Court File No.: 14-A-70

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Moving Party

– and –

CANADIAN TRANSPORTATION AGENCY and DELTA AIR LINES, INC.

Respondents

REPLY OF THE MOVING PARTY

(Motion for Leave to Appeal)

Dated: February 2, 2015

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REPLY OF THE MOVING PARTY

1. At stake here is whether Delta's practice of discriminating against passengers based on their physical characteristics will go unchallenged.

2. Contrary to paragraph 10 of Delta's submissions, the second proposed ground of appeal concerns the failure of the Agency to recognize the collective nature of certain rights, and not the Agency's past decisions. Delta also misstates the record in paragraphs 8-9 of its submissions by omitting a substantial amount of information.

A. QUESTIONS OF LAW ARE ABOUT THE CORRECT LEGAL TEST

3. Delta erroneously argues at paragraph 17 of its submissions that the proposed appeal involves a question of mixed fact and law. Questions of law are about the correct legal test, whereas questions of mixed fact and law are about whether the facts satisfy the legal test.

> ***Alberta (Workers' Compensation Board) v. Appeals Commission*, 2005 ABCA 276, paras. 21-22** **Tab 2: 13**

4. The proposed appeal challenges the legal principles used by the Agency, and as such it raises only questions of pure law.

B. THE PROPOSED APPEAL DOES NOT TURN ON STANDARD OF REVIEW

5. Contrary to paragraph 19 of Delta's submissions, the standard of "reasonableness" is not confined to the examination of the outcome:

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process.

***New Brunswick Board of Management v. Dunsmuir*, [2008] 1 S.C.R. 190 (S.C.C.), para. 47** — **Delta's Book of Authorities, Tab 10**

6. Delta conflates discretion involving application of the correct law to the facts with using the wrong legal principles in the exercise of discretion. A decision founded on wrong legal principles is unreasonable. Discretion does not immunize a decision from judicial review of the legal principles used.

***Gavrila v. Canada (Justice)*, 2010 SCC 57, para. 11** — **Tab 3: 31**

C. ANY PERSON CAN MAKE A COMPLAINT TO THE AGENCY

7. Delta erroneously argues at paragraphs 33-37 of its submissions that the Agency "retains discretion to hear the complaint or not." This point was directly addressed by Ms. Moya Green, the Assistant Deputy Minister of Transport, during the study of Bill C-101 (which became the *Canada Transportation Act*) by the Standing Committee on Transport:

> Under part I the agency can subpoena witnesses, can inquire into any complaint that is laid before it. The agency "must" decide the matter. The agency does not have a discretion to say "well, that one I'm not going to look at". The agency must decide the matter, and must decide the matter with dispatch.
>
> ⋮
>
> Most importantly, under clause 38, the agency has to hear any complaint, on any matter or act that is the subject of this or other pieces of legislation under its jurisdiction, and the agency shall make a decision. Under clause 29 it is obliged to hear it, obliged to decide.

⋮

> There is a misconception that I think it is very important the committee get on its table early. Subclause 27(2) does not entitle the agency not to deal with the complaint. The agency is required by law to take complaints and required to make decisions.
>
> [Emphasis added.]

These statements are consistent with the textual, contextual, and purposive analysis of the *Canada Transportation Act*: the Agency's mandate and duty extend to deciding complaints involving collective rights of the travelling public.

Study of Bill C-101 (October 5, 1995): Standing Committee on Transport, Meeting No. 63, 35th Parliament, 1st Session, pp. 3, 6 — **Tab 4: 36 , 39**

8. The role of the Agency with respect to unreasonable or unduly discriminatory tariff provisions is similar to the role of the Canadian Food Inspection Agency with respect to unsafe food products: to protect the entire public, and not merely the individual complainant, and to take action before anyone is harmed. The logic of the Agency's decision in the present case is analogous to the rejection of a complaint about meat infected with *E. coli* on the basis that the complainant is vegetarian, and thus has no "sufficient interest" in the product.

9. The Agency's decision in the present case is unreasonable because it partially defeats the purpose for which Parliament chose to create the Agency, and shields Delta's discriminatory practices from scrutiny. Indeed, Lukács has the key piece of evidence, the damning email from Delta's customer service, describing the discriminatory practices. Other passengers who experience discrimination are unlikely to succeed in establishing that they were denied transportation or delayed because of their physical characteristics, and are even less likely to be able to prove that discrimination is Delta's standard procedure.

D. PUBLIC INTEREST STANDING

10. Delta did not cite any authority to support the proposition that public interest standing is available *only* in constitutional challenges of legislation and challenges to the legality of administrative actions, nor did Delta dispute that the Agency misquoted the Supreme Court of Canada.

(i) The *Thibodeau* case: Air Canada is not a "federal institution"

11. Delta is mistaken in claiming, at paragraph 23, that Air Canada is a "federal institution." Lukács asks this Honourable Court to take judicial notice that Air Canada was privatized in the late 1980's. The *Official Languages Act* applies to Air Canada because of section 10 of the *Air Canada Public Participation Act*, and for no other reason:

> 27 The Canadian government decided to privatize the airline. This project materialized through the enactment of the ACPPA. The airline, previously a Crown corporation, now became an ordinary company whose activities were subject to the Canada Business Corporations Act, R.S.C. 1985, c. C-44.
>
> 28 Under section 10 of the ACPPA, the OLA applies to Air Canada. It is clear that this company is under a statutory duty to comply with the OLA and the Regulations thereunder.
>
> [Emphasis added.]

Thibodeau v. Air Canada, 2005 FC 1156, paras. 27-28 — **Moving Party's Record, Tab 15: 169**

12. Contrary to Delta's submissions at paragraph 25, the *Thibodeau* case did not involve any "state action," but rather the actions and omissions of an "ordinary company"; nor did it involve a challenge to the constitutionality of legislation. The reason that public interest standing was available in *Thibodeau* is that language rights are collective rights, and not merely individual rights. Indeed, the *Official Languages Act* permits "any person" to make a complaint.

(ii) The *ATU Local 279* case: corporate decision

13. Delta misstates the *ATU Local 279* case at paragraphs 24-25 of its submissions. This case did not involve any "challenge to the conformity of state action to Constitutional or statutory authority." Indeed, the refusal of the City of Ottawa, in its capacity as a corporation operating a public transportation system, to purchase automated announcement systems for bus stops was a business decision. The Agency was not asked to rule on whether the municipal government conformed to its statutory authority under the *City of Ottawa Act, 1999*, but rather to determine whether the business decision created an "undue obstacle" for passengers with disabilities within the meaning of s. 172 of the *Canada Transportation Act*.

***ATU Local 279 v. OC Transpo*, 431-AT-MV-2008** — **Moving Party's Record, Tab 10: 92**

(iii) Conclusions

14. As the *Thibodeau* and *ATU Local 279* cases demonstrate, public interest standing is also available in cases involving collective rights of the public, and not only in cases involving a constitutional challenge or a challenge to the legality of administrative action. The "principle of legality," articulated in *Downtown Eastside*, applies *mutatis mutandis* in cases involving collective rights of the public: under the first and third parts of the legal test, the decision-maker must consider whether there is a "serious issue" and whether the issue will escape scrutiny if public interest standing is refused.

15. In the present case, the Agency did not consider whether the complaint of discrimination based on physical characteristics raised a "serious issue," nor whether the issue would escape scrutiny if public interest standing were re-

fused; instead, the Agency fettered its discretion by holding that public interest standing was not available at all. Hence, the Agency's decision is unreasonable.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

February 2, 2015

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Moving Party

Case Name:

Alberta (Workers' Compensation Board) v. Appeals Commission

Between
The Workers' Compensation Board - Alberta, appellant (applicant), and
The Appeals Commission, respondent (respondent)

[2005] A.J. No. 1012

2005 ABCA 276

258 D.L.R. (4th) 29

[2006] 7 W.W.R. 611

51 Alta. L.R. (4th) 237

371 A.R. 318

31 Admin. L.R. (4th) 304

43 C.C.E.L. (3d) 12

141 A.C.W.S. (3d) 1083

2005 CarswellAlta 1110

Docket No.: 0403-0096-AC

Alberta Court of Appeal
Edmonton, Alberta

Picard, Fruman and Ritter JJ.A.

Heard: June 10, 2005.
Judgment: August 25, 2005.

(85 paras.)

Administrative law -- Judicial review and statutory appeal -- Appeal by the WCB from dismissal of its appeal of a decision by the Appeals Commission dismissed.

Administrative law -- Judicial review and statutory appeal -- Privative clauses.

Administrative law -- Judicial review and statutory appeal -- When available.

Administrative law -- Judicial review and statutory appeal -- When available -- Matters not subject to review.

Administrative law -- Judicial review and statutory appeal -- Standard of review.

Administrative law -- Judicial review and statutory appeal -- Deference to expertise of decision maker.

Workplace health, safety & compensation law -- Boards and tribunals -- Appeals and judicial review.

Appeal by the Workers' Compensation Board from the dismissal of its appeal of a decision by the Appeals Commission. The Appeals Commission allowed a claimant's appeal and ordered the WCB to pay benefits. The WCB appealed the decision of the Appeals Commission on the ground that the Appeals Commission improperly relied on new medical evidence adduced on behalf of the claimant. The Court found that the issue of mixed fact and law was outside of the scope of the statutory appeal provision under the Workers' Compensation Act. It proceeded by way of judicial review and upheld the decision by the Appeals Commission on the basis that the decision was not patently unreasonable. The WCB submitted that the judge erred in failing to characterize the issue of the admission of evidence as a question of law or jurisdiction, erred by proceeding by way of judicial review, and applied the incorrect standard of review.

HELD: Appeal dismissed. The matters under appeal were reviewable on a standard of correctness. The privative clause and the statutory appeal provision limited the right of appeal from a decision by the Appeals Commission to pure questions of law. Therefore the reviewing judge did not err in this regard. The issue related to the admission of, and the weight accorded to, the new evidence, was not reviewable because strict rules of evidence did not apply to the hearing, and the submissions by the WCB did not raise issues of procedural fairness or natural justice. The reviewing judge correctly selected and applied the standard of patent unreasonableness.

Statutes, Regulations and Rules Cited:

Workers' Compensation Act, R.S.A. 2000 c. W-15, ss. 13.1(1), 13.1(9), 13.2(1), 13.2(2), 13.2(6), 13.4(1)

Appeal From:

On Appeal from the Order by The Honourable Mr. Justice E.S. Lefsrud. Granted the 16th day of December, 2003. Entered on the 25th day of March, 2004. (2003 ABQB 1035, Docket: 0303 07833)

Counsel:

J.J. Bodnar for the Appellant

S.R. Hermiston for the Respondent

H.L. Goldford for James Davick

C.W. Neuman for Klemke Mining Corporation

REASONS FOR JUDGMENT

The judgment of the Court was delivered by

1 FRUMAN J.A.:-- In Alberta, a worker who suffers injuries in a work-related accident is entitled to claim compensation pursuant to the Workers' Compensation Act, R.S.A. 2000 c. W-15 (WCB Act). This legislative scheme replaces the worker's right to sue in tort. If the worker's claim is refused at the initial stage by a Workers' Compensation Board (WCB) claims adjudicator, the worker may appeal to a review body, an internal organization within the WCB. If a further rejection is encountered, an appeal is available to the Appeals Commission, an independent tribunal, comprised of panels of two or more commissioners appointed by order-in-council.

2 For many years, all Appeals Commission decisions were protected by a full privative clause, specifying that its decisions were not open to question or review by any court. In September 2002, amendments to the WCB Act came into effect, adding, for the first time, a statutory right of appeal to the Court of Queen's Bench from decisions of the Appeals Commission, on questions of law or jurisdiction. The full privative clause was retained for other types of questions.

3 The addition of a statutory right of appeal raises questions about the issues appealable under the new right of appeal and the standard of review to be applied to decisions of the Appeals Commission. The response by Queen's Bench to these questions has been inconsistent. Queen's Bench decisions also reveal varied approaches to the functional and pragmatic analysis, employed to determine the standard of review. This case presents the first opportunity for this Court to consider the 2002 amendments and provide guidance.

4 Two sections of the WCB Act are of particular relevance to this appeal. Section 13.4(1), added

in 2002, grants a statutory right of appeal to Queen's Bench on particular types of questions:

> 13.4(1) The Board and any person who has a direct interest in a decision of the Appeals Commission made pursuant to section 13.2 may appeal the decision to the Court of Queen's Bench on a question of law or jurisdiction.

5 Sections 13.1(1) and (9) provide a full privative clause in respect of questions not covered by s. 13.4(1):

> 13.1(1) Subject to sections 13.2(11) and 13.4, the Appeals Commission has exclusive jurisdiction to examine, inquire into, hear and determine all matters and questions arising under this Act and the regulations in respect of
>
> ...
>
> (b) appeals from decisions under section 120 made by a review body appointed under section 119
>
> and the decision of the Appeals Commission on the appeal or other matter is final and conclusive and is not open to question or review in any court.
>
> (9) No proceedings by the Appeals Commission shall be restrained by injunction, prohibition or other process or proceedings in any court, nor shall any action be maintained or brought against the Appeals Commission or any member of the Appeals Commission in respect of any act done or decision made in the honest belief that it was within the jurisdiction of the Appeals Commission.

6 The present case involves an individual worker, James Davick, who appealed the denial of his claim through the internal appeals process, concluding with a hearing before the Appeals Commission. The Appeals Commission allowed his appeal, ordering the WCB to pay benefits. The WCB then appealed the Appeals Commission's decision to Queen's Bench, without success. The WCB now appeals to this Court. Before addressing the merits of the appeal, it is useful to set out some guiding principles for review of Appeals Commission decisions.

THE PUSHPANATHAN FUNCTIONAL AND PRAGMATIC ANALYSIS

7 Administrative regimes are often created in the hope they will provide a more effective and efficient alternative to the court system. See MacMillan Bloedel Ltd. v. Simpson, [1995] 4 S.C.R. 725 at para. 53; International Woodworkers of America, Local 2-69 v. Consolidated-Bathhurst

Packaging Ltd., [1990] 1 S.C.R. 282 at para. 69. One method by which the legislature reinforces this goal is the inclusion of a privative clause in the constating statute, declaring that all or certain types of decisions are final and are not open to question or review by any court.

8 Because superior courts retain supervisory jurisdiction over administrative tribunals, the legislature cannot completely preclude judicial review, no matter how clear and strong the wording of the privative clause. However, the legislature's intended protection is not ignored by the reviewing court. That intention translates into the amount of deference the court accords to the question under review, and, in turn, the level of scrutiny, or standard of review, the court uses to examine the tribunal's decision on that question. There is an inverse relationship between deference and standard of review. When the intended protection is strong, the court gives greater deference to the administrative tribunal's decision and employs a lower standard of review (reasonableness or patent unreasonableness). When the intended protection is weak or non-existent, less deference is given and the standard of review is higher (correctness).

9 The reviewing court must therefore determine the level of deference the legislature intended to accord to the tribunal on the particular questions under review. The presence or absence of a privative clause is relevant, though not wholly determinative. The court must use the functional and pragmatic analysis articulated in Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982. This analysis, which involves consideration of the privative clause together with a number of other factors, facilitates the process of inquiring into that legislative intent, while at the same time recognizing the role superior courts play in maintaining the rule of law: Dr. Q. v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226, 2003 SCC 19 at para. 21.

10 The concept of judicial review of administrative decisions embraces both statutory appeals and applications for judicial review (the old prerogative writs): Dr. Q., supra, at para. 21. The Pushpanathan functional and pragmatic approach applies to both. The analysis involves an examination of four factors: (1) the presence or absence of a privative clause or statutory right of appeal; (2) the expertise of the tribunal relative to that of the reviewing court on the issue in question; (3) the purpose of the legislation and the provision in particular; and (4) the nature of the question: law, fact or mixed fact and law. A reviewing court must consider and balance these four factors to determine the level of deference the legislature intended, and to select the appropriate standard of review for each question. The three standards, in decreasing order of deference, are correctness, reasonableness and patent unreasonableness. The chosen standard is then applied to the question under review.

11 In the course of judicial review applications, courts are sometimes invited by the parties to establish the standard of review for all decisions of a given tribunal. Occasionally, they take the parties up on the offer. Sweeping statements in some judgments profess to set the standard of review for all decisions, or all questions within a general category (questions of law, fact or mixed fact and law) of a particular administrative decision-maker. Sometimes other courts rely on these

general pronouncements instead of applying the functional and pragmatic analysis.

12 As recently confirmed in Voice Construction Ltd. v. Construction and General Workers' Union, Local 92, [2004] 1 S.C.R. 609, 2004 SCC 23, these practices are inappropriate. There is no one, correct, standard of review of general application for all decisions of a specific tribunal or all questions within a general category. In each case, the court must select the standard of review, using the functional and pragmatic approach: Dr. Q. at para. 21. This analysis must be employed on every judicial review application, to every question under review, from every administrative decision-maker.

13 Conducting the functional and pragmatic analysis can be a complex and lengthy process, sometimes longer than the actual review of the impugned decision. Nevertheless, there are no shortcuts and general statements by previous courts as to the standard of review cannot serve as precedents. While the reasoning in the application of the functional and pragmatic analysis by other reviewing judges may be instructive, it cannot replace the mandatory application of that analysis in each case. As noted at paras. 24-26 of Dr. Q., the old categorical approach of slotting issues into judicial review pigeon holes has now been replaced by a principled approach.

14 The structure of the WCB Act raises some unique issues in terms of judicial review. I will therefore discuss each step in the functional and pragmatic analysis in the context of the WCB Act.

Part 1: Characterize the question

15 Perhaps the judge's most difficult task in WCB Act judicial review applications is determining whether the question is one of law, fact or mixed fact and law, and deciding whether the question is subject to the statutory right of appeal, or alternatively, judicial review with a full privative clause.

16 Although the Pushpanathan factors are often outlined with characterization of the question as the fourth step, there is no requirement that the analysis proceed in this order. In fact, judicial review under the WCB Act compels a different order. The reviewing court must begin by characterizing the question because the Legislature intended to give a different level of protection to different types of questions, which are, in turn, subject to different court review processes. Questions of law or jurisdiction enjoy a statutory right of appeal under s. 13.4(1), indicating less intended protection from court scrutiny, while other questions are subject to a full privative clause under s. 13.1, indicating more protection. In terms of process, questions of law or jurisdiction may be appealed by way of statutory appeal, while only judicial review is available on other questions.

17 When an application for judicial review involves several questions, each question must be characterized separately. Moreover, the questions before the reviewing court will not likely be the same as the ultimate question before the tribunal below. Although the applicant will express general dissatisfaction with the tribunal's decision, particular errors will be identified. The reviewing judge must confine the exercise of characterization to those errors. In each case, after characterizing a question, the judge must decide whether the review of that question will proceed as a statutory

appeal, under s. 13.4(1) (questions of law or jurisdiction) or by judicial review (other questions).

18 This procedural characterization has an important practical aspect. The form of originating notice and service requirements are somewhat different for statutory appeals and judicial review applications. For example, r. 753.09(1) of the Rules of Court, A.R. 356/90 requires an application for judicial review to be served on the Attorney General, while there is no similar requirement for a statutory appeal under the WCB Act. Accordingly, a proceeding mistakenly commenced as a statutory appeal will not necessarily meet the procedural requirements for a judicial review.

19 The reviewing court must also keep in mind that it is in an applicant's best interest to characterize a question as one of law or jurisdiction, as those questions generally attract a less deferential standard of review. A nimble drafter may succeed in dressing errors of fact in error-of-law clothing. Simply asserting a question of law or jurisdiction is insufficient. The reviewing court must identify the true target of the applicant's attack, determine if it raises a question of law or jurisdiction and gauge whether the issue is arguable. When a statutory right of appeal is conditioned on leave being granted (see, for example, Municipal Government Act, R.S.A. 2000, c. M-26, s. 688(1); Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17, s. 26(1)), this inquiry is performed by the judge hearing the leave application. As the statutory right of appeal under the WCB Act does not import a leave requirement, the reviewing judge must perform this threshold function.

20 This leads to a consideration of the types of errors that are properly appealed under the statutory right of appeal. While there is general agreement that questions of law and jurisdiction are appealable under s. 13.4(1), and questions of fact are subject to the full privative clause in s. 13.1, Queen's Bench judges have struggled to decide where questions of mixed fact and law properly lie.

21 There is a well-recognized distinction between questions of law and questions of mixed fact and law. In Canada (Director of Investigation and Research, Competition Act) v. Southam Inc., [1997] 1 S.C.R. 748 at paras. 35-37, the Supreme Court noted that questions of law are about the correct legal test, whereas questions of mixed fact and law are about whether the facts satisfy the legal test. A general proposition with precedential value might qualify as a principle of law, but not its application to particular facts or circumstances.

22 The Supreme Court confirmed this distinction in Housen v. Nikolaisen, [2002] 2 S.C.R. 235, 2002 SCC 33 at paras. 27-31. In that case the Court noted that questions of mixed fact and law involve the application of a legal standard to a set of facts; conversely, errors of law involve an incorrect statement of the legal standard, or a flawed application of the legal test. An example of the latter occurs when a decision-maker only considers factors A, B, and C, but the test also requires factor D to be considered. The Court also acknowledged an exception to the distinction between questions of law and questions of mixed fact and law, when it is possible to extricate a pure legal question from what appears to be a question of mixed fact and law: at para. 34.

23 Despite this well-recognized distinction, the WCB urges us to conclude that questions of

mixed fact and law are synonymous with questions of law, and subject to the statutory right of appeal. The WCB bases its argument on the WCB Act's legislative history. Prior to the 2002 amendments, decisions of the Appeals Commission were protected by a full privative clause, subject only to the WCB's right to order a rehearing if the WCB thought the Appeals Commission had not properly applied policy or the provisions of the WCB Act (former ss. 12(1) and 13(7)). The September 2002 amendments followed the work of two review committees, the MLA Workers' Compensation Board Service Review Input Committee (Hon. Victor Doerksen, chair) and the Review Committee of the Workers' Compensation Board Appeal System (Samuel Friedman, Q.C., chair). The reports issued by these committees identified systemic problems at every level of the WCB process. The Friedman report called for more accountability to the injured worker and criticized the WCB for its "culture of denial" of long-term disability claims: The Workers' Compensation Board Appeals Systems: Are They Working Well?, Final Report, Review Committee of the Workers' Compensation Board Appeals System (Friedman report) at i-ii. In response, the Alberta Legislature amended the WCB Act. Among other things, the amendments extinguished the WCB's power to order a rehearing, substituting a right of appeal to Queen's Bench by interested parties on a question of law or jurisdiction (s. 13.4(1)), and adding a provision permitting the Appeals Commission to ask Queen's Bench for an opinion on any question of law or jurisdiction (s. 13.2(11)). The amended WCB Act retained the privative clause in s. 13.1, making it subject to ss. 13.4(1) and 13.2(11).

24 The WCB cited excerpts from the Friedman report, a discussion guide from a symposium on Workers' Compensation, and Hansard in support of its argument that the Alberta Legislature intended questions of mixed fact and law to be appealable under s. 13.4(1). These excerpts are of little assistance because they make no mention of questions of mixed fact and law; rather, the materials evidence an intent to confine the statutory right of appeal to questions of law, jurisdiction and policy: Friedman report, supra, at 21-23; Edmonton, Symposium Discussion Guide, Charting a New Course for Workers' Compensation, September 17-18, 2001 (Edmonton: Alberta Human Resources and Employment, 2001) at 19; Alberta, Legislative Assembly, Hansard, 999 (29 April 2002) at 25.

25 Moreover, many recommendations in the reports, such as the Friedman report's recommended deletion of the entire privative clause, were not implemented in the amended legislation: Friedman report at 23. Accordingly, it is difficult to make a convincing argument that these extrinsic materials are a reliable indicator of legislative intent. They should be given little weight in this case. See R. v. Heywood, [1994] 3 S.C.R. 761 at para. 41; R. v. Morgentaler, [1993] 3 S.C.R. 463 at para. 28.

26 In contrast, an examination of the words chosen by the Legislature is key to interpreting their meaning. Section 13.4(1), the statutory appeal section, refers only to questions of law or jurisdiction, with no reference to questions of mixed fact and law. The words "question of law or jurisdiction" are familiar, as several Alberta statutes provide a right of appeal to the Court of Appeal on such questions. See, for example, Municipal Government Act, supra, s. 688(1); Alberta Energy and Utilities Board Act, supra, s. 26(1); Metis Settlements Act, R.S.A. 2000, c. M-14, s. 204;

Natural Resources Conservation Board Act, R.S.A. 2000, c. N-3, s. 31.

27 Consequently, this Court has frequently interpreted the words "law or jurisdiction." In doing so, we have consistently refused to consider questions of mixed fact and law under the rubric of questions of law or jurisdiction. The words "law or jurisdiction" have been confined to their ordinary and grammatical meaning. See Pachanga Energy Inc. v. Mobil Canada Energy Inc. (1993), 149 A.R. 73 at para. 4 (C.A.); R. v. Wells (2004), 361 A.R. 256, 2004 ABCA 371 at paras. 2-4; R. v. Seath (1999), 48 M.V.R. (3d) 11, 1999 ABCA 347. In ATCO Gas v. Alberta Energy and Utilities Board, 2005 ABCA 122 at para. 55, this Court held that when the governing legislation grants a right of appeal on questions of law or jurisdiction, questions of mixed fact and law are not appealable unless there is an extricable legal question. This interpretation is consistent with Housen, supra.

28 The Legislature's choice of the words "law or jurisdiction" in s. 13.4(1), and the well-recognized distinction between questions of law and questions of mixed fact and law, lead to the logical conclusion that the Legislature did not intend to provide a statutory right of appeal for questions of mixed fact and law. The only exception is when a pure legal question can be extricated from a question of mixed fact and law. Even then, only the pure legal question will be considered.

29 The concept of an extricable legal error can be difficult to understand. In Housen at para. 36, the Supreme Court provided clarification. In that case the alleged error was a finding of negligence, a question of mixed fact and law. The Court noted that when the error in a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test or a similar error in principle, such an error can be characterized as an extricable error of law. However, when the issue on appeal involves a trial judge's interpretation of the evidence as a whole, or the application of the correct legal test to the evidence, there is no extricable error of law.

30 After the question has been characterized, the analysis of this Pushpanathan factor involves considering what level of deference the question attracts. A question of pure fact compels more deference, while a question of pure law indicates a more searching review is appropriate. When the question is one of mixed fact and law, more deference will be called for if the question is fact-intensive and less deference if it is law-intensive: Dr. Q. at para. 34.

Part 2: Examine the privative clause or statutory appeal provision

31 Under this heading, the reviewing judge must consider the presence or absence of a privative clause or statutory right of appeal to determine whether the legislature intended deference. The inclusion of both a statutory right of appeal and a privative clause in the WCB Act has caused some Queen's Bench judges to ponder whether the two provisions should be considered together, resulting in a combined level of deference for all types of questions.

32 As noted above, the statutory right of appeal in s. 13.4(1) applies to questions of law or jurisdiction (including a legal issue that can be extricated from a question of mixed fact and law).

The privative clause in s. 13.1(1) is "subject to" s. 13.4. The expression "subject to" in legislation is "used to assign a subordinate position ... or to pave the way for qualifications": Elmer A. Driedger, The Composition of Legislation: Legislative Forms and Precedents, 2nd ed. rev. (Ottawa: Supply and Services Canada, 1976) at 139-40. The words "subject to" in s. 13.1(1) indicate that there is no conflict with s. 13.4(1); rather there is a hierarchy. A question of law or jurisdiction (or an extricable legal error) may be appealed under the statutory right of appeal in s. 13.4(1). All other questions are subject to the full privative clause in s. 13.1. See Pauli v. Ace Ina Insurance (2003), 334 A.R. 104, 2003 ABQB 107 at paras. 29-33, aff'd (2004), 346 A.R. 263, 2004 ABCA 84.

33 Accordingly, the appeal provision and privative clause apply to different types of questions, with no overlap. Similarly, questions heard under each process attract a different level of deference. There is no blended standard of review for all questions, created by mixing the privative clause and statutory appeal provisions. Nor do the two clauses somehow offset one another.

34 Questions of mixed fact and law (without an extricable legal error) and questions of fact fall outside the statutory appeal provision. These questions are protected by a full privative clause. A full or true privative clause is one that declares decisions of the tribunal to be final and conclusive, from which no appeal lies, and all forms of judicial review are excluded: Pasiechnyk v. Saskatchewan (Workers' Compensation Board), [1997] 2 S.C.R. 890 at para. 17. Generally, the stronger the privative clause, the greater the deference that is due: Dr. Q. at para. 27. The full privative clause in s. 13.1 indicates that the Legislature has confidence in the ability of the Appeals Commission to determine questions of fact and mixed fact and law.

35 The same cannot be said for the statutory right of appeal; the existence of an appeal right denotes less deference: Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247, 2003 SCC 20 at paras. 28-29. Under the WCB Act, questions of law or jurisdiction (including an extricable legal error) are not protected by a privative clause, and are appealable pursuant to the statutory right of appeal. As such, these questions enjoy less deference.

Part 3: Consider the tribunal's expertise

36 The reviewing court must consider both the general expertise of the tribunal, and its expertise on the particular question on appeal. The court must then compare the tribunal's expertise to its own: Pushpanathan, supra, at para. 33. Greater deference will be called for only when the decision-making body is, in some way, more expert than the court, and the question under consideration falls within the ambit of this expertise: Dr. Q. at para. 28 citing Moreau-Bérubé v. New Brunswick (Judicial Council), [2002] 1 S.C.R. 249, 2002 SCC 11 at para. 50.

37 If a tribunal has particular expertise in achieving the aims of an Act, either because of the specialized knowledge of its decision-makers or the special procedures or non-judicial means it employs to implement the statute, a greater degree of deference is accorded: Pushpanathan at para. 32. Conversely, if the tribunal has no advantage (no expert qualifications, no accumulated experience) on the particular issue before it, as compared with the reviewing court, less deference is

due.

38 Even when decisions of a tribunal are not protected by a full privative clause, or the question falls under a statutory right of appeal, a specialized tribunal will nonetheless often be shown some deference on matters squarely within its jurisdiction: United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd., [1993] 2 S.C.R. 316 at para. 31.

Part 4: Examine the purpose of the statute and the provision in particular

39 Tribunals perform a wide range of functions. At one end of the spectrum are tribunals that regularly consider "polycentric" matters, involving many interlocking and interacting interests and considerations: Pushpanathan at para. 36 citing P. Cane, An Introduction to Administrative Law (3rd ed., 1996) at 35. A statutory purpose that requires a tribunal to select from a range of remedial choices or administrative responses, is concerned with the protection of the public, engages policy issues or involves balancing multiple sets of interests or considerations will demand greater deference from a reviewing court: Dr. Q. at para. 31.

40 At the other end of the spectrum are tribunals charged with determining rights between parties, resolved largely by the facts before the tribunal. This type of adjudicative function generally calls for less deference: Dr. Q. at para. 32. However, even when the tribunal is properly classified as performing adjudicative functions, an examination of the purpose of the statute or the provision in particular may indicate that the legislature intended that the tribunal be accorded deference, as was the case in Voice, supra, at para. 28.

Select the standard of review

41 As discussed above, the purpose of the functional and pragmatic approach is to ascertain the level of deference the legislature intended for the particular question or issue under review: Pushpanathan at para. 26; Dr. Q. at para. 21; Voice at para. 15. Following the analysis of the four factors, the reviewing court must select the standard of review to apply. No single factor is determinative: Voice at para. 18; Dr. Q. at para. 25. The functional and pragmatic approach calls upon the court to weigh and balance the four factors in an effort to discern whether a particular issue before the administrative body should receive exacting review by a court (correctness), undergo significant searching or testing (reasonableness) or be left to the near-exclusive determination of the decision-maker (patent unreasonableness): Dr. Q. at para. 22.

42 Unfortunately, there is no set formula to apply in selecting the applicable standard. When all factors indicate a high degree of deference, the appropriate standard should be patent unreasonableness; when all indicate little deference, correctness should be selected: Voice at para. 18. Although cases involving a mixture will most often merit the reasonableness label, careful analysis will nevertheless be required to determine the most fitting standard.

Apply the standard of review

43 The reviewing judge's final task involves applying the selected standard of review to the question in issue. A review for correctness is the most straightforward: the court completes its own reasoning process to arrive at the result it judges correct: Ryan at para. 50.

44 In contrast, when determining whether an administrative decision is reasonable, the reviewing court should not ask if it agrees with the decision, or what the correct decision would have been: Ryan at para. 50. The court must not interfere unless the party seeking review has positively shown that the decision was unreasonable: Ryan at para. 48. If any of the reasons supporting the conclusion are tenable, in the sense that they can stand up to a somewhat probing examination, the decision will not be unreasonable and a reviewing court must not interfere: Southam at para. 56; Ryan at para. 55.

45 Finally, a patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason": Canada (Attorney General) v. Public Service Alliance of Canada, [1993] 1 S.C.R. 941 at para. 44; Centre communautaire juridique de l'Estrie v. Sherbrooke (City), [1996] 3 S.C.R. 84 at paras. 9-12; Ryan at para. 52. A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand: Ryan at para. 52. The result must almost border on the absurd: Voice at para. 18.

APPLICATION OF THE GUIDING PRINCIPLES TO THE PRESENT CASE

46 Having set out the guiding principles, I now turn to the specific circumstances of this appeal.

Background

47 On January 31, 2000, James Davick was working at Klemke Mining Corporation when a 70-ton truck he was operating was rear-ended by a loader. He submitted a claim for cervical strain and impairment in memory retrieval, working memory and concentration. The WCB accepted responsibility for the cervical strain only, terminating his benefits on May 12, 2000. Mr. Davick appealed to the review body, which reached the same conclusion. On further appeal, the Appeals Commission accepted that Mr. Davick sustained a mild traumatic brain injury as a result of the accident, and was entitled to benefits: Decision No. 2003-235, Application No. 6486 (April 12, 2003).

48 The WCB applied to Queen's Bench to appeal the decision, pursuant to s. 13.4(1) of the WCB Act. In particular, the WCB took issue with the Appeals Commission's reliance on new evidence presented at the Appeals Commission hearing by Dr. Flor-Henry, involving quantitative electroencephalography (qEEG) or "brain mapping" testing.

49 The reviewing judge dismissed the WCB's appeal: Alberta (Workers' Compensation Board) v. Appeals Commission (2003), 350 A.R. 217, 2003 ABQB 1035. He characterized the WCB's grounds of appeal as questions of mixed fact and law, which did not fall under the statutory right of appeal in s. 13.4(1). Proceeding with the application on the basis of judicial review, he employed

the functional and pragmatic analysis to determine the standard of review, selecting the patent unreasonableness standard. Then, applying this standard, he concluded that the Appeals Commission's decision was not patently unreasonable.

50 The WCB raises the following issues in this appeal:

1. The reviewing judge erred in failing to characterize one of the questions before him as a question of law or jurisdiction.
2. The reviewing judge erred in finding that questions of mixed fact and law do not fall within the statutory right of appeal in s. 13.4(1) of the WCB Act.
3. The reviewing judge erred in his analysis of the four functional and pragmatic factors, arriving at the incorrect standard of review.

51 These issues all relate to the functional and pragmatic analysis performed by the reviewing judge, and will be analyzed in that context.

52 On appeal, our standard of review for each of these alleged errors is correctness. The first ground, the characterization of the question by the reviewing judge, is a question of law. An erroneous characterization affects the judge's determination whether the matter is a statutory appeal or a judicial review, and has a significant impact on the functional and pragmatic analysis. The second ground of appeal involves a legal question of statutory interpretation, subject to a correctness standard of review: Pauli v. Ace Ina Insurance Co., supra, (C.A.) at para. 5. The reviewing judge's selection of the standard of judicial review, the third ground of appeal, is also reviewed on a correctness standard: Dr. Q. at para. 43; Alberta (Minister of Municipal Affairs) v. Telus Communications Inc. (2002), 312 A.R. 40, 2002 ABCA 199 at paras. 24-26.

Application of the functional and pragmatic approach

Part 1: Characterize the question

53 Many alleged errors were advanced by the WCB before the reviewing judge. On appeal, the WCB contends that the reviewing judge erred in the characterization of the following question:

> Whether the Appeals Commission failed to embark on the proper inquiry as to the reliability or scientific validity of the qEEG procedure and evidence advanced by Dr. Flor-Henry, and failed to inquire into his qualifications as an expert.

This question, the WCB submits, is one of law or jurisdiction, not mixed fact and law, as held by the reviewing judge.

54 In order to characterize a question, a court must get to the bottom of the applicant's complaint, and determine whether it raises an arguable issue of law or jurisdiction. To ascertain the true nature

of the WCB's complaint, it is necessary to consider the context in which this issue arose.

55 Dr. Flor-Henry's evidence was presented for the first time at the Appeals Commission hearing. The WCB was given notice of Dr. Flor-Henry's attendance at the hearing and was familiar with the brain-mapping techniques he used to diagnose brain injury. However, the WCB chose not to attend the hearing. Consequently, Dr. Flor-Henry's expert qualifications were not directly challenged at the hearing, nor was evidence provided to contest the validity and reliability of brain-mapping.

56 Dr. Flor-Henry attended the hearing by conference call and his extensive 37-page resumé was before the panel of commissioners. The Appeals Commission had previously considered brain-mapping evidence proffered by Dr. Flor-Henry. See Application No. 4576, Claim No. 324-1875 (August 30, 2001). At the commencement of his evidence in the Davick hearing, Dr. Flor-Henry shared his professional qualifications with the panel, and described his current position of employment (A.B. II 16/14-25; 17/14-18/2). He outlined the information he reviewed before commencing any testing, including numerous medical reports (A.B. II 18/13-19/8). A member of the panel noted that "[t]he WCB doesn't seem to place a very high regard on your methods of this quantitative EEG", to which Dr. Flor-Henry provided a response (A.B. II 42/25-44/4). Much of Dr. Flor-Henry's testimony concerned the methodology of qEEG testing.

57 At the hearing, the Appeals Commission also considered written medical reports of at least 10 other medical experts. None of these experts were present, sworn or formally qualified to give expert evidence. However, their opinions had been considered by the WCB claims adjudicator and review body in the earlier stages of Mr. Davick's claim, again without any formal procedures to determine qualification or admissibility. The WCB does not take issue with the admission of any of these other expert opinions by the Appeals Commission.

58 The WCB challenges the Appeals Commission's decision to admit Dr. Flor-Henry's evidence on two related grounds. First, the WCB contends admission of the evidence constituted a breach of natural justice, which is an error of law or jurisdiction. While conceding the relevance of the evidence, the WCB takes issue with its reliability and the fact that the Appeals Commission did not follow strict qualification procedures to qualify Dr. Flor-Henry as an expert.

59 In an administrative law setting, a failure to admit relevant evidence may render the proceeding unfair in certain limited circumstances, resulting in a denial of natural justice: Univérsité du Québec à Trois-Rivières v. Larocque, [1993] 1 S.C.R. 471 at para. 52. But the WCB offers no authority to support the proposition that admitting relevant evidence, without further inquiry, constitutes a denial of natural justice. The duty to be fair, or natural justice, has two fundamental principles: the requirement that persons affected be heard before they are adversely impacted by some action or decision, and the rule against bias: David P. Jones Q.C. & Ann S. de Villars, Principles of Administrative Law, 4th ed. (Scarborough, Ont.: Carswell, 2004) at 249; David J. Mullan, Administrative Law, (Toronto: Irwin Law, 2001) at 232. The WCB does not allege bias.

60 In terms of the right to be heard, a tribunal must not abuse its discretion by basing its decision

on insufficient or no evidence, or on irrelevant considerations: Principles of Administrative Law, supra, at 289. The decision-maker must consider relevant evidence, inform the parties of that evidence, and allow the parties to comment on it and present argument on the whole of the case: ibid. at 289, citing R. v. Deputy Industrial Injuries Commissioner, [1965] 1 Q.B. 456 at 488-90.

61 The WCB concedes that Dr. Flor-Henry's evidence was relevant and does not complain about lack of notice or violation of any other aspect of the right to be heard. Accordingly, the particular right the WCB alleges, to have the Appeals Commission qualify Dr. Flor-Henry and inquire further into the reliability and scientific validity of brain-mapping, does not fit within the established parameters of procedural fairness or natural justice. This issue is not arguable and does not raise an appealable question of law or jurisdiction.

62 The WCB's second argument is that the Appeals Commission erred in failing to apply the test for admission of expert evidence outlined by the Supreme Court in R. v. Mohan, [1994] 2 S.C.R. 9 at para. 17. The Mohan test requires four elements to be established as a precondition to the admission of expert opinion evidence: 1) relevance; 2) necessity in assisting the trier of fact; 3) the absence of any exclusionary rule; and 4) a properly qualified expert. Specifically, the WCB alleges the Appeals Commission failed to fulfill the fourth criterion which, it contends, was an error of law.

63 This argument departs from established principles of administrative law. As a general rule, strict rules of evidence do not apply to administrative tribunals, unless expressly prescribed: Toronto (City) v. CUPE, Local 79 (1982), 35 O.R. (2d) 545 at 556 (C.A.). See also Principles of Administrative Law at 289-90; Sara Blake, Administrative Law in Canada, 3rd ed., (Markham, Ont.: Butterworths, 2001) at 56-57; Robert W. MacAulay, Q.C. & James L.H. Sprague, Practice and Procedure before Administrative Tribunals, looseleaf (Toronto: Carswell, 2004) at 17-2. While rules relating to the inadmissibility of evidence (such as the Mohan test) in a court of law are generally fixed and formal, an administrative tribunal is seldom, if ever, required to apply those strict rules: Practice and Procedure before Administrative Tribunals at 17-11. "Tribunals are entitled to act on any material which is logically probative, even though it is not evidence in a court of law": T.A. Miller Ltd. v. Minister of Housing and Local Government, [1968] 1 W.L.R. 992 at 995 (C.A.); Trenchard v. Secretary of State for the Environment, [1997] E.W.J. No. 1118 at para. 28 (C.A.). See also Bortolotti v. Ontario (Ministry of Housing) (1977), 15 O.R. (2d) 617 (C.A.).

64 This general rule applies even in the absence of a specific legislative direction to that effect. While many statutes stipulate that a particular tribunal is not constrained by the rules of evidence applicable to courts of civil and criminal jurisdiction, "these various provisions do not however alter the common law; rather they reflect the common law position: in general, the normal rules of evidence do not apply to administrative tribunals and agencies": Administrative Law, supra, at 279-80.

65 Although the **WCB Act** does not expressly state that strict rules of evidence do not apply, two of its provisions support the application of this rule in respect of Appeals Commission proceedings.

Pursuant to ss. 13.2(1) and (2), the Appeals Commission must consider the records of the claims adjudicator and the review body relating to the claim. Notably, these records often contain medical documents and opinion evidence, all unsworn, in the form of hearsay and lacking expert qualification or other admissibility procedures. In addition, s. 13.2(6) provides that the Appeals Commission "shall give all persons with a direct interest in the matter under appeal ... an opportunity to present any new or additional evidence" [emphasis added].These provisions are inconsistent with the application of strict rules of evidence.

66 As strict rules of evidence do not apply to Appeals Commission hearings, it follows that the Appeals Commission's failure to formally qualify Dr. Flor-Henry to give expert evidence does not give rise to an arguable question of law or jurisdiction. The record reflects that the Appeals Commission considered Dr. Flor-Henry's resumé, professional qualifications and testing methodology, and concluded that his evidence deserved some weight. The Appeals Commission did not rely on this evidence alone, but found it supported the evidence of other medical practitioners: Decision No. 2003-235, supra, at 10.

67 It appears, therefore, that the WCB's real complaint is with the weight the Appeals Commission placed on Dr. Flor-Henry's evidence. In an administrative law context, "[r]elevant expert evidence is admissible. Any frailties in the facts or hypotheses upon which an opinion is based, or in the qualifications of the expert, affect the weight of the evidence, but not its admissibility": Administrative Law in Canada, supra, at 59, citing Canada (A.G.) v. Restrictive Trade Practices Commission (1980), 113 D.L.R. (3d) 295 at 306-07 (F.C.T.D.); University of Sask. Engineering Students Society v. Sask. (Human Rights Commission) (1983), 24 Sask.R. 167 at 176 (Q.B.).

68 The reviewing judge correctly concluded that it was not open to the WCB to argue that the Appeals Commission was bound to apply the admissibility criteria outlined in Mohan, or that a failure to apply these criteria constituted a denial of natural justice. Rather, the arguable issue involved the weight the Appeals Commission placed on this evidence, which he characterized as a question of mixed fact and law: at para. 20.

69 Weighing evidence is generally characterized as a question of fact, as factual conclusions result from the weight assigned to the underlying evidence: Housen at para. 23. See also R. v. Spencer, 2002 ABCA 32 at para. 13. There is a legal aspect to the Appeals Commission's weighing of evidence because it had to decide whether Mr. Davick suffered an injury in the accident that entitled him to benefits under workers' compensation legislation. However, the question raised by the WCB in this case, the weight given to expert medical evidence, does not have the traditional earmarks of a legal issue: there is no legal principle or test involved and the question is specific to the case, lacking in precedential value: Southam at para. 37. Nor is there any extricable legal question. The question in issue is highly fact intensive, attracting a more deferential standard of review: Dr. Q. at para 34.

Part 2: Examine the privative clause or statutory appeal provision

70 As the second ground of appeal, the WCB takes issue with the reviewing judge's finding that questions of mixed fact and law do not automatically fall within s. 13.4(1).

71 As discussed above, the statutory right of appeal in s. 13.4(1) applies to questions of law or jurisdiction. Questions of mixed fact and law are not appealable unless there is an extricable legal question. There is no such question in this case, and the reviewing judge properly held at para. 26 that the questions the WCB raised fell outside the statutory right of appeal. At para. 27, he correctly noted that since the "subject to" clause in 13.1(1) does not apply to the alleged errors in this case, the Appeals Commission's decision is protected by the full privative clause in s. 13.1, signalling a more deferential standard of review.

Part 3: Consider the tribunal's expertise

72 The Appeals Commission has been constituted with particular expertise in achieving the aims of the WCB Act because of its experience and non-judicial means of implementing the legislation and policy. As such, greater deference will be accorded to its decisions: Pushpanathan at para. 32. Because the Appeals Commission is regularly called on to make findings of fact in a distinctive legislative context, it can be said to have gained a measure of relative institutional expertise: Dr. Q. at para. 29.

73 The question in issue in this case, the weight given to expert medical evidence, falls within the Appeals Commission's relative expertise. The Appeals Commission hears and decides approximately 1100 appeals each year, the vast majority of which involve medical opinion evidence. It has more expertise than the courts in considering and weighing this medical evidence to determine a worker's entitlement to benefits under the workers' compensation scheme, as the reviewing judge noted at para. 28. This factor indicates a high degree of deference.

Part 4: Examine the purpose of the statute and the provision in particular

74 The Appeals Commission is not required to undertake a polycentric analysis, taking into account broad policy objectives, or the public interest; rather, it routinely resolves disputes among workers, employers and the WCB. Nevertheless, one of the principal purposes of the WCB Act is to provide a system of compensation independent of court involvement, as recognized by the reviewing judge at paras. 29-31. The Appeals Commission's role is central to this purpose, indicating deference to the Appeals Commission's decision. In addition, the WCB Act is properly described as a policy-laden statute, further suggesting deference: Voice at para. 18; Alberta (Workers' Compensation Board) v. Alberta (Workers' Compensation Appeals Commission), 2005 ABCA 235 at para. 28.

Select the standard of review

75 The presence of a fact-intensive question protected by a full privative clause, the Appeals Commission's experience and particular expertise in evaluating medical evidence and the WCB Act's purpose of providing an efficient and rapid process of compensation independent of court involvement, indicate that a high level of deference should be accorded to the Appeals Commission's decision, in this case, on this question. The reviewing judge correctly selected the patent unreasonableness standard of review.

76 While the WCB alleges the reviewing judge erred in selecting the patently unreasonable standard, it does not take issue with his application of that standard to the Appeals Commission's decision. It is therefore not necessary to consider his application of the standard of review or his determination that the Appeals Commission's decision on this question was not patently unreasonable. DISPOSITION

77 In summary, questions of mixed fact and law from which no legal question can be extricated are not appealable under the statutory right of appeal in s. 13.4(1) of the WCB Act. The question at issue in this appeal was properly characterized by the reviewing judge as highly fact-intensive and subject to the privative clause in s. 13.1. Finally, an analysis of the functional and pragmatic factors indicates that the standard of patent unreasonableness was appropriate for review of the question in issue in this case. Accordingly, the appeal is dismissed.

APPEAL BY THE EMPLOYER

78 Mr. Davick's former employer, Klemke Mining Corporation, made its first appearance in this matter before the reviewing judge. In that proceeding, Klemke supported the WCB's grounds of appeal, and raised one additional ground. It alleged that it did not receive adequate notice of the new evidence to be introduced by Dr. Flor-Henry at the Appeals Commission hearing. The reviewing judge held that sufficient notice had been given: at para. 4. Klemke appeals that finding.

79 The Appeals Commission provided Klemke with a hearing notice well in advance of the hearing date, stating that Dr. Flor-Henry would be presenting evidence. It also sent an appeal document package to the parties. Dr. Flor-Henry's report was not included because it was not submitted to the Appeals Commission until two days before the hearing. It should be noted that the WCB received the same information as Klemke, but did not allege inadequate notice.

80 Notwithstanding receipt of the hearing notice indicating that Dr. Flor-Henry would be in attendance by conference call, Klemke chose not to contact the Appeals Commission or the WCB before the hearing, to indicate an interest in attending or to inquire about Dr. Flor-Henry's evidence. Nor did Klemke appear at the hearing.

81 Klemke argues the Appeals Commission contravened the rules of natural justice, in failing to provide "sufficient" or "adequate" notice of the nature of the opinion that would be expressed by Dr. Flor-Henry and failing to provide a copy of Dr. Flor-Henry's report to it in advance of the hearing.

82 Sufficiency or adequacy of notice is a question of procedural fairness or natural justice. A finding of inadequate or no notice renders the tribunal's decision void: Wiswell v. Winnipeg (Metropolitan), [1965] S.C.R. 512. The relevant factors to be considered were recently reiterated in Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village), [2004] 2 S.C.R. 650 at para. 5, citing Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817:

> (1) the nature of the decision and the decision-making process employed by the public organ;
> (2) the nature of the statutory scheme and the precise statutory provisions pursuant to which the public body operates;
> (3) the importance of the decision to the individuals affected;
> (4) the legitimate expectations of the party challenging the decision; and
> (5) the nature of the deference accorded to the body.

83 As to the third and fourth factors, it should be noted that Klemke has a more limited interest in this process than the WCB or Mr. Davick. Here, the ultimate dispute is between the worker and the WCB, as any awarded benefits are paid from WCB coffers. The employer has an indirect financial interest only, through a possible increase in WCB premiums.

84 Dealing with the remaining factors, while the Appeals Commission performs an adjudicative function, the WCB Act does not require it to provide copies of expert opinions to interested parties prior to a hearing. Section 13.1(3) authorizes the Appeals Commission to set its own procedures, indicating that deference should be accorded to the Appeals Commission in its decision not to supply the report or more detailed information in advance of the hearing.

85 In these circumstances, the Appeals Commission was not remiss in failing to provide Klemke with the report and the reviewing judge did not err in finding sufficient notice had been given. Klemke's appeal is also dismissed.

FRUMAN J.A.
PICARD J.A.:-- I concur.
RITTER J.A.:-- I concur.

Indexed as:

Gavrila v. Canada (Justice)

Tiberiu Gavrila Appellant;
v.
Minister of Justice of Canada Respondent, and
Amnesty International (Canada Section), Québec Immigration Lawyers Association and Canadian Civil Liberties Association Interveners.

[2010] 3 S.C.R. 342

[2010 3 R.C.S. 342

[2010] S.C.J. No. 57

[2010] A.C.S. no 57

2010 SCC 57

File No.: 33313.

Supreme Court of Canada

Heard: January 13, 2010;
Judgment: November 25, 2010.

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

(13 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Catchwords:

Extradition -- Surrender -- Convention refugees -- Principle of "non-refoulement" -- Minister of

Justice ordered extradition of Convention refugee to Romania -- Whether Minister of Justice had legal authority to surrender for extradition refugee whose refugee status had not ceased or been revoked -- If so, whether Minister reasonably exercised his authority to surrender -- Extradition Act, S.C. 1999, c. 18, s. 44 -- Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 115.

Extradition -- Surrender -- Evidence -- Burden of proof -- Convention refugees sought for extradition -- Statutory grounds justifying Minister of Justice's refusal to make surrender order -- Whether s. 44(1)(b) of Extradition Act makes risk of persecution mandatory ground of refusal of surrender -- Whether Minister of Justice erred by imposing on refugees the burden of showing that they would suffer persecution if extradited -- Extradition Act, S.C. 1999, c. 18, s. 44(1)(b).

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Summary:

G came to Canada in 2004 and successfully made a claim for refugee protection, alleging that he had been persecuted in Romania because of his ethnic origin and activities in a Roma advocacy association. The Romanian authorities later requested that G be extradited to serve a prison sentence on a conviction for forging visas. G had allegedly been convicted in Romania for participating in the forging of visas for two people in exchange for US$1,800. In 2008, the Minister of Justice ordered that G be extradited to his country of origin to serve his prison sentence. The Court of Appeal dismissed the application for judicial review.

Held: The appeal should be allowed and the matter remitted to the Minister of Justice for reconsideration.

For the reasons given in *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281, the Minister did not apply the correct legal principles given that at the time the surrender decision was made, G's refugee status had not ceased or been revoked. The Minister ought to have considered the application of s. 44(1)(*b*) of the *Extradition Act*. The Minister's decision having been founded on wrong legal principles was unreasonable and must be set aside. While the decisions taken under the *Immigration and Refugee Protection Act* are not binding on the Minister, G should not have been required to prove that persecution would in fact occur and that it would either shock the conscience or be fundamentally unacceptable to Canadians and should not have had his case evaluated only on the basis of s. 44(1)(*a*) considerations.

Cases Cited

Applied: *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 7.

Extradition Act, S.C. 1999, c. 18, s. 44(1)(*a*), (*b*).

Immigration and Refugee Protection Act, S.C. 2001, c. 27.

Penal Code (Romania).

International Documents

Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221.

Convention Relating to the Status of Refugees, Can. T.S. 1969 No. 6, Art. 1F(b).

History and Disposition:

APPEAL from a judgment of the Quebec Court of Appeal (Beauregard, Gendreau and Côté JJ.A.), [page344] 2009 QCCA 1288, [2009] J.Q. no 6686 (QL), 2009 CarswellQue 6650, dismissing an application for judicial review of a decision by the Minister of Justice of Canada ordering the appellant's surrender. Appeal allowed.

Counsel:

Stéphane Handfield and *Dimitrios Strapatsas*, for the appellant.

Ginette Gobeil and *Janet Henchey*, for the respondent.

Lorne Waldman and *Jacqueline Swaisland*, for the intervener Amnesty International (Canada Section).

Johanne Doyon, *Elaine Doyon* and *Dan Bohbot* , for the intervener the Québec Immigration Lawyers Association.

Sukanya Pillay, for the intervener Canadian Civil Liberties Association.

The judgment of the Court was delivered by

CROMWELL J.:--

I. Introduction

1 This case, like its companion case *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281, released concurrently, raises questions about the interplay between extradition and refugee protection. Applying the principles developed in *Németh*, I would allow the appeal and remit the matter to the Minister of Justice for reconsideration of his decision to surrender the appellant for extradition.

II. Facts and Proceedings

2 The appellant came to Canada in 2004 and made a claim for refugee protection, alleging that he had been persecuted in Romania because of his ethnic origin and his activities in a Roma advocacy association. The Immigration and Refugee Board ("IRB") allowed the appellant's claim for refugee protection.

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3 The Romanian authorities later requested that he be extradited to serve a prison sentence on a conviction for forging visas. The appellant had allegedly been convicted in Romania for participating in the forging of Schengen visas for two persons in exchange for US$1,800. The appellant did not reveal in his refugee claim that he was wanted by the Romanian police or that he had been convicted of forging visas. He had not appeared at his trial or at the hearing of his appeal, even though he was still residing in Romania at the time. He had therefore been convicted *in absentia*. But he had been represented by counsel at every stage of the proceedings, both at trial and on appeal. He left his country on December 18, 2003, a week after his appeal was dismissed.

4 In May 2005, the appellant's spouse joined him in Canada without their children. Their two sons were left in the care of their grandparents until July 2008, when they joined their parents here. Ms. Gavrila has been a permanent resident of Canada since December 2007. On May 4, 2006, she gave birth to a third child in Quebec.

5 The appellant was never able to acquire permanent resident status, because he was inadmissible to Canada on grounds of serious criminality. Between his arrival in Canada and the time he was taken into custody pursuant to an order made under the *Extradition Act*, S.C. 1999, c. 18 ("*EA*"), the appellant was convicted of several indictable offences, including theft, fraud, possession and use of forged documents (credit card), obstruction of a peace officer, possession of break-in instruments, and conspiracy.

6 In May 2006, the Minister of Citizenship and Immigration Canada applied to the IRB to vacate the decision to allow the appellant's claim for refugee protection. The issue was whether the decision in question had been obtained as a result of directly or indirectly misrepresenting material

or relevant facts. The IRB rejected the application to vacate [page346] the decision. In its decision, the IRB found that the INTERPOL notice seemed to have been fabricated, as it was unlikely that INTERPOL would issue a wanted notice without fingerprints for a person who has allegedly been arrested, tried and convicted.

7 The Quebec Superior Court ordered that the appellant be committed into custody to await his extradition. The appellant contested his extradition, alleging, *inter alia*, that he was at risk of being mistreated and that he would be unable to have the verdict and the sentence reviewed. On July 2, 2008, the Minister of Justice ("Minister") ordered that the appellant be extradited to his country of origin to serve his prison sentence.

8 In his July 2, 2008 decision to surrender the appellant for extradition, the Minister applied the same test that he had in *Németh*, namely whether the person sought had established on the balance of probabilities that he would be persecuted and that the persecution would sufficiently shock the conscience or be fundamentally unacceptable to Canadian society. The Minister stated that Romania had joined the European Union and therefore had to meet that organization's requirements regarding, in particular, the rule of law as well as respect for, and the protection of, minorities. The fact that it had become a member of the European Union also meant that its citizens are now afforded the protection and guarantees of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221. The Minister concluded that the appellant had not satisfied him that his surrender would be unjust, oppressive or contrary to the *Canadian Charter of Rights and Freedoms*. The Minister expressed the view that granting refugee status does not preclude extraditing a person if doing so is otherwise justified. Finally, he noted that the Romanian authorities had informed him that that country's *Penal Code* provides for a right to a new trial in certain circumstances. The appellant applied to the Court of Appeal for judicial review of the order of surrender.

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9 The Court of Appeal dismissed the application for judicial review (2009 QCCA 1288 (CanLII)), holding that the objective and purpose of the *EA* differ from those of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*"). Therefore, the principle of *non-refoulement* with respect to an individual who has been granted refugee protection does not bar a request for the extradition of that individual to be tried or to serve a sentence imposed following a guilty verdict. Moreover, the IRB may vacate a decision to allow a claim for refugee protection if it is shown that the decision was obtained as a result of a misrepresentation, which was the case here. Finally, the Court of Appeal held that the impugned decision was not unreasonable from the standpoint of s. 7 of the *Charter*.

III. Issue

10 The appellant raises a number of issues, but it is only necessary for me to deal with one of them, namely whether the Minister's decision to order the appellant's surrender was reasonable.

IV. Analysis

11 Responding to the submissions made to him by the appellant, the Minister viewed the case through the lens of s. 44(1)(*a*) of the *EA* and asked himself whether he was satisfied that the appellant had shown on the balance of probabilities that his surrender for extradition would be oppressive or unjust. As noted, the Minister stated the test to be whether the appellant had shown on the balance of probabilities that he would be subjected to persecution in the requesting state and that the persecution would shock the conscience or be fundamentally unacceptable to Canadian society. For the reasons given in *Németh*, this was not the correct legal principle to apply given that at the time the surrender decision was made, the appellant's refugee status had not ceased or been revoked. The Minister ought to have considered the application of s. 44(1)(*b*) of the *EA*, the most relevant provision in this case, in light of the principles set out in *Németh.* His decision having been founded on wrong legal principles, it was unreasonable and must be set aside. While as discussed in *Németh*, the decisions taken [page348] under the *IRPA* (i.e. the decisions to grant refugee status and not to vacate that status) are not binding on the Minister, the appellant should not have been required to prove that persecution would in fact occur and that it would either shock the conscience or be fundamentally unacceptable to Canadians and should not have had his case evaluated only on the basis of s. 44(1)(*a*) considerations.

12 I should add that the Minister did not base his decision to surrender on, and appears not to have addressed, whether the appellant was no longer entitled to refugee (and therefore *non-refoulement*) protection by virtue of the serious non-political crimes exception under Article 1F(b) of the *Convention Relating to the Status of Refugees*, Can. T.S. 1969 No. 6 or of his extensive criminal conduct in Canada. While not the subject of argument in this Court, it seems clear from the record that the extradition offence would constitute serious criminality for the purposes of the *IRPA* and it is open to the Minister to consider the possible application of Article 1F(b) of the *Convention Relating to the Status of Refugees* in deciding whether the appellant is entitled to refugee protection. I do not find it necessary to address the appellant's submissions relating to the impact of extradition on his spouse and children.

V. Disposition

13 I would allow the appeal, set aside the decision of the Court of Appeal and the Minister's order of surrender and remit the matter to the Minister for reconsideration in accordance with the law. The appellant did not request costs and I would order none.

Appeal allowed.

Solicitors:

Solicitors for the appellant: Lapointe & Associés, Montréal.

[page349]

Solicitor for the respondent: Attorney General of Canada, Montréal.

Solicitors for the intervener Amnesty International (Canada Section): Waldman & Associates, Toronto.

Solicitors for the intervener the Québec Immigration Lawyers Association: Doyon et Associés, Montréal.

Solicitor for the intervener the Canadian Civil Liberties Association: Canadian Civil Liberties Association, Toronto.

cp/e/qlhbb

HOUSE OF COMMONS OF CANADA
35th PARLIAMENT, 1st SESSION

EVIDENCE

Standing Committee
on

TRANSPORT

Chairman: Stan Keyes

Meeting No. 63

Thursday, October 5, 1995

ORDER OF THE DAY:

Bill C-101, An Act to continue the National Transportation Agency as the Canadian Transportation Agency, to consolidate and revise the National Transportation Act, 1987 and the Railway Act and to amend or repeal other Acts

WITNESSES:

Department of Transport:

Ed Cochrane, Special Policy Advisor, Policy and Coordination;

Moya Greene, Assistant Deputy Minister, Policy and Coordination;

Clyde McElman, Special Policy Advisor, Policy and Coordination;

Jean Patenaude, Special Advisor, Minister's Office.

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EVIDENCE

[*Recorded by Electronic Apparatus*]

Thursday, October 5, 1995

.0933

[*English*]

The Chairman: Good morning, colleagues. We move to consideration of Bill C-101. This morning we have a briefing session on Bill C-101 with officials from the Department of Transport. Moya Greene is a face familiar to the committee. Maybe she can introduce those she's brought with her this morning.

Just before you do that, Moya, it is customary for the Chair to welcome any new members who have come to this committee. We welcome Mr. David Chatters, who's the newest member of the committee.

Welcome, David. We hope you enjoy your stay with us, as so many other members of this committee do.

Moya, maybe you could introduce your colleagues and we can get into some statements from you.

Ms Moya Greene (Assistant Deputy Minister, Policy and Coordination, Department of Transport): Thank you, Mr. Chairman.

With me this morning I have Jed Cochrane, Jean Patenaude, and Clyde McElman. Among the lot of us our hope is that we will be able to answer succinctly and clearly all the questions the committee might have for us this morning. If we cannot, Mr. Chairman, we endeavour to get responses to the committee as quickly as possible.

.0935

Perhaps you will allow me to make a few opening comments before we get down to the business at hand.

First, on behalf of the department I would very much like to thank the committee for accepting to review this important piece of legislation so very early in this legislative season. It is a very important bill for the transportation sector and for the reform that the government is proposing across all modes of

transport as we move toward the next century.

You will know about many aspects of that reform, because, as you have pointed out, we have been in front of this committee on many occasions in the past couple of years. This bill is important because it will be the primary economic regulation that will remain in place for the transportation sector and it consolidates a lot of pieces of fairly archaic and antiquated legislation.

The objectives of the reform were put quite precisely by the minister yesterday, so I won't go into any great detail on that. Indeed, they are set out in clause 5 of the bill. There is one aspect, though, that I think bears a little bit of reinforcement. It is that, as clause 5 states, economic regulation should be used only where it is necessary, which is where the competitive and the commercial forces of the market are inadequate or are incapable of moderating the relationships between the parties. That is set out in clause 5, and it has been there for some time.

At various occasions in history, in 1967 and 1987, we have looked afresh to ask ourselves if we have the right balance in place between what is necessary in terms of economic regulation and what can reasonably be left to commercial forces to mediate the transportation relationship between the parties.

That really is what we're about with this new bill.

I wanted to stress that, because, even though that has been an abiding objective of previous reforms, it is the guiding principle again today for this bill.

So, for every section of the framework that was in place, we asked ourselves, is this regulation still necessary? If the regulation is drafted and if we say that it is necessary, then is there a way in which to write it so that we will encourage the parties to take over more of the subject-matter that might be covered by that aspect of the regulation?

When we looked at the bill, we found that there were still many items in the NTA 1987 that probably were no longer needed. We found that we were purporting to regulate motor vehicles when, in all cases but one, the matters were handled under separate legislation and by the parties themselves. We found, for example, that we had not given sufficient weight to the maturity of the industry and the ability of other generic legislation to look after particular concerns. So, for example, we had provisions in the Railway Act that purported to regulate the corporate affairs of railways in a manner that was very different from all other corporations in Canada and at a time when there is general, modern corporations legislation on the books. We found in the 1987 act we were probably too timid with the application of general competition law and competition principles as they apply to the transportation act.

.0940

When we looked through the 1987 bill, we found a number of redundancies. We found a number of places where general business legislation could be made to

apply more directly. One of the things we therefore attempted to do was to reduce the weight of regulation if it was covered off adequately in some other area.

What the 1995 bill attempts to do is to strike, as I say, a new balance between what the parties can and should do themselves in the marketplace, what should be matters of government policy left for Parliament to decide, and what must remain a matter for the regulator to be involved in. As I have been involved in this process now for several years in consultations across the country, in very detailed discussions on how best to find that new balance in the bill, and in the reading of the briefs that are before the committee, there are five or six items that are likely to be items of prominent discussion for the committee.

One concerns the agency powers. In finding this new balance among commercial decision-making, economic regulation, and government policy-making, has access to the agency been given short shrift? As the first item I would like to address in my remarks, Mr. Chairman, I'd like to give you our thoughts on this.

I think if you read the first part of the bill, you will want to ask yourself, well, in response to this claim that access to the agency has been given short shrift or curtailed, does that seem correct or accurate to you, when you consider that the agency, under part I, has all the powers of a superior court? Under part I the agency can subpoena witnesses, can inquire into any complaint that is laid before it. The agency ``must'' decide the matter. The agency does not have a discretion to say ``well, that one I'm not going to look at''. The agency must decide the matter, and must decide the matter with dispatch.

The agency can make regulations on its own to govern its procedures. The orders of the agency are enforceable in a federal court, as if they were orders of the federal court, such that the normal procedures.... If you were to ignore that order, the normal procedures that apply to court orders can be brought to bear.

The agency will have its own powers to construct new penalties to enforce its decisions. The agency can inquire into a matter even if some of the facts that are in dispute are before another court. The agency is not constrained in its ability to hear the matter.

Most importantly, under clause 38, the agency has to hear any complaint, on any matter or act that is the subject of this or other pieces of legislation under its jurisdiction, and the agency shall make a decision. Under clause 29 it is obliged to hear it, obliged to decide.

Where I think you're likely to hear some concern about agency powers relates to subclause 29(2), where Parliament would give guidance to the agency; guidance on when restraints in decision-making should be exercised. That is all that subclause 29(2) does. It does not allow an agency to say it won't hear a complaint, it won't decide a complaint or it won't decide the complaint quickly. Subclause 27(2) simply tells the agency that when making a decision on a complaint, it should be restrained if there is no interest seriously at stake - if

there is no significant prejudice.

.0945

So when this honourable committee comes to look at subclause 27(2) - and it was already raised in the discussions yesterday - I would ask that you look at it in the context of the agency powers and ask yourself whether this curtails access to the agency or gives guidance to the agency to reinforce what is already an objective in the act.

That is to say, economic regulations should be used in places where competitive commercial forces are inadequate. So it is guidance on restraint, not to turn away a complaint, not to refuse to decide, but in the context of making a decision it should be one of the considerations.

The Chairman: Excuse me, Moya. I don't want to slow the process down at all, but because there are five or six items, if anyone has a concern or a question they'd like to ask at this particular point, maybe we could do that.

Ms Greene: Certainly we can engage in a bit of debate.

The Chairman: That way we can stick with a theme as we go.

So if anybody has a question at this point on Moya's opening remarks or on the agency powers, just give me the signal.

Mr. Fontana (London East): I have just one question. It relates to the size of the agency - it's going from nine to three, I believe, with some part-time members - and the fact that the agency itself will be composed of something around 200 people in its final form.

Do you feel, given the mandate it still will have with the coming of this bill, that it will have sufficient resources and representation on its board to fulfil that mandate?

Ms Greene: Yes, I do, Mr. Fontana.

You will all know that the agency, in addition to its quasi-judicial functions, used to have a fair amount of administrative duties. It had to administer big subsidies with lots of claimants. That was not really a quasi-judicial function but an administrative function.

You will know that the agency had to accept all kinds of filings, even though it didn't do anything with them. The law made the agency accept those filings. With the budget, these subsidies are discontinued, so a lot of the resources of the agency that had been devoted to these kinds of administrative actions are simply no longer required.

On the matter of three members and part-time members, in discussions with the agency it was felt that this is perhaps the most flexible way of going at the

agency's residual and core quasi-judicial functions. Looking at the number of actual complaints the agency has to decide in a given year and looking at the ability of the government to increase the number of people who would be available through the roster of temporary members should something unusual occur so that there would be a backlog of complaints, I'm very confident that the agency is resourced with a sufficient number of people and will have a sufficient number of decision-makers available to it to deal with it.

The other thing I would point out is that our agency is a large agency for reasons that are perhaps justifiable. Over the years Canadians have come to rely upon the agency, quite rightly, for a range of things that in some cases are still necessary. But relative to the size of the agency that exists in the United States for similar functions, it is still almost the same size.

.0950

In discussions I've had with the minister...the minister is very anxious that the agency never be put in a position where it cannot expeditiously deal with whatever is in front of it. Part of helping make sure the agency can deal with dispatch with things in front of it is the things found in the bill: that the agency shall make decisions within a certain timeframe and that the agency should be empowered to award costs against somebody who would use its process unnecessarily. But in addition, the minister wants to make sure the agency does have access to resources to enable it to get on with that timely decision-making. Relative to what has to be done, I am very confident those resources are there.

The Chairman: Mr. Gouk.

Mr. Gouk (Kootenay West - Revelstoke): I'm curious about the concept of the agency expeditiously dealing with things that come before it at the same time as clauses such as subclauses 27(2) and 34(1) place obstacles in the way of getting things to them in the first place. Right now if there's a dispute between the shipper and the railroad, the process allows it to go to the agency, period, and then it is dealt with in one way or the other. But the concept of significant prejudice means there has to be some process, as yet undefined in what I've seen, that says there has to be someone else who goes through a determination, first on what the significant prejudice really is, and second, on whether or not significant prejudice occurred. I don't know what that process is, I don't know how long it will take, before it can eventually make its way to this expeditious handling.

I also still think you're working in conflict between subclauses 27(2) and 34(1). Subclause 27(2) provides a potential roadblock in getting something to the agency. It says we may or may not look at it, depending on whether or not it's judged to be significant prejudice. Then you're providing another clause that says if you bring something before us that is frivolous and vexatious, we will penalize you for it - having said in an earlier clause if it isn't significant prejudice we won't even allow you to bring it before us in the first place.

I'd like to have some of those things cleared up.

Ms Greene: There is a misconception that I think it is very important the committee get on its table early. Subclause 27(2) does not entitle the agency not to deal with the complaint. The agency is required by law to take complaints and required to make decisions.

Subclause 27(2) is not an obstacle, in the sense that you don't have to prove a significant prejudice in order to get access to the agency. That's not how it works. You can go to the agency on any matter and the agency must decide.

If you look at the language of subclause 27(2), it simply says ``in its decision''. So the agency has accepted the complaint, because it's obliged by law to do so. The agency is making a decision because it's obliged by law to do so. In its decision the agency must consider whether or not this is a matter that raises a significant prejudice. There's no need for a process.

I would submit to you, Mr. Gouk, that if there were a process, you could fairly argue that it was an obstacle or a roadblock to the agency. But if you look at clause 38, they have to hear a complaint. If you look at clause 30, they have to hear that complaint even if a fact is in dispute in another forum. They can still go on.

Subclause 27(2), if you look at the wording of it...and it's well to read it in terms of subclause 27(1).

The agency has always been empowered to grant the relief, in whole or in part, it thinks appropriate under the circumstances. Subclause 27(2) says the application is made, the agency may grant the relief in whole or in part, just as it always has been able to - that's at the discretion of the agency - and then there's a bit of parliamentary guidance, meant to reinforce the objectives of the bill. It says ``in the decision''. Please satisfy yourself, agency, that there's a significant interest here that would not be satisfied if you didn't give the relief people are asking you to give.

So there's a misconception that this is a roadblock and this is a process. I am not going to say to this committee that simply because one is industrious you've done a good job. That's for you to decide: whether at the end of the day, in finding that balance, we've done a good job. But I will say the concern about a roadblock was certainly heard by those who were involved in drafting. And it was accepted: we certainly don't want to put a roadblock to the agency.

.0955

We considered other alternatives that the committee also might want to keep in its mind.

Right now the act says that the agency must accept all complaints, and it must accept complaints from all classes of shippers, whether they're captive or not.

There are captive shippers in this country, but there are far more in the country who are not captive. They are not captive to a single railroad or to a single mode

of transport.

So we felt maybe what we will do in this effort at regulatory reform is narrow the classes of complaint that can have access to the agency. People did not want us to do that.

The other alternative we considered was to narrow the class of shippers that can go to the agency. Only captive shippers, for example, would have access to a regulatory remedy. People did not want us to do that.

We said if all classes of complaint from all classes of shipper can go to the agency and if the agency will be legally obliged to accept them and to deal with them and make a decision on them, is it inappropriate to provide a little bit of guidance to reinforce the objectives of the act?

In your decision, yes, take the complaint. Yes, decide it with dispatch; don't put up a roadblock to anybody. Take the complaint, decide it with dispatch, but consider if a significant interest is at stake.

On frivolous and vexatious, I think they deal with slightly different things.

Remember, the agency has the complaint. It must take the complaint. The agency has to make a decision and do so within a period of time. The law requires the agency so to act.

On the basis of what I know, most cases are legitimate. But, Mr. Gouk, you know that there have been very protracted proceedings in front of the agency in certain cases, proceedings that did not help to tease out what the issues were, did not help the agency to come to its ultimate determination, only served to delay, only served to cost the parties money.

If you look at the civil procedure handbooks of this country, almost every court in the land is able to control that kind of misuse of its process by saying to people: you have a legal right to come to us and we are legally obliged to decide your case, but if you cause the process to be a frivolous and vexatious one, then we are going to ask you to pay costs. This is standard for almost every kind of procedure that is carried out across the land. It's not a roadblock, but it is an indicator that you get the agency, you get the decision, but if you're found to have delayed the agency in an untoward way and caused people to bear unnecessary legal costs in the process, then you will be asked to pay.

The Chairman: Thanks, Moya.

Mr. Guimond.

[*Translation*]

Mr. Guimond (Beauport - Montmorency - Orléans): Ms Greene, I missed the beginning of your presentation. Subsection 7(2) says that the number of members in the agency will decrease from nine to three, but that they will still