus* in a provincial superior court remains the more timely remedy.

62 The appellants argue to allow the provincial superior courts to review CSC transfer decisions for reasonableness would lengthen the duration of applications, increase their cost and cause a shift in the allocation of judicial resources. However, as Wilson J. stated in *Gamble*, "[r]elief in the form of *habeas corpus* should not be withheld for reasons of mere convenience" (p. 635).

[page531]

63 Fourth, the fact that inmates have local access to relief in the form of *habeas corpus* also weighs in favour of including a review for reasonableness. In *May*, this Court noted that "it would be unfair if federal prisoners did not have the same access to *habeas corpus* as do provincial prisoners" (para. 70). If the appellants' position were accepted, whereas provincial prisoners can apply to their provincial superior court for *habeas corpus* on procedural or jurisdictional grounds while also having that same court review the decision which resulted in their loss of liberty for reasonableness on an application for judicial review (see, for example, *Libo-on v. Alberta (Fort Saskatchewan Correctional Centre)*, 2004 ABQB 416, 32 Alta. L.R. (4th) 128, at para. 1), federal inmates would be required to apply to two different courts for redress flowing from a single impugned decision with the exact same record. It seems inconsistent to force the latter to do so solely because they are in federal prisons.

64 Fifth, the non-discretionary nature of *habeas corpus* and the traditional onus on an application for that remedy favour an inmate who claims to have been unlawfully deprived of his or her liberty. If the inmate were forced to apply to the Federal Court to determine whether the deprivation was unreasonable, the remedy would be a discretionary one. Further, on an application for judicial review, the onus would be on the applicant to show that the transfer decision was unreasonable. As Farbey, Sharpe and Atrill state, "[i]t would be wrong ... to deny [the benefits of the writ] by forcing the applicant to pursue some alternative remedy" (p. 54).

65 Ultimately, weighing these factors together leads to the conclusion that allowing a provincial superior court to conduct a review for reasonableness in deciding an application for *habeas corpus* would lead to greater access to a more effective remedy. Reasonableness should therefore be regarded as one element of lawfulness.

[page532]

66 Whether a decision is "lawful" cannot relate to jurisdiction alone. The appellants suggest that a review on a *habeas corpus* application is "limited to an analysis of whether there is jurisdiction to make a decision", as opposed to a review of the reasonableness of the underlying decision. For this proposition, the appellants rely on Le Dain J.'s conclusions in *Miller* (1) that *certiorari* in aid cannot be employed to convert an application for *habeas corpus* into an appeal on the merits (p. 632), and (2) that an application for *habeas corpus* addresses issues going to jurisdiction rather than issues going to the merits (p. 630). However, the appellants misread the context of Le Dain J.'s comments, which were made in reference to the earlier cases of *Goldhar v. The Queen*, [1960] S.C.R. 431, *Re Sproule* (1886), 12 S.C.R. 140, and *Re Trepanier* (1885), 12 S.C.R. 111. Le Dain J. was simply echoing earlier decisions in which this Court had held that *habeas corpus* is not to be used to appeal a *conviction*. Thus, he was saying in that case what the Court subsequently clarified in *May*, namely that "provincial superior courts should decline *habeas corpus* jurisdiction ... where ... a statute such as the *Criminal Code* ... confers jurisdiction on a court of appeal to correct the errors of a lower court and release the applicant if need be" (para. 50). This cannot be interpreted as a statement that a provincial superior court may not rule on the reasonableness of an administrative decision in the context of an application for *habeas corpus* with *certiorari* in aid.

67 Nor does *May* prohibit a provincial superior court from examining the reasonableness of an underlying transfer decision in the context of an application for *habeas corpus* with *certiorari* in aid. In *May*, this Court confirmed that "[a] deprivation of liberty will only be lawful where it is within the jurisdiction of the decision-maker" (para. 77). This cannot be read as a signal that *only* decisions outside the decision maker's jurisdiction will be unlawful. [page533] On the contrary, it simply means that jurisdiction is one requirement to be met for a decision to be lawful. On its own, however, this requirement is not sufficient to make a decision lawful. A decision that is within the decision maker's jurisdiction but that lacks the safeguards of procedural fairness will not be lawful.

Likewise, a decision that lacks an evidentiary foundation or that is arbitrary or unreasonable cannot be lawful, regardless of whether the decision maker had jurisdiction to make it.

68 It is true that there is a line of United Kingdom cases that suggests that a decision is unlawful only if it is outside the decision maker's jurisdiction. In *R. v. Secretary of State for the Home Department, ex parte Cheblak*, [1991] 2 All E.R. 319, for example, Lord Donaldson of the Court of Appeal stated:

> *A writ of habeas corpus* will issue where someone is detained without any authority or the purported authority is beyond the powers of the person authorising the detention and so is unlawful. *The remedy of judicial review* is available where the decision or action sought to be impugned is within the powers of the person taking it but, due to procedural error, a misappreciation of the law, a failure to take account of relevant matters, a taking account of irrelevant matters or the fundamental unreasonableness of the decision or action, it should never have been taken. In such a case the decision or action is lawful, unless and until it is set aside by a court of competent jurisdiction. [Emphasis in original; pp. 322-23.]

Lord Donaldson subsequently clarified this statement in *R. v. Secretary of State for the Home Department, Ex parte Muboyayi*, [1992] 1 Q.B. 244 (C.A.), holding that a claim for *habeas corpus* should be denied because

> there was no challenge to jurisdiction, but only to a prior underlying administrative decision. This is a quite different challenge and, unless and until it succeeds, there are no grounds for impugning the legality of his detention. [p. 255]

[page534]

In other words, a decision cannot be unlawful for reasons other than jurisdiction unless it is deemed unlawful by a "proper" reviewing court (Farbey, Sharpe and Atrill, at p. 58).

69 These decisions do not reflect the state of the law in Canada. First, if the *Cheblak/Muboyayi* line of cases were accepted in Canada, it would result in the bifurcated jurisdiction this Court explicitly rejected both in the *Miller* trilogy and in *May* (*May*, at para. 72; *Miller*, at pp. 624-26). Second, the conclusion that jurisdictional error alone is determinative of "lawfulness" contradicts a higher line of authority from the United Kingdom (see, for example, *R. v. Governor of Brixton Prison, Ex parte Armah*, [1968] A.C. 192 (H.L.); *R. v. Secretary of State for the Home Department, Ex parte Khawaja*, [1984] 1 A.C. 74 (H.L.); for further criticism of the *Cheblak/Muboyayi* line of cases see H. W. R. Wade, "Habeas Corpus and Judicial Review" (1997), 113 *L.Q.R.* 55, and Farbey,

Sharpe and Atrill, at pp. 56-63).

70 Finally, requiring inmates to challenge the reasonableness of a CSC transfer decision in the Federal Court could also result in a waste of judicial resources. For example, an inmate may take issue with both the process and the reasonableness of such a decision. Were we to accept the appellants' position, it would be possible for the inmate to first challenge that decision for want of procedural fairness by applying for *habeas corpus* with *certiorari* in aid in a provincial superior court and then, should that application fail, challenge the reasonableness of the same decision by seeking *certiorari* in the Federal Court. This bifurcation makes little sense given that *certiorari* in aid is available, and it would undoubtedly lead to a duplication of proceedings and have a negative impact on judicial economy.

[page535]

71 In an earlier article, Robert Sharpe had written that "the scope of review on *habeas corpus* depends upon the material which may be looked at by the court" (R. J. Sharpe, "Habeas Corpus in Canada" (1976), 2 Dal. L.J. 241, at p. 262; Chiasson J.A., at para. 72). If this is correct, which I believe it is, and the scope of the review is inextricably related to the material before the reviewing court, it is only logical on an application for *habeas corpus* to include an assessment of reasonableness in a review for lawfulness. Given that it is now well settled that on an application for *habeas corpus* with *certiorari* in aid the court will have before it "the complete record of inferior proceedings", the court has the power to review that record to ensure that the record supports the decision (Farbey, Sharpe and Atrill, at pp. 45-46). This will also aid in the conservation of scarce judicial resources.

72 The above reasoning leads to the conclusion that an inmate may challenge the reasonableness of his or her deprivation of liberty by means of an application for *habeas corpus*. Ultimately, then, where a deprivation of liberty results from a federal administrative decision, that decision can be subject to either of two forms of review, and the inmate may choose the forum he or she prefers. An inmate can choose either to challenge the reasonableness of the decision by applying for judicial review under s. 18 of the *FCA* or to have the decision reviewed for reasonableness by means of an application for *habeas corpus*. "Reasonableness" is therefore a "legitimate ground" upon which to question the legality of a deprivation of liberty in an application for *habeas corpus*.

73 A transfer decision that does not fall within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" will be unlawful (*Dunsmuir*, at para. 47). Similarly, a decision that lacks "justification, transparency and intelligibility" will be unlawful (*ibid.*). For it to be lawful, the reasons for and record of the decision must "in fact or in principle support the conclusion reached" (*Newfoundland and Labrador Nurses' [page536] Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 12, quoting with approval

D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304).

74 As things stand, a decision will be unreasonable, and therefore unlawful, if an inmate's liberty interests are sacrificed absent any evidence or on the basis of unreliable or irrelevant evidence, or evidence that cannot support the conclusion, although I do not foreclose the possibility that it may also be unreasonable on other grounds. Deference will be shown to a determination that evidence is reliable, but the authorities will nonetheless have to explain that determination.

75 A review to determine whether a decision was reasonable, and therefore lawful, necessarily requires deference (*Dunsmuir*, at para. 47; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 59; *Newfoundland and Labrador Nurses' Union*, at paras. 11-12). An involuntary transfer decision is nonetheless an administrative decision made by a decision maker with expertise in the environment of a particular penitentiary. To apply any standard other than reasonableness in reviewing such a decision could well lead to the micromanagement of prisons by the courts.

76 Like the decision at issue in *Lake*, a transfer decision requires a "fact-driven inquiry involving the weighing of various factors and possessing a 'negligible legal dimension'" (*Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761, at paras. 38 and 41). The statute outlines a number of factors to which a warden must adhere when transferring an inmate: the inmate must be placed in the least restrictive environment that will still assure the safety of the public, penitentiary staff and other inmates, should have access to his or her home community, and should be transferred to a compatible cultural and linguistic environment (s. 28, *CCRA*). Determining whether an inmate poses a threat to [page537] the security of the penitentiary or of the individuals who live and work in it requires intimate knowledge of that penitentiary's culture and of the behaviour of the individuals inside its walls. Wardens and the Commissioner possess this knowledge, and related practical experience, to a greater degree than a provincial superior court judge.

77 The intervener the BCCLA argues that the application of a standard of review of reasonableness should not change the basic structure or benefits of the writ. I agree. First, the traditional onuses associated with the writ will remain unchanged. Once the inmate has demonstrated that there was a deprivation of liberty and casts doubt on the reasonableness of the deprivation, the onus shifts to the respondent authorities to prove that the transfer was reasonable in light of all the circumstances.

78 Second, the writ remains non-discretionary as far as the decision to review the case is concerned. If the applicant raises a legitimate doubt as to the reasonableness of the detention, the provincial superior court judge is required to examine the substance of the decision and determine whether the evidence presented by the detaining authorities is reliable and supports their decision. Unlike the Federal Court in the context of an application for judicial review, a provincial superior court hearing a *habeas corpus* application has no inherent discretion to refuse to review the case

(see Farbey, Sharpe and Atrill, at pp. 52-56). However, a residual discretion will come into play at the second stage of the *habeas corpus* proceeding, at which the judge, after reviewing the record, must decide whether to discharge the applicant.

79 Third, the ability to challenge a decision on the basis that it is unreasonable does not necessarily change the standard of review that applies to other [page538] flaws in the decision or in the decision-making process. For instance, the standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be "correctness".

80 It will not be necessary to determine whether the decision made by the Warden in the instant case was unlawful on the basis of unreasonableness. As I will explain below, the decision was unlawful because it was procedurally unfair.

D. *Discipline and Disclosure*

81 Section 29 of the *CCRA* authorizes inmate transfers, and ss. 5(1)(*b*) and 13 of the *CCRR* outline how this authority is exercised where an immediate transfer is necessary. Section 29 of the *CCRA* provides that the Commissioner may authorize the transfer of an inmate from one penitentiary to another in accordance with the regulations on condition that the penitentiary to which the inmate is transferred provides him or her with an environment that contains only the necessary restrictions, taking into account the safety of the public and persons in the penitentiary, and the security of the penitentiary (ss. 28 and 29). According to s. 13(2)(*a*) of the *CCRR*, if the Commissioner or a designated staff member determines that an inmate must be transferred immediately on an emergency and involuntary basis, the inmate is nonetheless entitled to make representations regarding the transfer. Section 27(1) of the *CCRA* provides that where an inmate is entitled by the regulations to make such representations, the decision maker must give him or her "all the information" to be considered in taking a final decision regarding the transfer, subject only to s. 27(3). Even inmates transferred on an emergency and involuntary basis are therefore entitled to all the information considered in the Warden's decision-making process, or a summary thereof, except where s. 27(3) applies. The requirement that the inmate be provided with "all the information" can be satisfied by providing him or her with a summary of the information.

82 As this Court put it in *Cardinal*, one of the cases in the *Miller* trilogy, "there is, as a general common law principle, a duty of procedural [page539] fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual" (p. 653). Section 27 of the *CCRA* guides the decision maker and elaborates on the resulting procedural rights (*May*, at para. 94). In order to guarantee fairness in the process leading up to a transfer decision, s. 27(1) provides that the inmate should be given all the information that was considered in the taking of the decision, or a summary of that information. This disclosure must be made within a reasonable time before the final decision is made. The onus is on the decision maker to show that s. 27(1) was complied with.

83 This disclosure is not tantamount to the disclosure required by *R. v. Stinchcombe*, [1991] 3

S.C.R. 326. As the Court stated in *May*, "[t]he requirements of procedural fairness must be assessed contextually" (para. 90, citing *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3, at para. 39; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 21; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at p. 743; *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3, at para. 82). In this context, the inmate's residual liberty is at stake, but his or her innocence is not in issue. *Stinchcombe* requires that the Crown disclose all relevant information, including "not only that which the Crown intends to introduce into evidence, but also that which it does not" (p. 343). Section 27 does not require the authorities to produce evidence in their possession that was not taken into account in the transfer decision; they are only required to disclose the evidence that was *considered*. Further, whereas *Stinchcombe* requires the Crown to disclose *all* relevant information, s. 27 of the *CCRA* provides that a summary of that information will suffice.

84 The statutory scheme allows for some exemptions from the onerous disclosure requirement [page540] of s. 27(1) and (2). Section 27(3) provides that where the Commissioner has reasonable grounds to believe that disclosure of information under s. 27(1) or (2) would jeopardize (a) the safety of any person, (b) the security of a penitentiary, or (c) the conduct of a lawful investigation, he or she may authorize the withholding from the inmate of as much information as is strictly necessary in order to protect the interest that would be jeopardized.

85 A decision to withhold information pursuant to s. 27(3) is necessarily reviewable by way of an application for *habeas corpus.* Such a decision is not independent of the transfer decision made under s. 29. Rather, s. 27 serves as a statutory guide to procedural protections that have been adopted to ensure that decisions under s. 29 and other provisions are taken fairly. When a transfer decision is made under s. 29 and an inmate is entitled to make representations pursuant to the *CCRR*, s. 27 is engaged and decisions made under it are reviewable. If the correctional authorities failed to comply with s. 27 as a whole, a reviewing court may find that the transfer decision was procedurally unfair, and the deprivation of the inmate's liberty will not be lawful. This is certainly a "legitimate ground" upon which an inmate may apply for *habeas corpus*.

86 *Habeas corpus* is structured in such a way that so long as the inmate has raised a legitimate ground upon which to question the legality of the deprivation, the onus is on the authorities to justify the lawfulness of the detention (*May*, at para. 71). If the Commissioner, or a representative of the Commissioner, chooses to withhold information from the inmate on the basis of s. 27(3), the onus is on the decision maker to invoke the provision and prove that there were reasonable grounds to believe that disclosure of that information would jeopardize one of the listed interests.

87 Where, pursuant to s. 27(3), the correctional authorities do not disclose to the inmate *all* the information considered in their transfer decision or [page541] a summary thereof, they should generally, if challenged on an application for *habeas corpus*, submit to the judge of the reviewing court a sealed affidavit that contains both the information that has been withheld from the inmate

compared with the information that was disclosed and the reasons why disclosure of that information might jeopardize the security of the penitentiary, the safety of any person or the conduct of a lawful investigation.

88 When the prison authorities rely on kites or anonymous tips to justify a transfer, they should also explain in the sealed affidavit why those tips are considered to be reliable. When liberty interests are at stake, procedural fairness also includes measures to verify the evidence being relied upon. If an individual is to suffer a form of deprivation of liberty, "procedural fairness includes a procedure for verifying the evidence adduced against him or her" (*Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 S.C.R. 326, at para. 56).

89 Section 27(3) authorizes the withholding of information when the Commissioner has "reasonable grounds to believe" that should the information be released, it might threaten the security of the prison, the safety of any person or the conduct of an investigation. The Commissioner, or his or her representative, is in the best position to determine whether such a risk could in fact materialize. As a result, the Commissioner, or the warden, is entitled to a margin of deference on this point. Similarly, the warden and the Commissioner are in the best position to determine whether a given source or informant is reliable. Some deference is accordingly owed on this point as well. If, however, certain information is withheld without invoking s. 27(3), deference will not be warranted, and the decision will be procedurally unfair and therefore unlawful.

[page542]

90 I should point out that not all breaches of the *CCRA* or the *CCRR* will be unfair. It will be up to the reviewing judge to determine whether a given breach has resulted in procedural unfairness. For instance, if s. 27(3) has been invoked erroneously or if there was a strictly technical breach of the statute, the reviewing judge must determine whether that error or that technicality rendered the decision procedurally unfair.

E. *Lawfulness of the Deprivation of Liberty*

91 As I mentioned above, the writ of *habeas corpus* will issue if (1) the applicant has been deprived of his or her liberty and (2) that deprivation was unlawful. No one has contested the fact that the transfer of Mr. Khela to Kent Institution was a deprivation of his liberty. However, the parties disagree on whether that deprivation was lawful.

92 It is clear from the record that the Warden, in making the transfer decision, considered information that she did not disclose to Mr. Khela. Nor did she give him an adequate summary of the missing information. The withholding of this information was not justified under s. 27(3). As a result, the Warden's decision did not meet the statutory requirements related to the duty of procedural fairness.

93 In this case, the application judge noted that the Warden had failed to disclose information about the reliability of the sources (at para. 47), the specific statements made by the sources (at para. 51), and the scoring matrix that informed Mr. Khela's security classification (para. 56). She found that the failure to disclose this information had rendered the transfer decision procedurally unfair (para. 59). I agree with that finding.

94 The specific statements made by the sources and information concerning the reliability of the sources should have been disclosed to Mr. Khela. The appellants submit that information on the reliability of sources and substantial details about [page543] the incident that led to Mr. Khela's transfer were in fact disclosed. The only information in the Assessment regarding the sources was that "[s]ource information was received by the Security Intelligence Department implicating Mr. Khela as the contractor for the stabbing assault" in October 2009 and January 2010, and that "three separate and distinct sources" implicated Mr. Khela in the incidents which led up to his transfer. The Assessment also states that the information so received "corroborates previous claims and lends credence to [existing] suspicions". These statements do not provide Mr. Khela with enough information to know the case to be met. It is unclear from the Assessment what each of the three separate and distinct sources said, or why the new information "corroborated" previous claims. Vague statements regarding source information and corroboration do not satisfy the statutory requirement that all the information to be considered, or a summary of that information, be disclosed to the inmate within a reasonable time before the decision is taken.

95 Although some of this information may have been justifiably withheld under s. 27(3) of the *CCRA*, the appellants did not invoke s. 27(3) or lead any evidence (including a sealed affidavit) to suggest that their withholding of information related to concerns arising from the interests protected by s. 27(3). If s. 27(3) is never invoked, pled, or proven, there is no basis for this Court to find that the Warden was justified in withholding information that was considered in the transfer decision from the inmate.

96 Further, I agree with the determination of the application judge and the Court of Appeal that the Warden's failure to disclose the scoring matrix for the SRS was procedurally unfair. The appellants argue that the courts below should not have taken issue with the Warden's failure to disclose the scoring matrix, because, unlike in *May*, the decision to transfer Mr. Khela was not based on the SRS [page544] alone, given that the Commissioner overrode the security classification. Whether the decision was based on that scale alone is irrelevant, however. What is instead of concern is whether the Warden *considered* the scoring matrix, on which the SRS calculation was based, in taking her decision (s. 27).

97 An override of the SRS calculation does not eliminate the Warden's obligation to disclose the scoring matrix. The scoring matrix is used to calculate the inmate's security classification. That classification is then reviewed and can be overridden. Even if it is overridden, however, the security classification (and thereby, indirectly, the scoring matrix) is nonetheless "considered" within the meaning of s. 27 of the *CCRA*. The Warden or the Commissioner must review the calculation

before it can be overridden. Without access to the scoring matrix and information on the methodology used to calculate the total score, Mr. Khela was not in a position to challenge the information relied upon for the calculation or the method by which the total score was arrived at, and therefore could not properly challenge the override decision.

98 To be lawful, a decision to transfer an inmate to a higher security penitentiary must, among other requirements, be procedurally fair. To ensure that it is, the correctional authorities must meet the statutory disclosure requirements. In this case, these statutory requirements were not met, and the decision to transfer Mr. Khela from Mission Institution to Kent Institution was therefore unlawful. The British Columbia Supreme Court properly granted *habeas corpus*. Mr. Khela was properly returned to a medium security institution (C.A., at para. 95).

VI. Conclusion

99 For the foregoing reasons, I would dismiss the appeal without costs. The original transfer decision was unlawful. However, Mr. Khela is now [page545] lawfully incarcerated in Kent Institution and is not, therefore, to be returned to a medium security facility at this time.

Appeal dismissed without costs.

Solicitors:

Solicitor for the appellants: Attorney General of Canada, Ottawa and Vancouver.

Solicitors for the respondent: Conroy & Company, Abbotsford.

Solicitor for the interveners the Canadian Association of Elizabeth Fry Societies and the John Howard Society of Canada: Queen's University, Kingston.

Solicitors for the intervener the Canadian Civil Liberties Association: Gowling Lafleur Henderson, Ottawa.

Solicitor for the intervener the British Columbia Civil Liberties Association: University of British Columbia, Vancouver.

Canadian Transportation Agency

Decision No. 201-C-A-2005

April 8, 2005

IN THE MATTER OF a complaint filed by Irwin Nathanson concerning denied boarding by Lineas Aereas Costarricenses S.A. carrying on business as LACSA for a flight from Havana, Cuba to Toronto, Canada.

File No. M4370/L150/03-01

COMPLAINT

[1] On April 14, 2003, Irwin Nathanson filed with the Air Travel Complaints Commissioner (hereinafter the ATCC) the complaint set out in the title.

[2] On August 12, 2004, the complaint was referred to the Canadian Transportation Agency (hereinafter the Agency) for consideration as the complaint raised a tariff issue that falls within the jurisdiction of the Agency.

[3] On September 1, 2004, Agency staff advised the parties of the Agency's jurisdiction in this matter and sought Mr. Nathanson's confirmation whether he wished to pursue this matter formally before the Agency. As both parties had previously filed comments regarding Mr. Nathanson's complaint with the ATCC, Agency staff also requested the parties' confirmation as to whether they wished to have the comments they filed with the ATCC considered as pleadings before the Agency.

[4] On September 20, 2004, Mr. Nathanson advised the Agency that he wished to pursue the matter formally before the Agency, and to have the Agency consider the comments he filed with the ATCC as pleadings before the Agency.

[5] On October 5, 2004, Grupo TACA, on behalf of Lineas Aereas Costarricenses S.A. carrying on business as LACSA (hereinafter LACSA), filed a submission respecting Mr. Nathanson's complaint and, on October 13, 2004, advised that it did not want the Agency to solely rely on the pleadings before the ATCC, but to also consider the submission dated October 5, 2004.

[6] On October 28, 2004, Mr. Nathanson responded to LACSA's submission dated October 5, 2004.

[7] In its Decision No. LET-A-66-2005 dated February 28, 2005, the Agency directed questions to LACSA

164

regarding the application of its denied boarding policy in respect of Mr. Nathanson and his family. On March 17, 2005, LACSA filed its response.

[8] Pursuant to subsection 29(1) of the *Canada Transportation Act*, S.C., 1996, c. 10 (hereinafter the CTA), the Agency is required to make its decision no later than 120 days after the application is received unless the parties agree to an extension. In this case, the parties agreed to an extension of the deadline until April 8, 2005.

ISSUE

[9] The issue to be addressed is whether LACSA applied the terms and conditions of its tariff as required by subsection 110(4) of the *Air Transportation Regulations*, SOR/88-58, as amended (hereinafter the ATR).

POSITIONS OF THE PARTIES

[10] On March 23, 2003, Mr. Nathanson and his family arrived at the airport in Havana to check in for LACSA Flight No. 622 to Toronto, and were informed that the flight was oversold.

[11] Mr. Nathanson alleges that he informed the ticket agent that it was necessary that he and his family return to Toronto on March 23, 2003, so as to be able to board an Air Canada flight from Toronto to Vancouver the next morning, thereby allowing Mr. Nathanson to attend a business meeting at his office that day. According to Mr. Nathanson, the agent responded that there was nothing that could be done, other than placing Mr. Nathanson and his family on a LACSA flight to Toronto departing Havana on March 24, 2003.

[12] Mr. Nathanson submits that he and his family returned to their hotel and had someone contact air carriers departing from Varadero airport. Mr. Nathanson advises that he was eventually able to make reservations for himself and his family for an Air Transat A.T. Inc. carrying on business as Air Transat (hereinafter Air Transat) flight departing the night of March 23, 2003 from Varadero to Montréal, and a second flight with Air Canada from Montréal to Toronto, which would then allow Mr. Nathanson and his family to connect with their originally booked flight with Air Canada from Toronto to Vancouver.

[13] Mr. Nathanson requests a full refund of CAD$3,462 for the additional Air Transat and Air Canada tickets that he purchased for himself and his family to travel from Varadero to Montreal, and then from Montréal to Toronto.

[14] In its response, LACSA explains the industry practice of "overbooking", and states that, in general, this practice works to the advantage of both airlines and passengers because the air carriers are able to operate at maximum capacity, thus resulting in the lowest possible fares for consumers. LACSA submits that in situations where overbooking occurs, carrier staff handle affected passengers according to the carrier's over-sale

procedures. LACSA notes that, although there was no requirement in its over-sale procedures to provide hotel, meals or any such courtesies, it did offer Mr. Nathanson and his family hotel accommodations.

[15] LACSA submits that it provided Mr. Nathanson with a travel voucher on May 13, 2003 worth 400$USD, which was not redeemable in cash, and which represents the compensation required by the United States Department of Transportation. LACSA also submits that on December 2, 2003, it offered additional compensation in the form of four travel vouchers for 100$USD for each member of the Nathanson family, or one travel voucher for 400$USD in the name of Mr. Nathanson. LACSA further states that, in February 2004, it refunded 810.16$USD to Mr. Nathanson for the unused portions of the four tickets belonging to Mr. Nathanson and his family. LACSA maintains that it respected its regulations in addressing this matter.

[16] Mr. Nathanson submits that he is not satisfied with the response from LACSA, and maintains that the requirements set by the United States Department of Transportation relating to compensation for overbooking are not applicable to his contract for return transportation between Canada and Cuba.

[17] By Decision No. LET-A-66-2005 dated February 28, 2005, the Agency requested that LACSA provide its comments as to why it appears that the carrier failed to respect its policy in respect of compensation for denial of boarding as a result of overbooking. The Agency noted that although the policy is not reflected in LACSA's International Passenger Rules Tariff No. WHG-1, NTA(A) No. 326, Airline Tariff Publishing Company, Agent (hereinafter the Tariff), it is nonetheless set out in a policy document applicable to travel between Canada and Cuba, a copy of which LACSA submitted to the Agency in relation to Mr. Nathanson's complaint. The Agency notes that as of the date of the present Decision, LACSA refuses to provide compensation to Mr. Nathanson.

ANALYSIS AND FINDINGS

[18] In making its findings, the Agency has considered all of the evidence submitted by the parties during the pleadings, and the Tariff, as filed with the Agency.

[19] The Agency's jurisdiction with respect to the application to the terms and conditions of tariffs is set out in subsection 110(4) and section 113.1 of the ATR.

[20] Subsection 110(4) of the ATR provides that:

> 110(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.

166

[21] Section 113.1 of the ATR states:

> 113.1 Where a licensee fails to apply the fares, rates, charges, terms or conditions of carriage applicable to the international service it offers that were set out in its tariffs, the Agency may
>
> (*a*) direct the licensee to take corrective measures that the Agency considers appropriate; and
>
> (*b*) direct the licensee to pay compensation for any expense incurred by a person adversely affected by the licensee's failure to apply the fares, rates, charges, terms or conditions of carriage applicable to the international service it offers that were set out in its tariffs.

[22] A review of the Tariff indicates that it does not include terms and conditions of carriage clearly stating LACSA's policy in respect of compensation for denial of boarding as a result of overbooking.

[23] With respect to the compensation requested by Mr. Nathanson for the Air Transat and Air Canada tickets that he purchased for himself and his family on March 23, 2003, the Agency notes that, on several occasions, staff acting on behalf of the ATCC requested that LACSA reconsider its apparent refusal to tender this compensation. Following the referral of this matter to the Agency, LACSA offered to issue Mr. Nathanson a new travel voucher for 800$USD, in exchange for the vouchers previously provided to Mr. Nathanson that have since expired.

[24] Based on the evidence, as well as the lack of any policy in LACSA's Tariff regarding denied boarding compensation, the Agency does not have the statutory authority to order the payment of compensation in this case. In light of the foregoing, the Agency finds that the compensation requested by Mr. Nathanson is a matter beyond its jurisdiction.

[25] In this regard, subparagraph 122(*c*)(iii) of the ATR and section 26 of the CTA, provide as follows:

> 122. Every tariff shall contain
>
> (*c*) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,
>
> (iii) compensation for denial of boarding as a result of overbooking
>
> 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] The Agency notes that, in this case, as stated above, LACSA's Tariff does not set out its policy related to denied boarding compensation. Accordingly, the Agency finds that LACSA has contravened subparagraph 122(*c*)(iii) of the ATR. In this regard, LACSA should be aware that the Agency considers contraventions of

provisions of the CTA or the ATR to be serious and will take appropriate punitive action should any such contraventions occur in the future.

[27] Further, it is important to note that the authority of the Agency in such situations is limited to requiring a carrier to amend its tariff so as to comply with subparagraph 122(*c*)(iii) of the ATR. The Agency cannot require a carrier to apply a policy if that policy is not reflected in its tariff.

CONCLUSION

[28] As the Agency has no jurisdiction in the matter, the Agency hereby dismisses Mr. Nathanson's complaint in respect of the request for compensation.

[29] In addition, in respect of the contravention of the ATR, the Agency, pursuant to section 26 of the CTA, hereby directs LACSA to, within thirty (30) days from the date of this Decision, file a revision to the Tariff with the Agency, which clearly states LACSA's policy in respect of compensation for denial of boarding as a result of overbooking for travel to and from Canada.

Case Name:

Sherman v. Canada (Minister of National Revenue - M.N.R.)

Between
David M. Sherman, appellant, and
The Minister of National Revenue, respondent

[2004] F.C.J. No. 136

[2004] A.C.F. no 136

2004 FCA 29

2004 CAF 29

236 D.L.R. (4th) 546

317 N.R. 84

30 C.P.R. (4th) 149

2004 D.T.C. 6591

[2004] G.S.T.C. 6

129 A.C.W.S. (3d) 258

Docket A-387-02

Federal Court of Appeal
Ottawa, Ontario

Desjardins, Létourneau and Evans JJ.A.

Heard: In writing.
Judgment: January 23, 2004.

(17 paras.)

Civil Procedure -- Parties -- Representation of -- Self-representation -- Costs -- Assessment or fixing of costs -- Considerations -- Tariffs

Motion brought by appellant taxpayer for costs awarded on an appeal which was successful against the respondent federal government.The respondent contended that the bill of costs tendered ought not to have exceeded an award for party and party costs. The appellant had been awarded a moderate allowance to recognize the time and effort he spent representing himself at trial and on the appeal.

Motion allowed in part. The taxpayer was a reputable tax expert. His award for costs should not have exceeded the amount to which he would have been entitled if he had been represented by counsel. A moderate allowance only permitted partial, not full, indemnity of the taxpayer's cost.

Statutes, Regulations and Rules Cited:

Federal Court Rules, Tariff B, Tariff B Column III, Rules 369, 397, 403.

Counsel:

Written representations by:
David M. Sherman, the appellant, on his own behalf.
Sointula Kirkpatrick and Louis L'Heureux, for the respondent.

The judgment of the Court was delivered by

1 **LÉTOURNEAU J.A.**:-- In a judgment dated May 6, 2003, this Court concluded in part:

> The appellant is entitled to disbursements and a moderate allowance for the time and effort he devoted to preparing and presenting his case before the Trial and the Appeal Divisions of this Court on proof that, in so doing, he incurred an opportunity cost by foregoing remunerative activity.

2 By motion made under Rule 369, the appellant requests that this Court fix the award of costs at $30,528.00 for his time spent and $684.18 for disbursements plus costs of his motion in the amount of $5,760.00 plus disbursements for the twelve hours he spent to prepare and file his motion for costs. The appellant filed an affidavit to his motion detailing his costs. He submits that he worked 66.1 hours on the trial and the appeal. He calculates one half of the opportunity costs of his time at the rate of $550.00 an hour, the other half at $600.00 per hour. He discounted the total figure by 20% in order to meet the requirement that the allowance be moderate.

3 The respondent does not dispute the appellant's request for $684.08 in disbursements but otherwise opposes both his other requests. I should add that the appellant kept a detailed account of the time spent and effort devoted to the preparation and defence of his case. I do not think that the number of hours is unreasonable or subject to argument.

4 The objection is based on two grounds. Firstly, the respondent says that the appellant did not indicate the provisions on which the motion is based, except for Rule 369, which is procedural. The appellant is long out of time to bring his motion either under Rule 397 or under Rule 403 and has not asked for an extension.

5 Secondly, the respondent claims that it is implicit in this Court's judgment and reasons for judgment that the appellant was awarded party and party costs to be calculated according to Tariff B, the applicable tariff under the Rules.

6 This Court's decision, issued on May 6, 2003, was based on case law on which the Court relied to award to the appellant "a moderate allowance for the time and effort devoted to preparing and presenting the case". Rule 397 does not apply as there are no grounds for reconsideration.

7 The appellant could have sought an extension of time and brought a motion under Rule 403 for directions to the taxation officer. In the part of its order dealing with costs, this Court intended not to fix the actual quantum of the costs awarded, but to leave it to a taxation officer to determine such quantum within the parameters of the reasons for the costs order. However, since the Court is now seized with the issue, which is novel, and in view of the wide gap separating the parties with respect to the meaning of a "moderate allowance", it would be better for this Court to rule on it than merely to issue directions. Consequently, the appellant's bill of costs was appropriately brought under Rule 369.

8 The purpose of the costs rules is not to reimburse all the expenses and disbursements incurred by a party in the pursuit of litigation, but to provide partial compensation. The costs awarded, as a matter of principle, are party-and-party costs. Unless the Court orders otherwise, Rule 407 requires that they be assessed in accordance with column III of the table to Tariff B. As the Federal Court properly said in Apotex Inc. v. Wellcome Foundation Ltd. (1998), 159 F.T.R. 233, Tariff B represents a compromise between compensating the successful party and burdening the unsuccessful party.

9 Column III of the table to Tariff B is intended to address a case of average complexity: Apotex Inc. v. Syntex Pharmaceuticals International Ltd., [2001] F.C.J. No. 727, 2001 FCA 137. The Tariff includes counsel fees among the judicial costs. Since it applies uniformly across Canada, it obviously does not reflect a counsel's actual fees as lawyers' hourly rates vary considerably from province to province, from city to city and between urban and rural areas.

10 There is no doubt that the appellant, who was unrepresented, expended time and effort in the pursuit of his claims. However, as the Alberta Court of Appeal pointed out in Dechant v. Law

Society of Alberta, [2001] A.J. No. 373, 2001 ABCA 81, "represented litigants also sacrifice a considerable amount of their own time and effort for which no compensation is paid". Furthermore, their lawyers' fees are not fully reimbursed. I agree that "applying an identical cost schedule to both represented and unrepresented litigants will work an inequity against the represented litigant who, even with an award of costs, will be left with some legal fees to pay and no compensation for a personal investment of time": ibid, paragraph 16. It could also promote self-litigation as an occupation: ibid, paragraph 17; see also Lee v. Anderson Resources Ltd., 2002 ABQB 536, (2002) 307 A.R. 303 (Alta Q.B.).

11 In the present instance, if the appellant had been represented, he would have been awarded party and party costs according to column III of the table to Tariff B. I believe that his award of costs as an unrepresented litigant can, at best, equal, but should not exceed, what would have otherwise been paid to him if he had been represented by counsel. I should add that the unrepresented litigant enjoys no automatic right to the full amount contemplated by the tariff. The amount of the award is in the discretion of the Court. The concept of a "moderate allowance" is an indication of a partial indemnity although, as previously mentioned, I accept that, in appropriate but rare cases, the amount of that indemnity could be equal to what the tariff would grant to a represented litigant.

12 Like Registrar Doolan in City Club Development (Middlegate) Corp. v. Cutts (1996) 26 B.C.L.R. (3d) 39, Registrar Roland of the Supreme Court of Canada concluded in Metzner v. Metzner, [2000] S.C.C.A. No. 527, that the "reasonably competent solicitor approach was unworkable when assessing special costs awarded to a lay litigant": S.C.C. Bulletin 2001, p. 1158. She endorsed the conclusion that the only reasonable approach was to make an award on a quantum meruit basis.

13 In Clark v. Taylor [2003] N.W.T.J. No. 67, Vertes J. of the Northwest Territories Supreme Court was called upon to assess costs for an unrepresented female litigant. At paragraph 12 of the decision, he wrote:

> In considering what would be a "reasonable" allowance for the applicant's loss of time in preparing and presenting her case, I am not convinced that it is at all appropriate to simply apply what she herself would charge for her hourly fees to a client. The reality is that any litigation will eat up time and expenses whether one is represented or not.

14 He went on to add that the tariff can provide useful benchmarks, even if costs are not assessed on the tariff basis. I agree. The hourly rate claimed by the appellant in the present case is not the benchmark to be used in determining the quantum of a moderate allowance. It is much in excess of the allocation rate contemplated by the tariff.

15 In the present case, this Court was of the view that the appellant, who is a reputable tax expert, raised new issues of public interest as regards the interpretation of an international tax convention

and the right to access the information obtained and exchanged pursuant to that Convention: see paragraph 44 of the decision. The work submitted by the appellant was of good quality . The submissions to the Court were well documented and helpful. There is no doubt that his attendance at the hearing before the Federal Court and our Court was necessary and caused him to lose time from work. Furthermore, the appellant behaved with great propriety throughout the litigation.

16 Bearing all these factors in mind, including the legitimate purpose pursued by the appellant and the fact that costs under Tariff B would have amounted to some $7,200.00, I would fix the moderate allowance at $6,000.00 plus disbursements in the undisputed amount of $684.08. As for the costs and disbursements of bringing this motion, I would allow the sum of $350.00.

17 It would have been useful if the parties, or at least the respondent who was opposing the bill of costs, had given us some of the existing jurisprudence relating to the interpretation and application of the "moderate allowance" notion.

LÉTOURNEAU J.A.
DESJARDINS J.A.:-- I concur.
EVANS J.A.:-- I agree.

cp/e/qw/qlaim/qlhcs

Indexed as:

Zündel v. Canada (Canadian Human Rights Commission)

Between
Sabina Citron, Toronto Mayor's Committee on Community and Race Relations, the Attorney General of Canada, the Canadian Human Rights Commission, Canadian Holocaust Remembrance Association, Simon Wiesenthal Centre, Canadian Jewish Congress and League for Human Rights of B'nai Brith, appellants, and
Ernst Zündel and Canadian Association for Free Expression Inc., respondents

[2000] F.C.J. No. 678

[2000] A.C.F. no 678

[2000] 4 F.C. 255

[2000] 4 C.F. 255

256 N.R. 125

25 Admin. L.R. (3d) 135

97 A.C.W.S. (3d) 977

Dockets A-258-99, A-269-99

Federal Court of Appeal
Toronto, Ontario

Isaac, Robertson and Sexton JJ.

Heard: April 4, 2000.
Judgment: May 18, 2000.

(18 paras.)

Appeal from the judgment of the Trial Division of the Federal Court of Canada, delivered April 13,

1999 in Docket No. T-1411-98, [1999] F.C.J. No. 503.

Counsel:

Jane S. Bailey, for the appellants, Sabina Citron and the Canadian Holocaust Remembrance Association.
Andrew A. Weretelnyk, for the appellants, Toronto Mayor's Committee on Community and Race Relations.
Richard Kramer, for the appellant, Attorney General of Canada.
René Duval, for the appellant, Canadian Human Rights Commission.
Robyn M. Bell, for the appellant, Simon Weisenthal Centre.
Joel Richler and Judy Chan, for the appellant, Canadian Jewish Congress.
Marvin Kurz, for the appellant, League for Human Rights of B'Nai Brith.
Douglas Christie and Barbara Kulaszka, for the respondent, Ernst Zündel.
Gregory Rhone, for the respondent, Canadian Association for Free Expression Inc.

The judgment of the Court was delivered by

SEXTON J.:--

INTRODUCTION

1 This is an appeal from an application for judicial review of two rulings made by the Canadian Human Rights Tribunal in the course of hearing a human rights complaint made against Mr. Zündel. In the first ruling (A-258-99), the Tribunal ruled that counsel for Mr. Zündel could not engage in a certain line of cross-examination. In the second ruling (A-269-99), the Tribunal refused to qualify a witness tendered by Mr. Zündel as an expert witness. The issue in these appeals is whether Mr. Zündel's applications for judicial review of the Tribunal's rulings are premature on the basis that the rulings are interlocutory decisions made during the course of the Tribunal's proceedings. This set of reasons deals with both appeals and a copy will be placed in each file.

BACKGROUND FACTS

2 Prior to the time that these applications for judicial review were brought, the Canadian Human Rights Tribunal was inquiring into whether an Internet website operated by Mr. Zündel contravened s. 13(1) of the Canadian Human Rights Act.

Ruling at issue in A-258-99

3 During the hearing, counsel for the Canadian Human Rights Commission called a witness

described as "an expert historian in the field of anti-Semitism and Jewish-Christian relations."[1] During the course of cross-examination of that witness, counsel for Mr. Zündel sought to cross-examine the witness on the "truth" of certain statements found on Mr. Zündel's website, which the witness had testified were anti-Semitic.

4 Counsel for the Canadian Human Rights Commission objected to the line of questioning, arguing that the so-called "truth" of the statements was irrelevant, since truth was not a defence to the s. 13(1) complaint at issue before the Tribunal.

5 The Tribunal accepted the Commission's arguments. It held that "questions as to the truth or falsity of the statements found on the Zundel site [i.e. the website at issue] add nothing to our ability to determine the issues before us, and potentially will add a significant dimension of delay, cost and affront to the dignity of those who are alleged to have been victimized by these statements."[2]

Ruling at issue in A-269-99

6 In its second ruling, the Tribunal was asked to qualify a witness tendered by Mr. Zündel as an expert. It declined to do so, holding that an expert witness "must be capable of giving an objective, disinterested and unbiased opinion."[3] The Tribunal held that the witness tendered by Mr. Zündel was not capable of doing so, since it considered his views on anti-Semitism to be "so extreme as to render his opinion well beyond the impartial and objective standard required of an expert."[4] The Tribunal added that the witness did "not bear any of the essential indicia of an expert in the subject area."[5]

7 Mr. Zündel applied to the Federal Court-Trial Division for judicial review of the Tribunal's two rulings.

THE FEDERAL COURT - TRIAL DIVISION'S DECISION

8 In short reasons, the Motions Judge held that he was satisfied that "special circumstances exist to hear the present judicial review applications which are with respect to interlocutory evidentiary decisions."[6] He held that because he had concluded in a related application for judicial review that one of the members who had participated in the two evidentiary rulings was subject to a reasonable apprehension of bias, the two rulings should be quashed.

ANALYSIS

9 In a related appeal (A-253-99), I have concluded that the member who participated in the two evidentiary rulings at issue in this appeal is not subject to a reasonable apprehension of bias. Accordingly, I disagree with the Motion Judge's reasons for allowing Mr. Zündel's applications for judicial review in these matters. Consequently, the interlocutory rulings must be dealt with on an alternative ground.

10 Are the applications for judicial review premature? As a general rule, absent jurisdictional issues, rulings made during the course of a tribunal proceeding should not be challenged until the tribunal's proceedings have been completed. The rationale for this rule is that such applications for judicial review may ultimately be totally unnecessary: a complaining party may be successful in the end result, making the applications for judicial review of no value. Also, the unnecessary delays and expenses associated with such appeals can bring the administration of justice into disrepute. For example, in the proceedings at issue in this appeal, the Tribunal made some 53 rulings. If each and every one of the rulings was challenged by way of judicial review, the hearing would be delayed for an unconscionably long period. As this Court held in In Re Anti-Dumping Act,[7] "a right, vested in a party who is reluctant to have the tribunal finish its job, to have the Court review separately each position taken, or ruling made, by a tribunal in the course of a long hearing would, in effect, be a right vested in such a party to frustrate the work of the tribunal."[8]

11 This rule has been re-affirmed by many courts. Although her remarks were made in the context of criminal proceedings, I think McLachlin J.'s remarks in R. v. Seaboyer[9] are apposite here:

> [...] I would associate myself with the view that appeals from rulings on preliminary enquiries ought to be discouraged. While the law must afford a remedy where one is needed, the remedy should, in general, be accorded within the normal procedural context in which an issue arises, namely the trial. Such restraint will prevent a plethora of interlocutory appeals and the delays which inevitably flow from them. It will also permit a fuller view of the issue by the reviewing courts, which will have the benefit of a more complete picture of the evidence and the case.[10]

12 In Szczecka v. Canada (Minister of Employment and Immigration),[11] Létourneau J.A. held:

> [...] Unless there are special circumstances there should not be any appeal or immediate judicial review of an interlocutory judgment. Similarly, there will not be any basis for judicial review, especially immediate review, when at the end of the proceedings some other appropriate remedy exists. These rules have been applied in several court decisions specifically in order to avoid breaking up cases and the resulting delays and expenses which interfere with the sound administration of justice and ultimately bring it into disrepute.[12]

13 Similarly, in Howe v. Institute of Chartered Accountants of Ontario,[13] the Ontario Court of Appeal held that it was "trite law that the court will only interfere with a preliminary ruling made by an administrative tribunal where the tribunal never had jurisdiction or has irretrievably lost it."[14]

14 Notwithstanding the general rule, counsel for Mr. Zündel argued that the two rulings made by the Tribunal constituted "special circumstances" that warranted immediate judicial review. He argued that the Tribunal's rulings were so significant that they went to the Tribunal's very

jurisdiction.

15 I disagree. The rulings at issue in these appeals are mere evidentiary rulings made during the course of a hearing. Such rulings are made constantly by trial courts and tribunals and if interlocutory appeals were allowed from such rulings, justice could be delayed indefinitely. Matters like bias and a tribunal's jurisdiction to determine constitutional questions or to make declaratory judgments have been held to go to the very jurisdiction of a tribunal and have therefore constituted special circumstances that warranted immediate judicial review of a tribunal's interlocutory decision.[15] By contrast, rulings made by a coroner refusing to permit certain questions to be asked have been considered not to result in the loss of jurisdiction sufficient to warrant immediate judicial review of an interlocutory decision.[16] Similarly, in Doman v. British Columbia (Securities Commission),[17] Huddart J. (as she then was) held that "the fact that an evidentiary ruling may give rise to a breach of natural justice is not sufficient reason for a court to intervene in the hearing process."[18] Huddart J. added:

> I find support for that conclusion in the policy of the appeal courts not to review a judge's ruling under the Charter made during the course of a trial. Substantive rights are at stake, the trial judge can be wrong, evidence may be inadmissible, the decision may be overturned, a new trial may be required, but nothing should be allowed to interfere with the trial process once it has begun.[19]

16 In oral argument, counsel for Mr. Zündel argued that had he waited until the Tribunal determined the merits of the complaint, ss. 18.1(2) of the Federal Court Act would have deprived him of the ability to seek judicial review of the two rulings at issue in this appeal. Subsection 18.1(2) states:

> 18.1(2) Time limitation -- 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.

17 In light of my conclusion that each and every ruling made by a Tribunal in the course of its proceedings cannot be the subject of an application for judicial review, it follows that the word "decision" contained in s. 18.1(2) cannot refer to every interlocutory decision a tribunal makes. A party against whom an interlocutory order has been made is not therefore under an obligation to immediately appeal in order to preserve his rights. In my view, the time period prescribed in s. 18.1(2) of the Federal Court Act does not begin to run until the final decision in the proceedings has been rendered. If the Tribunal's final decision is appealed, any objection to procedures taken during the hearing of the appeal can be raised at that time.

CONCLUSION

18 I would allow the appeal, with costs and set aside the order of the Motions Judge dated April 13, 1999.

SEXTON J.
ISAAC J.:-- I agree.
ROBERTSON J.:-- I agree.

cp/d/qlndn/qlhcs/qlhbb

1 Appeal Book A-258-99, p. 37 XXXX.

2 Ibid., pp. 37 DDDDD-37 EEEEE.

3 Appeal Book A-269-99, p. 234.

4 Ibid., p. 231.

5 Ibid.

6 Ibid., p. 8.

7 [1974] 1 F.C. 22 (C.A.), cited approvingly by this Court in Canada v. Schnurer Estate, [1997] 2 F.C. 545 (C.A.).

8 Ibid., p. 34.

9 [1991] 2 S.C.R. 577.

10 Ibid., p. 641.

11 (1993), 116 D.L.R. (4th) 333 (F.C.A.).

12 Ibid., p. 335. See also People First of Ontario v. Ontario (Niagara Regional Coroner) (1992), 87 D.L.R. (4th) 765 (Ont. C.A.) ("We entirely agree with the Divisional Court that it is undesirable to interrupt inquests with applications for judicial review. Whenever possible, it is best to let the inquest proceed to its resolution and then perhaps, if circumstances dictate, to take judicial proceedings.")

13 (1994), 19 O.R. (3d) 483 (C.A.).

14 Ibid., p. 490.

15 Pfeiffer v. Canada, [1996] 3 F.C. 584 (T.D.).

16 People First of Ontario v. Ontario (Niagara Regional Coroner) (1992), 87 D.L.R. (4th) 765 (Ont. C.A.).

17 (1995), 34 Admin. L.R. (2d) 102 (B.C.S.C.).

18 Ibid., p. 109.

19 Ibid.

Case Name:

Air Canada v. Greenglass

Between
Air Canada, Appellant, and
Marley Greenglass and Canadian Transportation Agency, Respondents

[2014] F.C.J. No. 1286

2014 FCA 288

Docket: A-405-13

Federal Court of Appeal
Montréal, Quebec

Nadon, Gauthier and Scott JJ.A.

Heard: October 7, 2014.
Judgment: December 9, 2014.

(50 paras.)

Administrative law -- Natural justice -- Hearings -- Procedural rights and requirements -- Right to be heard -- Responses and submissions -- Appeal by Air Canada from the ruling rendered by Canadian Transportation Agency allowed -- Respondent suffered allergic reaction to dog in cabin on passenger flight and applied to Agency challenging Air Canada's policy of allowing dogs in cabin -- Agency ordered Air Canada to develop and implement policies and procedures necessary to comply with series of accommodation measures -- Decision breached procedural fairness by misleading directions in two opening pleading decisions causing Air Canada to fail in making submissions regarding alternative accommodation, undue obstacle and undue hardship -- Matter remitted for reconsideration.

Transportation law -- Air transportation -- Regulation -- Federal -- Persons with disabilities -- Canadian Transportation Agency -- Appeal by Air Canada from the ruling rendered by Canadian Transportation Agency allowed -- Respondent suffered allergic reaction to dog in cabin on passenger flight and applied to Agency challenging Air Canada's policy of allowing dogs in cabin -- Agency ordered Air Canada to develop and implement policies and procedures necessary to comply

with series of accommodation measures -- Decision breached procedural fairness by misleading directions in two opening pleading decisions causing Air Canada to fail in making submissions regarding alternative accommodation, undue obstacle and undue hardship -- Matter remitted for reconsideration.

Appeal by Air Canada from a decision by the Canadian Transportation Agency (CTA) in favour of the respondent, Greenglass. The respondent was allergic to dogs. She was seated on a flight directly behind a passenger accompanied by a dog. The respondent experienced an allergic reaction that caused her flight to be delayed and required several days of recovery. She applied to the CTA, challenging Air Canada's policy allowing the carriage of pet dogs in aircraft cabins. The CTA ordered Air Canada to develop and implement policies and procedures necessary to comply with a series of accommodation measures, including seating separation requirements, booking priority rules, and, in some instances, a ban on dogs in the cabin in certain circumstances. Air Canada appealed.

HELD: Appeal allowed. Air Canada was denied procedural fairness in the course of two opening pleading decisions in which the CTA attempted to set the ground rules for adjudication of the respondent's application. Due to conflicting and misleading directions in the decisions regarding evidence and submissions, Air Canada was prevented from submitting evidence on a number of crucial issues, such as obstacle and appropriate accommodation for individuals with a dog allergy disability. In the absence of evidence from Air Canada, the CTA concluded that accommodation measures ordered in a cat allergy decision were appropriate to address the needs of individuals who were allergic to dogs. Fairness and justice required that Air Canada be given the opportunity to make submissions with regard to alternative accommodation, undue obstacle, and undue hardship. The CTA's final decision was set aside and returned for reconsideration.

Statutes, Regulations and Rules Cited:

Canada Transportation Act, S.C. 1996, c. 10, s. 172(1)

Counsel:

Patrick Girard, Patrick Désalliers, for the Appellant.

Andray Renaud, Simon-Pierre Lessard, for the Respondent Canadian Transportation Agency.

REASONS FOR JUDGMENT

The judgment of the Court was delivered by

1 NADON J.A.:-- On August 2, 2013, the Canadian Transportation Agency (the Agency) rendered its Final Decision (Decision No. 303-AT-A-2013 or the "Final Decision") concerning the application of Mrs. Marley Greenglass (the applicant) made pursuant to subsection 172(1) of the *Canada Transportation Act*, S.C. 1996, c.10 (the *Act*) against Air Canada's policy which allows the carriage of pet dogs in aircraft cabins particularly as it affects individuals, such as the applicant, who have an allergy to dogs. At paragraphs 62 to 68 of the Final Decision, the Agency ordered Air Canada to comply with the following accommodation measures:

> **CONCLUSION**
>
> [62] The Agency therefore orders Air Canada to develop and implement the policies and procedures necessary to provide the following appropriate accommodation and to provide the requisite training to its staff to ensure the provision of the appropriate accommodation.
>
> **With respect to dogs carried as pets**
>
> [63] On aircraft with air circulation/ventilation systems using HEPA filters or which provide 100 percent unrecirculated fresh air:
>
> * a seating separation that is confirmed prior to boarding the flight and that provides a minimum of five rows between persons with a dog allergy disability and pet dogs, including during boarding and deplaning and between their seat and a washroom; or
>
> * a ban on pet dogs in the aircraft cabin in which a person with a disability as a result of their allergy to dogs is travelling.
>
> [64] On aircraft without air circulation/ventilation systems using HEPA filters or which do not provide 100 percent unrecirculated fresh air:
>
> * a ban on pet dogs in the aircraft cabin in which a person with a disability as a result of their allergy to dogs is travelling.
>
> [65] When advance notification of less than 48 hours is provided by persons with

a dog allergy disability, a ban on pet dogs is to be provided if no person travelling with a pet dog has already booked their travel on the selected flight. If a person travelling with a pet dog has already been booked on the flight, persons with a dog allergy disability must be provided with the same flight ban accommodation within 48 hours on the next flight available on which there is no person with a pet dog already booked. If the next available flight is beyond the 48-hour period, persons with a dog allergy disability must be given priority and provided with the accommodation measures applicable when the 48-hour advance notice is given by the person with a dog allergy disability.

With respect to service dogs

[66] On aircraft with air circulation/ventilation systems using HEPA filters or which provide 100 percent unrecirculated fresh air:

* a seating separation that is confirmed prior to boarding the flight and that provides a minimum of five rows between persons with a dog allergy disability and service dogs, including during boarding and deplaning and between their seat and a washroom.

[67] On aircraft without air circulation/ventilation systems using HEPA filters or which do not provide 100 percent unrecirculated fresh air:

* give the booking priority to whoever of the person with a dog allergy disability and the person travelling with a service dog first completed their booking. A person with a dog allergy disability and a person travelling with a service dog will not be accepted on the same flight using an aircraft that does not have HEPA filters or which does not provide 100 percent unrecirculated fresh air.

[68] Air Canada has until September 16, 2013 to comply with this order.

2 On October 10, 2013, Pelletier J.A. granted leave to Air Canada to appeal the Agency's Final Decision and on November 29, 2013, Air Canada filed its Notice of Appeal.

3 The facts underlying this appeal are simple. In short, on a flight from Toronto to Phoenix, Arizona, the applicant was seated in a row directly behind a passenger accompanied by a dog. The

presence of the dog caused "health issues" for the applicant, resulting in her flight being delayed. She took medication and put on a charcoal filter mask to prevent things from getting worse. Ultimately, the dog was moved, but by that time the applicant was feeling unwell and had to increase her medication throughout the flight. During the flight, the applicant had a second "attack" and it took her several days to recover.

4 On February 7, 2012, the applicant filed her application against Air Canada's policy providing for the carriage of pets in aircraft cabins as it relates to her dog allergy.

5 On March 6, 2012, the Agency adjourned her application pending the adjudication of a decision in an investigation into WestJet, Air Canada and Air Canada Jazz's policies with respect to persons whose allergy to cats results in a disability for the purposes of the *Act*.

6 On June 14, 2012, the Agency issued its final decision regarding cat allergies (the "Cat Allergy Decision"). As part of this decision, the Agency determined the appropriate accommodation measures that the airlines had to adopt for persons allergic to cats (Decision No. 227-AT-A-2012).

I. The Decision under Review

7 In addition to its Final Decision, the Agency made three other decisions which are relevant to this appeal as they form part and parcel of the Final Decision. These decisions are referred to as: the Initial Opening Pleading Decision, rendered on January 16, 2013; the Second Opening Pleading Decision, given on March 7, 2013; and the Show Cause Decision, rendered on June 5, 2013. A brief review of these decisions is necessary to fully understand the Final Decision and the issues which arise in this appeal.

A. *The Initial and Second Opening Pleading Decisions*

8 On January 16, 2013, the Agency opened pleadings in the applicant's application and gave her an opportunity to complete her application following which Air Canada would have the opportunity to file a response.

9 The Initial Opening Pleading Decision (this decision is numbered No. LET-AT-A-10-2013) set out a three step process for resolving applications through formal adjudication: first, the applicant would have to establish that she was a person with a disability for the purposes of the *Act*; second, the applicant would have to establish that she had encountered an "obstacle", i.e. that she needed, and was not provided with, accommodation; third, the Agency would determine whether the obstacle was an undue obstacle and whether corrective measures were therefore required to eliminate it.

10 With respect to the third step, the Agency explained that an obstacle will not be considered "undue" if the service provider can justify its existence by showing that the removal of the obstacle would be unreasonable, impractical or impossible, such that any formal accommodation would

cause the service provider undue hardship.

11 The Initial Opening Pleading Decision found, on a preliminary basis, that the accommodation measures ordered by the Agency in the Cat Allergy Decision constituted the appropriate accommodation needed to meet the disability-related needs of persons who are disabled by an allergy to dogs.

12 The Agency asked the applicant to provide a letter or medical certificate from a physician or allergist giving answers to a number of questions posed by the Agency. The Agency also requested that the applicant describe in detail how Air Canada's policy to allow the carriage of pets in the aircraft cabin affected her ability to engage in air travel.

13 The applicant did not respond to the Initial Opening Pleading Decision as required. Consequently, the Agency closed her file (this decision is numbered No. LET-AT-A-28-2013).

14 On February 21, 2013, the applicant resubmitted her application and informed the Agency that she was seeking the same accommodation which the Agency provided for those suffering from cat allergies in its Cat Allergy Decision.

15 On March 7, 2013, the Agency reopened the applicant's file and sent the Second Opening Pleading Decision to the parties (this decision is numbered No. LET-AT-A-46-2013). In this decision, the Agency again set out the findings in the Cat Allergy Decision and noted the applicant's request that the accommodation measures adopted in that decision be provided to individuals with a dog allergy disability.

16 On April 4, 2013, Air Canada filed its response to the Second Opening Pleading Decision in which it raised the issue of its obligations with respect to service dogs. On April 7, 2013, the applicant filed a reply to Air Canada's submissions and pleadings were considered closed.

B. *Show Cause Decision*

17 On June 5, 2013, the Agency issued its Show Cause Decision (this decision is numbered No. LET-AT-A-82-2013) in which it made three final determinations and one preliminary determination.

18 First, the Agency determined that the applicant was a person with a disability within the meaning of the *Act*. Second, it determined that the same accommodation which it provided to individuals in the Cat Allergy Decision was appropriate in this case. The Agency noted that Air Canada had submitted an internet article from the website "My Health News Daily" (published on July 26, 2012) which indicated that there were differences between cat and dog dander. More particularly, the article indicated that cat protein was so small and light that it could remain airborne for many hours. The article then quoted Dr. Mark Larche, Immunology Professor at McMaster University, to the effect that dog allergens do not remain airborne in the same way that cat allergens

do. Based on this article, Air Canada submitted that the five row seating separation between cats and individuals with an allergy to cats, as recommended in the Cat Allergy Decision, may not be necessary for persons with a dog allergy.

19 The Agency dismissed this argument in the following terms at paragraph 46 of the Show Cause Decision:

> Although the article submitted by Air Canada states that dog allergens are different than cat allergens in terms of the manner that they stay airborne, Air Canada did not file any evidence that specifies how the airborne features of dog allergens differ from those of cat allergens and the implications of any differences for persons with a dog allergy disability. Air Canada has not filed reasons that would support a finding that different measures are required to meet the needs of persons with a dog allergy disability as compared to those with a cat allergy disability based on differences in the manner in which the allergens stay airborne. Moreover, Air Canada provided no evidence that dog dander particles would not be effectively captured by HEPA filters or that an airflow of 100 percent fresh air would not rid the cabin of such particles.

20 The Agency therefore concluded that, when at least 48 hours advance notification was provided by persons with a dog allergy disability (or best efforts were made when less than 48 hours notice is given), the appropriate accommodation with respect to service dogs was a seating separation of a minimum five rows between dogs and individuals with a dog allergy on aircraft with either High Efficiency Particulate Air (HEPA) filters or which provide for 100 percent unrecirculated fresh air. For non-HEPA or unrecirculated fresh air aircraft (such as Bombardier Dash 8's), the appropriate accommodation was to provide the booking priority to whomever completed their booking first, whether it be the individual with the service dog or the person suffering from a dog allergy.

21 Third, the Agency concluded that Air Canada's current policy with respect to the carriage of dogs in aircraft cabins constituted an obstacle to the mobility of individuals with a dog allergy, including the applicant.

22 Lastly, the Agency preliminarily concluded that Air Canada's policy relating to the carriage of dogs in the aircraft cabin constituted an undue obstacle to the applicant's mobility and that of other individuals suffering from a dog allergy. The Agency requested that Air Canada show cause why this preliminary finding should not be finalized and the applicant was provided with the opportunity to reply to any submissions made in that regard by Air Canada.

C. *Final Decision*

23 In its Final Decision, the Agency finalized its preliminary finding from the Show Cause Decision with respect to Air Canada's policy constituting an undue obstacle to the applicant's

mobility and that of other persons with a dog allergy. Before reaching its conclusion, the Agency refused to consider the additional submissions made by Air Canada with respect to the Agency's determination in the Show Cause Decision concerning the appropriate accommodation in this case. In brief, Air Canada argued that a key report, namely that of Dr. Sussman entitled "Report Addendum: Cat and Dog Dander in the Aircraft Cabin, May 23, 2008" referred to in both the Show Cause Decision and the Cat Allergy Decision, needed to be amended in order to take account of the specific situation of individuals with a dog allergy. Similarly, the Agency refused to consider further submissions made by the applicant concerning the need to amend Dr. Sussman's report.

24 The main part of the Final Decision addressed the interpretation and application of a set of regulations from the United States Department of Transportation entitled *Nondiscrimination on the Basis of Disability in Air Travel*, 14 C.F.R. $S 382 (2008) (the "U.S. Regulations"). Because of the conclusion which I have reached with regard to Air Canada's arguments on procedural fairness, I need not address nor discuss the Agency's findings on specific components of the U.S. Regulations.

II. Appellant's Submissions

25 Air Canada makes a number of submissions as to why this appeal should be allowed. It says that the Agency reversed the burden of proof and made a decision in the absence of evidence, thus violating procedural fairness. It also argues that the Agency's refusal to consider its arguments regarding alternative appropriate accommodation violated procedural fairness. Lastly, it argues that the decision is unreasonable in that the effect of the Final Decision is that Air Canada will be forced to discriminate against people requiring service dogs in a manner that is specifically prohibited by the U.S. Regulations. Again, because of the conclusion that I have reached on the procedural fairness issue, I need not address Air Canada's last submission.

III. Standard of Review

26 As indicated above, I intend to restrict my analysis to the procedural fairness issues raised by Air Canada. In this respect, there can be no doubt that these issues must be assessed against a standard of correctness (See *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502 at paragraphs 79 and 83).

IV. Analysis

27 In my view, the procedural fairness issues which Air Canada raises stem mainly from the wording of the Initial and Second Opening Pleading Decisions by which the Agency attempted to set the 'ground rules' pursuant to which it would adjudicate the applicant's application. As it turned out, the process resulted in a denial of procedural fairness to Air Canada. It goes without saying that this result was not intentional. However, in the end, it appears that form took over substance and the process became rigid and inflexible. Air Canada was prevented from submitting evidence on a number of crucial issues such as obstacle and appropriate accommodation. This situation occurred by reason of the approach taken by the Agency and the manner in which it communicated its 'game

plan' to the parties.

28 Because I conclude that in the particular circumstances of this case Air Canada was deprived of procedural fairness, I would allow this appeal. My reasons for so concluding are as follows.

29 I begin with page 10 of Appendix A of the Initial Opening Pleading Decision where the Agency informed the parties that it was the applicant's burden to establish her need for accommodation and that her need was not met by Air Canada's policy. The text found at page 10 of Appendix A is as follows:

> It is the Applicant's responsibility to provide sufficiently persuasive evidence to establish their need for accommodation and to prove that this need was not met. The standard of evidence that applies to this burden of proof is the balance of probabilities.

30 The Agency repeated this statement at paragraph 37 of the Show Cause Decision.

31 This theme was reiterated by the Agency in a decision (Decision No. 430-AT-A-2011) rendered on December 15, 2011, which forms part and parcel of its Cat Allergy Decision where, at paragraph 225, it said that "the Applicants have not provided persuasive evidence that seat row separation is ineffective and the burden, at the obstacle phase, lies upon them to show that this is the case".

32 The above language suggests that it was up to the applicant to prove her need for accommodation and that her need had not been met by Air Canada. However, at page six of the Initial Opening Pleading Decision, the Agency appears to be saying something different. There it states that the applicant must establish her need for accommodation if that need differs from the Agency's preliminary finding of appropriate accommodation in the Cat Allergy Decision. In other words, the Agency seems to be saying that the applicant need not do anything unless she wants accommodation other than what the Agency found in the Cat Allergy Decision. The relevant passages read as follows:

- The applicant will have until February 6, 2013 to establish that she is a person with a disability, and that she requires an accommodation measure that is different from the Agency's preliminary finding of appropriate accommodation to meet her disability-related needs and those of persons with a disability as a result of their allergies to dogs, should this be her view;

- The respondent will have until February 20, 2013 to respond to the applicant's submissions on disability and obstacle/appropriate accommodation, and to file undue hardship arguments with respect to the

> Agency's preliminary finding of appropriate accommodation and any other alternative suggested by the applicant and to propose another form of accommodation;
>
> - The applicant will then have until February 25, 2013 to file a reply.

33 To make matters slightly more complicated, at page two of the Second Opening Pleading Decision, which allowed the applicant to reinstitute her application, after indicating that the applicant was requesting the same accommodation provided in the Cat Allergy Decision, the Agency proceeded to inform Air Canada that it had until March 28, 2013 (this date was extended to April 4, 2013) to file submissions in response to the applicant's submissions on disability and obstacle/appropriate accommodation and to file undue hardship arguments. The relevant passages read as follows:

> On February 21, 2013, Mrs. Greenglass filed the attached application and Disability Assessment Form in regards to her allergy to dogs. Mrs. Greenglass requests that the aforementioned accommodation determined by the Agency for persons with a cat allergy disability be provided by Air Canada to persons with a dog allergy disability.
>
> The respondent has until March 28, 2013 to respond to the applicant's submissions on disability and obstacle/ appropriate accommodation, and to file undue hardship arguments with respect to the Agency's preliminary finding of appropriate accommodation and to propose another form of accommodation, following which the applicant will have until April 4, 2013 to file a reply.

34 The difference in substance between the two texts reproduced immediately above is that, at the time of the Initial Opening Pleading Decision, the applicant had not indicated that she was adopting the accommodation described by the Agency in the Cat Allergy Decision, whereas at the time of the Second Opening Pleading Decision, she had done so.

35 Air Canada argues that the Agency reversed the burden of proof when it allowed the applicant to import the Cat Allergy Decision without any supporting arguments or evidence. It submits a number of legal arguments in support of this position. I am far from convinced, on the authorities, that Air Canada's assertion is correct. However, I am satisfied that Air Canada was misled by the two opening pleading decisions, the relevant passages of which I have already reproduced. More particularly, the implication of the Agency's direction to Air Canada that it would have to respond to the applicant's submissions by March 28, 2013 is that there would actually be submissions made by the applicant on the questions of obstacle/appropriate accommodation.

36 With hindsight, it is clear to me that the Agency considered that the applicant had already

made her submissions when she adopted the accommodation determined in the Cat Allergy Decision. Therefore, Air Canada should not have waited for the applicant's submissions, but should have responded to the accommodation measures determined by the Agency in the Cat Allergy Decision on the understanding that those measures had been put forward by the applicant and that they would be adopted by the Agency unless rebutted.

37 However, also with the benefit of hindsight, it is obvious to me that Air Canada plainly misunderstood the Agency's opening pleading decisions and did not, prior to the rendering of the Show Cause Decision, adduce any evidence concerning obstacle/appropriate accommodation other than the internet article described above.

38 I am satisfied that Air Canada understood that the applicant was obliged to demonstrate why she required the measures prescribed by the Agency in the Cat Allergy Decision, i.e. a seat separation of at least five rows on planes with HEPA filters or with systems which provide 100 percent unrecirculated fresh air and the exclusion of all dogs from the planes without such systems, and not a different form of accommodation. As the applicant adduced no evidence, Air Canada did not adduce the evidence which it says it could have produced to counter the importation of the Cat Allergy Decision. In particular, Air Canada argues that it would have submitted evidence to the effect that less disruptive measures could be implemented to accommodate both those travelling with dogs and those suffering from dog allergies. However, as events unfolded, that evidence was not submitted because of the Agency's refusal to entertain it.

39 The only evidence which Air Canada did adduce was the internet article. In the Show Cause Decision, the Agency considered that article and held that it did not explain how the airborne features of dog allergens differed from those of cat allergens and the consequences or implications of any difference for persons such as the applicant. Therefore, there was no evidence to support the view that different measures of accommodation would suffice to meet the needs of persons with a dog allergy disability. The Agency further held that there was also no evidence that dog dander particles would not be effectively captured by HEPA filters or that an airflow of 100 percent unrecirculated fresh air would not rid the cabin of such particles.

40 In the absence of any evidence on the part of Air Canada, the Agency concluded that the accommodation measures which it had ordered in the Cat Allergy Decision constituted the appropriate accommodation needed to address the needs of persons who were disabled by reason of an allergy to dogs, whether they be service dogs or pets.

41 After finding that Air Canada's policy with respect to the carriage of dogs in an aircraft cabin constituted an obstacle to the applicant's mobility and that of other persons with a dog allergy, the Agency turned to the question of whether the obstacle was undue. To this question, it gave a preliminary answer which was that Air Canada's policy constituted an undue obstacle to the mobility of the applicant and of other persons with a dog allergy disability. Consequently, at paragraph 89 of the Show Cause Decision, the Agency indicated that it would provide Air Canada

with an opportunity to submit evidence with regard to this preliminary finding. It stated, at paragraph 90, that "Air Canada is required to show cause why the Agency should not finalize its preliminary finding with respect to undue obstacle regarding the appropriate accommodation to be provided to persons with a disability due to an allergy to dogs".

42 In response, Air Canada made detailed submissions regarding the operational conflict that the Agency's proposed accommodation created with the U.S. Regulations and further argued that the burden created by those measures was undue since less intrusive measures could be put in place while still fulfilling the needs of persons such as the applicant. More particularly, Air Canada argued that as its goal was to minimize situations where it would have to displace or remove a passenger from a flight, particularly where that person was a person with a disability, it intended to propose alternatives with regard to the carriage of dogs on board aircrafts that were not equipped with HEPA-type filters.

43 Air Canada concluded its submissions by requesting that the Agency remove its conclusion in the Show Cause Decision that a person with a dog allergy disability and a service dog could not be accepted on the same aircraft if that aircraft did not have HEPA filters or did not provide 100 percent unrecirculated fresh air.

44 However, in its Final Decision, the Agency refused to consider the above submissions on the ground that they had not been filed within the time given to Air Canada to do so. The Agency explained that it had given Air Canada an opportunity to provide evidence and submissions regarding the question of obstacle and appropriate accommodation when it rendered its Second Opening Pleading Decision, adding that the purpose of the Show Cause Decision was not to give Air Canada a second chance to address the same question, but rather to allow it to comment on the Agency's preliminary finding of undue obstacle. Consequently, Air Canada's submissions, as well as those made by the applicant on the same topic, were deemed out of time and, as a result, not considered.

45 Thus Air Canada was unable, for all intents and purposes, to either adduce evidence or provide submissions with regard to the important questions of obstacle and appropriate accommodation. Air Canada argues, and I agree entirely, that the Agency's rationale seems to have been that the undue character of the proposed accommodation could be examined in a vacuum independent of the existence of other possibly less intrusive remedies.

46 It appears to me that in the grander scheme of things, fairness required that Air Canada be given the opportunity to make submissions with regard to alternative accommodation, even at the "undue obstacle" stage of the Agency's inquiry. It is safe to say that had the Agency allowed Air Canada to make these submissions, they would not have had any impact on the applicant's application other than to the extent that different measures of accommodation might have been found.

47 It is clear that there was a breakdown in communications between Air Canada and the

Agency. Air Canada understood from the two opening pleading decisions that it was to respond to the applicant's submissions on, *inter alia*, obstacle and appropriate accommodation. When the applicant made no submissions, Air Canada believed that it had nothing to which it needed to respond. This explains why it submitted practically no evidence other than an internet article. This, in due course, led to further procedural problems.

48 I have no hesitation in saying that common sense has not prevailed in the present matter. The Agency determined important issues, not only for the applicant and all those having dog allergies, but also for Air Canada. It did so without the benefit of any real evidence being adduced by the parties and, more particularly, by Air Canada. This was the result of Air Canada's apparent difficulty in fully understanding the meaning of the various directions given by the Agency in its opening pleading decisions.

49 Had common sense prevailed, one would have expected the Agency, at some point in time, to realize that it was disposing of these important issues without, in effect, the full participation of Air Canada. I concede, as I must, that the Agency is entitled to establish its rules and procedures. However, in the end, the rules and procedures are there to serve the interests of justice. In my view, justice in this case required that Air Canada be given the opportunity of adducing evidence on the issues of obstacle, appropriate accommodation and undue hardship. That has not really taken place in this case.

V. Disposition

50 Consequently, I would allow the appeal, set aside the Final Decision, rendered by the Agency on August 2, 2013 and return the matter to the Agency for reconsideration in the light of these reasons. In view of the particular circumstances of this case, I would not make any order as to costs.

NADON J.A.
GAUTHIER J.A.:-- I agree.
SCOTT J.A.:-- I agree.