Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

RAYMOND PAUL NAWROT and
KRISTINA MARIE NAWROT and
KAROLYN THERESA NAWROT

Moving Parties

– and –

SUNWING AIRLINES INC. and
CANADIAN TRANSPORTATION AGENCY

Respondents

MOTION RECORD OF THE MOVING PARTIES
VOLUME III — APPENDIX "B"
(Motion for Leave to Appeal, Rule 352)

Dated: December 7, 2013

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15 *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158

16 *Via Rail Canada Inc. v. Lemonde*, [2001] 2 FC 25

Indexed as:

Bell Canada v. Consumers' Association of Canada

Bell Canada, appellant;
and
Consumers' Association of Canada, National Anti-Poverty Organization, Inuit Tapirisat of Canada, Taqramiut Nipingat Inc., Mr. S.A. Rowan, and Canadian Radio-television and Telecommunications Commission, respondents.

[1986] 1 S.C.R. 190

[1986] S.C.J. No. 8

File No: 17676.

Supreme Court of Canada

1985: April 25 / 1986: February 28.

Present: McIntyre, Lamer, Wilson, Le Dain and La Forest JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Taxation -- Costs -- CRTC rate hearing -- Commission empowered to award costs in any proceedings -- Costs awarded to interveners -- Question whether costs actually incurred by interveners -- Whether or not Commission bound by principle of indemnification in award of costs as applied by courts -- National Transportation Act, R.S.C. 1970, c. N-17 ss. 64(2), 73 -- Railway Act, R.S.C. 1970, c. R-2, s. 2(1) -- CRTC Telecommunications Rules of Procedure, SOR/79-554, s. 44(1), (6).

The issue raised in this appeal was whether, in the exercise of the discretion to award costs conferred by s. 73 of the National Transportation Act, the Canadian Radio-television and Telecommunications Commission was bound by the principle of indemnification as it is applied in the award of costs by the courts. Bell Canada had challenged the taxation order on the ground that, because of the arrangements for the remuneration of counsel who represented the interveners and

for the payment of other expenses of the interventions, the taxation order had the effect of awarding costs for expenses that were not actually incurred by the interveners and thus violated the principle of indemnification or compensation applicable to the award of legal costs by courts. Respondent Consumers' Association of Canada received government funding for participation in a variety of regulatory proceedings and its counsel in the rate hearing was on a "first retainer" with it. Counsel for the other respondents was on retainer from and disbursements [page191] made in connection with the hearing were paid by the Public Interest Advocacy Centre.

Held: The appeal should be dismissed.

The word "costs" in s. 73 must carry the same general connotation as legal costs. It cannot be construed to mean something quite different from or foreign to that general sense of the word, such as an obligation to contribute to the administrative costs of a tribunal or the grant of a subsidy to a participant in proceedings without regard to what may reasonably be considered to be the expense incurred for such participation. The word "costs", therefore, must carry the general connotation of being for the purpose of indemnification or compensation. In view, however, of the nature of the proceedings before the Commission and the financial arrangements of public interest interveners, the discretion conferred on the Commission by s. 73 must include the right to take a broad view of the application of the principle of indemnification or compensation. The Commission should not be bound by the strict view of whether an expense has been actually incurred that is applicable in the courts. It should, for example, be able to fix the expense which may be reasonably attributed to a particular participation by a public interest intervener as being deemed to have been incurred, whether or not as a result of the particular means by which the intervention has been financed there has been any actual out-of-pocket expense. The Commission did not reject the general concept of indemnification or compensation. Rather, it rejected the contention that in its application of the general principle of indemnification or compensation it should be governed by the authorities reflecting the application of that principle in the courts. The Commission, in doing so, did not err in law, so long as it adopted a reasonable approach to what should be deemed to be the expenses incurred for the interventions on behalf of the respondents.

Cases Cited

Ryan v. McGregor (1925), 58 O.L.R. 213; Bell Canada (Re) and Telecom. Decision CRTC 79-5, [1982] 2 F.C. 681; Re Eastwood, [1974] 3 All E.R. 603; Armand v. Carr, [1927] S.C.R. 348; Northern Engineering & Dev. Co. v. Philip, [1930] 3 D.L.R. 387; Re Green, Michaels & Associates Ltd. and Public Utilities Board (1979), 94 D.L.R. (3d) 641; Newfoundland & Labrador Hydro v. Newfoundland & Labrador Federation of Municipalities (1979), 65 A.P.R. 317, 24 Nfld. & P.E.I.R. 317, referred to.

Statutes and Regulations Cited

CRTC Telecommunications Rules of Procedure, SOR/79-554, s. 44(1), (6).

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Electrical Power Control Act, 1977 (Nfld.), c. 92, s. 14(1).
Municipal and Public Utility Board Act, 1926 (Man.), c. 33, s. 55.
National Transportation Act, R.S.C. 1970, c. N-17, ss. 64(2), 73(1), (2), (3).
Public Utilities Board Act, R.S.A. 1970, c. 302, s. 60.
Railway Act, R.S.C. 1970, c. R-2, s. 2(1).

APPEAL from a judgment of the Federal Court of Appeal (1983), 147 D.L.R. (3d) 37, 48 N.R. 197, dismissing an appeal from a judgment of the Canadian Radio-television and Telecommunications Commission dismissing an appeal from a taxation order. Appeal dismissed.

Bernard Courtois and David Kidd, for the appellant.
K.J. MacDonald and John S. Tyhurst, for the respondent the Consumers' Association of Canada.
J.J. Robinette, Q.C., and Max Wolpert, for the respondent the National Anti-Poverty Organization.
Gavin MacKenzie, Gregory van Koughnett and Lisa de Wilde, for the respondent the Canadian Radio-television and Telecommunications Commission.

Solicitor for the appellant: E.E. Saunders, Hull.
Solicitor for the respondent the Consumers' Association of Canada: K.J. MacDonald, Ottawa.
Solicitor for the respondent the National Anti-Poverty Organization: M. Wolpert, Ottawa.
Solicitors for the respondent the Canadian Radio-television and Telecommunications Commission: Campbell, Godfrey & Lewtas, Toronto.

The judgment of the court was delivered by

1 **LE DAIN J.**:-- The question raised by this appeal is whether, in the exercise of the discretion to award costs conferred by s. 73 of the National Transportation Act, R.S.C. 1970, c. N-17, the Canadian Radio-television and Telecommunications Commission is bound by the principle of indemnification as it is applied in the award of costs by the courts.

2 The appeal is by leave of this Court from the judgment of the Federal Court of Appeal on March 31, 1983 [[1984] 1 F.C. 79] dismissing an appeal, pursuant to s. 64(2) of the Act, from Telecom Decision CRTC 81-5 of March 9, 1981, in which the Commission dismissed an appeal [page193] from Taxation Order 1980-1 of February 19, 1980. The order taxed the costs awarded by the Commission in Telecom Decision CRTC 78-7 of August 10, 1978 to the respondents as interveners in the hearing of an application by the appellant Bell Canada for a general rate increase.

3 Bell Canada challenged the taxation order on the ground that because of the arrangements for the remuneration of counsel who represented the interveners and for the payment of other expenses of the interventions, the taxation order had the effect of awarding costs for expenses that were not actually incurred by the interveners and thus violated the principle of indemnification or compensation applicable to the award of legal costs by courts.

4 In issue is the award of counsel fees to the respondent Consumers' Association of Canada ("CAC"), which received government funding for participation in a variety of regulatory proceedings and whose counsel in the rate hearing was on a "first retainer" with it; and the award of costs for counsel fees and disbursements to the respondents National Anti-Poverty Organization, Inuit Tapirisat of Canada, Taqramiut Nipingat Inc., and Mr. S.A. Rowan (hereinafter collectively referred to as "NAPO et al."), who were represented in the rate hearing by Mr. Andrew Roman, counsel on retainer from the Public Interest Advocacy Centre ("PIAC"), which also paid the disbursements incurred in connection with the intervention of NAPO et al. It was the contention of Bell Canada that because of CAC's government funding and its retainer arrangement with its counsel it was not put to any additional expense by its counsel's participation in the rate hearing. With respect to the costs awarded to NAPO et al., the essential contention was that the costs had not been incurred by NAPO et al. but had been incurred by PIAC, to which NAPO et al. had no obligation of payment or reimbursement.

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5 The costs were allowed by the taxing officer and confirmed by the Commission on the general ground that they fell within the criteria adopted by the Commission in the exercise of its discretion to award costs to interveners in rate hearings in order to encourage informed public participation in such hearings.

6 The Federal Court of Appeal unanimously held that the Commission had not erred in law in dismissing the appeal from the taxation order, but the members of the panel differed in their reasons. The majority (Ryan J. and Kelly D.J.) held that the principle of indemnification or compensation applied to an award of costs by the Commission, but that the record did not establish that there had been a violation of that principle in the costs awarded to the respondents. Urie J. held that while the principle of indemnification or compensation was a relevant consideration in the exercise of the Commission's discretion to award costs, the Commission was not limited by that principle but could award costs on a broader basis to ensure effective participation in its hearings. He held that the court should not interfere with the exercise of the Commission's discretion to award costs in this case because it had not been exercised on wrong principles.

II

7 To understand the principles, as applied to the facts of this case, on which the Commission

exercised its discretion, it is necessary to refer at some length to the reasons of the Commission and the taxing officer.

8 In its Telecom Decision CRTC 78-4 of May 23, 1978 the Commission stated that one of the objectives of its practices and procedures was to "increase the capacity of interveners to participate at public hearings in an informed way" and in the course of a discussion of possible forms of financial assistance to interveners it made the following statement of principle with respect to the award of costs to them:

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> In the case of rate hearings, the Commission has concluded that costs may be awarded against an applicant, when the intervener meets the criteria set out in s. 52 of the Draft Rules, and subject to the circumstances of each case. These criteria were developed following a consideration of the factors used by the Alberta Public Utilities Board and the Ontario Energy Board, two agencies which have adopted a similar practice. Costs will only be available to interveners who have participated in a responsible way, and have contributed to a better understanding of the issues by the Commission. As noted above, costs will not be available to interveners who already have funding from government or other sources that would in the Commission's opinion enable them to participate in the case.

9 The criteria referred to in the above passage were set out in s. 52(1) of the Draft CRTC Telecommunications Rules of Procedure, published at the same time as Decision 78-4, as follows:

> 52. (1) In any proceeding under this Part, the Commission may award costs against the applicant to any intervener who
>
> (a) has a substantial interest in the outcome of the proceeding, or represents the interests of a substantial number or class of subscribers,
> (b) has participated in a responsible way,
> (c) has contributed to a better understanding of the issues by the Commission, and
> (d) does not have sufficient financial resources available to enable it to prosecute its interest adequately, having regard to the financial implications of the application for the intervener, or, where the intervener represents the interests of a group or class of subscribers, for each member thereof, and the intervener requires the assistance provided by costs to do

so.

10 Subsection 52(5) of the Draft Rules should also be noted:

> 52. ...
>
> (5) Costs awarded under this section shall be taxed by the General Counsel of the Commission or by such officer as may be appointed by the Commission, and shall not exceed those necessarily and reasonably incurred by the intervener in connection with its intervention and, where the Commission has prescribed a scale of costs, shall not exceed the amounts so prescribed.

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11 In its Telecom Decision CRTC 78-7 of August 10, 1978 the Commission made the following general statement with respect to the award of costs to the interveners in the Bell Canada rate hearing:

> The Commission has decided to award costs to a number of interveners, as set out in detail below. In each case, the costs are to be paid by the applicant, as taxed by the General Counsel for the Commission, and may be included by the applicant as part of its expenses for regulatory purposes. At the hearing, the question arose as to whether certain interveners had been awarded government funding, specifically, although not necessarily entirely, for the purpose of intervention in this rate case. In his taxation, General Counsel will take these forms of funding into account in the application of the Commission's principles as noted in Decision 78-4 and Section 52(1)(d) of the Draft Rules.

12 The award of costs to CAC in Telecom Decision 78-7 was originally in the following terms:

> 2. Awards
>
> (a) The Consumers' Association of Canada
>
> In the Commission's view, the Consumers' Association of Canada represented not only the interests of the Association's membership but also those of Bell Canada subscribers generally. The C.A.C., through its counsel, Mr. G. Kane, and its expert witness, Dr. Gordon, contributed to a better understanding of a number of relevant issues including that of the

> relationship between Bell Canada and its subsidiaries.
>
> The Commission considers that participation in regulatory matters affecting its membership is a normal function of an association such as the C.A.C., and that a portion of its membership fees and annual budget can be deemed to be directed towards this participation. Accordingly, the Commission does not award costs to the Association for its administrative and routine expenses, including those related to the appearance of its counsel, a full-time employee of the Association. The Commission does however, subject to written confirmation from the C.A.C. that it is formally applying for costs, award costs to the C.A.C. in respect of its expenses associated with Dr. Gordon's appearance.

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13 By Telecom Decision CRTC 80-1 of January 4, 1980 the Commission amended its award of costs to CAC by removing the limitation in the second paragraph above for reasons indicated as follows:

> Uncontested affidavit evidence submitted by the CAC established that: (a) no portion of the membership fees of this Association are allocated to participation in rate hearings; and (b) counsel to the CAC is not a full time employee of the Association. These facts have convinced the Commission that the wording employed in the award of costs to the CAC was inappropriately narrow in scope.
>
> Therefore, the second paragraph on page 108 of Decision 78-7, 4 C.R.T. 359, cited above, is deleted and replaced with the following: "The Commission accordingly awards costs to the CAC."

14 The award of costs to NAPO et al. in Telecom Decision 78-7 was in the following terms:

> 2. Awards
>
> . . .
>
> (e) The National Anti-Poverty Organization, Inuit Tapirisat of Canada, Taqramiut Nipingat Inc. and Mr. S.A. Rowan

> Through their counsel, Mr. A.J. Roman, NAPO et al. represented a broad spectrum of subscriber interests and made an important and substantial contribution not only to the Commission's understanding of the relevant issues in the present case, but also to the fulfilment of the Commission's objectives as set forth in Decision 78-4.
>
> In the Commission's view also, the cross-examination by Mr. Roman of a number of the Company's witnesses was clearly aided by the preparatory work performed by his expert witnesses.
>
> The Commission accordingly awards costs to NAPO et al. (except for ACCQ which did not request costs).

15 In its Telecom Decision 80-1 reviewing the above awards, the Commission indicated that future awards of costs to interveners would be governed by s. 44 of the CRTC Telecommunications Rules of Procedure, SOR/79-554, which were adopted by Telecom Order CRTC 79-297 of July 20, 1979. Subsections (1) and (6) of s. 44 of the adopted rules are as follows:

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> 44. (1) In any proceeding under this Part the Commission may award costs to be paid by the regulated company to any intervener who
>
> (a) has, or is representative of a group or class of subscribers that has, an interest in the outcome of the proceeding of such a nature that the intervener or group or class of subscribers will receive a benefit or suffer a detriment as a result of the order or decision resulting from the proceeding;
> (b) has participated in a responsible way; and
> (c) has contributed to a better understanding of the issues by the Commission.
>
> . . .
>
> (6) Costs awarded under this section
>
> (a) shall be taxed by the General Counsel of the Commission or by such officer as may be appointed by the Commission;

(b) shall not exceed those necessarily and reasonably incurred by the intervener in connection with its intervention; and
(c) where the Commission has prescribed a scale of costs based on prevailing market rates, shall not exceed the amounts so prescribed.

16 In his Taxation Order 1980-1, the taxing officer, Mr. David E. Osborn, considered whether the Commission's direction to take government funding into consideration included government funding for general purposes as well as government funding specifically earmarked for the particular rate hearing. After discussion of this question and consideration of Bell Canada's submissions against the award of costs to CAC and NAPO et al. based on the government funding received by CAC and PIAC, the relationship between CAC and its counsel, and the fact that the costs incurred in the intervention of NAPO et al. were paid by PIAC, the taxing officer concluded as follows:

> I have concluded, after a consideration of all the facts and arguments, that the interpretation submitted on behalf of Bell Canada cannot be sustained. To do so would, in ultimate practical effect, weaken or destroy the principle which the Commission set out to accomplish in Decision 78-4. In my opinion, the Commission's position in 78-4 and the Draft Rules can be summarized as follows: informed participation in public hearings should be encouraged; the awarding of costs is a necessary, or at least desirable, method of so doing; the costs [page199] awarded shall not exceed those necessarily and reasonably incurred by the intervener and, more particularly, those parties who have received some form of public funding to participate before the CRTC should not receive a double recovery by means of an award of costs.

Some light is perhaps thrown on the view which he took of the application of the principle of indemnification by the following passage in his order:

> I have reviewed the cases referred to me by counsel for all parties, but I have not found conclusive authority therein for purposes of the present case. Most of them deal with costs in a traditional legal context, and assume a traditional relationship between counsel, client and tribunal. Regulatory agencies and public interest interveners pose different problems and, while legal cases can be a useful guide in the area of costs, particularly with respect to quantum, the approach to the problems in this case cannot, in my opinion, be circumscribed by a strict application of traditional legal principles. Therefore, I have interpreted the Commission's decision in light of the knowledge that public participation is a fragile concept, more talked about than realized, that public interest advocacy groups offer a different, but no less valuable, approach to participation than does the traditional solicitor-client form, and that a restrictive interpretation of a costs award by the officer responsible for implementing it would serve no useful

public purpose.

17 The taxing officer acted on certain assumptions or findings of fact concerning the nature of the government funding received by CAC and PIAC and the understanding between NAPO et al. and PIAC concerning payment or reimbursement of costs for counsel fees and disbursements. He accepted the statements of counsel that CAC and PIAC had received government funding for the general purpose of participation in regulatory proceedings but that none of it was specifically ear-marked for participation in the Bell Canada rate hearing. With respect to the obligation, if any, of NAPO et al. to pay for the services of Mr. Roman or to reimburse PIAC for the cost of such services and the disbursements made on behalf of NAPO et al., he expressed the following conclusion:

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> It is clear that there was never any obligation flowing from NAPO et al. to either PIAC or Mr. Roman for their services. If the subject of costs was ever discussed between counsel and these interveners, the understanding was merely that if costs should happen to be awarded, they would be given by the interveners to the PIAC. This understanding is reflected in the terms of reference of the PIAC. According to Mr. Roman, any such bill, in the absence of an award of costs, would simply have had to be written off as an uncollectible debt, a practice which he submitted would accomplish nothing and would not be conducive to good client relations.

18 In the result, the taxing officer concluded that the disputed allowance of counsel fees to CAC and counsel fees and disbursements to NAPO et al. fell within the criteria established by the Commission for the award and taxation of costs to interveners.

19 In its Telecom Decision 81-5 dismissing the appeal from Taxation Order 1980-1, after reviewing the principles laid down in its previous decisions, the taxing officer's reasons and Bell Canada's submissions with respect to the effect that should be given to the government funding of CAC and PIAC and the principle of indemnification, the Commission said:

> The Commission considers that the active participation of established organizations such as CAC and NAPO et al. in regulatory proceedings is desirable in view of their continuing interest and knowledge base in the field. In the Commission's view, the adoption of Bell's argument concerning double recovery would in effect mean that only ad hoc organizations could expect to obtain awards of costs from the Commission. Such organizations would not likely have the base for informed participation upon which established

> organizations such as CAC and NAPO et al. can build their specific interventions. Such organizations are called upon to intervene in a number of regulatory proceedings and the Commission has concluded that the taxing officer did not err in principle when he interpreted the Commission's direction to take into account government funding as a direction to deduct from awards of costs only funds specifically designated for the 1978 Bell rate case.
>
> . . .
>
> In the Commission's view, the application of the principle of indemnification upon which Bell relies would not be appropriate in regulatory proceedings before it. In [page201] the Commission's opinion, the proper purpose of such awards is the encouragement of informed public participation in Commission proceedings. It would inhibit public interest groups from developing and maintaining expertise in regulatory matters if, in order to be entitled to costs, they had to retain and instruct legal counsel in the manner appropriate to proceedings before the courts in civil matters. On the other hand, no useful purpose would be served by requiring public interest groups artificially to arrange their affairs, by means, for instance, of forgivable debts or bonus accounts, in order to avoid a restrictive interpretation of the term "costs".

The Commission concluded:

> The Commission therefore finds that the taxing officer did not err in principle in awarding counsel fees to CAC and costs to NAPO et al.

III

20 The issue is whether the award and taxation of costs for counsel fees to CAC and for counsel fees and disbursements to NAPO et al. on the basis and in the circumstances indicated in the decisions of the Commission and the taxation order fell within the proper exercise of the discretion with respect to costs conferred on the Commission by s. 73 of the National Transportation Act as follows:

> 73. (1) The costs of and incidental to any proceeding before the Commission, except as herein otherwise provided, are in the discretion of the Commission, and may be fixed in any case at a sum certain, or may be taxed.
>
> (2) The Commission may order by whom and to whom any costs are to be paid, and by whom they are to be taxed and allowed.

> (3) The Commission may prescribe a scale under which such costs shall be taxed.

21 By section 43 of the Act the word "costs" in s. 73 has the same meaning as it has in the Railway Act, R.S.C. 1970, c. R-2, where it is defined in s. 2(1) as follows:

> 2. (1) In this Act, and in any Special Act as hereinafter defined in so far as this Act applies,
>
> . . .
>
> "costs" includes fees, counsel fees and expenses;

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22 Counsel for the appellant contended that the principle on which that discretion must be exercised is that "costs are an indemnity to a party for the expenses to which the party has been put as a result of the litigation or proceeding in question". As authority for the principle of indemnification he cited, among others, the case of Ryan v. McGregor (1925), 58 O.L.R. 213 (C.A.), in which Middleton J.A. said at p. 216:

> The fundamental principle is thus clearly stated by Baron Bramwell in the case of Harold v. Smith (1860), 5 H. & N. 381, 385: "Costs as between party and party are given by the law as an indemnity to the person entitled to them: they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the damnification can be found out, the extent to which costs ought to be allowed is also ascertained."

23 The question is whether the principle of indemnification, clearly applicable to the award of costs by the courts, should apply, at least in some form, to the award of costs by the Commission, having regard to the special nature and requirements of its proceedings and the financial arrangements of interveners. On this question, as I have indicated, the members of the Federal Court of Appeal differed. After referring to the statement of Pratte J. in Re Bell Canada and Telecom. Decision CRTC 79-5, [1982] 2 F.C. 681, at pp. 687-88 (to which further reference will be made) that the word "costs" in s. 73 of the National Transportation Act must be given its "normal legal meaning according to which the costs of a proceeding are the costs incurred by the parties or participants in that proceeding and do not include the expenses of the tribunal before which the proceedings are brought", Ryan J., with whom Kelly D.J. concurred, concluded as follows concerning the application of the principle of indemnification:

> It does not, as I see it, follow that in assessing costs in a rate proceeding, the

> Commission is bound to follow precisely the same rules as would a taxing master assessing costs in litigation in the courts. Allowances would have to be made for differences in the purposes of the two quite different processes and in the practices and procedures followed in each. I am of opinion, however, that the term "costs", as used in section 73, does carry [page203] with it, as an essential aspect, the element of compensation or indemnification for expenses incurred in a proceeding. The Commission would thus have been in error if, in its Reasons for dismissing the appeal to it, it meant to reject the proposition that indemnification is an essential purpose in an award of costs under section 73 of the Act.

24 Ryan J. found, however, applying Re Eastwood, [1974] 3 All E.R. 603 (C.A.), respecting the taxation of costs for the services of a salaried solicitor and Armand v. Carr, [1927] S.C.R. 348, respecting the entitlement of an insured to costs for solicitors instructed by the insurer to act for him, in the absence of an agreement excluding his liability for such costs, that the record did not establish a violation of the principle of indemnification as applied by the courts in the award of counsel fees to CAC and counsel fees and disbursements to NAPO et al.

25 On the application of the principle of indemnification to the award of costs by the Commission pursuant to s. 73 of the Act, Urie J. expressed himself as follows:

> The principal issue in this appeal is whether the meaning to be ascribed to the word ["costs"] as it appears in the Act should be the meaning given it in ordinary judicial proceedings in which, in general terms, costs are awarded to indemnify or compensate a party for the actual expenses to which he has been put by the litigation in which he has been involved and in which he has been adjudged to have been a successful party. In my opinion, this is not the interpretation of the word which must necessarily be given in proceedings before regulatory tribunals.
>
> I use the word "necessarily" because I have no doubt that an element which may be considered by the tribunal in determining the entitlement of a party appearing before it to costs, is whether or not the party has incurred liability for expenses for the purpose of its appearance before the tribunal. It is not, however, in my view, either the only or a necessary element. As has been said on other occasions, the proceedings before the Commission in a rate fixing hearing are not adversarial in nature; there is no lis inter partes. The purpose of a hearing in such a proceeding is to obtain meaningful reaction from concerned and interested parties affected by the rate fixing, whether adversely or positively. Such parties may or may not have incurred actual, measurable expenses, such as counsel fees, in providing input to the proceedings and yet have contributed in a very real

> [page204] fashion to a better understanding by the Commission of some of the issues involved in the proposed rate structure. Such contributions to a better understanding of the issues should, as I see it, be encouraged and rewarded. If this is so, obviously such encouragement cannot be based solely on indemnification for actual costs incurred. It is at this point that the Commission's discretion as to who is deserving of an award of costs, as to the elements to be considered and the principles to be applied in the award, is exercised in any of the ways contemplated by section 73.

26 Courts of appeal in three provinces have held that in the exercise of the discretion to award costs under provisions in essentially the same terms as s. 73 of the National Transportation Act regulatory tribunals were not bound by the principles and rules governing the award of costs in the courts, although the application of the principle of indemnification would not appear to have been directly in issue in these cases. In Northern Engineering & Dev. Co. v. Philip, [1930] 3 D.L.R. 387, a majority of the Manitoba Court of Appeal (Prendergast C.J.M., Trueman and Dennistoun JJ.A.) held that whether a party who had successfully opposed an application before the Municipal and Public Utility Board to vary a building restriction was entitled to costs was not governed under s. 55 of The Municipal and Public Utility Board Act, 1926 (Man.), c. 33, which was in essentially the same terms as s. 73 of the National Transportation Act, by the principles applicable to the award of costs by the courts. Trueman J.A., speaking for the majority, said at p. 390:

> Proceedings before the board belong to a different category and are necessarily dealt with from a point of view that has no place in litigation between parties. The status and risks of suitors in an action are fixed by practice and authority. No rule has been laid down by the board that persons appearing by counsel before the board shall, subject to the board's discretion, have costs in event of their success or pay costs in event of their [page205] failure. Whether such a rule should be adopted or not is a matter wholly for the board. In the meantime, the matter is left by s. 55 in the board's absolute discretion, untrammelled by the principles which necessarily control the discretion of the Court or a Judge. See Local Government Bd. v. Arlidge, [1915] A.C. 120.

Robson J.A., dissenting, with whom Fullerton J.A. concurred, said with reference to the word "discretion" in s. 55 of the Act: "I construe this as meaning in the same sense as costs are in the discretion of a Court. The discretion must be exercised in accordance with legal principle."

27 In Re Green, Michaels & Associates Ltd. and Public Utilities Board (1979), 94 D.L.R. (3d) 641, interveners in a rate hearing before the Public Utilities Board of Alberta attacked reductions by the Board in their bills of costs on the ground that the Board had improperly exercised its discretion with respect to costs under s. 60 of The Public Utilities Board Act, R.S.A. 1970, c. 302, which is in essentially the same terms as s. 73 of the National Transportation Act. In the course of his analysis of the issues Clement J.A., who delivered the unanimous judgment of the Alberta Court of Appeal,

said at pp. 655-56 (a passage which was quoted with approval by Urie J. in the case at bar):

> In the factum of the appellants a number of cases were noted dealing with the discretion exercisable by Courts in the matter of costs of litigation, as well as statements propounded in texts on the subject. I do not find them sufficiently appropriate to warrant discussion. Such costs are influenced by Rules of Court, which in some cases provide block tariffs, and in any event are directed to lis inter partes. We are here concerned with the costs of public hearings on a matter of public interest. There is no underlying similarity between the two procedures, or their purposes, to enable the principles underlying costs in litigation between parties to be necessarily applied to public hearings on public concerns. In the latter case the whole of the circumstances are to be taken into account, not merely the position of [page206] the litigant who has incurred expense in the vindication of a right.

28 In Newfoundland & Labrador Hydro v. Newfoundland & Labrador Federation of Municipalities (1979), 65 A.P.R. 317, 24 Nfld. & P.E.I.R. 317, the Board of Commissioners of Public Utilities of Newfoundland awarded costs in a fixed sum to the Newfoundland & Labrador Federation of Municipalities as interveners in the hearing of an application by Newfoundland & Labrador Hydro for an increase in rates. Hydro attacked the award of costs on the ground, among others, that the amount was excessive and that the costs should have been taxed on a party and party basis. Section 14(1) of The Electrical Power Control Act, 1977 (Nfld.), c. 92, conferred a discretion on the Board with respect to costs in essentially the same terms as s. 73 of the National Transportation Act, and like it, expressly conferred the power to award costs in a fixed sum. In the course of rejecting Hydro's contention, Furlong C.J.N. said at p. 320: "I can find no support for bringing in the Rules as to costs in this court to proceedings before independent bodies." Gushue J.A., with whom Morgan J.A. concurred, said at p. 425: "The manner in which the costs are arrived at, and awarded, is a matter strictly within the discretion and competence of the Board, and this Court has no jurisdiction to interfere with that discretion, unless of course improperly exercised. The fact that a litigant in a court proceeding is subject to various rules relating to costs is of no relevance here."

29 In Re Bell Canada, supra, which was considered by both Ryan and Urie JJ. in the case at bar, the issue was whether the Commission could, in the exercise of the authority conferred by s. 73 of the National Transportation Act, compel Bell Canada and British Columbia Telephone Company to pay the costs of an independent study ordered by the Commission in preparation for a hearing to consider [page207] applications for rate increases by these companies. The Federal Court of Appeal held that it could not. Pratte J., with whom Ryan J. and Hyde D.J. concurred, said at pp. 687-88:

> In my view, the word "costs" in section 73 of the National Transportation Act must, as argued by the appellant, be given its normal legal meaning according to which the costs of a proceeding are the costs incurred by the parties

> or participants in that proceeding and do not include the expenses of the tribunal before which the proceedings are brought. I do not see any reason to give it a wider meaning. I am confirmed in this opinion by the fact that much of the language used in section 73 is normally used in association with court costs. I have in mind the phrase "costs of and incidental to all proceedings" (which is found in section 50 of the English Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo. 5, c. 49), the reference to the possibility that costs be fixed at a sum certain or taxed and that the Commission prescribe a "scale" (in the French text: "tarif") of costs. If another interpretation were to prevail, the Commission would have the right to force the utility companies which the law obliges to appear before it to defray part of its expenses. This, in my opinion, would be contrary to the general policy of the National Transportation Act following which the expenses of the Commission are to be paid out of public funds rather than by the utility companies that are subject to its jurisdiction.

30 I would agree that the word "costs" in s. 73 must carry the same general connotation as legal costs. It cannot be construed to mean something quite different from or foreign to that general sense of the word, such as an obligation to contribute to the administrative costs of a tribunal or the grant of a subsidy to a participant in proceedings without regard to what may reasonably be considered to be the expense incurred for such participation. Thus I am of the opinion that the word "costs" must carry the general connotation of being for the purpose of indemnification or compensation. In view, however, of the nature of the proceedings before the Commission and the financial arrangements of public interest interveners, the discretion conferred on the Commission by s. 73 must, in my opinion, include the right to take a broad view of the application of the principle of indemnification or compensation. The Commission [page208] therefore should not be bound by the strict view of whether expense has been actually incurred that is applicable in the courts. It should, for example, be able to fix the expense which may be reasonably attributed to a particular participation by a public interest intervener as being deemed to have been incurred, whether or not as a result of the particular means by which the intervention has been financed there has been any actual out-of-pocket expense. This is what I understand the Commission to have done in this case. It did not reject the general concept of indemnification or compensation, as indicated by the provision in its draft and adopted rules that the costs awarded to an intervener "shall not exceed those necessarily and reasonably incurred by the intervener in connection with its intervention" -- a requirement included by the taxing officer in his summary of the principles which should govern him as a result of the general approach to the award of costs to interveners adopted by the Commission. What the Commission did reject, as I read its reasons and those of the taxing officer, was the contention that in its application of the general principle of indemnification or compensation it should be governed by the authorities reflecting the application of that principle in the courts. In doing so, it did not in my opinion err in law, so long as it adopted a reasonable approach, as it appears to have done, to what should be deemed to be the expenses incurred for the interventions on behalf of CAC and NAPO et al. I would accordingly dismiss the appeal.

qp/qlcvd

Indexed as:

British Columbia (Minister of Forests) v. Okanagan Indian Band

Her Majesty The Queen in Right of the Province of British Columbia, as represented by the Minister of Forests, appellant;

v.

Chief Dan Wilson, in his personal capacity and as representative of the Okanagan Indian Band, and all other persons engaged in the cutting, damaging or destroying of Crown Timber at Timber Sale Licence A57614, respondents, and

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of British Columbia, Attorney General of Alberta, the Songhees Indian Band, the T'Sou-ke First Nation, the Nanoose First Nation and the Beecher Bay Indian Band (collectively the "Te'mexw Nations"), and Chief Roger William, on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations government and on behalf of all other members of the Tsilhqot'in Nation, interveners.

And between

Her Majesty The Queen in Right of the Province of British Columbia, as represented by the Minister of Forests, appellant;

v.

Chief Ronnie Jules, in his personal capacity and as representative of the Adams Lake Indian Band, Chief Stuart Lee, in his [page372]

personal capacity and as representative of the Spallumcheen Indian Band, Chief Arthur Manuel, in his personal capacity and as representative of the Neskonlith Indian Band, and David Anthony Nordquist, in his personal capacity and as representative of the Adams Lake Indian Band, the Spallumcheen Indian Band and the Neskonlith Indian Band, and all other persons engaged in

the cutting, damaging or destroying of Crown Timber at Timber Sale Licence A38029, Block 2, respondents, and Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of British Columbia, Attorney General of Alberta, the Songhees Indian Band, the T'Sou-ke First Nation, the Nanoose First Nation and the Beecher Bay Indian Band (collectively the "Te'mexw Nations"), and Chief Roger William, on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations government and on behalf of all other members of the Tsilhqot'in Nation, interveners.

[2003] 3 S.C.R. 371

[2003] S.C.J. No. 76

2003 SCC 71

File Nos.: 28988, 28981.

Supreme Court of Canada

Heard: June 9, 2003;
Judgment: December 12, 2003.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

(88 paras.)

[page 373]

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Catchwords:

Costs -- Interim costs -- Principles governing exercise of court's discretionary power to grant interim costs -- Minister of Forests serving Indian Bands with stop-work orders for logging on Crown land without authorization -- Bands claiming aboriginal title to lands -- Minister applying to

have proceedings remitted to trial list -- Bands arguing that matter of aboriginal title should not go to trial as they lack financial resources to fund action or in alternative, requesting order that Crown pay interim costs to fund action in advance and in any event of cause -- Whether Court of Appeal's decision to grant interim costs should be upheld -- Whether Court of Appeal had sufficient grounds to review exercise of chambers judge's discretion -- Rules of Court, B.C. Reg. 221/90, ss. 52(11)(d), 57(9).

Summary:

In 1999, members of the four respondent Bands began logging on Crown land in B.C. without authorization under the *Forest Practices Code of British Columbia Act*. The Minister of Forests served the Bands with stop-work orders under the Code, and commenced proceedings to enforce the orders. The Bands claimed that they had aboriginal title to the lands in question and were entitled to log them. They filed a notice of constitutional question challenging the Code as conflicting with their constitutionally protected aboriginal rights. The Minister then applied to have the proceedings remitted to the trial list instead of being dealt with in a summary manner. The Bands argued that the matter should not go to trial, because they lacked the financial resources to fund a protracted and expensive trial. In the alternative, they argued that the court, in the exercise of its powers to attach conditions to a discretionary order and to make orders as to costs, should order a trial only if it also ordered the Crown to pay their legal fees and disbursements in advance and in any event of the cause. The B.C. Supreme Court held that the case should be remitted to the trial list and declined to order the Minister to pay the Bands' costs in advance of the trial. The Court of Appeal allowed the Bands' appeal. The decision to remit the matter of the Bands' aboriginal rights or title to trial was upheld. The court concluded, however, that although the Bands did not have a constitutional right to legal fees funded by the provincial Crown the court did have a discretionary [page374] power to order interim costs. It ordered the Crown to pay such legal costs of the Bands as ordered by the chambers judge from time to time, subject to detailed terms that it imposed so as to encourage the parties to minimize unnecessary steps in the dispute and to resolve as many issues as possible by negotiation.

Held (Iacobucci, Major and Bastarache JJ. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and Gonthier, Binnie, Arbour, LeBel and Deschamps JJ.: The Court of Appeal's decision to grant interim costs to the Bands should be upheld. The discretionary power to award interim costs in appropriate cases has been recognized in Canada. Concerns about access to justice and the desirability of mitigating severe inequality between litigants feature prominently in the rare cases where such costs are awarded. The power to order interim costs is inherent in the nature of the equitable jurisdiction as to costs, in the exercise of which the court may determine at its discretion when and by whom costs are to be paid. Several conditions must be present for an interim costs order to be granted. The party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case; the claimant must establish a *prima facie* case of sufficient merit to warrant pursuit; and there must be

special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate.

In public interest litigation special considerations also come into play. Public law cases, as a class, can be distinguished from ordinary civil disputes. They may be viewed as a subcategory where the special circumstances that must be present to justify an award of interim costs are related to the public importance of the questions at issue in the case. It is for the trial court to determine in each instance whether a particular case, which might be classified as special by its very nature as a public interest case, is special enough to rise to the level where the unusual measure of ordering costs [page375] would be appropriate. The criteria that must be present to justify an award of interim costs in this kind of case are as follows: the party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial; the claim to be adjudicated is *prima facie* meritorious; and the issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

Each of these criteria is met in this case. The Bands are impecunious and cannot proceed to trial without an order for interim costs. The case is of sufficient merit that it should go forward; the issues sought to be raised at trial are of profound importance to the people of B.C., both aboriginal and non-aboriginal, and their determination would be a major step towards settling the many unresolved problems in the Crown-aboriginal relationship in that province. In short, the circumstances of this case are indeed special, even extreme. The conditions attached to the costs order by the Court of Appeal ensure that the parties will be encouraged to resolve the matter through negotiation, which remains the ultimate route to achieving reconciliation between aboriginal societies and the Crown, and also that there will be no temptation for the Bands to drag out the process unnecessarily and to throw away costs paid by the Crown.

The Court of Appeal had sufficient grounds to review the exercise of discretion by the trial court. Discretionary decisions are not completely insulated from review. An appellate court may and should intervene where it finds that the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts. Two errors in particular vitiate the chambers judge's decision and call for appellate intervention. First, he overemphasized the importance of avoiding any order that involved prejudging the issues and erred when he concluded that his discretion did not extend so far as to empower him to make the order requested. Second, his finding that a contingent fee arrangement might be a viable alternative for funding the litigation does not appear to be supported by any evidence, and the prospect of the Bands' hiring counsel on a contingency basis seems [page376] unrealistic in the particular circumstances of this case.

Per Iacobucci, Major and Bastarache JJ. (dissenting): The chambers judge interpreted the applicable principles correctly and there is no basis for reversing his discretion. Traditionally, costs are awarded after the ultimate trial or appellate decision and almost always to the successful party. However, the common law on interim costs has been more confined and interim costs have been awarded in two circumstances: in marital cases where some liability is presumed and the

indemnificatory purpose of the costs power is fulfilled; and in corporate and trust cases where the court grants advanced costs to be paid by the corporation or trust for whose benefit the action is brought. Courts may also award interim costs in child custody cases. The reason for such restrictive use is apparent since awarding costs in advance could be seen as prejudging the merits and the objectivity of the court making such an order will almost automatically be questioned. The awarding of interim costs in the circumstances of this appeal appears as a form of judicially imposed legal aid. Interim costs should not be expanded to engage the court in essentially funding litigation for impecunious parties and ensuring their access to court. The new criteria endorsed by the majority broaden the scope of interim costs to an undesirable extent and are not supported in the case law. Such developments should be initiated by trial courts properly exercising their discretionary power, not the appellate reversal of that discretion. A case must be exceptional in order to attract interim costs; however, the majority accept that most public interest cases would satisfy this criterion and leave to the discretion of the trial judge the decision as to whether the case is "special enough" to warrant an order. The difficulty for the trial judge is that this does not provide any ascertainable standard or direction. Even if such special circumstances were to be considered, there is nothing to distinguish the present aboriginal land claims from any other. Further, one may not presume that the Bands will establish even partial aboriginal title in the cases under appeal. The *ratio* of the common law dictates the following three guidelines for the discretionary, extraordinary award of interim costs: the party seeking the interim costs cannot afford to fund the litigation, and has no other realistic manner of proceeding with the case; there is a special relationship between the parties such that an award of interim costs or support would be particularly appropriate; and it is presumed that the party seeking [page377] interim costs will win some award from the other party. The chambers judge committed no error of law nor a palpable error in his assessment of the facts. Deference should be given to his decision not to exercise his discretion to grant interim costs.

Cases Cited

By LeBel J.

Referred to: Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc. (1985), 51 O.R. (2d) 23; Ryan v. McGregor (1925), 58 O.L.R. 213; Fellowes, McNeil v. Kansa General International Insurance Co. (1997), 37 O.R. (3d) 464; Skidmore v. Blackmore (1995), 2 B.C.L.R. (3d) 201; Kendall v. Hunt (No. 2) (1979), 16 B.C.L.R. 295; Canadian Newspapers Co. v. Attorney-General of Canada (1986), 32 D.L.R. (4th) 292; Re Lavigne and Ontario Public Service Employees Union (No. 2) (1987), 60 O.R. (2d) 486, rev'd (1989), 67 O.R. (2d) 536, aff'd [1991] 2 S.C.R. 211; Rogers v. Sudbury (Administrator of Ontario Works) (2001), 57 O.R. (3d) 467; B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315, aff'g (1992), 10 O.R. (3d) 321, aff'g [1989] O.J. No. 205 (QL); Jones v. Coxeter (1742), 2 Atk. 400, 26 E.R. 642; Organ v. Barnett (1992), 11 O.R. (3d) 210; McDonald v. McDonald (1998), 163 D.L.R. (4th) 527; Woloschuk v. Von Amerongen, [1999] A.J. No. 463 (QL), 1999 ABQB 306; Roberts v. Aasen, [1999] O.J. No. 1969 (QL); Amcan Industries Corp. v. Toronto-Dominion Bank, [1998] O.J. No. 3014 (QL); Turner v. Telecommunication Workers

Pension Plan (2001), 197 D.L.R. (4th) 533, 2001 BCCA 76; New Brunswick (Minister of Health and Community Services) v. G. (J.) (1995), 131 D.L.R. (4th) 273, rev'd [1999] 3 S.C.R. 46; Earl v. Wilhelm (2000), 199 Sask. R. 21, 2000 SKCA 68; Benson v. Benson (1994), 120 Sask. R. 17; R. v. Regan, [2002] 1 S.C.R. 297, 2002 SCC 12; Pelech v. Pelech, [1987] 1 S.C.R. 801; Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010.

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By Major J. (dissenting)

Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010; R. v. Van der Peet, [1996] 2 S.C.R. 507; McDonald v. McDonald (1998), 163 D.L.R. (4th) 527; Randle v. Randle (1999), 254 A.R. 323, 1999 ABQB 954; Roberts v. Aasen, [1999] O.J. No. 1969 (QL); Watkins v. Olafson, [1989] 2 S.C.R. 750; R. v. Salituro, [1991] 3 S.C.R. 654; Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.), [1997] 3 S.C.R. 925.

Statutes and Regulations Cited

Business Corporations Act, R.S.O. 1990, c. B.16, ss. 248, 249.

Canadian Charter of Rights and Freedoms, s. 15.

Company Act, R.S.B.C. 1996, c. 62, s. 201.

Constitution Act, 1982, s. 35.

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 131(1).

Forest Practices Code of British Columbia Act, R.S.B.C. 1996, c. 159, ss. 96, 123.

Queen's Bench Rules, Man. Reg. 553/88, r. 49.10.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rr. 49.10, 57.01(1)(d), (2).

Rules of Court, B.C. Reg. 221/90, rr. 1(12), 37(23) to 37(26), 52(11)(d), 57(9).

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History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (2001), 95 B.C.L.R. (3d) 273,

208 D.L.R. (4th) 301, 161 B.C.A.C. 13, 263 W.A.C. 13, 92 C.R.R. (2d) 319 (sub nom. British Columbia (Ministry of Forests) v. Jules), [2002] 1 C.N.L.R. 57, [2001] B.C.J. No. 2279 (QL), 2001 BCCA 647, allowing in part an appeal from a decision of the British Columbia Supreme Court, [2000] B.C.J. No. 1536 (QL), 2000 BCSC 1135. Appeal dismissed, Iacobucci, Major and Bastarache JJ. dissenting.

Counsel:

Patrick G. Foy, Q.C., and Robert J. C. Deane, for the appellant.

[page379]

Louise Mandell, Q.C., Michael Jackson, Q.C., Clarine Ostrove and Reidar Mogerman, for the respondents.

Cheryl J. Tobias and Brian McLaughlin, for the intervener the Attorney General of Canada.

Lori R. Sterling and Mark Crow, for the intervener the Attorney General of Ontario.

René Morin, Gilles Laporte and Brigitte Bussières, for the intervener the Attorney General of Quebec.

Written submissions only by Gabriel Bourgeois, Q.C., for the intervener the Attorney General of New Brunswick.

Written submissions only by George H. Copley, Q.C., for the intervener the Attorney General of British Columbia.

Written submissions only by Margaret Unsworth, for the intervener the Attorney General of Alberta.

Robert J. M. Janes and Dominique Nouvet, for the interveners the Songhees Indian Band et al.

Joseph J. Arvay, Q.C., and David M. Robbins, for the intervener Chief Roger William.

The judgment of McLachlin C.J. and Gonthier, Binnie, Arbour, LeBel and Deschamps JJ. was delivered by

LeBEL J.:--

I. Introduction

1 These two appeals concern the inherent jurisdiction of the courts to grant costs to a litigant, in rare and exceptional circumstances, prior to the final disposition of a case and in any event of the cause (I will refer to a cost award of this nature as "interim costs"). Such a jurisdiction exists in British Columbia. This discretionary power is subject to stringent conditions and to the observance of [page380] appropriate procedural controls. In this case, for the reasons which follow, I would uphold the granting of interim costs to the respondents by the British Columbia Court of Appeal, and I would hold that the Court of Appeal had sufficient grounds to review the exercise of discretion by the trial court.

II. Background

2 In the fall of 1999, members of the four respondent Indian bands (the "Bands") began logging on Crown land in British Columbia without authorization under the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159 (the "Code"). The Bands' respective tribal councils had purportedly authorized the harvesting of the timber, which was to be used to construct housing on the Bands' reserves. The appellant Minister of Forests served the Bands with stop-work orders under the Code, and commenced proceedings to enforce the orders. The Bands claimed that they had aboriginal title to the lands in question and were entitled to log them. They filed a notice of constitutional question challenging ss. 96 and 123 of the Code as conflicting with their constitutionally protected aboriginal rights.

3 The Minister then applied under Rule 52(11)(d) of the *Rules of Court* of the Supreme Court of British Columbia, B.C. Reg. 221/90 , to have the proceedings remitted to the trial list instead of being dealt with in a summary manner. The respondents argued that the matter should not go to trial, because they lacked the financial resources to fund a protracted and expensive trial -- which, given the evidentiary challenges of proving a claim of aboriginal title, this would almost undoubtedly be. In the alternative, they argued that the court, in the exercise of its powers to attach conditions to a discretionary order under Rule 52(11)(d) and to make orders as to costs pursuant to Rule 57(9), should order a trial only if [page381] it also ordered the Crown to pay their legal fees and disbursements in advance and in any event of the cause. In support of this position, they raised constitutional arguments on three grounds: a general right of access to justice that is implicit in the *Canadian Charter of Rights and Freedoms* and flows from the primacy of the rule of law; the protection of aboriginal rights, as affirmed by s. 35 of the *Constitution Act, 1982*; and equality rights under s. 15 of the *Charter*.

4 The respondents filed affidavit and documentary evidence in support of their claims of aboriginal title and rights. They also submitted evidence demonstrating that it was impossible for them to fund the litigation themselves. The evidence indicated that the Bands were all in extremely difficult financial situations. The chiefs deposed that their communities face grave social problems, including high unemployment rates, lack of housing, inadequate infrastructure, and lack of access to

education. Many members of the respondent Bands who live off-reserve would like to return to their communities, but are unable to do so because there are not enough jobs and homes even for those who live on the reserves now. The Bands have been forced to run deficits to finance their day-to-day operations. The chiefs of the Spallumcheen and Neskonlith Bands deposed that they are close to having outside management of their finances imposed by the Department of Indian and Northern Affairs because their working capital deficits are so high.

5 The Bands' counsel estimated that the cost of a full trial would be $814,010. The Bands say that they had no way to raise this much money; and that even if they did, there are many more pressing needs which would have to take priority over funding litigation. One of the most urgent needs is new housing -- the very purpose for which, they say, they [page382] want to harvest timber from the land to which they claim title.

III. Relevant Legislative Provisions

6 Supreme Court of British Columbia *Rules of Court*, B.C. Reg. 221/90

> 1(12) When making an order under these rules the court may impose terms and conditions and give directions as it thinks just.
>
> 52(11) On an application the court may
>
> (d) order a trial of the proceeding, either generally or on an issue, and order pleadings to be filed, and may give directions for the conduct of the trial and of pre-trial proceedings, and for the disposition of the application.
>
> 57(9) ... costs of and incidental to a proceeding shall follow the event unless the court otherwise orders.

IV. Judicial History

A. *British Columbia Supreme Court*, [2000] B.C.J. No. 1536 (QL), 2000 BCSC 1135

7 Sigurdson J. held that the case could not be decided on the basis of documentary and affidavit evidence alone, and should therefore be remitted to the trial list. The evidence submitted by the Bands of their historical connection to the land was not sufficient in itself to dispose of the issue. Proving the Bands' aboriginal rights claims, which were contested by the Crown, would require historical, anthropological and archaeological evidence to be given by live witnesses and subjected to the detailed and rigorous testing of the trial process. The just resolution of the dispute required a trial and pleadings.

8 Sigurdson J. went on to consider whether he should impose a condition that the Minister pay the Bands' legal fees and disbursements. He began with the question of whether the court retained a general [page383] jurisdiction to award interim costs in a proceeding. He noted that costs usually follow the event and are awarded at the conclusion of the proceedings. Referring to a line of Ontario cases where a narrow jurisdiction to award interim costs has been recognized, Sigurdson J. held that such a discretion also existed in British Columbia in exceptional circumstances. He noted that he was unaware of any cases where substantial amounts had been awarded prior to trial where a liability or right was seriously in issue.

9 Turning to the Bands' argument that constitutional norms applied to the exercise of his discretion over costs, Sigurdson J. held that those norms did not require an order of interim costs to be made in the Bands' favour. He acknowledged that the Bands would need to retain experienced counsel and experts, and that a trial would be complex and expensive. He also recognized that the Bands' poverty would make it difficult for them to put their case forward. In his view, however, these obstacles resulted from the nature of the case and from the Bands' financial circumstances, not from any interference with their constitutional rights. The Bands' s. 35 argument failed, he held, because there were no specific circumstances giving rise to a fiduciary obligation on the part of the Crown to negotiate with the Bands or to fund the litigation of their land claim.

10 Sigurdson J. declined to order the Minister to pay the Bands' costs in advance of the trial. He found that his jurisdiction to make such an order was very narrow and was limited by the principle that he could not prejudge the outcome of the case. In this case, liability was still in issue, and Sigurdson J. held that ordering the payment of costs in advance would involve prejudging the case on the merits. For this reason, he was of the view that he was precluded from making such an order. Sigurdson J. added a recommendation that the federal and provincial Crown consider providing funding to ensure that the cases, which had elements of test cases, would [page384] be properly resolved at trial. He also suggested that the litigation might be able to proceed if the Bands could work out a contingent fee arrangement with counsel.

B. *British Columbia Court of Appeal* (2001), 95 B.C.L.R. (3d) 273, 2001 BCCA 647

11 Newbury J.A., writing for a unanimous panel, allowed the Bands' appeal of Sigurdson J.'s decision.

12 At the outset, Newbury J.A. noted that the Bands' claims, if they went to trial, would be the first to try aboriginal claims to title and other rights in respect of logging in British Columbia. She also summarized some of the affidavit evidence setting out the dire financial circumstances of the Bands.

13 Newbury J.A. upheld the chambers judge's decision to remit the matter of the Bands' aboriginal rights or title to trial. She agreed with him that the just determination of these issues required a trial. This holding was not raised on appeal to this Court.

14 On the question of funding the litigation, Newbury J.A. distinguished between a constitutional right to full funding of legal fees and disbursements, on the one hand, and on the other, the court's discretion to make orders as to "costs" as that term is used in the rules of court and in general legal parlance -- meaning a payment to offset legal expenses, usually in an amount set by statutory guidelines, rather than payment of the actual amount owed by the client to his or her solicitor.

15 As far as a constitutional right to funding of the Bands' legal expenditures was concerned, Newbury J.A. substantially agreed with the reasons of the [page385] chambers judge. She held that the principle of access to justice did not extend so far as to oblige the government to fund litigants who could not afford to pay for legal representation in a civil suit. She also agreed with Sigurdson J. that s. 35 of the *Constitution Act, 1982* did not place an affirmative obligation on the government to provide funding for legal fees of an aboriginal band attempting to prove asserted aboriginal rights. Nothing in the specific circumstances of this case gave rise to a fiduciary expectation on the Bands' part that their legal fees would be funded. (She did not address the Bands' s. 15 arguments, which were not raised on appeal.) Newbury J.A. concluded that the Bands did not have a constitutional right to legal fees funded by the provincial Crown.

16 Newbury J.A. came to a different conclusion, however, on the matter of the court's discretion to order interim costs in favour of the Bands. She agreed with Sigurdson J. that this discretion existed, and that it was narrow in scope and restricted to narrow and exceptional circumstances. In her view, however, the circumstances of this case were indeed exceptional. Newbury J.A. held that the chambers judge had placed too much emphasis on concerns about prejudging the outcome, which in her view were diminished in light of the special circumstances of the case and the public interest in a proper resolution of the issues. She held that constitutional principles and the unique nature of the relationship between the Crown and aboriginal peoples were background factors that should inform the exercise of the court's discretion to order costs. Newbury J.A. held that the chambers judge had erred in failing to recognize that the case involved exceptional and unique circumstances which outweighed concerns about prejudging the outcome of the case.

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17 Newbury J.A. held that, although the court had no discretion to order full funding of the Bands' case by the Crown, the chambers judge did have a discretionary power to order interim costs. She held that such an order should be made with conditions designed to provide concrete assistance to the Bands without exposing the Minister to unreasonable or excessive costs. She ordered the Crown to pay such legal costs of the Bands as ordered by the chambers judge from time to time, subject to detailed terms that she imposed so as to encourage the parties to minimize unnecessary steps in the dispute and to resolve as many issues as possible by negotiation. These terms, as found in the Court of Appeal Order dated November 5, 2001, are best stated in full:

AND THIS COURT FURTHER ORDERS that the Crown, in any event of the cause, pay such legal costs of the Bands, as that term is used and as the Chambers judge orders from time to time in accordance with the following:

(a) Costs, as is referenced in paragraph [10] of the *Reasons for Judgment*;
(b) Unless the Chambers judge concludes that special costs are warranted in this case, costs are to be calculated on the appropriate scale in light of the complexity and difficulty of the litigation;
(c) Counsel are to consider whether costs could be saved by trying one of the four cases rather than all four at the same time. If counsel are unable to agree on that issue, they should seek directions from the Chambers judge. Counsel are also to use all other reasonable measures to minimize costs, and the Chambers judge may impose restrictions for this purpose;
(d) The Province and the Bands are to attempt to agree on a procedure whereby the Bands upon incurring taxable costs and disbursements from time to time up to the end of the trial, will so advise the respondent, and provide such other 'backup' material as the Chambers judge may order. Such costs would be paid by the respondent within a given time-frame, unless the [page387] Province objects, in which case it shall refer the matter to the Chambers judge, who may order the taxation of the bill in the ordinary way;
(e) If counsel are unable to agree on such procedures, the matter shall be taken back to the Chambers judge, who shall make directions in accordance with the spirit of these *Reasons*.

V. Issues

18 This case raises two issues: first, the nature of the court's jurisdiction in British Columbia to grant costs on an interim basis and the principles that govern its exercise; and second, appellate review of the trial court's discretion as to costs. The issue of a constitutional right to funding does not arise, as it was not relied on by the respondents in this appeal.

VI. Analysis

A. *The Court's Discretionary Power to Grant Interim Costs*

(1) Traditional Costs Principles -- Indemnifying the Successful Party

19 The jurisdiction of courts to order costs of a proceeding is a venerable one. The English

common law courts did not have inherent jurisdiction over costs, but beginning in the late 13th century they were given the power by statute to order costs in favour of a successful party. Courts of equity had an entirely discretionary jurisdiction to order costs according to the dictates of conscience (see M. M. Orkin, *The Law of Costs* (2nd ed. (loose-leaf)), at p. 1-1). In the modern Canadian legal system, this equitable and discretionary power survives, and is recognized by the various provincial statutes and rules of civil procedure which make costs a matter for the court's discretion.

20 In the usual case, costs are awarded to the prevailing party after judgment has been given. The [page388] standard characteristics of costs awards were summarized by the Divisional Court of the Ontario High Court of Justice in *Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc.* (1985), 51 O.R. (2d) 23, at p. 32, as follows:

> (1) They are an award to be made in favour of a successful or deserving litigant, payable by the loser.
> (2) Of necessity, the award must await the conclusion of the proceeding, as success or entitlement cannot be determined before that time.
> (3) They are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding.
> (4) They are *not* payable for the purpose of assuring participation in the proceedings. [Emphasis in original.]

21 The characteristics listed by the court reflect the traditional purpose of an award of costs: to indemnify the successful party in respect of the expenses sustained either defending a claim that in the end proved unfounded (if the successful party was the defendant), or in pursuing a valid legal right (if the plaintiff prevailed). Costs awards were described in *Ryan v. McGregor* (1925), 58 O.L.R. 213 (App. Div.), at p. 216, as being "in the nature of damages awarded to the successful litigant against the unsuccessful, and by way of compensation for the expense to which he has been put by the suit improperly brought".

(2) Costs as an Instrument of Policy

22 These background principles continue to govern the law of costs in cases where there are no special factors that would warrant a departure from them. The power to order costs is discretionary, but it is a discretion that must be exercised judicially, and accordingly the ordinary rules of costs should be followed unless the circumstances justify a different approach. For some time, however, courts have recognized that indemnity to the successful party is [page389] not the sole purpose, and in some cases not even the primary purpose, of a costs award. Orkin, *supra*, at p. 2-24.2, has remarked that:

> The principle of indemnification, while paramount, is not the only consideration when the court is called on to make an order of costs; indeed, the principle has been called "outdated" since other functions may be served by a costs order, for

> example to encourage settlement, to prevent frivolous or vexations [*sic*] litigation and to discourage unnecessary steps.

23 The indemnification principle was referred to as "outdated" in *Fellowes, McNeil v. Kansa General International Insurance Co.* (1997), 37 O.R. (3d) 464 (Gen. Div.), at p. 475. In this case the successful party was a law firm, one of whose partners had acted on its behalf. Traditionally, courts applying the principle of indemnification would allow an unrepresented litigant to tax disbursements only and not counsel fees, because the litigant could not be indemnified for counsel fees it had not paid. Macdonald J. held that the principle of indemnity remained a paramount consideration in costs matters generally, but was "outdated" in its application to a case of this nature. The court should also use costs awards so as to encourage settlement, to deter frivolous actions and defences, and to discourage unnecessary steps in the litigation. These purposes could be served by ordering costs in favour of a litigant who might not be entitled to them on the view that costs should be awarded purely for indemnification of the successful party.

24 Similarly, in *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201, the British Columbia Court of Appeal stated at para. 28 that "the view that costs are awarded solely to indemnify the successful litigant for legal fees and disbursements incurred is now outdated". The court held that self-represented lay litigants should be allowed to tax [page390] legal fees, overruling its earlier decision in *Kendall v. Hunt (No. 2)* (1979), 16 B.C.L.R. 295. This change in the common law was described by the court as an incremental one "when viewed in the larger context of the trend towards awarding costs to encourage or deter certain types of conduct, and not merely to indemnify the successful litigant" (para. 44).

25 As the *Fellowes* and *Skidmore* cases illustrate, modern costs rules accomplish various purposes in addition to the traditional objective of indemnification. An order as to costs may be designed to penalize a party who has refused a reasonable settlement offer; this policy has been codified in the rules of court of many provinces (see, e.g., Supreme Court of British Columbia *Rules of Court*, Rule 37(23) to 37(26); Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 49.10; Manitoba *Queen's Bench Rules*, Man. Reg. 553/88, Rule 49.10). Costs can also be used to sanction behaviour that increases the duration and expense of litigation, or is otherwise unreasonable or vexatious. In short, it has become a routine matter for courts to employ the power to order costs as a tool in the furtherance of the efficient and orderly administration of justice.

26 Indeed, the traditional approach to costs can also be viewed as being animated by the broad concern to ensure that the justice system works fairly and efficiently. Because costs awards transfer some of the winner's litigation expenses to the loser rather than leaving each party's expenses where they fall (as is done in jurisdictions without costs rules), they act as a disincentive to those who might be tempted to harass others with meritless claims. And because they offset to some extent the outlays incurred by the winner, they make the legal system more accessible to litigants who seek to vindicate a legally sound position. These effects of the traditional rules can be connected to the court's concern with overseeing its own process and ensuring [page391] that litigation is conducted

in an efficient and just manner. In this sense it is a natural evolution in the law to recognize the related policy objectives that are served by the modern approach to costs.

(3) Public Interest Litigation and Access to Justice

27 Another consideration relevant to the application of costs rules is access to justice. This factor has increased in importance as litigation over matters of public interest has become more common, especially since the advent of the *Charter*. In special cases where individual litigants of limited means seek to enforce their constitutional rights, courts often exercise their discretion on costs so as to avoid the harshness that might result from adherence to the traditional principles. This helps to ensure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole.

28 Courts have referred to the importance of this objective on numerous occasions. In *Canadian Newspapers Co. v. Attorney-General of Canada* (1986), 32 D.L.R. (4th) 292 (Ont. H.C.J.), Osler J. opined that "it is desirable that *bona fide* challenge is not to be discouraged by the necessity for the applicant to bear the entire burden" (pp. 305-6), while at the same time cautioning that "the Crown should not be treated as an unlimited source of funds with the result that marginal applications would be encouraged" (p. 306). In *Re Lavigne and Ontario Public Service Employees Union (No. 2)* (1987), 60 O.R. (2d) 486 (H.C.J.), White J. held that "it is desirable that Charter litigation not be beyond the reach of the citizen of ordinary means" (p. 526). He awarded costs to the successful *Charter* applicant in spite of the fact that his representation had been paid for by a third-party organization (so that he would not, on the [page392] traditional approach, have been entitled to any indemnity). This case was overturned on the merits on appeal (*Lavigne v. O.P.S.E.U.* (1989), 67 O.R. (2d) 536 (C.A.), aff'd [1991] 2 S.C.R. 211), but neither the Ontario Court of Appeal nor this Court expressed any disapproval of White J.'s remarks on costs. Referring to both *Canadian Newspapers* and *Lavigne* in *Rogers v. Sudbury (Administrator of Ontario Works)* (2001), 57 O.R. (3d) 467 (S.C.J.), Epstein J. concluded at para. 19 that "costs can be used as an instrument of policy and ... making *Charter* litigation accessible to ordinary citizens is recognized as a legitimate and important policy objective".

29 In *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, the applicants, who were Jehovah's Witnesses, unsuccessfully argued that their *Charter* rights had been violated when a blood transfusion was administered to their baby daughter over their objections. Instead of granting costs in the cause, the District Court judge directed the intervening Attorney General to pay the applicants' costs. Whealy Dist. Ct. J. cited Osler J.'s statement in *Canadian Newspapers*, *supra*, that *bona fide* challenges should not be deterred, and observed that the case before him was an unusual one involving a matter of province-wide importance (see [1989] O.J. No. 205 (QL) (Dist. Ct.)). His costs order, although unconventional, was upheld on appeal by the Ontario Court of Appeal, and subsequently by this Court. At the Court of Appeal, Tarnopolsky J.A. noted that this case, in which "the parents rose up against state power because of their religious beliefs", was one of national, even international significance ((1992), 10 O.R. (3d) 321, at pp.

354-55). La Forest J. stated at para. 122 of this Court's judgment that the costs award against the Attorney General was "highly unusual" and something that should be permitted "only in very rare cases", but that the case "raised special and peculiar [page393] problems". He allowed Whealy Dist. Ct. J.'s order to stand.

30 The *B. (R.)* case illustrates that in highly exceptional cases involving matters of public importance the individual litigant who loses on the merits may not only be relieved of the harsh consequence of paying the other side's costs, but may actually have its own costs ordered to be paid by a successful intervenor or party. It should be noted that Whealy Dist. Ct. J. applied Rule 57.01(2), a provision of Ontario's *Rules of Civil Procedure* that expressly authorized the court to award costs against a successful litigant and specified that the importance of the issues was a factor to be considered (see Rule 57.01(1)(d)). Although these principles are not spelled out in the Supreme Court of British Columbia *Rules of Court*, in my view they are generally relevant in guiding the exercise of a court's discretion as to costs. They form part of the background against which a British Columbia court exercises its inherent equitable jurisdiction, confirmed by Rule 57(9), to depart from the usual rule that costs follow the event.

(4) Interim Costs

31 Concerns about access to justice and the desirability of mitigating severe inequality between litigants also feature prominently in the rare cases where interim costs are awarded. An award of costs of this nature forestalls the danger that a meritorious legal argument will be prevented from going forward merely because a party lacks the financial resources to proceed. That costs orders can be used in this way in a narrow class of exceptional cases was recognized early on by the English courts. In *Jones v. Coxeter* (1742), 2 Atk. 400, 26 E.R. 642 (Ch.), the Lord Chancellor found that "the poverty of the person will not allow her to carry on the cause, unless the court will direct the defendant to pay something to the plaintiff in the mean time". Invoking the "intirely discretionary" equitable jurisdiction to order costs, he ordered costs to be paid [page394] to the plaintiff "to empower her to go on with the cause" (p. 642).

32 The discretionary power to award interim costs in appropriate cases has also been recognized in Canada. An extensive discussion of this power is found in *Organ v. Barnett* (1992), 11 O.R. (3d) 210 (Gen. Div.) . Macdonald J. reviewed the authorities, including *Jones, supra,* and concluded that "the court *does* have a general jurisdiction to award interim costs in a proceeding" (p. 215 (emphasis in original)). She also found that that jurisdiction was "limited to very exceptional cases and ought to be narrowly applied, especially when the court is being asked to essentially pre-determine an issue" (p. 215).

33 As Macdonald J. recognized in *Organ, supra,* at p. 215, the power to order interim costs is perhaps most typically exercised in, but is not limited to, matrimonial or family cases. In *McDonald v. McDonald* (1998), 163 D.L.R. (4th) 527 (Alta. C.A.), Russell J.A. observed that the wife in divorce proceedings could traditionally obtain "anticipatory costs" to enable her to present her

position (para. 18). This was because husbands usually controlled all the matrimonial property. Since the wife had "no means to pay lawyers, her side of the litigation would not be advanced, and this position was patently unfair" (para. 20). Interim costs will still be granted in family cases where one party is at a severe financial disadvantage that may prevent his or her case from being put forward. See, e.g., *Woloschuk v. Von Amerongen*, [1999] A.J. No. 463 (QL), 1999 ABQB 306, where the Alberta Court of Queen's Bench ordered a lump sum payment of $10,000 to the mother in a custody action by way of interim costs, finding that the father's financial position was "significantly better than that of the [mother] in terms of funding this protracted lawsuit" (para. 16); and *Roberts v. Aasen*, [1999] O.J. No. 1969 (QL) (S.C.J.), also a custody case, where [page395] the court held that the father was unlikely to succeed at trial and that the mother lacked the resources to pay her legal fees and disbursements, and ordered the father to pay $15,000 as interim costs. Orkin, *supra*, at p. 2-23, observes that in the modern context "the *raison d'tre* [*sic*] of such awards is to assist the financially needy party pending the trial; they are made where the spouse is without resources and would otherwise be unable to obtain relief in court" (citations omitted).

34 Interim costs are also potentially available in certain trust, bankruptcy and corporate cases, where they are awarded for essentially the same reason -- to avoid unfairness by enabling impecunious litigants to pursue meritorious claims with which they would not otherwise be able to proceed. *Organ* was a corporate case involving, among other causes of action, an action under the oppression remedy set out in s. 248 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16. The statute also provided in s. 249(4) that interim costs could be awarded in an oppression case. Macdonald J. held that, in addition to this express statutory power, the court also had an inherent jurisdiction to award interim costs. In the particular circumstances of this case, however, she held that the order should not be granted, because by their own admission the plaintiffs were not impecunious and would be able to proceed to trial without it. In *Amcan Industries Corp. v. Toronto-Dominion Bank*, [1998] O.J. No. 3014 (QL) (Gen. Div.), a bankruptcy case, Macdonald J. acknowledged "the inherent unfairness that arises in choking a plaintiff's action if access to funds is not permitted" (para. 39); in this case, again, interim costs were not awarded because impecuniosity was not established. In *Turner v. Telecommunication Workers Pension Plan* (2001), 197 D.L.R. (4th) 533, 2001 BCCA 76, an action for breach of fiduciary duty in respect of a pension fund, the British Columbia [page396] Court of Appeal recognized that the court had the power to award interim costs, but held that the interests of justice did not require it to do so on the facts of the case. Newbury J.A. noted that the financial position or impecuniosity of a party is not in itself reason enough to depart from the usual rules as to costs (para. 18).

35 Based on the foregoing overview of the case law, the following general observations can be made. The power to order interim costs is inherent in the nature of the equitable jurisdiction as to costs, in the exercise of which the court may determine at its discretion when and by whom costs are to be paid. This broad discretion may be expressly referred to in a statute, as in s. 131(1) of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides that costs "are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid". Indeed, the power to order interim costs may be specifically stipulated, as in the Ontario *Business*

Corporations Act or similar legislation in other jurisdictions. Even absent explicit statutory authorization, however, the power to award interim costs is implicit in courts' jurisdiction over costs as it is set out in statutes such as the Supreme Court of British Columbia *Rules of Court*, which provides that the court may make orders varying from the usual rule that costs follow the event.

36 There are several conditions that the case law identifies as relevant to the exercise of this power, all of which must be present for an interim costs order to be granted. The party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the [page397] opportunity to proceed with the case. The claimant must establish a *prima facie* case of sufficient merit to warrant pursuit. And there must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate. These requirements might be modified if the legislature were to set out the conditions on which interim costs are to be granted, or where courts develop criteria applicable to a particular situation where interim costs are authorized by statute (as is the case in relation to s. 249(4) of the Ontario *Business Corporations Act*; see *Organ, supra*, at p. 213). But in the usual case, where the court exercises its equitable jurisdiction to make such costs orders as it concludes are in the interests of justice, the three criteria of impecuniosity, a meritorious case and special circumstances must be established on the evidence before the court.

37 Although a litigant who requests interim costs must establish a case that is strong enough to get over the preliminary threshold of being worthy of pursuit, the order will not be refused merely because key issues remain live and contested between the parties. If the court does decide to award interim costs in such circumstances, it will in a sense be predetermining triable issues, since it will have to decide that one side will receive its costs before it is known who will win on the merits (and since the winner is usually entitled to costs). As a result, concerns may arise about fettering the discretion of the trial judge who will eventually be called upon to adjudicate the merits of the case. This in itself should not, however, preclude the granting of interim costs if the relevant criteria are met. As Macdonald J. noted in *Organ, supra*, the court's discretion must be exercised with particular caution where it is being asked to predetermine an issue in this sense, but it does not follow that the court would be going beyond the limits of its discretion if it were to grant the order. I therefore disagree with the conclusion of the New Brunswick Court of Queen's Bench in *New Brunswick (Minister of Health and Community Services) v. G. (J.)* (1995), 131 D.L.R. (4th) 273, [page398] that costs cannot be ordered at the commencement of a proceeding in the absence of express statutory authority to award costs regardless of the outcome of the proceeding (p. 283) (this case was eventually overturned by this Court in [1999] 3 S.C.R. 46, but the interim costs issue was a secondary one that was not dealt with on appeal). As I stated above, the power to order costs contrary to the cause is always implicit in the court's discretionary jurisdiction as to costs, as is the power to order interim costs.

(5) Interim Costs in Public Interest Litigation

38 The present appeal raises the question of how the principles governing interim costs operate in

combination with the special considerations that come into play in cases of public importance. In cases of this nature, as I have indicated above, the more usual purposes of costs awards are often superseded by other policy objectives, notably that of ensuring that ordinary citizens will have access to the courts to determine their constitutional rights and other issues of broad social significance. Furthermore, it is often inherent in the nature of cases of this kind that the issues to be determined are of significance not only to the parties but to the broader community, and as a result the public interest is served by a proper resolution of those issues. In both these respects, public law cases as a class can be distinguished from ordinary civil disputes. They may be viewed as a subcategory where the "special circumstances" that must be present to justify an award of interim costs are related to the public importance of the questions at issue in the case. It is for the trial court to determine in each instance whether a particular case, which might be classified as "special" by its very nature as a public interest case, is special enough [page399] to rise to the level where the unusual measure of ordering costs would be appropriate.

39 One factor to be borne in mind by the court in making this determination is that in a public law case costs will not always be awarded to the successful party if, for example, that party is the government and the opposing party is an individual *Charter* claimant of limited means. Indeed, as the *B. (R.)* case demonstrates, it is possible (although still unusual) for costs to be awarded in favour of the unsuccessful party if the court considers that this is necessary to ensure that ordinary citizens will not be deterred from bringing important constitutional arguments before the courts. Concerns about prejudging the issues are therefore attenuated in this context since costs, even if awarded at the end of the proceedings, will not necessarily reflect the outcome on the merits. Another factor to be considered is the extent to which the issues raised are of public importance, and the public interest in bringing those issues before a court.

40 With these considerations in mind, I would identify the criteria that must be present to justify an award of interim costs in this kind of case as follows:

1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial -- in short, the litigation would be unable to proceed if the order were not made.
2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.

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3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

41 These are necessary conditions that must be met for an award of interim costs to be available in cases of this type. The fact that they are met in a particular case is not necessarily sufficient to establish that such an award should be made; that determination is in the discretion of the court. If all three conditions are established, courts have a narrow jurisdiction to order that the impecunious party's costs be paid prospectively. Such orders should be carefully fashioned and reviewed over the course of the proceedings to ensure that concerns about access to justice are balanced against the need to encourage the reasonable and efficient conduct of litigation, which is also one of the purposes of costs awards. When making these decisions courts must also be mindful of the position of defendants. The award of interim costs must not impose an unfair burden on them. In the context of public interest litigation judges must be particularly sensitive to the position of private litigants who may, in some ways, be caught in the crossfire of disputes which, essentially, involve the relationship between the claimants and certain public authorities, or the effect of laws of general application. Within these parameters, it is a matter of the trial court's discretion to determine whether the case is such that the interests of justice would be best served by making the order.

B. *Appellate Review of Discretionary Decisions*

42 The discretion of a trial court to decide whether or not to award costs has been described as unfettered and untrammelled, subject only to any applicable rules of court and to the need to act judicially on the facts of the case (*Earl v. Wilhelm* (2000), 199 Sask. R. 21, 2000 SKCA 68, at para. 7, citing *Benson v. Benson* (1994), 120 Sask. R. 17 (C.A.)). Sigurdson J.'s decision in the present case was based on his judicial experience, his view of what justice [page401] required, and his assessment of the evidence; it is not to be interfered with lightly.

43 As I observed in *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, however, discretionary decisions are not completely insulated from review (para. 118). An appellate court may and should intervene where it finds that the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts. As this Court held in *Pelech v. Pelech*, [1987] 1 S.C.R. 801, at p. 814-15, the criteria for the exercise of a judicial discretion are legal criteria, and their definition as well as a failure to apply them or a misapplication of them raise questions of law which are subject to appellate review.

44 Two errors in particular vitiate the chambers judge's decision and call for appellate intervention. First, he overemphasized the importance of avoiding any order that involved prejudging the issues. In a case of this kind, as I have indicated, this consideration is of less weight than in the ordinary case; in fact, the allocation of the costs burden may, in certain cases, be determined independently of the outcome on the merits. Sigurdson J. erred when he concluded that his discretion did not extend so far as to empower him to make the order requested. Secondly,

Sigurdson J.'s finding that a contingent fee arrangement might be a viable alternative for funding the litigation does not appear to be supported by any evidence, and I agree with Newbury J.A. that the prospect of the Bands' hiring counsel on a contingency basis seems unrealistic in the particular circumstances of this case.

C. *Application to the Facts of this Case*

45 It is unnecessary to send this case back to the chambers judge to apply the criteria set out here, [page402] because it is apparent from his reasons that, had he done so, he would have ordered interim costs in favour of the respondents. Sigurdson J. found as a fact that the Bands were in extremely difficult financial circumstances and could not afford to pay for legal representation. The only alternative which he suggested might be available for funding the litigation was a contingent fee arrangement, which, as I have stated, was not feasible. He found the Bands' claims of aboriginal title and rights to be *prima facie* plausible and supported by extensive documentary evidence; although the claim was not so clearly valid that there was no need for it to be tested through the trial process, it was certainly strong enough to warrant pursuit. Finally, Sigurdson J. found the case to be one of great public importance, raising novel and significant issues resolution of which through the trial process was very much in the interests of justice. He even went so far as to urge the executive branches of the federal and provincial governments to provide funding so that the respondents' claims could be addressed.

46 Applying the criteria I have set out to the evidence in this case as assessed by the chambers judge, it is my view that each of them is met. The respondents are impecunious and cannot proceed to trial without an order for interim costs. The case is of sufficient merit that it should go forward. The issues sought to be raised at trial are of profound importance to the people of British Columbia, both aboriginal and non-aboriginal, and their determination would be a major step towards settling the many unresolved problems in the Crown-aboriginal relationship in that province. In short, the circumstances of this case are indeed special, even extreme.

47 The conditions attached to the costs order by Newbury J.A. ensure that the parties will be encouraged to resolve the matter through [page403] negotiation, which remains the ultimate route to achieving reconciliation between aboriginal societies and the Crown (see *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010, at para. 186), and also that there will be no temptation for the Bands to drag out the process unnecessarily and to throw away costs paid by the appellant. I would uphold her disposition of the case.

VII. Disposition

48 The appeal is dismissed with costs to the respondents.

The reasons of Iacobucci, Major and Bastarache JJ. were delivered by

49 MAJOR J. (dissenting):-- At issue in this appeal is how trial courts should be guided in their

award of interim costs. When are these advance costs appropriate? How much deference should appellate courts give to the trial judge's discretion in the matter?

50 Four Indian bands are suing the Crown in right of British Columbia, to establish aboriginal title over land they wish to log. Because this litigation will be expensive, they seek interim costs -- that is, advance costs awarded whether or not they are successful at trial. By any standard, this is an extraordinary remedy.

51 The chambers judge could not find a supporting precedent and in the exercise of his discretion he chose not to grant interim costs. The British Columbia Court of Appeal, and now my colleague LeBel J., reversed the chambers judge on what appears to be a new rule for interim costs. With respect for the contrary view, I conclude that Sigurdson J. interpreted the applicable principles correctly and can find no basis for [page404] reversing his discretion. I would therefore allow the appeal.

52 The appeal raises difficult questions. In particular, how may impoverished parties sue to establish what is submitted to be constitutionally supported rights? Constitutional issues, however, were not pursued in this appeal. The respondents rely solely on the common law rules on costs.

53 Traditionally, costs -- usually party and party costs -- are awarded after the ultimate trial or appellate decision and almost always to the successful party. Party and party costs in all Canadian jurisdictions are only partial indemnification of the litigants' legal costs. In certain cases, interim costs may be awarded to a spouse suing for the division of property as a consequence of separation or divorce. The *ratio* of the matrimonial cases is clear: a spouse usually owns or is entitled to part of the matrimonial property; some success on the merits is practically assured. Thus, the traditional purpose of costs -- indemnification of the prevailing party -- is preserved.

54 But to award interim costs when liability remains undecided would be a dramatic extension of the precedent. Furthermore, to do so in a case with serious constitutional considerations where the Crown is the defending party would be an unusual extension of highly exceptional private law precedent into an area fraught with other implications.

55 The common law is said to evolve to adapt prevailing principles to modern circumstances. But the common law of costs should develop through the discretion of trial judges. This equitable trial-level discretion, developed over centuries, is essential [page405] to the primary traditional use of the discretionary costs power by courts: to manage litigation and case loads. It may be that there are public law questions where access to justice can be provided through the discretionary award of interim costs. Even so, such cases must lie closer to the heart of the interim costs case law. Such developments should be initiated by trial courts properly exercising their discretionary power, not the appellate reversal of that discretion.

I. Background

56 My colleague has fairly characterized the facts of this litigation. However, some highlighting of those facts may be useful.

57 In 1999, the four respondent Indian bands (the "Bands") began logging Crown land. Funds from that activity were to be used for housing and other desperately needed social services. The British Columbia Minister of Forests served the Bands with stop-work orders and commenced proceedings to prevent further logging. The Bands challenged the orders and claimed aboriginal title to the lands.

58 At the British Columbia Supreme Court, Sigurdson J. ruled that the question of aboriginal title was sufficiently complex that a trial was necessary. The Bands stated that they could not afford to litigate and even if they could, they would have preferred to use such funds to provide social services. The Bands claimed that they had been unable to find any governmental or *pro bono* sources of aid. They therefore petitioned for interim costs -- costs in advance of trial. The Bands' motions were originally grounded in the constitutional question of title. They now seek interim costs on the [page406] basis of the trial court's inherent and statutory cost power.

59 The chambers judge conducted a thorough examination of the case law on interim costs and, in the exercise of his discretion, concluded:

> I find that the respondents' argument that its trial costs be paid in advance must fail. The issue of liability is very much in dispute and the trial costs are substantial. To order the payment of trial costs would require prejudging the case on the merits which, of course, I cannot do. Although I have a limited discretion in appropriate circumstances to award interim costs this case falls far outside that area. I recognize that these respondents are in a difficult position. However, counsel may be prepared to represent them on a contingency basis and, if successful, the respondents will undoubtedly receive significant indemnity for their costs. I recommend, however, that the Federal and Provincial Crown consider providing some funding so that these disputes, which have some elements of test cases, if they cannot be settled, can be properly resolved at trial.
>
> ([2000] B.C.J. No. 1536 (QL), 2000 BCSC 1135, at para. 129)

II. Analysis

A. *The Law of Costs*

60 The standard rule on party and party costs is that they are generally awarded to the successful litigant at the end of litigation. These costs are a contribution to the successful party's actual expense. Full indemnification by way of solicitor-client costs is infrequently ordered in Canada. Such costs require unusual and egregious conduct by the losing party. On rare occasions the court

may award solicitor-client costs where equity is met by doing so.

61 My colleague points to what he describes as a modern trend in the law on costs -- its use as an instrument to encourage litigation in the public interest. With respect, I think this proposition [page407] mistakes public funding to pursue *Charter* claims as an exercise in awarding costs. It is a separate function. Although the trial judge retains a discretion on the question of costs in such cases, they have always been awarded at the conclusion of the litigation.

B. *The Law of Interim Costs*

62 As a matter of public policy as reflected in federal and provincial rules of court, costs are usually awarded at the conclusion of trial as a contribution to the successful party's legal expenses. However, the common law on interim costs -- costs in advance of trial -- has been more confined and almost exclusively restricted to family law litigation to allow the impecunious spouse and children access to the court. The reason for such restrictive use is apparent since awarding costs in advance could be seen as prejudging the merits. While there is limited jurisdiction to award interim costs, it is logical that the party who must pay them and informed members of society might, in the absence of compelling reasons, have a reasonable apprehension of bias in favour of the recipient. The objectivity of the court making such an order will almost automatically be questioned.

63 The award of costs before trial is a more potent incentive to litigation than the possibility of costs after the trial. The awarding of interim costs in the circumstances of this appeal appears as a form of judicially imposed legal aid. Interim costs are useful in family law, but should not be expanded to engage the court in essentially funding litigation for impecunious parties and ensuring their access to court. As laudable as that objective may be, the remedy lies with the legislature and law societies, not the judiciary.

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64 LeBel J. concludes from his review of the case law on interim costs that they may be granted when (i) the party seeking the costs would be unable to pursue the litigation otherwise; (ii) there is a *prima facie* case of sufficient merit; and (iii) there are present "special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate" (para. 36). He finds that such special circumstances may exist if the case is in the public interest and is a test case. With respect, I come to a different result.

65 I agree that the case must be exceptional in order to attract interim costs. Of necessity, the proposition that extraordinary circumstances practically always exist where the public interest is invoked is too broad to meet the exceptional requirement. LeBel J. accepts that most public interest cases would satisfy this criterion (para. 38). This is why he leaves to the discretion of the trial judge the decision as to whether the case is "special enough" to warrant an order. The difficulty for the

trial judge is that this does not provide any ascertainable standard or direction. To say simply that the issues transcend the individual interests in the case and have not yet been resolved (para. 40) does not assist the trial judge in deciding what is "special enough". An examination of past *Charter* cases will demonstrate that dilemma.

66 Test cases are referred to by LeBel J. and involve situations where important precedents are sought. In my view, the proposition that "it [would be] contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means" (para. 40), without more, is not sufficient. A trial judge can draw no direction from this proposal.

67 But even if such special circumstances were to be considered, there is nothing to distinguish the present aboriginal land claims from any other. On the contrary, the litigation here is likely to involve [page409] the application of principles enunciated by this Court in cases such as *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, and *R. v. Van der Peet*, [1996] 2 S.C.R. 507. There is no evidence to establish that these land claims should be considered exceptional. Nor is there anything to establish how the new criteria would apply in a different way between one impecunious aboriginal party and another.

68 It is worth noting that the honour of the Crown is not at stake in this appeal and that there is no reason to distinguish the aboriginal claimants from any other impecunious persons claiming rights under the Constitution with regard to the availability of costs. The new definition of extraordinary circumstances must therefore apply generally and its impact measured accordingly. There is no doubt that the conclusions of LeBel J. will result in an increase of interim costs applications while offering little in the way of guidance to trial judges.

69 The interim costs case law suggests narrow guidelines. Interim costs have been awarded in two circumstances: (i) in marital cases where some liability is presumed and the indemnificatory purpose of the costs power is fulfilled; and (ii) in corporate and trust cases where the court grants advanced costs to be paid by the corporation or trust for whose benefit the action is brought. In those cases it is still necessary that the party seeking advanced costs show that they would otherwise be unable to proceed with litigation.

70 The matrimonial cases involving the division of assets upon divorce comprise the oldest line of interim costs jurisprudence. At common law, a wife could be awarded interim costs to help her maintain her divorce action. This rule has been generally recognized in statute and Canadian case law. See *McDonald v. McDonald* (1998), 163 D.L.R. (4th) 527 [page410] (Alta. C.A.). See also *Randle v. Randle* (1999), 254 A.R. 323, 1999 ABQB 954, where interim costs were granted in an action concerning the division of property between common law spouses.

71 There are three legal characteristics that explain why the post-marital contest serves as the exception to the standard rule that costs "follow the event". These three characteristics are guidelines for the exercise of discretion in the award of interim costs.

72 First, at common law, husbands usually had control and legal ownership of the marital purse and property, ensuring in most cases that wives did not have the financial resources to pursue litigation. See *McDonald, supra*, at para. 20. Therefore, the first required element of an interim cost award is that the party seeking the award is impoverished, and would not be able to pursue the litigation without such an award. It is acknowledged in this appeal that each of the bands are without funds.

73 Second, the marital relationship is perhaps unique in the mutual support owed between spouses. Thus, generalizing beyond the marital context, there must be a special relationship between the parties such that the cost award would be particularly appropriate. Where, as in this appeal, no right under s. 35 of the *Constitution Act, 1982* is implicated and the matter involves the provincial Crown rather than the federal Crown, this special relationship cannot automatically be presumed.

74 But third, and dispositive to this appeal, in the marital cases there is a presumption that the property that is the subject of the dispute is to be shared in some way. See *Randle, supra*, at para. 22. Generally, it is the distribution of assets and extent of support that are at issue in a divorce action, not [page411] whether such a division and such support are owed. In a sense, some liability is assumed; all that is to be litigated is the extent of the liability. LeBel J. blunts the bite of this element, reducing it to the modest requirement that "[t]he claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means" (para. 40). The traditional roots of the costs power require more than *prima facie* merit. The costs power originally provided indemnification -- the prevailing party won costs. In a divorce action, however, it was assumed that the spouse, usually the wife, would be awarded something; the question was how much.

75 The matrimonial cases can therefore be seen as exceptional not because they dispensed with the rule that the prevailing party won costs (and the related principle that judges not predetermine the merits of the case), but because they dispensed with the need to wait for the end of trial to decide which party prevailed, for some liability was presumed.

76 In this appeal, Sigurdson J.'s reluctance to "prejudg[e] the case on the merits" was appropriate. Unlike the divorce cases, one may not presume that the Bands will establish even partial aboriginal title in the cases under appeal.

77 In summary, in my opinion the *ratio* of the common law dictates the following three guidelines for the discretionary, extraordinary award of interim costs:

1. The party seeking the interim costs cannot afford to fund the litigation, and has no other realistic manner of proceeding with the case.

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2. There is a special relationship between the parties such that an award of interim costs or support would be particularly appropriate.
3. It is presumed that the party seeking interim costs will win some award from the other party.

78 In my view, a court should be particularly careful in the exercise of its inherent powers on costs in cases involving the resolution of controversial public questions. Not only was such precedent not required at common law, but by incorporating such an amorphous concept without clearly defining what constitutes "special circumstances", the distinction between the traditional purpose of awarding costs and concerns over access to justice has been blurred.

79 As noted earlier, certain corporate and trust actions form another line of interim costs cases with a different *ratio*. In those cases, a litigant sues on behalf of a corporation or trust, and seeks interim costs. Such cases are an exception to the general rule on costs because the court makes the costs order on behalf of the corporation or trust. For example, where a shareholder sues directors on behalf of the corporation, it is presumed that the corporation, which in many ways is owned by the shareholders, although under the control of the directors, consents to the paying of the interim costs. It is important to note that in the corporate context, interim costs are specifically addressed by legislation. See British Columbia *Company Act*, R.S.B.C. 1996, c. 62, s. 201; Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 249.

80 Courts may also award interim costs in child custody cases. See *Roberts v. Aasen*, [1999] O.J. No. 1969 (QL) (S.C.J.). Child custody litigation focuses on the best interests of the child for whose welfare both parents are responsible. The purpose of the interim costs award is not merely to aid one side or the other in funding their litigation but, [page413] commensurate with the parents' duty, to help the court find the result most beneficial to the child.

81 The value in considering the derivative and related child custody cases is simply to concede that there are circumstances beyond the matrimonial cases in which interim costs may be appropriate. The cases on appeal do not fit these exceptions.

C. *The Trial Judge's Discretion*

82 I agree with LeBel J. that a trial judge's discretionary decision on interim costs is owed great deference, and should be disturbed only if "the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts" (para. 43). I also agree that a misapplication of the criteria relevant to an exercise of discretion constitutes an error of law.

83 LeBel J. concludes that because Sigurdson J. failed to apply the newly enunciated criteria of impecuniosity, *prima facie* merit, and public importance, an error of law was (understandably)

committed. LeBel J. saw no need to return the case to the chambers judge, and held that Sigurdson J. would have exercised his discretion to grant the award had he had the benefit of what is described as new criteria.

84 If this Court enlarges the scope for interim costs it should be seen as a new rule and not an adaptation of existing law. On the basis of the law on costs at the time of this application the chambers judge properly exercised his discretion.

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85 Sigurdson J. was correct in his assessment that liability remains an open question in this appeal and that ordering interim costs would inappropriately require prejudging the case. Accordingly, he was justified in concluding that "[a]lthough [he had] a limited discretion in appropriate circumstances to award interim costs this case falls far outside that area" (para. 129).

III. Conclusion

86 The common law is to advance by increments while generally staying true to the purposes behind its rules. The new criteria endorsed by my colleague broaden the scope of interim costs to an undesirable extent and are not supported in the case law. In my view, the common law rules on interim costs should not be advanced through an appellate court ignoring and overturning the trial judge's correctly guided discretion. This is more appropriately a question for the legislature. See *Watkins v. Olafson*, [1989] 2 S.C.R. 750; *R. v. Salituro*, [1991] 3 S.C.R. 654; and *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925.

87 Since Sigurdson J. committed no error of law and did not commit a "palpable error" in his assessment of the facts, I would defer to his decision not to exercise his discretion to make the extraordinary grant of interim costs.

88 I would allow the appeal, with each side to bear its own costs.

Solicitors:

Solicitors for the appellant: Borden Ladner Gervais, Vancouver.

Solicitors for the respondents: Mandell Pinder, Vancouver.

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Solicitor for the intervener the Attorney General of Canada: Department of Justice of Canada, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Department of Justice, Sainte-Foy.

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

Solicitor for the intervener the Attorney General of British Columbia: Ministry of Attorney General, Victoria.

Solicitor for the intervener the Attorney General of Alberta: Alberta Justice, Edmonton.

Solicitors for the interveners the Songhees Indian Band et al.: Cook, Roberts, Victoria.

Solicitors for the intervener Chief Roger William: Woodward & Company, Victoria.

cp/e/qw/qllls

Indexed as:

Canada (Attorney General) v. Georgian College of Applied Arts and Technology (C.A.)

The Attorney General of Canada (applicant)
v.
Georgian College of Applied Arts and Technology (respondent)

[2003] 4 F.C. 525

[2003] F.C.J. No. 801

2003 FCA 199

Court File No. A-505-02

Federal Court of Canada - Court of Appeal

Stone, Noël and Sexton JJ.A.

Heard: Toronto, April 7, 2003.
Judgment: Ottawa, May 2, 2003.

(39 paras.)

Foreign Trade -- Canadian International Trade Tribunal -- CITT refusing to award Crown, as represented by HRDC, costs though successful in resisting procurement complaint -- Case concerned method of selecting service providers for employment assistance programs -- CITT dismissing complaint in entirety for want of jurisdiction -- Costs refusal justified as complainant acted in good faith, HRDC counsel salaried -- Attorney General's research showing CITT always denying Crown costs where complaints dismissed, awarding complainants costs if successful -- Consideration of appropriate standard of review -- At issue: not particular exercise of discretion to deny costs but Tribunal's practice of denying Crown costs whenever successful -- Reasonableness appropriate standard as Tribunal's expertise possibly extending to awarding costs -- Awarding costs is within discretion of court, tribunal -- But must be exercised judicially -- No justification for costs denial herein -- Absence of statutory authority -- Irrelevant that HRDC counsel on salary -- Tribunal's argument as "bid challenge authority" having duty to ensure Canadian compliance with

NAFTA obligations, encourage complainants to come forward, rejected -- One thing to provide dispute resolution forum, another to encourage litigation -- No statutory authority for CITT to undertake pro-active role in encouraging complaints.

Practice -- Costs -- Canadian International Trade Tribunal (CITT) denying Crown costs though successful in resisting NAFTA procurement complaint -- Denial justified as [page526] complainant acted in good faith, government lawyer salaried -- CITT invariably denying Crown costs when successful -- CITT having statutory authority to award costs to either side -- Decision reviewed on reasonableness standard as CITT's expertise perhaps extending to awarding costs -- Costs awarded as indemnity, not imposed as punishment -- Award of costs is in discretion of courts, tribunals -- But must be exercised judicially -- Exercised against successful party only for reason connected with case -- Wrong to hold Crown "unusual" litigant, able to pay own costs -- Time when "rule of dignity" dictated Crown neither demand, pay costs long gone -- Denial of costs herein not justified -- Irrelevant that government lawyer salaried -- While policy of denying Crown costs would encourage complainants to come forward, no statutory authority for CITT to adopt pro-active role of encouraging litigation.

Administrative Law -- Judicial Review -- Certiorari -- Canadian International Trade Tribunal (CITT) denying Crown costs though successfully resisting procurement complaint -- Determining appropriate standard of review -- In pragmatic, functional approach, four contextual factors considered: whether privative clause or statutory appeal; tribunal's expertise relative to court's; purpose of statutory provision; whether question of law, fact, mixed law, fact -- Here neither privative clause nor statutory appeal -- CITT having expertise adjudicating procurement complaints -- Having statutory authority to award costs -- Real question herein: not simple exercise of Tribunal's discretion but practice of invariably denying Crown costs despite success -- Question of law attracting lower deference level -- Court's decision herein going to jurisdiction, important as precedent -- Reasonableness appropriate standard as Tribunal's expertise perhaps extending to awarding costs -- Reasonableness standard requires court to stay close to tribunal's reasons to see whether support decision -- Should be unnecessary to look outside Tribunal's reasons -- Costs award by court, tribunal is discretionary but facts of litigation, outcome must be considered -- Discretion must be exercised judicially -- Upon application of standard, costs denial herein unjustified -- Tribunal fettered discretion by adhering to practice of denying Crown costs -- Decision set aside, case referred back for proper exercise of discretion.

[page527]

This was an application for judicial review of a decision by the Canadian International Trade Tribunal (CITT) not to award costs in applicant's favour although successful in overcoming a procurement complaint made by the College. The Attorney General argued that, in refusing an award of costs, the CITT fettered its discretion by taking into account irrelevant considerations

while ignoring considerations that were relevant.

Georgian College filed a complaint with CITT that the method employed by Human Resources Development Canada (HRDC) of selecting service providers for certain Employment Insurance Act employment assistance programs violated the North American Free Trade Agreement (NAFTA) as well as the Agreement on Internal Trade (AIT).

HRDC took the position that CITT lacked jurisdiction, the selection process at issue not being a procurement within the meaning of the agreements. The CITT dismissed the complaint for want of jurisdiction but failed to address the matter of costs even though HRDC had asked for them. HRDC then wrote to the Tribunal requesting that it consider the matter but the costs request was denied.

The Tribunal defended its refusal to award costs on the basis that the College had acted in good faith and that HRDC counsel are on salary. The Tribunal's policy is to award reasonable costs where complainant is successful but not to require an unsuccessful complainant to pay costs unless warranted by such conduct as: launching a frivolous or vexatious complaint, not being candid and forthright during the investigation or being guilty of conduct amounting to abuse of process. The Tribunal found no reason herein to depart from its usual policy in the matter of costs. Research conducted by the Attorney General revealed that the Tribunal always awarded costs to successful complainants but invariably denied the government institution its costs where complaints were dismissed in their entirety. Whenever success was divided, the CITT in every case awarded complainant its costs.

Held, the application should be allowed.

The appropriate standard of review was the pragmatic and functional approach very recently reiterated by McLachlin C.J. in Dr. Q. v. College of Physicians and Surgeons of British Columbia. While Tribunal decisions are not protected by a [page528] privative clause, neither is there a statutory right of appeal. The CITT is a specialized body the expertise of which extends to the adjudication of procurement complaints. The Tribunal has, under Canadian International Trade Tribunal Act, section 30.16, power to award costs and to direct by whom and to whom they are to be paid. From the above, it would appear that a high degree of deference would be owed to this Tribunal and that the "patent unreasonableness" standard would, upon judicial review, be applicable. But, what was here at issue was the Tribunal's practice of always denying the Crown its costs despite its success. Since whether such practice is authorized by the Act is a question of law, the Tribunal was entitled to a lower level of deference than if the case involved a simple exercise of discretion. Such reduced deference level was also appropriate in view of the jurisdictional nature of this decision and its precedential value. Even so, the decision should be reviewed on a standard of reasonableness, since the Tribunal's expertise in procurement matters may perhaps extend to the awarding of costs. The Supreme Court of Canada has stated that in an application of the reasonableness standard, a reviewing court must "stay close to the reasons given by the tribunal" to see whether any of them adequately support the decision. It should be necessary to look beyond the

reasons given by the CITT to determine whether they disclose a reasonable justification of the Tribunal's practice which resulted in the denial of costs to the Crown herein.

Absent statutory or regulatory provision to the contrary, the awarding of costs -- whether by courts or tribunals -- is within the discretion of the adjudicator. The exercise of that discretion requires, however, a consideration of the facts giving rise to the litigation as well as the outcome of the dispute. As was said by Viscount Cave L.C. in the 1927 case Donald Campbell and Company Limited v. Pollack, a court's absolute, unfettered discretion in the matter of costs "like any other discretion, must of course be exercised judicially, and the judge ought not to exercise it against the successful party except for some reason connected with the case". The reasons in Pollack were applied by this Court in R. v. James Lorimer and Company Limited, in which the Crown met with success but was denied costs, the Trial Division Judge not wishing to "punish" defendant or further its burden and also because the Crown was seen as an "unusual plaintiff" capable of paying its own costs. As noted by Mahoney J.A. in overturning that decision, the time was long gone when the "rule of dignity" dictated that the Crown neither asked for nor paid costs. None of the reasons given for denying the Crown its costs had anything to [page529] do with the facts connected with or leading up to the case. The same could be said in the instant case. Certainly, section 30.16 does not authorize the CITT to adopt a practice of denying costs to the Crown regardless of its success. Indeed, the provision, on its face, contemplates an award of costs to either side.

Nor was it relevant that HRDC was represented by salaried lawyers. The Tribunal's reasons ignored the principle of indemnification and failed to recognize the fact that costs were incurred by the government department in resisting the complaint. Again, the reference in the Tribunal's reasons to its general experience in dealing with complaints, even to the extent that they can be read as addressing specifics of the present case, were not such as to justify a denial of costs to the Crown. That Georgian College had to navigate through complex legal issues and presented its case in a forthright manner, did not justify denial of costs to the successful party.

The Tribunal's final argument was that it had a duty to ensure Canadian compliance with NAFTA and authority to encourage complainants to come forward. Its costs policy was said to be consistent with that objective. While the Tribunal's costs policy would indeed encourage complainants to come forward, it was unable to point to any statutory authority for its taking on a pro-active role by encouraging complaints. Providing a forum for dispute resolution was one thing; encouraging disputes was quite another.

The Tribunal, in adhering to its practice in the case at bar, fettered its discretion and its decision had to be set aside and the matter referred back so that it could exercise its discretion on proper principle.

Statutes and Regulations Judicially Considered

Agreement on Internal Trade, Canada Gazette, Part I, Vol. 129, No. 17 (29 April 1995).
Canadian International Trade Tribunal Act, R.S.C., 1985 (4th Supp.), c. 47, s. 30.16 (as enacted by

S.C. 1993, c. 44, s. 44).
Employment Insurance Act, S.C. 1996, c. 23.
National Transportation Act, R.S.C. 1970, c. N-17.
North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, December 17, 1992, [1994] Can. T.S. No. 2.

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Cases Judicially Considered

Applied:
Dr. Q. v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226; (2003), 223 D.L.R. (4th) 599; [2003] 5 W.W.R. 1; 11 B.C.L.R. (4th) 1; 48 Admin. L.R. (3d) 1; 179 B.C.A.C. 170; 302 N.R. 34.
Law Society of New Brunswick v. Ryan, [2003], S.C.R. 247 (2003), 223 D.L.R. (4th) 577; 48 Admin. L.R. (3d) 33; 31 C.P.C. (5th) 1; 302 N.R. 1.
Bell Canada v. Consumers' Association of Canada, [1986] 1 S.C.R. 190; (1986), 26 D.L.R. (4th) 573; 17 Admin. L.R. 205; 9 C.P.R. (3d) 145; 65 N.R. 1.
Ryan v. McGregor (1925), 58 O.L.R. 213 (C.A.).
Donald Campbell and Company Limited v. Pollack, [1927] A.C. 732 (H.L.).
R. v. James Lorimer and Company Limited, [1984] 1 F.C. 1065; (1984), 77 C.P.R. (2d) 262; 180 N.R. 351 (C.A.).

Referred to:
Georgian College of Applied Arts and Technology (Re), [2002] C.I.T.T. No. 49 (QL).
Flolite Industries (Re), [1998] C.I.T.T. No. 26 (QL).
Stelco Inc. v. British Steel Canada Inc., [2000] 3 F.C. 282; (2000), 20 Admin. L.R. (3d) 159; 252 N.R. 364 (C.A.).
Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services), [2002] 1 F.C. 292; (2001), 202 D.L.R. (4th) 610; 36 Admin. L.R. (3d) 171; 274 N.R. 69 (C.A.).
Chieu v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 84; (2002), 208 D.L.R. (4th) 107; 37 Admin. L.R. (3d) 252; 18 Imm. L.R. (3d) 93; 280 N.R. 268.
Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc., [2001] 2 S.C.R. 100; (2001), 199 D.L.R. (4th) 598; 29 Admin. L.R. (3d) 56; 12 C.P.R. (4th) 417; 270 N.R. 153.
Canada (Deputy Minister of National Revenue, Customs and Excise) v. Schrader Automotive Inc. (1999), 240 N.R. 381; 4 T.T.R. (2d) 179 (F.C.A.).
Telecom. Decision CRTC 81-5 (Re), [1984] 1 F.C. 79; (1983), 147 D.L.R. (3d) 37; 34 C.P.C. 121; 72 C.P.R. (2d) 162; 48 N.R. 197 (C.A.).
Henderson v. Laframboise (1930), 65 O.L.R. 610; [1930] 4 D.L.R. 273 (C.A.).

CCH Canadian Ltd. v. Law Society of Upper Canada (2000), 184 D.L.R. (4th) 186; 4 C.P.R. (4th) 129 (F.C.T.D.).
Canada (Attorney General) v. McNally Construction Inc., [2002] 4 F.C. 633; (2002), 214 D.L.R. (4th) 478; 42 Admin. L.R. (3d) 1; 291 N.R. 139 (C.A.).

APPLICATION for judicial review of a CITT decision denying an award of costs to the Crown although successful in a matter before it (Georgian College of Applied Arts and Technology (Re), [2002] C.I.T.T. No. 73 (QL)). Application granted.

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Appearances:

Susanne G. Pereira, for the applicant.
Kevin D. MacNeill, for the respondent.

Solicitors of record:

Deputy Attorney General of Canada, for the applicant.
Graham, Wilson and Green, Barrie, Ontario, for the respondent.

The following are the reasons for judgment rendered in English by

1 **NOËL J.A.**:-- This is an application for judicial review of a decision by the Canadian International Trade Tribunal (the Tribunal) [[2002] C.I.T.T. No. 73 (QL)] not to award costs in favour of the applicant despite its success in overcoming the procurement complaint which had been brought by the respondent. The applicant maintains that in refusing to award costs in its favour, the Tribunal fettered its discretion by taking into account irrelevant considerations and by ignoring relevant considerations.

THE FACTS

2 On February 27, 2002, the respondent Georgian College of Applied Arts and Technology filed a complaint with the Tribunal alleging that Human Resources Development Canada's (HRDC) method of selecting service providers for certain employment assistance programs pursuant to the Employment Insurance Act [S.C. 1996, c. 23] violated the North American Free Trade Agreement [North American Free Trade Agreement Between the Government of Canada, the Government of

the United Mexican States and the Government of the United States of America, December 17, 1992, [1994] Can. T.S. No. 2] (NAFTA) and the Agreement on Internal Trade [Canada Gazette, Part I, Vol. 129, No. 17 (29 April 1995)] (AIT).

3 On March 6, 2002, the Tribunal informed the parties that the complaint had been accepted for inquiry. At the same time, the Tribunal issued an order [page532] postponing the award of any contract in connection with the procurement pending its determination on the validity of the complaint.

4 On April 2, 2002, HRDC filed a government institution report in response to the complaint in which HRDC submitted that the Tribunal was without jurisdiction to hear the complaint since the selection process was not a procurement within the meaning of NAFTA or AIT.

5 By letters dated May 2, 2002 and May 13, 2002, the Tribunal requested that HRDC provide additional information. HRDC complied with these requests on May 7, 2002 and on May 15, 2002 respectively.

6 On May 29, 2002, the Tribunal issued a determination in which it dismissed the complaint in its entirety. In its statement of reasons released on July 16, 2002 [[2002] C.I.T.T. No. 49 (QL)], the Tribunal indicated that it had rejected the complaint on the basis that it did not have jurisdiction. The Tribunal did not address the question of costs in either its initial determination or in its statement of reasons despite the fact that costs had been sought by HRDC.

7 By letter dated July 17, 2002, HRDC again requested that the Tribunal address the issue of costs.

8 On August 9, 2002 [[2002] C.I.T.T. No. 73 (QL)], the Tribunal denied HRDC's request for costs by way of an addendum which is the subject of this application.

THE DECISION UNDER REVIEW

9 The Tribunal justified its refusal to award costs on the basis that Georgian College, although its claim had been dismissed, had acted in good faith in bringing the complaint and that counsel for HRDC receive salaries for their services. The Tribunal also expressed the view that little purpose would be served by awarding costs to HRDC while this would add to the burden faced by complainants when deciding whether to file a complaint. The precise reasoning of the Tribunal is as follows, at paragraphs 3-9:

[page533]

Subsection 30.16(1) of the CITT Act provides that the Tribunal may award "costs of, and incidental to, any proceedings before it in relation to a complaint". When a complainant is successful, the Tribunal usually awards the complainant its reasonable costs, in a manner consistent with the Tribunal's Procurement Cost Guidelines.

At times, a complaint is so apparently without merit that the Tribunal does not even commence an investigation. At other times, a complaint demonstrates a reasonable indication of a breach at the initiation stage, but, upon further investigation, it becomes clear that the complaint lacks merit. Also, a complaint may be seemingly meritorious, but, for "technical" reasons, the Tribunal cannot conclude that there has been a breach of any of the relevant agreements, or there is simply insufficient evidenced to satisfy it that an agreement has been breached.

In the Tribunal's experience, most complaints have a degree of merit and are pursued by the complainants in a forthright and candid manner. Though complainants present their cases in the most favourable light possible, the Tribunal rarely sees them acting in a way that would indicate that the complaints are improper or abusive or that the complainants lack candour.

Complainants may range from very small to very large organizations. They devote time, money and resources in preparing a bid. When they feel aggrieved and decide to file a complaint, they devote more time, money and resources. It is not unusual for complainants to retain outside counsel to assist them navigate the world of procurement law and procedures. In addition to the costs and time that they have expended, they may have lost the opportunity to win a government contract.

On the one hand, HRDC was represented by salaried counsel from the Department of Justice whose responsibilities included representing HRDC's interests in this matter. On the other, the complainant often faces a difficult decision with regard to filing a complaint but must also incur additional costs in pursuing its complaint.

Generally speaking, little purpose would be served by awarding costs to HRDC and thereby adding to the burden that a complainant already bears, except in those cases where a complainant's conduct demands it. This may arise, for

> example, where it becomes clear that a complaint was frivolous or vexatious, where a complainant was not candid and forthright before or during the investigation or where a complainant acted in a way that amounts to an abuse of process. This is not an exhaustive list of the circumstances in which the Tribunal may award complaint costs to a [page534] government department, but it does indicate the type of conduct that would generally warrant the award of costs.
>
> In the present case, Georgian College presented its case in a forthright and professional manner. While Georgian College was ultimately unsuccessful, in the Tribunal's opinion, it acted in good faith. The Tribunal sees no reasons why, in the circumstances of this case, costs should be awarded to HRDC. Consequently, HRDC's request for costs is denied.

10 It was pointed out during the hearing that the above-quoted reasons are virtually identical to those given by the Tribunal in an earlier decision (Flolite Industries (Re), [1998] C.I.T.T. No. 26 (QL) file No. PR-97-045, May 8, 1998). As here, the government institution concerned had been successful in resisting a complaint and, upon noting that its request for costs had gone unaddressed in the Tribunal's reasons, had made a further request that costs be addressed. This resulted in the issuance of an addendum bearing the same language as the addendum issued in this case.

11 In the same vein, a review of the decisions reached by the Tribunal conducted by the applicant for the period of April 1, 1999 to December 2, 2002 reveals that amongst the 50 cases where complaints were dismissed in their entirety during that period, the Tribunal refused to award costs in favour of the government institution concerned in every case. Conversely, among the 37 cases where complaints were upheld, the Tribunal awarded costs to the complainant in every case. In the 19 cases where success was divided, the Tribunal awarded costs in favour of the complainant.

12 While the respondent did allege that the period underlying this review was arbitrarily chosen, it has placed no material before the Court which would suggest that a different pattern can be established by reference to another period. Nor has it challenged the accuracy of the reported figures with respect to the period surveyed.

13 Against this background, it is apparent that the Tribunal has over the years adhered to a practice of awarding costs to successful complainants while denying costs to the Crown although successful in resisting [page535] complaints; and awarding the Crown its costs only where it can be shown that the complaint was frivolous, vexatious or where some reprehensible conduct can be attributed to the complainant. It is also clear from the reasons that the Tribunal adhered to this practice in denying costs in this instance.

ANALYSIS

Standard of Review

14 The appropriate approach to determining the standard of review was reiterated by the Supreme Court in the recent decision of Dr. Q. v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226. At paragraph 26, McLachlin C.J. described the pragmatic and functional approach as follows:

> In the pragmatic and functional approach, the standard of review is determined by considering four contextual factors -- the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particular; and, the nature of the question -- law, fact, or mixed law and fact. The factors may overlap. The overall aim is to discern legislative intent, keeping in mind the constitutional role of the courts in maintaining the rule of law.

15 Applying this approach to the present case, I note that the procurement complaint determinations made by the Tribunal are not protected by a privative clause. However, neither is there a statutory right of appeal. The Tribunal is clearly a specialized body (e.g. see Stelco Inc. v. British Steel Canada Inc., [2000] 3 F.C. 282 (C.A.), at paragraph 18) and I am willing to accept that its expertise extends to the adjudication of procurement complaints (Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services), [2002] 1 F.C. 292 (C.A.)).

16 Section 30.16 [as enacted by S.C. 1993, c. 44, s. 44] of the Canadian International Trade Tribunal Act [R.S.C., 1985 (4th Supp.), c. 47] (the Act) is the statutory authority under which the decision in issue was rendered. It provides:

[page536]

> 30.16. (1) Subject to the regulations, the Tribunal may award costs of, and incidental to, any proceeding before it in relation to a complaint on a final or interim basis and the costs may be fixed at a sum certain or may be taxed.
>
> (2) Subject to the regulations, the Tribunal may direct by whom and to whom any costs are to be paid and by whom they are to be taxed and allowed.

17 The purpose of this provision is to grant the Tribunal the power to make determinations as to costs in procurement complaint proceedings. It gives the Tribunal the power to award costs, determine when, and by whom they should be payable. Because such costs awards are made in the context of proceedings which are within the Tribunal's specialized jurisdiction, its expertise arguably extends to the framing of these awards.

18 The first three factors identified by McLachlin C.J. in Dr. Q. would therefore tend to indicate that a relatively high degree of deference would be owed to the Tribunal in reviewing its decision.

19 The fourth factor -- i.e. the nature of the question -- is of particular significance in the present case. The Tribunal's determination, to the extent that it results from the simple exercise of the Tribunal's statutorily conferred discretion and considering the other factors noted above, would suggest the application of a standard of "patent unreasonableness". This was the standard proposed by the parties at the hearing.

20 However, the decision in this case does not involve the simple exercice of the Tribunal's discretion to award costs. What is in issue here is the Tribunal's practice of denying costs to the Crown despite its success, while awarding costs to complainants in the same circumstances. It seems clear when regard is had to the record before us and to the generic wording of the reasons given by the Tribunal that this judicial review is directed not so much against the decision denying costs, as against the practice which the Tribunal adhered to in denying such costs.

[page537]

21 Keeping this in mind, the real question to be decided in this case is whether the practice adhered to by the Tribunal over the years, which resulted in the denial of costs in this instance, is authorized by the Act. This is a pure question of law, which indicates a lower level of deference than that which would apply to the simple exercise of discretion. Consideration must also be given to the jurisdictional nature of this decision (Chieu v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 84, at paragraph 24, per Iacobucci J.) as well as to its obvious precedential value (Dr. Q., supra, at paragraph 34, per McLachlin C.J.). Both of these factors emphasize the appropriateness of a less deferential standard.

22 The nature of the question, properly understood, suggests that this Court may be in as good a position as the Tribunal to decide the issue in this case. However, I believe that the decision should nevertheless be reviewed on a standard of reasonableness, recognizing as I must that the Tribunal's expertise in procurement matters possibly extends to the awarding of costs (Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc., [2001] 2 S.C.R. 100, at paragraphs 32-33; Canada (Deputy Minister of National Revenue, Customs and Excise) v. Schrader Automotive Inc. (1999), 240 N.R. 381 (F.C.A.), at paragraphs 4-5).

23 The reasonableness standard requires a determination as to whether there are reasons capable of supporting the decision. The Supreme Court recently explained that this approach should focus on the reasons provided by the decision maker. In Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247, Iacobucci J. stated (paragraph 49):

> ... the reasonableness standard requires a reviewing court to stay close to the

> reasons given by the tribunal and "look to see" whether any of those reasons adequately support the decision. Curial deference involves respectful attention, though not submission to, those reasons.

24 Accordingly, it is incumbent upon this Court to focus on the above-quoted reasons of the Tribunal to [page538] determine whether they disclose a reasonable justification for the practice which resulted in the denial of costs in this instance. It should not be necessary to look beyond the Tribunal's reasons in this respect, particularly since it can be assumed that the Tribunal provided its full answer to the respondent's repeated requests for costs in this and in other cases dating back to 1998.

Application of the Standard

25 In Bell Canada v. Consumers' Association of Canada, [1986] 1 S.C.R. 190, it was held (at page 207) that in the absence of words to the contrary, "costs" in section 73 of the National Transportation Act [R.S.C. 1970, c. N-17] carries the same general connotation as legal costs, that is being for the purpose of indemnification or compensation. In the course of his reasons, Le Dain J. writing for a unanimous Court quoted (at page 202) the following passage from Middleton J.A. in Ryan v. McGregor (1925), 58 O.L.R. 213 (C.A.) [as page 216]:

> The fundamental principle is thus clearly stated by Baron Bramwell in the case of Harold v. Smith (1960), 5 H. & N. 381, 385: "Costs as between party and party are given by the law as an indemnity to the person entitled to them: they are not imposed as punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the damnification can be found out, the extent to which costs ought to be allowed is also ascertained."

26 An award of costs, whether made in a judicial proceeding or in a proceeding before a regulatory or other Tribunal and apart from some statute or regulation providing for the contrary, is in the discretion of the Court or the Tribunal (Telecom. Decision CRTC 81-5 (Re), [1984] 1 F.C. 79 (C.A.), at page 84, per Urie J.A.). Section 30.16 expressly provides the Tribunal with this discretion, and is to that extent confirmative of the case law.

27 In the absence of some indication to the contrary, the exercise of this discretion requires consideration of the facts connected with or leading up to the litigation with respect to which the award is made, including the [page539] outcome of the dispute (Henderson v. Laframboise (1930), 65 O.L.R. 610 (C.A.)).

28 In the normal course, and absent indications to the contrary, costs usually go to the successful party. Similarly, costs are not usually awarded where success is evenly divided in the absence of some factor dictating a different result (CCH Canadian Ltd. v. Law Society of Upper Canada (2000), 184 D.L.R. (4th) 186 (F.C.T.D.) at page 190). In Donald Campbell and Company Limited v. Pollack, [1927] A.C. 732 (H.L.), Viscount Cave L.C. gave the following account of the discretion to

award costs [at pages 811-812]:

> A successful defendant in a non-jury case has no doubt, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the plaintiff; but he has no right to costs unless and until the Court awards them to him, and the Court has an absolute and unfettered discretion to award or not to award them. This discretion, like any other discretion, must of course be exercised judicially, and the judge ought not to exercise it against the successful party except for some reason connected with the case. Thus, if -- to put a hypothesis which in our Courts would never in fact be realized -- a judge were to refuse to give a party his costs on the ground of some misconduct wholly unconnected with the cause of action or of some prejudice due to his race or religion or (to quote a familiar illustration) to the colour of his hair, then a Court of Appeal might well feel itself compelled to intervene. But when a judge, deliberately intending to exercise his discretionary powers, has acted on facts connected with or leading up to the litigation which have been proved before him or which he has himself observed during the progress of the case, then it seems to me that a Court of Appeal, although it may deem his reasons insufficient and may disagree with his conclusion, is prohibited by the statute from entertaining an appeal from it.

29 This Court applied the above-quoted passage in R. v. James Lorimer and Company Limited, [1984] 1 F.C. 1065 (C.A.) where the relevance of similar considerations was at issue. In that case, the Trial Division Judge [T-2216-81, April 30, 1982, not reported] had exercised his discretion not to award costs to the Crown despite the Crown's success in the proceeding [page540] before him. Mahoney J.A., writing for this Court, noted that the Trial Judge had refused to award costs on the basis that he did not see fit to "punish" the defendant or "further [its] burden" and also because he viewed the Crown as an "unusual plaintiff" which could pay its own costs. In overturning the decision of the Trial Judge, Mahoney J.A. stated (pages 1076-1077):

> It is trite law that costs are not awarded to punish an unsuccessful party. There was a time when the "rule of dignity" dictated that the Crown neither asked nor paid costs in the ordinary course of events. That time is long past and the position of the Crown, even if it be "unusual", is no more relevant than the colour of a litigant's hair. With respect, none of the reasons given for denying the appellant costs have anything to do with the case nor any facts connected with it or leading up to it.

30 Considering that the broad discretion to award (or not to award) costs must nevertheless be exercised judicially and staying close to the reasons offered by the Tribunal in support of its decision (Ryan, supra), I am unable to detect any reasonable justification for denying costs in this instance. I first note that section 30.16, which is the only statutory authority to which the Tribunal

referred in its reasons (paragraph 3), does not authorize the Tribunal to adhere to a practice of denying costs to the Crown despite its success. Quite to the contrary, this provision, on the face of it, envisages that costs can be awarded to either party.

31 Looking at the remainder of the reasons, the fact that HRDC was represented by salaried employees (reasons, paragraph 7) is not a relevant consideration. Furthermore, the reasons give no consideration to the principle of indemnification and do not recognize the fact that costs were incurred by HRDC in resisting the complaint brought against it. I also note that paragraphs 4, 5 and 6 of the reasons relate to the Tribunal's general experience in dealing with complaints and, as such, bear no connection with the litigation with respect to which costs were sought.

[page541]

32 In this last connection, the respondent argued that although the observations made in these paragraphs are of a general nature, some of the facts in issue in this case come within the profile of cases to which the Tribunal was alluding in making these comments. As such, the respondent argued that these observations are relevant and justify the decision of the Tribunal denying costs to the applicant.

33 Assuming that these paragraphs can be read as addressing the specifics of the present case, I do not believe that any of the observations which they embody can justify the denial of costs to the applicant. In particular, the fact that the respondent may have had to navigate through complex legal issues, devote time, money and resources to the pursuit of the complaint or that it presented its case in a forthright manner (reasons, paragraphs 5 and 6) does not justify a denial of costs to the successful party. After all, the end result establishes that HRDC was well advised to resist the complaint and costs were incurred in the process of doing so.

34 Similarly, the fact that the complaint was "seemingly meritorious" at the initial stage (reasons, paragraph 4) is not a valid reason for ultimately denying costs to the successful party. A complaint which seems meritorious at the initial stage may turn out to be devoid of any merit at the final stage. Incidentally, this question cannot be answered in this case as there was no adjudication on the merits and hence no determination as to whether the complaint was meritorious.

35 Finally, looking beyond what is expressly stated by the Tribunal in its reasons, the respondent argued that the Tribunal, as the "bid challenge authority" (Canada (Attorney General) v. McNally Construction Inc., [2002] 4 F.C. 633 (C.A.), at paragraph 8) had a duty to ensure Canada's compliance with international obligations arising under NAFTA and AIT relating to procurement matters. As such, it was submitted that the Tribunal has the authority to encourage complainants to come forward, or at least not to discourage them from doing so. The Tribunal's costs policy is said to be justified on this basis.

[page542]

36 Although it seems clear that the practice of denying costs to the Crown despite its success has the effect of encouraging complainants to come forward, the Tribunal has alluded to no provision which would authorize it to implement measures towards that end. Indeed, the only statutory reference contained in the reasons is to section 30.16 which, as we have seen, provides for no such authority. The respondent has been unable to point to any other provision which could be construed as authorizing the Tribunal to assume a pro-active role in encouraging complaints.

37 I accept that Parliament has designated the Tribunal as the competent forum for adjudicating procurement complaints and that, in fulfilling this function, the Tribunal is called upon to give effect to the international obligations which bind Canada in relation to procurement matters. But there is a quantum leap between providing a forum for dispute resolution and encouraging disputes to take place. I can find nothing in the Act which would give the Tribunal authority to encourage or invite litigation in the area of procurement by adhering to a practice of denying costs to the Crown despite its success.

38 I therefore conclude that the Tribunal fettered its discretion by adhering to this practice in this instance.

39 I would allow the application for judicial review, set aside the decision of the Tribunal, and refer the matter back so that the Tribunal may exercise its discretion anew on proper principle, in the light of the foregoing reasons. The applicant should be entitled to the costs of this application.

STONE J.A.:-- I agree.
SEXTON J.A.:-- I agree.

cp/d/qllls

Case Name:

Canadian Assn. of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada

Between
Canadian Association of Broadcasters, Applicant, and Society of Composers, Authors and Music Publishers of Canada and Neighbouring Rights Collective of Canada, Respondents

[2006] F.C.J. No. 1547

[2006] A.C.F. no 1547

2006 FCA 337

2006 CAF 337

354 N.R. 310

54 C.P.R. (4th) 15

152 A.C.W.S. (3d) 415

Docket A-542-05

Federal Court of Appeal
Toronto, Ontario

Létourneau, Noël and Evans JJ.A.

Heard: October 12, 2006.
Judgment: October 19, 2006.

(24 paras.)

Intellectual property law -- Copyright -- Copyright Board -- Judicial review -- Application for judicial review of Copyright Board certification of tariffs payable by commercial radio stations allowed in part -- Canadian Association of Broadcasters argued Board had failed to consider its

objection to tariffs and had inadequate reasons -- Tariffs were increased to 4.2 per cent for SOCAN and 2.1 per cent for NRCC -- Objection that proliferation in rights holders had created a cumulative burden was not specifically addressed but was implicit and so Board had not erred by failing to consider relevant factor -- Canadian Association of Broadcasters did not object to increase in rate but in lack of reasons for amount of rate increase -- Board had failed to explain why it selected increase amounts and so failed in its duty -- Application allowed with costs and matter remitted to Board for redetermination with the two members who had not previously been on the panel to be included.

Statutes, Regulations and Rules Cited:

Copyright Act, s. 68(4)(b)

Counsel:

John B. Laskin and Andrew Bernstein for the Appellant.

Y.A. George Hynna and Gilles M. Daigle for the Respondent.

Glen A. Bloom and Steve Seiferling for the Respondent.

The judgment of the Court was delivered by

EVANS J.A.:--

A.

INTRODUCTION

1 This is an application for judicial review by the Canadian Association of Broadcasters ("CAB") to set aside a decision made by the Copyright Board pursuant to subsection 68(3) of the *Copyright Act*, R.S.C. 1985, c. C-42. In this decision, dated October 14, 2005, the Board certified tariffs of the royalties payable by commercial radio stations in the years 2003-2007 to the Society of Composers, Authors and Music Publishers of Canada ("SOCAN") and to the Neighbouring Rights Collective of Canada ("NRCC"). The tariffs are payable for the public performance of musical works and sound recordings in which members of the two collectives respectively hold rights.

2 The tariffs are based on a percentage of the gross annual advertising revenues of commercial radio broadcasters. From 1978 to 2002, the general rate of the SOCAN tariff for the public performance of musical works by commercial radio broadcasters remained unchanged at 3.2%.

Using the same methodology as for the SOCAN tariff, the Board approved a general rate for the NRCC tariff of 1.44% for the years 1998 to 2002.

3 In the decision under review, the Board certified a general rate for the SOCAN tariff of 4.2% and, because of its smaller repertoire, 2.1% for the NRCC tariff. The Board rejected the models for determining an appropriate royalty proposed by NRCC and CAB. Instead, it started with the existing SOCAN tariff and adjusted it in light of the evidence which the parties adduced.

4 The Board found that an increase to the tariff was warranted on three grounds: the existing tariff underestimated the value of music to radio stations' revenue; broadcasters were now using more music in their programming; and, as result of new formats and other developments in the industry, broadcasters used music more efficiently to target particular audiences and, hence, to increase their revenues.

B.

ISSUES AND ANALYSIS

5 CAB has challenged the tariffs on two grounds: the failure of the Board to consider an objection by CAB to the tariffs proposed by the collective societies, and inadequacies in the Board's reasons.

(i) Failure to consider cumulative royalty burden

6 CAB argued that the Board failed to take into account its objection to the proposed tariffs, namely that there had been a proliferation in the number of rights holders to be compensated. SOCAN was the original collective society. A tariff was certified for NRCC in 1998 and, in 2003, for CSI, which represents the holders of the rights to the reproduction of music. The CSI tariff is the smallest of the three. The increased financial burden that this has placed on the industry, it was said, should be recognized by the Board in certifying the tariffs for SOCAN and NRCC.

7 Although the "cumulative burden" argument is not specifically mentioned in the Board's reasons, it is in my opinion implicit in the Board's finding that, on the basis of the evidence of rising revenues, the industry can afford to pay increased royalties even greater than those certified by the Board. And, as Mr. Laskin, counsel for CAB, fairly pointed out, the Board refers to the combined rates payable to all three collectives in a footnote to its reasons.

8 In these circumstances, I am not persuaded that the Board erred in law by failing to consider a relevant factor which it was statutorily bound to consider.

(ii) Inadequacy of the reasons

9 CAB argued that the Board failed to provide adequate reasons for the following two findings: first, that the previous royalty rate underestimated by between 10-15% the value of music to

commercial radio stations, and that a 10% increase in the SOCAN tariff was warranted; second, that broadcasters' increased efficiency in their use of music to enhance revenues warranted a 7.5% increase in the tariff.

10 The Board is required by paragraph 68(4)(*b*) of the *Copyright Act* to provide the parties with a copy of the approved tariffs and the reasons for its decision. It is common ground that, in order to comply with this statutory duty, the Board's reasons must be adequate.

11 "Adequacy" is to be assessed in light of the functions performed by reasons: enhancing the quality of decisions, assuring the parties that their submissions have been considered, enabling the decision to be subject to a meaningful judicial review, and providing future guidance to regulates: see *VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25 (C.A) at paras. 17-22. Equally important, the adequacy of the reasons must be assessed in context, including the agency's record, the issues to which the reasons relate, and the scope of the agency's expertise.

12 It is also agreed that a royalty rate set by the Board in the exercise of its broad statutory discretion is subject to review only on the ground of patent unreasonableness: *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Broadcasters* (1999), 1 C.P.R. (4th) 80 (F.C.A.). However, the adequacy of the Board's reasons is a question of procedural fairness and, as such, is for the Court to decide for itself.

(a) historical undervaluation of music

13 CAB concedes that the Board's finding that the existing rate had historically undervalued music to a radio station's revenues is rationally supported by the evidence, and does not challenge it. However, the difficulty lies with the Board's explanation of its quantification of the amount of the underestimation. On this issue, the Board simply states (at p. 20 of its reasons) that "based on the evidence taken as a whole", the undervaluation "is important and lies in an interval of between 10 and 15 percent." It goes on to say that, since "the evidence is not more precise," the Board chooses "to be careful" and values the underestimation at "about 10 percent".

14 CAB says that there is nothing in the record to explain the Board's quantification of the undervaluation: the Board's reasons reveal so little of the basis of its decision on this issue as to deny CAB its right to obtain a meaningful judicial review of the Board's decision. The quantification of a tariff is the core of the Board's decision.

15 The Board's reasons are very thin. Nor could counsel for SOCAN or NRCC refer us to anything in the evidence that would explain how the Board arrived at the 10-15% range. Indeed, as the Board's reasons indicate, the parties had not adduced evidence directly bearing on the quantification of the amount of the undervaluation. In effect, counsel argued that the Board was entitled to use its expertise to assess the evidence as whole and that it was not required to explain how it translated the evidence of undervaluation into a percentage.

16 The Board is entitled to the greatest deference in the exercise of its discretion to set a rate and, accordingly, the discretionary decisions lying at the heart of its expertise are reviewable only for patent unreasonableness. However, it must explain the basis of its decisions in a manner that enables the Court on judicial review to determine on the basis of the reasons, read in context, whether the decision was rationally supportable. When an administrative tribunal's decision is reviewable on a standard of reasonableness, its reasons are the central focus of a judicial review: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, at paras. 48-9, 54-5.

17 In my view, it was not sufficient in the circumstances of this case for the Board to justify its quantification of the undervaluation by merely referring to the evidence taken as a whole. It is not enough to say in effect: "We are the experts. This is the figure: trust us." The Board's reasons on this issue served neither to facilitate a meaningful judicial review, nor to provide future guidance for regulatees.

18 I recognize that the Board's difficulty in this respect seems to have stemmed in part from the failure of CAB to put in evidence showing, for example, the relative rates of return earned by radio stations which made a significant use of music and those which did not. Parties have a responsibility to produce relevant evidence in support of their position. This is not a case where the reasons fail to deal with significant evidence that appears to be contrary to its conclusion.

19 However, the Board may always ask the parties to provide evidence of the amount of the undervaluation. If none is forthcoming, then it can explain how it has made its best efforts to estimate an appropriate rate increase. It is not bound to quantify each of the components that justify an increase, but may choose simply to explain the reasoning supporting its quantification of the global royalty rate increase.

(b) increased efficiency in the use of music

20 Prior to the hearing of the application for judicial review, CAB abandoned its challenge to the sufficiency of the evidence to support the Board's finding that radio stations are now able to make more efficient use of music to attract particular audiences. But it argued that the Board's reasons do not provide an adequate explanation of its conclusion that this factor warranted an increase in the tariff of between 5 and 10%, and its decision to select the mid point, 7.5%.

21 The Board found (at p. 27 of its reasons) that in the years 1998-2002 the advertising revenue of the industry had increased by an average of $40 million each year. Acknowledging that the contribution that music had made to this increase could not be precisely measured, the Board stated that 5 to 10% of the increase would adequately compensate the rights-holders for the greater efficiencies that broadcasters had been able to achieve through the use of music. The Board chose the mid-point in this range, bringing the increased royalty to 4.2%.

22 For the reasons given above, the Board's failure to explain why it selected 7.5% breaches its duty to provide adequate reasons for its decision. I appreciate that this may be more a question of

expert judgment than evidence. Nonetheless, the Board must be more forthcoming in revealing the chain of reasoning that led it to its conclusion.

C. CONCLUSIONS

23 The inadequacies of the Board's reasons respecting the quantifications of the royalty increases attributable to both the historical undervaluation of music, and the greater efficiencies achieved by the industry through its use of music, in my opinion warrant the intervention of the Court.

24 Accordingly, I would grant the application for judicial review with costs, set aside the Board's decision, and remit the matter to the Board to re-determine the issues in respect of which the reasons have been found to be inadequate. On these issues of quantification, the Board may invite the parties to supplement the existing record with new evidence and submissions. When rehearing this matter, the Board shall be constituted to include the two members who were not members of the panel which rendered the decision under review.

EVANS J.A.
LÉTOURNEAU J.A.:-- I agree.
NOËL J.A.:-- I agree.

cp/e/qw/qlgxc

Case Name:

Canadian National Railway Co. v. York (Regional Municipality)

Between
Canadian National Railway Company, applicant, and
The Regional Municipality of York and the Canadian Transportation Agency, respondents

[2003] F.C.J. No. 1842

[2003] A.C.F. no 1842

2003 FCA 474

2003 CAF 474

Docket 03-A-45

Federal Court of Appeal

Noël, Nadon and Pelletier JJ.A.

Heard: In writing.
Judgment: December 10, 2003.

(3 paras.)

Railways -- Regulation -- Canadian Transport Commission (now Canadian Transportation Agency) -- Appeals.

Motion by the Canadian National Railway Company for leave to appeal from a decision by the Canadian Transportation Agency.

HELD: Motion allowed. Canadian raised a question of law that was fairly arguable.

Counsel:

Written representations by:

Gilles B. Legault, for the applicant.
Christine A. Zablocki, for the respondent (Regional Municipality of York).

The judgment of the Court was delivered by

1 **NADON J.A.**:-- Before us is a motion by the applicant, Canadian National Railway Company, for an order granting leave to appeal decision 517-R-2003 of the Canadian Transportation Agency, dated September 10, 2003.

2 After reviewing the affidavit evidence of Judy Jones and Leonard Ng, and the written submissions put forward by the applicant and the respondents, I am satisfied that the matter raises a question of law which is fairly arguable (See Canadian Pacific Railway v. Canada (Transportation Agency), [2003] F.C.J. No. 997, 2003 FCA 271, per Rothstein J.A. at 5).

3 Consequently, the applicant's motion for leave to appeal decision 517-R-2003 of the Canadian Transportation Agency, dated September 10, 2003, should be granted.

NADON J.A.
NOËL J.A.:-- I agree
PELLETIER J.A.:-- I agree

cp/e/qw/qlspg/qlhcs

Indexed as:

Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)

Between
Carlos Arturo Cepeda-Gutierrez, Mayelo Ivonne Macias De Cepeda and Arturo Itzhak Cepeda-Macias, applicants, and
The Minister of Citizenship and Immigration, respondent

[1998] F.C.J. No. 1425

[1998] A.C.F. no 1425

157 F.T.R. 35

1998 CanLII 8667

83 A.C.W.S. (3d) 264

Court File No. IMM-596-98

Federal Court of Canada - Trial Division
Toronto, Ontario

Evans J.

Heard: September 18, 1998
Judgment: October 6, 1998

(15 pp.)

Application by Cepeda-Gutierrez to set aside the Refugee Division's decision dismissing his claim for refugee status. Cepeda-Gutierrez was a Mexican citizen who came to Canada in 1996. He claimed refugee status on the ground that, while he lived in Mexico City, his refusal to pay officials part of his earnings as a taxi driver caused him to be beaten and threatened. He went to stay with a friend outside of Mexico City but saw police vehicles near the house on several occasions. There was documentary evidence about the scale of official corruption and the violence endemic to the taxi industry in Mexico City. A psychologist testified that Cepeda-Gutierrez suffered from

post-traumatic stress disorder which would worsen if he had to return to Mexico. The Refugee Division found that Cepeda-Gutierrez had a well-founded fear of persecution but rejected his claim on the ground that he had an internal flight alternative and it would not be unduly harsh for him to relocate in Mexico outside of Mexico City. Cepeda-Gutierrez argued that the Refugee Division failed to take into account the psychological evidence and the evidence showing the possibility of persecution outside of Mexico City.

HELD: Application allowed. The decision was set aside and referred to a differently constituted panel. In light of the psychological evidence before it and the evidence showing Cepeda-Gutierrez's fear of persecution outside Mexico City, the Refugee Division erred in finding that it would not be unduly harsh for Cepeda-Gutierrez to relocate outside of Mexico City.

Statutes, Regulations and Rules Cited:

Federal Court Act, s. 18.1(4).

Immigration Act, s. 2(1).

Counsel:

Douglas Lehrer, for the applicant.
Brian Frimeth, for the respondent.

EVANS J. (Reasons for Order):--

A. Introduction

1 This is an application for judicial review brought under section 18.1 of the Federal Court Act in which the principal applicant asks the Court to set aside a decision of the Convention Refugee Determination Division of the Immigration and Refugee Board (hereinafter the Refugee Division) dated January 19, 1998 dismissing his claim for refugee status on the ground that he had an internal flight alternative anywhere in Mexico outside Mexico City. The other applicants are his wife and son, whose claims for refugee status were rejected with the principal applicant's.

2 The principal applicant relies on section 18.1(4)(d) of the Federal Court Act which provides that the Court may set aside a decision on the ground that the federal board, commission, or other tribunal under review

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

He alleges in particular that, by failing in its reasons to refer to items of evidence before it, the Refugee Division made findings of fact pertaining to the availability of an internal flight alternative in Mexico that were erroneous, and were made "without regard for the material before it".

3 The other applicants' claims, which are also based on their family relationship to the principal applicant, succeed or fail with the claim of the principal applicant. It is not necessary for the purpose of these reasons to deal at length with their claims.

B. The facts

4 The applicant is a citizen of Mexico who, on his arrival in Canada on September 14, 1996, claimed to be a refugee, alleging that he had a well-founded fear of persecution on the grounds of political opinion and membership of a particular social group (a taxi drivers' union). The Refugee Division found that, while he was a taxi driver in Mexico City, the applicant had been the subject of beatings and threats of violence in 1995 and 1996 by the federal judicial police, the force responsible for Mexico City, and by persons unknown who entered his taxi as passengers. His taxi was at one time stolen and vandalized, and he and his wife were robbed on different occasions. The applicant's evidence was that his problems stemmed from his refusal to hand over to corrupt officials a percentage of his daily earnings, and his becoming a member of a taxi drivers' union that was formed to resist demands of this nature.

5 In May of 1996 he moved to the house of a friend in the town of Toluca, outside the district of the federal judicial police, where he stayed until August of that year. During this time, the applicant testified, on approximately five occasions he saw outside the house cars with tinted glass windows of the kind often used by the police. Fearing that he was still being sought by the police, he returned to Mexico City, where he was stopped by federal judicial police, who took his money and told him that they would kill him if they saw him again. He filed a complaint with the National Human Rights Commission against the federal judicial police about this incident, and shortly thereafter left for Canada.

6 The applicant provided documentary evidence about the scale and nature of official corruption, and the attendant violence, that represent serious social and human rights problems in Mexico. He claimed that municipal government is effectively run by officials of the national government, and that the influence of the governing party, the Partido Revolucionario Institucional (the PRI) was pervasive throughout governmental bodies in Mexico. Thus, while the taxi industry in Mexico City is formally run by municipal officials, they are subject to direction from officials at the national level. As a stark indication of the violence that is endemic in the taxi industry, the applicant stated in his personal information form that in May 1996 35 taxi drivers were murdered in Mexico City, 20 of whom worked from the same base as the applicant.

7 A psychologist, Dr. Pilowsky, whom the applicant and his wife consulted in Toronto, testified that in her opinion the applicant was suffering from post-traumatic stress disorder, a condition frequently found in victims of persecution. She went on to say that, while the applicant's condition

had improved while he had been in Canada, the symptoms, including depression, acute anxiety, insomnia and a lack of interest in life, were likely to recur if he was required to return to Mexico, "the site of the traumatizing stressor", to use the words found in the report that Dr. Pilowsky prepared for the applicants' counsel. Dr. Pilowsky also reported that Ms. Cepeda was suffering from moderate anxiety and post-traumatic nightmares. For both of them, Dr Pilowsky concluded, a return to Mexico would be a "highly retraumatizing experience".

C. The Board's decision

8 It is important to emphasize that in its reasons for decision the Refugee Division stated that the claimants were credible, and held that they had a well-founded fear of persecution in Mexico City. However, as I have already indicated, the Refugee Division rejected their claims to be recognized in Canada as refugees because they had an alternative flight alternative, and thus fell outside the definition of a Convention Refugee. Applying the two-pronged test established in Rasaratnam v. Canada (Minister of Employment and Immigration) [1992] 1 F.C. 706 (F.C.A.) for determining whether an alternative flight alternative exists, the Refugee Division found that on the balance of probabilities there was no serious possibility that the applicants would be persecuted outside Mexico City, and that it was not otherwise unreasonable for them to live elsewhere in Mexico.

9 The Refugee Division based its finding that the applicants had no reason to fear persecution outside Mexico City on the ground that this was where the incidents giving rise to their fear had occurred, and that the applicants had adduced no evidence that police forces outside the federal district were involved in persecuting the principal applicant. Moreover, the Refugee Division noted, the fact that the National Human Rights Commission had transferred the applicant's complaint to the Commission responsible for the federal district was evidence of the essentially local nature of the principal applicant's concerns.

10 The Refugee Division then turned to the contention that, even if there was no serious possibility that the applicant would be persecuted outside Mexico City, it was not unreasonable in all the circumstances for the applicants to establish residence elsewhere in Mexico, and that he therefore had an internal flight alternative. In particular, it was said:

> The panel is of the opinion that it would not be unduly harsh for the claimants to move. They are both young, the claimant's wife is a qualified teacher. The panel believes that the claimant's training as a driver gives him a skill that can easily be transferred to a new location. The panel does not believe that it is a denial of a core human right to expect the claimant to give up driving a taxi to avoid any possible links between the various taxi drivers unions. The claimant gave no indication that he intended to resume his union activities if he returned to Mexico.

D. The issues

11 The applicant takes no issue with the Board's formulation of the applicable legal tests to determine whether the applicant had an internal flight alternative, and was therefore not a refugee within the meaning of the Convention. Nor does he allege that, on the evidence before it, the Board's findings of fact that the applicant faced no serious possibility of persecution outside Mexico City and that it was not unreasonable for him to relocate elsewhere in Mexico, were made in a perverse or capricious manner. Rather, he says that, by failing in their reasons to mention and address the applicant's evidence that he saw what he thought were police vehicles outside the house in Toluca where he stayed in the spring and summer of 1996, the Board's finding that on the balance of probabilities there was no possibility that the applicant would be persecuted outside Mexico City was erroneous and made "without regard to the evidence".

12 The applicant makes a similar attack in respect of the Board's finding that it would not be unduly harsh to return the applicant to Mexico: the omission from its reasons of any reference to Dr. Pilowsky's evidence that, if returned to Mexico, the applicants' symptoms of post-traumatic stress disorder were likely to reemerge, rendered the finding erroneous and made without regard to the evidence.

13 Accordingly, this application for judicial review raises the following two issues:

1. Did the Refugee Division base its decision on an erroneous finding of fact when it found that there was no serious possibility that the applicant would be persecuted anywhere in Mexico, and was the finding of fact made without regard for the material before it, in so far as the reasons for decision make no mention of evidence that the applicant had seen police cars outside the house in Toluca where he was staying?
2. Did the Refugee Division base its decision on an erroneous finding of fact when it found that it would not be unreasonable to expect the applicant to relocate in Mexico, outside Mexico City, and was this finding of fact made without regard to the material before it, in so far as the Refugee Division failed to mention in its reasons evidence of the adverse psychological impact on the applicant of being returned to Mexico?

E. Analysis

14 It is well established that section 18.1(4)(d) of the Federal Court Act does not authorize the Court to substitute its view of the facts for that of the Board, which has the benefit not only of seeing and hearing the witnesses, but also of the expertise of its members in assessing evidence relating to facts that are within their area of specialized expertise. In addition, and more generally, considerations of the efficient allocation of decision-making resources between administrative agencies and the courts strongly indicate that the role to be played in fact-finding by the Court on an application for judicial review should be merely residual. Thus, in order to attract judicial

intervention under section 18.1(4)(d), the applicant must satisfy the Court, not only that the Board made a palpably erroneous finding of material fact, but also that the finding was made "without regard to the evidence": see, for example, Rajapakse v. Canada (Minister of Employment and Immigration), [1993] F.C.J. No. 649 (F.C.T.D.); Sivasamboo v. Canada (Minister of Employment and Immigration), [1995] 1 F.C. 741 (F.C.T.D.).

15 The Court may infer that the administrative agency under review made the erroneous finding of fact "without regard to the evidence" from the agency's failure to mention in its reasons some evidence before it that was relevant to the finding, and pointed to a different conclusion from that reached by the agency. Just as a court will only defer to an agency's interpretation of its constituent statute if it provides reasons for its conclusion, so a court will be reluctant to defer to an agency's factual determinations in the absence of express findings, and an analysis of the evidence that shows how the agency reached its result.

16 On the other hand, the reasons given by administrative agencies are not to be read hypercritically by a court (Medina v. Canada (Minister of Employment and Immigration) (1990), 12 Imm. L.R. (2d) 33 (F.C.A.)), nor are agencies required to refer to every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it (see, for example, Hassan v. Canada (Minister of Employment and Immigration) (1992), 147 N.R. 317 (F.C.A.). That would be far too onerous a burden to impose upon administrative decision-makers who may be struggling with a heavy case-load and inadequate resources. A statement by the agency in its reasons for decision that, in making its findings, it considered all the evidence before it, will often suffice to assure the parties, and a reviewing court, that the agency directed itself to the totality of the evidence when making its findings of fact.

17 However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": Bains v. Canada (Minister of Employment and Immigration) (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

Issue 1: a serious possibility of persecution

18 The first question therefore, to be determined, is whether the Board erred in finding that, on the balance of probabilities, there was no serious possibility that the applicant would be persecuted in Mexico outside Mexico City. The Refugee Division took the view that, on the evidence before it, the threats facing the applicant were strictly local in nature, and that once outside the jurisdiction of

the federal judicial police the applicant had no reason to fear that he or his family would be subject to further violence as a result of his union activity and other forms of resistance to the demands of corrupt officials.

19 The Board based this conclusion on the following evidence. First, it noted that the taxi industry was subject to the authority of local government officials, who had been the source of the applicant's difficulties, and that consequently, when outside their jurisdiction, the applicant had nothing to fear. However, this finding may be somewhat questionable in light of evidence before the Board, which was not contradicted, that central government officials, through the governing party, the PRI, exercise considerable influence on matters that are formally within municipal control: the web of corruption that blights sectors of public life in Mexico does not respect the legal divisions of power between the different levels of government.

20 The Board also relied on the fact that state police forces are separate and distinct and that there was no reason to think that a person such as the applicant, who was not on an official "wanted" list, would face the same kind of problems from members of police forces outside the federal district. However, the applicant's evidence that he had seen outside the house in Toluca cars with tinted windows similar to those often used by police forces was not contradicted. This indicates that the Board may have been mistaken in concluding that a law abiding citizen in Mexico who has been beaten, threatened and otherwise harassed for resisting the demands of corrupt officials by members of one police force has nothing to fear from members of other forces. On the other hand, it should also be noted that the fact that the applicant had been traced by the police to Toluca, which is in the state of Mexico and no more than approximately a hundred miles from Mexico City, does not necessarily prove that he would not be safe if he were to relocate much further away from the capital. Mexico, as counsel for the respondent reminded me, is a very large country, and the applicant's name is not in the national law enforcement computer records.

21 The Board inferred from the fact that the applicant's complaint to the national human rights body about the incident of police brutality in August 1996 was referred to the body for the federal district that the matter was of purely local concern. There was no evidence before the Board to this effect, and an equally plausible explanation may simply be that, since the complaint was against a member of the federal judicial police, it fell within the jurisdiction of the human rights body for the federal district. In other words, the reference by the national body did not necessarily signify the scale of the concern that the complaint raised.

22 Nonetheless, although I doubt whether I would have reached the same conclusion as the Refugee Division on this issue, on the basis of the evidence as a whole I am not persuaded by the applicant that the Board clearly erred when it found that on the balance of probabilities the applicant faced no serious possibility of persecution outside Mexico City and, perhaps, other cities, like Toluca, within the surrounding state of Mexico. It is therefore unnecessary for me to consider whether the Board's finding was "without regard to the evidence".

2. Unreasonable to expect the applicant to relocate in Mexico

23 The applicant also attacked the Board's finding that it would not be unduly harsh to expect the applicant to relocate himself and his family in another part of Mexico. Counsel for the Minister forcefully drew to my attention cases in which it had been held that it is not unreasonable to require a person to live in a part of her country of citizenship where she has no friends or family, the climate might be less favourable, or a different type of employment would have to be sought: see, for example, Thirunavukkarasu v. Canada (Minister of Employment and Immigration) (1993), 163 N.R. 232, 236-237 (F.C.A.). But I did not understand counsel to maintain that it would be reasonable for a person to be required to return to a country, despite the serious adverse effect that this would have upon the person's psychological well-being, such as the persistence of the symptoms of post-traumatic stress disorder. Rather, the dispute was whether on the totality of the evidence adduced in this case the Refugee Division had made an erroneous finding of fact "without regard for the material before it".

24 In her evidence, which was unchallenged, Dr. Pilowsky described the applicant's symptoms and concluded that:

> In my clinical opinion, having reviewed the clinical data emanating from the interview and after analysing the scores from the testing materials, Mr. Cepeda is currently suffering from symptoms of Posttraumatic Stress Disorder .... This client was likely suffering the full blown PTSD while living in Mexico but it appears that some of his symptoms, such as his nightmares, are abating in Canada.
>
> This client's PTSD condition is a direct result of his traumatic experiences in Mexico as he reported no prior history of psychological problems.....
>
> Posttraumatic Stress Disorder is a condition highly susceptible to intensification and reinvigoration of symptoms if the sufferer is exposed to triggering stimuli reminiscent of the original trauma. Consequently, it is my professional opinion that if Mr. Cepeda were made to return to Mexico, the site of the traumatizing stressor, he would become retraumatized and his psychological condition would worsen.
>
> If the client is allowed to remain in Canada, the chances for recovery are more promising particularly once the anxiety of his hearing vanishes.

25 Dr. Pilowsky was not asked why it would be re-traumatizing to require the applicant to return to a part of Mexico where he had not experienced persecution. Perhaps she did not consider this

possibility because it was not put specifically to her. Or perhaps she would say that, even though the applicant only experienced persecution in Mexico City, his belief that he was being sought by the police when he was in Toluca is likely to cause him to associate the traumatizing stressor with any of the judicial forces, whether state or federal. Moreover, his evidence that he fears the national authorities, and believes that the influence of corrupt officials extends through the PRI to the local government level, also suggests that the psychological source of his stress may not be confined to Mexico City.

26 We do not know, of course, how Dr. Pilowsky would define the precise location of the site of the applicant's traumatizing stressor. Nonetheless, in light of the psychological evidence before it, the Refugee Division erred in finding that it would not be unduly harsh for the applicant to relocate in Mexico outside Mexico City. The fact that the Refugee Division found that, in other respects, it would not be unreasonable to expect the applicant to return - such as the employment prospects of the applicant and his wife - does not mitigate the effect that Dr. Pilowsky predicts a return to Mexico is likely to have on his psychological condition. Indeed, some of those symptoms, such as depression, nightmares and a feeling of detachment, are likely make it much more difficult for him to undertake the search for new and different employment with the necessary energy and motivation.

27 Finally, I must consider whether the Refugee Division made this erroneous finding of fact "without regard for the material before it." In my view, the evidence was so important to the applicant's case that it can be inferred from the Refugee Division's failure to mention it in its reasons that the finding of fact was made without regard to it. This inference is made easier to draw because the Board's reasons dealt with other items of evidence indicating that a return would not be unduly harsh. The inclusion of the "boilerplate" assertion that the Board considered all the evidence before it is not sufficient to prevent this inference from being drawn, given the importance of the evidence to the applicant's claim.

28 I am supported in this conclusion by the decision of Richard J. (as he then was) in Singh v. Canada (Minister of Citizenship and Immigration) (1995), 30 Imm. L.R. (2d) 226 (F.C.T.D.), where the failure of the Refugee Division to mention a relevant and credible psychological report respecting the reasonableness of requiring a refugee claimant to return to his country of origin was held to be an error of law. There are other cases where the omission of any discussion of similar reports has been found not to vitiate the decision: Jhutty v. Canada (Minister of Citizenship and Immigration), [1996] F.C.J. No. 763 (F.C.T.D.); Canizalez v. Canada (Minister of Citizenship and Immigration), [1997] F.C.J. No. 1492 (F.C.T.D.); Randhawa v. Canada (Minister of Citizenship and Immigration), [1998] F.C.J. No. 749 (F.C.T.D.). However, in these cases, unlike the case at bar, the Board did at least specifically mention or acknowledge the report, so as to justify an inference that the Board had had regard to it.

F. Conclusion

29 Accordingly, the decision dismissing the applicants' claims to be recognized as Convention refugees is set aside, and the matter is remitted to a differently constituted panel of the Refugee Division to determine according to law, and in the light of these reasons, whether they are Convention refugees within the meaning of section 2(1) of the Immigration Act.

EVANS J.

cp/d/hbb

Indexed as:

Dunsmuir v. New Brunswick

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

[2008] 1 S.C.R. 190

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

2008 SCC 9

File No.: 31459.

Supreme Court of Canada

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

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

(173 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

Catchwords:

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

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

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

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

[page191]

Summary:

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

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

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

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

Held: The appeal should be dismissed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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History and Disposition:

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

Counsel:

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

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

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

BASTARACHE and LeBEL JJ.:--

I. Introduction

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

A. *Facts*

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

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

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

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

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

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

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

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

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

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

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

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

B. *Decisions of the Adjudicator*

(1) Preliminary Ruling (January 10, 2005)

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

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

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

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

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

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

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

C. *Judicial History*

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

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

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

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

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

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

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

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

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

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

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

II. Issues

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

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

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

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

A. *Judicial Review*

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

the matters delegated to administrative bodies by Parliament and legislatures.

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

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

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

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

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

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

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

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

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

B. *Reconsidering the Standards of Judicial Review*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. *Two Standards of Review*

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

(1) Defining the Concepts of Reasonabless and Correctness

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

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

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

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

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

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

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

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

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

(2) Determining the Appropriate Standard of Review

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. *Application*

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

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

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

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

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

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

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

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

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

(2) Was the Adjudicator's Interpretation Unreasonable?

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

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

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

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

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

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

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

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

A. *Duty of Fairness*

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

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

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

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

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

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

(1) The Preliminary Issue of Jurisdiction

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

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

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

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

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

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

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

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

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

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

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

(3) Procedural Fairness in the Public Employment Context

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[page244]

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

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

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

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

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

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

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

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

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

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

B. *Conclusion*

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

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

V. Disposition

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

The following are the reasons delivered by

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

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

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

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

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

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

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

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

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

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

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

A. *Limits on the Allocation of Decision Making*

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

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

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

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

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

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

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

B. *Reasonableness of Outcome*

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

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

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

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

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

D.

Standards of Review

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

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

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

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

E. *Degrees of Deference*

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

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

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

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

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

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

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

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

F. *Multiple Aspects of Administrative Decisions*

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

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

G. *The Existence of a Privative Clause*

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

H. *A Broader Reappraisal*

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

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

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

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

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

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

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

I. *Judging "Reasonableness"*

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

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

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

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

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

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

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

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

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

J. *Application to This Case*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * * * *

APPENDIX

Relevant Statutory Provisions

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

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

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

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

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

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

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

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

...

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

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

...

> **100.1**(5) Sections 19, 97, 98.1, 101, 108 and 111 apply *mutatis mutandis* to an adjudicator to whom a grievance has been referred in accordance with subsection (3) and in relation to any decision rendered by such adjudicator.
>
> ...
>
> **101**(1) Except as provided in this Act, every order, award, direction, decision, declaration or ruling of the Board, an arbitration tribunal or an adjudicator is final and shall not be questioned or reviewed in any court.
>
> **101**(2) No order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, judicial review, or otherwise, to question, review, prohibit or restrain the Board, an arbitration tribunal or an adjudicator in any of its or his proceedings.

Solicitors:

Solicitors for the appellant: Stewart McKelvey, Fredericton.

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

cp/e/qllls

Indexed as:

F.H. v. McDougall

F.H., Appellant;
v.
Ian Hugh McDougall, Respondent.
And
F.H., Appellant;
v.
The Order of the Oblates of Mary Immaculate in the Province of British Columbia, Respondent.
And
F.H., Appellant;
v.
Her Majesty The Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development, Respondent.

[2008] 3 S.C.R. 41

[2008] S.C.J. No. 54

2008 SCC 53

File No.: 32085.

Supreme Court of Canada

Heard: May 15, 2008;
Judgment: October 2, 2008.

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

(102 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Catchwords:

Evidence -- Standard of proof -- Allegations of sexual assault in a civil case -- Inconsistencies in complainant's testimony -- Whether Court of Appeal erred in holding trial judge to standard of proof higher than balance of probabilities.

[page42]

Evidence -- Corroborative evidence -- Allegations of sexual assault in a civil case -- Whether victim must provide independent corroborating evidence.

Appeals -- Standard of review -- Applicable standard of appellate review on questions of fact and credibility.

Summary:

From 1966 to 1974, H was a resident of the Sechelt Indian Residential School in British Columbia, an institution operated by the Oblates of Mary Immaculate and funded by the Canadian government. M was an Oblate Brother at the school and also the junior and intermediate boys' supervisor from 1965 to 1969. H claimed to have been sexually assaulted by M in the supervisors' washroom when he was approximately 10 years of age. These assaults were alleged to have occurred when the children were lined up and brought, one by one, into the washroom to be inspected by the supervisors for cleanliness. H told no one about the assaults until 2000, when he confided in his wife. He then commenced this action against the respondents. Despite inconsistencies in his testimony as to the frequency and gravity of the sexual assaults, the trial judge found that H was a credible witness and concluded that he had been anally raped by M on four occasions during the 1968-69 school year. In addition, she found that M had physically assaulted H by strapping him on numerous occasions. A majority of the Court of Appeal overturned the decision with respect to the sexual assaults on the grounds that the trial judge had failed to consider the serious inconsistencies in H's testimony in determining whether the alleged sexual assaults had been proven to the standard of proof that was "commensurate with the allegation", and had failed to scrutinize the evidence in the manner required.

Held: The appeal should be allowed and the trial judge's decision restored.

There is only one standard of proof in a civil case and that is proof on a balance of probabilities. Although there has been some suggestion in the case law that the criminal burden applies or that there is a shifting standard of proof, where, as here, criminal or morally blameworthy conduct is alleged, in Canada, there are no degrees of probability within that civil standard. If a trial judge expressly states the correct standard of proof, or does not express one at all, it will be presumed that

the correct standard was applied unless it can be demonstrated that an incorrect standard was applied. Further, the appellate court must ensure that it does not substitute its own view of the facts with that of the trial judge in determining whether the correct standard was [page43] applied. In every civil case, a judge should be mindful of, and, depending on the circumstances, may take into account, the seriousness of the allegations or consequences or inherent improbabilities, but these considerations do not alter the standard of proof. One legal rule applies in all cases and that is that the evidence must be scrutinized with care by the trial judge in deciding whether it is more likely than not that an alleged event has occurred. Further, the evidence must always be clear, convincing and cogent in order to satisfy the balance of probabilities test. In serious cases such as this one, where there is little other evidence than that of the plaintiff and the defendant, and the alleged events took place long ago, the judge is required to make a decision, even though this may be difficult. Appellate courts must accept that if a responsible trial judge finds for the plaintiff, the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test. In this case, the Court of Appeal erred in holding the trial judge to a higher standard of proof. This is sufficient to decide the appeal. [para. 30] [para. 40] [paras. 44-46] [para. 49] [paras. 53-54]

In finding that the trial judge failed to scrutinize H's evidence in the manner required by law, in light of the inconsistencies in his evidence and the lack of support from the surrounding circumstances, the Court of Appeal also incorrectly substituted its credibility assessment for that of the trial judge. Assessing credibility is clearly in the bailiwick of the trial judge for which he or she must be accorded a heightened degree of deference. Where proof is on a balance of probabilities, there is no rule as to when inconsistencies in the evidence of a plaintiff will cause a trial judge to conclude that the plaintiff's evidence is not credible or reliable. The trial judge must not consider the plaintiff's evidence in isolation, but should consider the totality of the evidence in the case, and assess the impact of any inconsistencies on questions of credibility and reliability pertaining to the core issue in the case. It is apparent from her reasons that the trial judge recognized this obligation upon her, and while she did not deal with every inconsistency, she did address in a general way the arguments put forward by the defence. Despite significant inconsistencies in his testimony concerning the frequency and severity of the sexual assaults, and the differences between his trial evidence and answers on previous occasions, the trial judge found that H was nevertheless a credible witness. Where a trial judge demonstrates that he or she is alive to the inconsistencies but still concludes that the witness was nonetheless credible, in the absence of palpable and overriding error, there is no basis for interference by the appellate court. Here, the Court of Appeal [page44] identified no such error. [para. 52] [paras. 58-59] [para. 70] [paras. 72-73] [paras. 75-76]

In addition, while it is helpful and strengthens the evidence of the party relying on it, as a matter of law, in cases of oath against oath, there is no requirement that a sexual assault victim must provide independent corroborating evidence. Such evidence may not be available, especially where the alleged incidents took place decades earlier. Also, incidents of sexual assault normally occur in private. Requiring corroboration would elevate the evidentiary requirement in a civil case above that in a criminal case. Trial judges faced with allegations of sexual assault may find that they are

required to make a decision on the basis of whether they believe the plaintiff or the defendant and as difficult as that may be, they are required to assess the evidence and make their determination without imposing a legal requirement for corroboration. In civil cases in which there is conflicting testimony, the judge must decide whether a fact occurred on a balance of probabilities, and provided the judge has not ignored evidence, finding the evidence of one party credible may well be conclusive of the result on an important issue because that evidence is inconsistent with that of the other party. In such cases, believing one party will mean explicitly or implicitly that the other party was not believed on an important issue. That may be especially true where a plaintiff makes allegations that are altogether denied by the defendant, as in this case. Here, the Court of Appeal was correct in finding that the trial judge did not ignore M's evidence or marginalize him, but simply believed H on essential matters rather than M. [para. 77] [paras. 80-81] [para. 86] [para. 96]

Finally, an unsuccessful party may well be dissatisfied with the reasons of a trial judge, especially where he or she was not believed. Where findings of credibility must be made, it must be recognized that it may be very difficult for the trial judge to put into words the process by which the decision is arrived at, but that does not make the reasons inadequate. Nor are reasons inadequate because in hindsight, it may be possible to say that the reasons were not as clear and comprehensive as they might have been. The Court of Appeal found that the trial judge's reasons showed why she arrived at her conclusion that H had been sexually assaulted by M. Its conclusion that the trial judge's reasons were adequate should not be disturbed. [paras. 100-101]

Cases Cited

Applied: *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154; *R. v. Lifchus*, [1997] 3 S.C.R. 320; [page45] *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25; *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17; *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26; *R. v. Walker*, [2008] 2 S.C.R. 245, 2008 SCC 34; *R. v. R.E.M.*, [2008] 3 S.C.R. 3, 2008 SCC 51; **referred to:** *H.F. v. Canada (Attorney General)*, [2002] B.C.J. No. 436 (QL), 2002 BCSC 325; *R. v. W. (D.)*, [1991] 1 S.C.R. 742; *Bater v. Bater*, [1950] 2 All E.R. 458; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164; *Heath v. College of Physicians & Surgeons (Ontario)* (1997), 6 Admin. L.R. (3d) 304; *R (McCann) v. Crown Court at Manchester*, [2003] 1 A.C. 787, [2002] UKHL 39; *In re H. (Minors) (Sexual Abuse: Standard of Proof)*, [1996] A.C. 563; *In re B (Children)*, [2008] 3 W.L.R. 1, [2008] UKHL 35; *R. v. Burns*, [1994] 1 S.C.R. 656; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33; *R. v. R.W.B.* (1993), 24 B.C.A.C. 1; *R. v. J.H.S.*, [2008] 2 S.C.R. 152, 2008 SCC 30; *Faryna v. Chorny*, [1952] 2 D.L.R. 354.

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History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Southin, Rowles and Ryan JJ.) (2007), 68 B.C.L.R. (4th) 203 (*sub nom. C. (R.) v. McDougall*), [2007] 9 W.W.R. 256, 41 C.P.C. (6th) 213, 239 B.C.A.C. 222, 396 W.A.C. 222, [2007] B.C.J. No. 721 (QL), 2007 CarswellBC 723, 2007 BCCA 212, allowing the appeal against Gill J.'s decision in the case of sexual assault but dismissing the appeal from her finding of physical assault, [2005] B.C.J. No. 2358 (QL) (*sub nom. R.C. v. McDougall*), 2005 CarswellBC 2578, 2005 BCSC 1518. Appeal allowed.

[page46]

Counsel:

Allan Donovan, Karim Ramji and *Niki Sharma*, for the appellant.

Bronson Toy, for the respondent Ian Hugh McDougall.

F. Mark Rowan, for the respondent The Order of the Oblates of Mary Immaculate in the Province of British Columbia.

Peter Southey and *Christine Mohr*, for the respondent Her Majesty the Queen in Right of Canada.

The judgment of the Court was delivered by

1 **ROTHSTEIN J.**:-- The Supreme Court of British Columbia found in a civil action that the respondent, Ian Hugh McDougall, a supervisor at the Sechelt Indian Residential School, had sexually assaulted the appellant, F.H., while he was a student during the 1968-69 school year. A majority of the British Columbia Court of Appeal allowed the respondent's appeal in part, and reversed the decision of the trial judge. I would allow the appeal to this Court and restore the judgment of the trial judge.

I. Facts

2 The Sechelt Indian Residential School was established in 1904 in British Columbia. It was funded by the Canadian government and operated by the Oblates of Mary Immaculate. F.H. was a resident student at the school from September 1966 to March 1967 and again from September 1968 to June 1974. Ian Hugh McDougall was an Oblate Brother until 1970 and was the junior and intermediate boys' supervisor at the school from 1965 to 1969.

3 The school building had three stories. Dormitories for junior and senior boys were located on the top floor. A supervisors' washroom was also located on the top floor and was accessible through a washroom for the boys. The intermediate boys' dormitory was on the second floor. McDougall had a room in the corner of that dormitory.

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4 F.H. claims to have been sexually assaulted by McDougall in the supervisors' washroom when he was approximately 10 years of age. At trial, he testified that McDougall sexually abused him on four occasions. The trial judge set out his evidence of these incidents at paras. 34-38 of her reasons:

> As to the first occasion, F.H. had been in the dormitory with others. The defendant asked four boys to go upstairs to the main washroom where they were to wait before going to the supervisors' washroom for an examination. F.H. was the last to go into the washroom to be examined. When he went in, he was asked to remove his pyjamas and while facing the defendant, he was checked from head to toe. His penis was fondled. The defendant then turned him around, asked him to bend over and put his finger in his anus. He removed his clothing, grabbed F.H. around the waist, pulled him onto his lap and raped him. The defendant had put the cover of the toilet down and was using it as a seat. After the defendant ejaculated, he told the plaintiff to put on his pyjamas and leave the room.
>
> F.H. was shocked. He did not cry or scream, nor did he say anything. When he went to the main communal washroom, he could see that he was bleeding. The next morning, he noticed blood in his pyjamas. He went

> downstairs to the boys' washroom and changed. The bloody pyjamas were rinsed and placed in his locker.
>
> The second incident was approximately two weeks after the first. F.H. was in the dormitory getting ready for bed when the defendant asked him to go to the supervisors' washroom so he could do an examination. There were no other boys present. F.H. was asked to remove his pyjamas and again, he was raped. He went to the communal washroom to clean himself up. In the morning, he realized that his pyjamas were bloody. As it was laundry day, he threw his pyjamas in the laundry bin with the sheets.
>
> The third incident occurred approximately one month later. F.H. testified that once again he was asked to go to the supervisors' washroom, remove his pyjamas and turn around. Again, the defendant grabbed him by the waist and raped him. He was bleeding, but could not recall whether there was blood on his pyjamas.
>
> The fourth incident occurred approximately one month after the third. As he was getting ready for bed, the defendant grabbed him by the shoulder and took [page48] him upstairs to the supervisors' washroom. Another rape occurred.
>
> ([2005] B.C.J. No. 2358 (QL), 2005 BCSC 1518)

5 F.H. did not tell anyone about the assaults until approximately the year 2000. He and his wife were having marital difficulties. She had learned of his extra-marital affair. He testified that because of the problems in his marriage he felt he had to tell his wife about his childhood experience. At his wife's recommendation, he sought counselling.

6 F.H. commenced his action against the respondents on December 7, 2000, approximately 31 years after the alleged sexual assaults. In British Columbia there is no limitation period applicable to a cause of action based on sexual assault and the action may be brought at any time (see *Limitation Act*, R.S.B.C. 1996, c. 266, s. 3(4)(l)).

II. Judgments Below

A. *British Columbia Supreme Court*, [2005] B.C.J. No. 2358 (QL), 2005 BCSC 1518

7 F.H.'s action was joined with the action of R.C., another former resident of the school who made similar claims against the same parties. The parties agreed to have a trial on the following discrete issues of fact:

(1) Was either plaintiff physically or sexually abused while he attended the school?
(2) If the plaintiff was abused

(a) by whom was he abused?
(b) when did the abuse occur? and
(c) what are the particulars of the abuse?

8 The trial judge, Gill J., began her reasons by noting that the answer to the questions agreed to by the parties depended on findings as to credibility and reliability. Few issues of law were raised. She referred to *H.F. v. Canada (Attorney General)*, [2002] B.C.J. No. 436 (QL), 2002 BCSC 325, in [page49] which the court stated that in cases involving serious allegations and grave consequences, the civil standard of proof that is "commensurate with the occasion" applied (para. 4).

9 The trial judge then went on to review the testimony of each plaintiff, McDougall and others who worked at the school or were former students. McDougall denied the allegations of sexual abuse and testified that he could not recall ever strapping F.H. He also denied ever conducting physical examinations of the boys and gave evidence that boys were not taken into the supervisors' washroom.

10 In determining whether F.H. was sexually assaulted, the trial judge dealt with the arguments of the defence that F.H.'s evidence was neither reliable nor credible. Gill J. rejected the defence's position that F.H.'s inability to respond to certain questions should lead to an adverse conclusion regarding the reliability of his evidence. She found F.H.'s testimony credible while acknowledging that the commission of the assaults in the manner described by F.H. would have carried with it a risk of detection. Gill J. also rejected the contention of defence counsel that F.H.'s motive to lie must weigh heavily against his credibility. Rather she agreed with counsel for F.H. that the circumstances surrounding his disclosure were not suggestive of concoction.

11 The trial judge pointed out areas of consistency and inconsistency between F.H.'s testimony and that of the other students at the school. She also noted that there were significant discrepancies in the evidence given by F.H. as to the frequency of the abuse. At trial, F.H. said there were four incidents. On previous occasions, he said the abuse occurred every two weeks or ten days. Despite these inconsistencies, the trial judge concluded F.H. was a credible witness and stated that his evidence about "the nature of the assaults, the location and the times they occurred" had been consistent (para. 112). She concluded that F.H. had been sexually abused by McDougall, the sexual assaults [page50] being four incidents of anal intercourse committed during the 1968-69 school year.

12 In relation to the issue of physical abuse, the trial judge limited herself to deciding whether the plaintiffs had proved that they were strapped while at school. To answer this question, the trial

judge reviewed the evidence of McDougall and the testimony of another Brother employed at the school as well as the testimony of several of F.H.'s fellow students. She concluded that strapping was a common form of discipline and that it was not used only in response to serious infractions. She concluded that F.H. was strapped by McDougall an undetermined number of times while at the school.

13 With respect to the claims made by R.C., the trial judge found that he had not proven that he had been sexually assaulted, but found that he had been strapped by a person other than McDougall.

B. *British Columbia Court of Appeal* (2007), 68 B.C.L.R. (4th) 203, 2007 BCCA 212

14 The decision of the Court of Appeal was delivered by Rowles J.A., with Southin J.A. concurring. Ryan J.A. dissented.

(1) Reasons of Rowles J.A.

15 Rowles J.A. concluded that McDougall's appeal from that part of the order finding that he had sexually assaulted F.H. should be allowed; however his appeal from that part of the order finding that he had strapped F.H. should be dismissed.

16 Rowles J.A. found that it was obvious that the trial judge was aware of the case authorities that have considered the standard of proof to be applied in cases where allegations of morally blameworthy conduct have been made, i.e. proof that is "commensurate with the occasion". However, in her view, the trial judge was bound to consider the serious inconsistencies in the evidence of F.H. in determining whether the alleged sexual assaults had been proven to the standard "commensurate with the allegation". She found that the trial judge did [page51] not scrutinize the evidence in the manner required and thereby erred in law.

17 In allowing the appeal in respect of the sexual assaults alleged by F.H., Rowles J.A. was of the opinion that in view of the state of the evidence on that issue, no practical purpose would be served by ordering a new trial.

(2) Concurring Reasons of Southin J.A.

18 In her concurring reasons, Southin J.A. discussed the "troubling aspect" of the case -- "how, in a civil case, is the evidence to be evaluated when it is oath against oath, and what is the relationship of the evaluation of the evidence to the burden of proof?" (para. 84).

19 Southin J.A. held that it was of central importance that the gravity of the allegations be forefront in the trier of fact's approach to the evidence. It was not enough, in her view, to choose the testimony of the plaintiff over that of the defendant. Instead, "[t]o choose one over the other ... requires ... an articulated reason founded in evidence other than that of the plaintiff" (para. 106). Moreover, Southin J.A. found that Cory J.'s rejection in *R. v. W. (D.)*, [1991] 1 S.C.R. 742, of the

"either/or" approach to evaluating evidence of the Crown and the accused as to the conduct of the accused in criminal cases also applied to civil cases.

20 In the end, she could not find in the trial judge's reasons a "legally acceptable articulated reason for accepting the plaintiff's evidence and rejecting the defendants' evidence" (para. 112).

(3) Dissenting Reasons of Ryan J.A.

21 While sharing the concerns of the majority about "the perils of assigning liability in cases where the events have occurred so long ago", Ryan J.A. disagreed with the conclusion that the trial judge did not apply the proper standard of proof to her assessment of the evidence (para. 115).

[page52]

22 Ryan J.A. noted that the trial judge set out the test -- a standard of proof commensurate with the occasion -- early in her reasons. "Having set out the proper test, we must assume that she properly applied it, unless her reasons demonstrate otherwise" (para. 116).

23 In the view of Ryan J.A., alleging that the trial judge misapplied the standard of proof to her assessment of the evidence was to say that the trial judge erred in her findings of fact. To overturn the trial judge's findings of fact, the appellate court must find that the trial judge made a manifest error, ignored conclusive or relevant evidence or drew unreasonable conclusions from it.

24 Ryan J.A. was of the view that the trial judge had made no such error. The trial judge had acknowledged the most troubling aspect of F.H.'s testimony -- that it was not consistent with earlier descriptions of the abuse -- and decided that at its core, the testimony was consistent and truthful. The inconsistencies were not overlooked by the trial judge.

25 Having found no error in the reasons for judgment, Ryan J.A. was of the view that the Court of Appeal should have deferred to the conclusions of the trial judge. Accordingly, she would have dismissed the appeal.

III. Analysis

A. *The Standard of Proof*

(1) Canadian Jurisprudence

26 Much has been written as judges have attempted to reconcile the tension between the civil standard of proof on a balance of probabilities and cases in which allegations made against a defendant are particularly grave. Such cases include allegations of fraud, professional misconduct, and criminal conduct, particularly sexual assault against minors. As explained by L. R. Rothstein,

R. A. Centa and E. Adams, in "Balancing Probabilities: The Overlooked Complexity of the Civil Standard [page53] of Proof" in *Special Lectures of the Law Society of Upper Canada 2003: The Law of Evidence* (2004), 455, at p. 456:

> These types of allegations are considered unique because they carry a moral stigma that will continue to have an impact on the individual after the completion of the case.

27 Courts in British Columbia have tended to follow the approach of Lord Denning in *Bater v. Bater*, [1950] 2 All E.R. 458 (C.A.). Lord Denning was of the view that within the civil standard of proof on a balance of probabilities "there may be degrees of probability within that standard" (p. 459), depending upon the subject matter. He stated:

> It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion. [p. 459]

28 In the present case the trial judge referred to *H.F. v. Canada (Attorney General)*, at para. 154, in which Neilson J. stated:

> The court is justified in imposing a higher degree of probability which is "commensurate with the occasion": ... .

29 In the constitutional context, Dickson C.J. adopted the *Bater* approach in *R. v. Oakes*, [1986] 1 S.C.R. 103. In his view a "very high degree of probability" required that the evidence be cogent and persuasive and make clear the consequences of the decision one way or the other. He wrote at p. 138:

> Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the *Charter* was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "commensurate with the occasion". Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit.

[page54]

30 However, a "shifting standard" of probability has not been universally accepted. In *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164, Laskin C.J. rejected a "shifting standard". Rather, to take account of the seriousness of the allegation, he was of the view

that a trial judge should scrutinize the evidence with "greater care". At pp. 169-71 he stated:

> Where there is an allegation of conduct that is morally blameworthy or that could have a criminal or penal aspect and the allegation is made in civil litigation, the relevant burden of proof remains proof on a balance of probabilities... .
>
> ... There is necessarily a matter of judgment involved in weighing evidence that goes to the burden of proof, and a trial judge is justified in scrutinizing evidence with greater care if there are serious allegations to be established by the proof that is offered... .
>
> I do not regard such an approach (the *Bater* approach) as a departure from a standard of proof based on a balance of probabilities nor as supporting a shifting standard. The question in all civil cases is what evidence with what weight that is accorded to it will move the court to conclude that proof on a balance of probabilities has been established.

31 In Ontario Professional Discipline cases, the balance of probabilities requires that proof be "clear and convincing and based upon cogent evidence" (see *Heath v. College of Physicians & Surgeons (Ontario)* (1997), 6 Admin. L.R. (3d) 304 (Ont. Ct. (Gen. Div.)), at para. 53).

(2) Recent United Kingdom Jurisprudence

32 In the United Kingdom some decisions have indicated that depending upon the seriousness of the matters involved, even in civil cases, the criminal standard of proof should apply. In *R (McCann) v. Crown Court at Manchester*, [2003] 1 A.C. 787, [2002] UKHL 39, Lord Steyn said at para. 37:

> ... I agree that, given the seriousness of matters involved, at least some reference to the heightened civil [page55] standard would usually be necessary: *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, 586 D-H, per Lord Nicholls of Birkenhead. For essentially practical reasons, the Recorder of Manchester decided to apply the criminal standard. The Court of Appeal said that would usually be the right course to adopt. Lord Bingham of Cornhill has observed that the heightened civil standard and the criminal standard are virtually indistinguishable. I do not disagree with any of these views. But in my view pragmatism dictates that the task of magistrates should be made more straightforward by ruling that they must in all cases under section 1 apply the criminal standard.

33 Yet another consideration, that of "inherent probability or improbability of an event" was discussed by Lord Nicholls in *In re H. (Minors) (Sexual Abuse: Standard of Proof)*, [1996] A.C. 563 (H.L.), at p. 586:

> ... the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.

34 Most recently in *In re B (Children)*, [2008] 3 W.L.R. 1, [2008] UKHL 35, a June 11, 2008 decision, the U.K. House of Lords again canvassed the issue of standard of proof. Subsequent to the hearing of the appeal, Mr. Southey, counsel for the Attorney General of Canada, with no objection from other counsel, brought this case to the attention of the Court.

35 Lord Hoffmann addressed the "confusion" in the United Kingdom courts over this issue. He stated at para. 5:

> Some confusion has however been caused by dicta which suggest that the standard of proof may vary with the gravity of the misconduct alleged or even the seriousness of the consequences for the person concerned. The cases in which such statements have been made fall into three categories. First, there are cases in which the court has for one purpose classified the proceedings as civil (for example, for the purposes of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms) but nevertheless thought that, because of the serious consequences of the [page56] proceedings, the criminal standard of proof or something like it should be applied. Secondly, there are cases in which it has been observed that when some event is inherently improbable, strong evidence may be needed to persuade a tribunal that it more probably happened than not. Thirdly, there are cases in which judges are simply confused about whether they are talking about the standard of proof or about the role of inherent probabilities in deciding whether the burden of proving a fact to a given standard has been discharged.

36 The unanimous conclusion of the House of Lords was that there is only one civil standard of proof. At para. 13, Lord Hoffmann states:

> I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not.

However, Lord Hoffmann did not disapprove of application of the criminal standard depending upon the issue involved. Following his very clear statement that there is only one civil standard of

proof, he somewhat enigmatically wrote, still in para. 13:

> I do not intend to disapprove any of the cases in what I have called the first category, but I agree with the observation of Lord Steyn in *McCann's* case, at p. 812, that clarity would be greatly enhanced if the courts said simply that although the proceedings were civil, the nature of the particular issue involved made it appropriate to apply the criminal standard.

37 Lord Hoffmann went on to express the view that taking account of inherent probabilities was not a rule of law. At para. 15 he stated:

> I wish to lay some stress upon the words I have italicised ["to whatever extent is appropriate in the particular case"]. Lord Nicholls [*In re H*] was not laying down any rule of law. There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.

38 *In re B* is a child case under the United Kingdom *Children Act 1989*. While her comments on standard of proof are confined to the 1989 Act, Baroness Hale explained that neither the seriousness of the allegation nor the seriousness of the [page57] consequences should make any difference to the standard of proof to be applied in determining the facts. At paras. 70-72, she stated:

> My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under section 31(2) or the welfare considerations in section I of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.
>
> As to the seriousness of the consequences, they are serious either way. A child may find her relationship with her family seriously disrupted; or she may find herself still at risk of suffering serious harm. A parent may find his relationship with his child seriously disrupted; or he may find himself still at liberty to maltreat this or other children in the future.
>
> As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in

most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable.

(3) Summary of Various Approaches

39 I summarize the various approaches in civil cases where criminal or morally blameworthy conduct is alleged as I understand them:

(1) The criminal standard of proof applies in civil cases depending upon the seriousness of the allegation;
(2) An intermediate standard of proof between the civil standard and the criminal standard commensurate with the occasion applies to civil cases;
(3) No heightened standard of proof applies in civil cases, but the evidence must be scrutinized with greater care where the allegation is serious;

[page58]

(4) No heightened standard of proof applies in civil cases, but evidence must be clear, convincing and cogent; and
(5) No heightened standard of proof applies in civil cases, but the more improbable the event, the stronger the evidence is needed to meet the balance of probabilities test.

(4) The Approach Canadian Courts Should Now Adopt

40 Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected for the reasons that follow.

41 Since *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154, at pp. 158-64, it has been clear that the criminal standard is not to be applied to civil cases in Canada. The criminal standard of proof beyond a reasonable doubt is linked to the presumption of innocence in criminal trials. The burden of proof always remains with the prosecution. As explained by Cory J. in *R. v. Lifchus*, [1997] 3 S.C.R. 320, at para. 27:

> First, it must be made clear to the jury that the standard of proof beyond a reasonable doubt is vitally important since it is inextricably linked to that basic premise which is fundamental to all criminal trials: the presumption of innocence. The two concepts are forever as closely linked as Romeo with Juliet or Oberon with Titania and they must be presented together as a unit. If the presumption of innocence is the golden thread of criminal justice then proof beyond a reasonable doubt is the silver and these two threads are forever intertwined in the fabric of criminal law. Jurors must be reminded that the burden of proving beyond a reasonable doubt [page59] that the accused committed the crime rests with the prosecution throughout the trial and never shifts to the accused.

42 By contrast, in civil cases, there is no presumption of innocence. As explained by J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 154:

> Since society is indifferent to whether the plaintiff or the defendant wins a particular civil suit, it is unnecessary to protect against an erroneous result by requiring a standard of proof higher than a balance of probabilities.

It is true that there may be serious consequences to a finding of liability in a civil case that continue past the end of the case. However, the civil case does not involve the government's power to penalize or take away the liberty of the individual.

43 An intermediate standard of proof presents practical problems. As expressed by Rothstein, Centa and Adams, at pp. 466-67:

> As well, suggesting that the standard of proof is "higher" than the "mere balance of probabilities" inevitably leads one to inquire: what percentage of probability must be met? This is unhelpful because while the concept of "51 percent probability," or "more likely than not" can be understood by decisionmakers, the concept of 60 percent or 70 percent probability cannot.

44 Put another way, it would seem incongruous for a judge to conclude that it was more likely than not that an event occurred, but not sufficiently likely to some unspecified standard and therefore that it did not occur. As Lord Hoffmann explained in *In re B* at para. 2:

> If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other [page60] carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he

> does discharge it, a value of one is returned and the fact is treated as having happened.

In my view, the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred.

45 To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.

46 Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

47 Finally there may be cases in which there is an inherent improbability that an event occurred. Inherent improbability will always depend upon the circumstances. As Baroness Hale stated in *In re B*, at para. 72:

> Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is [page61] seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog.

48 Some alleged events may be highly improbable. Others less so. There can be no rule as to when and to what extent inherent improbability must be taken into account by a trial judge. As Lord Hoffmann observed at para. 15 of *In re B*:

> Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.

It will be for the trial judge to decide to what extent, if any, the circumstances suggest that an allegation is inherently improbable and where appropriate, that may be taken into account in the assessment of whether the evidence establishes that it is more likely than not that the event occurred. However, there can be no rule of law imposing such a formula.

(5) <u>Conclusion on Standard of Proof</u>

49 In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

50 I turn now to the issues particular to this case.

B. *The Concerns of the Court of Appeal Respecting Inconsistency in the Evidence of F.H.*

51 The level of scrutiny required in cases of sexual assault was central to the analysis of the Court of Appeal. According to Rowles J.A. at para. 72, one of the issues was "whether the trial judge, in light of the standard of proof that had to be applied in a case such as this, failed to consider [page62] the problems or troublesome aspects of [F.H.]'s evidence". The "troublesome aspects" of F.H.'s evidence related to, amongst others, inconsistencies as to the frequency of the alleged sexual assaults as between F.H.'s evidence on discovery and at trial, as well as to an inconsistency between the original statement of claim alleging attempted anal intercourse and the evidence given at trial of actual penetration.

52 In the absence of support from the surrounding circumstances, when considering the evidence of F.H. on its own, the majority of the Court of Appeal concluded that the trial judge had failed to consider whether the facts had been proven "to the standard commensurate with the allegation" and had failed to "scrutinize the evidence in the manner required and thereby erred in law" (para. 79).

53 As I have explained, there is only one civil standard of proof -- proof on a balance of probabilities. Although understandable in view of the state of the jurisprudence at the time of its decision, the Court of Appeal was in error in holding the trial judge to a higher standard. While that conclusion is sufficient to decide this appeal, nonetheless, I think it is important for future guidance to make some further comments on the approach of the majority of the Court of Appeal.

54 Rowles J.A. was correct that failure by a trial judge to apply the correct standard of proof in assessing evidence would constitute an error of law. The question is how such failure may be apparent in the reasons of a trial judge. Obviously in the remote example of a trial judge expressly stating an incorrect standard of proof, it will be presumed that the incorrect standard was applied. Where the trial judge expressly states the correct standard of proof, it will be presumed that it was applied. Where the trial judge does not express a particular standard of proof, it will also be presumed that the correct standard was applied:

> Trial judges are presumed to know the law with which they work day in and day out.
>
> (*R. v. Burns*, [1994] 1 S.C.R. 656, at p. 664, *per* McLachlin J. (as she then was))

[page63]

Whether the correct standard was expressly stated or not, the presumption of correct application will apply unless it can be demonstrated by the analysis conducted that the incorrect standard was applied. However, in determining whether the correct standard has indeed been applied, an appellate court must take care not to substitute its own view of the facts for that of the trial judge.

55 An appellate court is only permitted to interfere with factual findings when "the trial judge [has] shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable or unsupported by the evidence" (*H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, at para. 4 (emphasis deleted), *per* Fish J.). Rowles J.A. correctly acknowledged as much (para. 27). She also recognized that where there is some evidence to support an inference drawn by the trial judge, an appellate court will be hard pressed to find a palpable and overriding error. Indeed, she quoted the now well-known words to this effect in the judgment of Iacobucci and Major JJ. in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33, at para. 27 of her reasons (para. 22 of *Housen*).

56 Rowles J.A. was satisfied that the trial judge was aware of the standard of proof that had heretofore been applied in cases of moral blameworthiness. At para. 35 of her reasons she stated:

> From her reasons it is obvious that the judge was aware of the case authorities that have considered the standard of proof to be applied in cases where allegations of morally blameworthy conduct have been made.

That should have satisfied the Court of Appeal that the trial judge understood and applied the standard of proof they thought to be applicable to this case.

C. *The Inconsistency in the Evidence of F.H.*

57 At para. 5 of her reasons, the trial judge had regard for the judgment of Rowles J.A. in *R. v. R.W.B.* (1993), 24 B.C.A.C. 1, at paras. 28-29, dealing with the reliability and credibility of witnesses in the case of inconsistencies and an absence of [page64] supporting evidence. Although *R.W.B.* was a criminal case, I, like the trial judge, think the words of Rowles J.A. are apt for the purposes of this case:

> In this case there were a number of inconsistencies in the complainant's own evidence and a number of inconsistencies between the complainant's evidence and the testimony of other witnesses. While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness' evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise but at the least the

> trier of fact should look to the totality of the inconsistencies in order to assess whether the witness' evidence is reliable. This is particularly so when there is no supporting evidence on the central issue, which was the case here. [para. 29]

58 As Rowles J.A. found in the context of the criminal standard of proof, where proof is on a balance of probabilities there is likewise no rule as to when inconsistencies in the evidence of a plaintiff will cause a trial judge to conclude that the plaintiff's evidence is not credible or reliable. The trial judge should not consider the plaintiff's evidence in isolation, but must look at the totality of the evidence to assess the impact of the inconsistencies in that evidence on questions of credibility and reliability pertaining to the core issue in the case.

59 It is apparent from her reasons that the trial judge recognized the obligation upon her to have regard for the inconsistencies in the evidence of F.H. and to consider them in light of the totality of the evidence to the extent that was possible. While she did not deal with every inconsistency, as she explained at para. 100, she did address in a general way the arguments put forward by the defence.

60 The trial judge specifically dealt with some of what the Court of Appeal identified as the troublesome aspects of F.H.'s evidence. For example, Rowles J.A. stated at para. 77 that F.H.'s evidence with respect to inspections in the supervisors' washroom was not consistent with the testimony of other witnesses:

[page65]

> There was no corroborative evidence from the witnesses who had been students at the School of other boys having lined up and being examined by McDougall in the supervisor[s'] washroom so as to lend support to the respondent's recollection of events. In fact, the defence evidence was to the opposite effect, that is, the boys did not line up outside the staff washroom for any reason or at any time.

61 However, Gill J. dealt with the washroom inspections as well as the inconsistent recollection of the witnesses regarding these inspections. She also made a finding of fact that inspections were performed and were routine at the school. At para. 106 of her reasons she stated:

> It was argued that the evidence of F.H. was not consistent with the evidence of others. No inspections were done in the supervisors' washroom or in the way that F.H. described. I agree that no other witness described inspections being done in the supervisors' washroom. However, evidence about inspections was given by defence witnesses. I have already referred to the evidence of Mr. Paul. I accept that inspections were done in the manner he described. The boys were sometimes inspected on shower days and supervisors regularly checked to

> ensure that they had washed themselves thoroughly. Admittedly, Mr. Paul did not say that the defendant had conducted such examinations, but he described the inspections as a routine of the school. In fact, Mr. Paul's evidence is not consistent with the evidence of the defendant, who stated that the only examination of the boys was for head lice and it was done by the nurse.

62 In this passage of her reasons, the trial judge dealt with the inconsistency between the evidence of F.H. and other witnesses. She also considered McDougall's testimony in light of other evidence given by witnesses for the defence. From the evidence of Mr. Paul she concluded that examinations were routinely carried out. She found that Mr. Paul's evidence about examinations was not consistent with that of McDougall who had testified that examinations were only for head lice and were carried out by the nurse. The necessary inference is that she found McDougall not to be credible on this issue.

63 The majority of the Court of Appeal was also concerned with the testimony of F.H., that each time he was sexually assaulted by McDougall, [page66] he would go upstairs from his dorm to the supervisors' washroom. At para. 77 of her reasons, Rowles J.A. stated:

> However, [F.H.] was a junior boy rather than an intermediate one at the relevant time and his dorm would have been on the top floor. Based on the evidence of where the boys slept, [McDougall] could not have taken [F.H.] "upstairs" from his dorm.

Counsel for F.H. points out that in his evidence at trial, F.H. testified that he was an intermediate boy when the sexual assaults occurred and that as an intermediate boy he would have to go upstairs to the supervisors' washroom. Although there was contradictory evidence, there was evidence upon which F.H. could have been believed.

64 It is true that Gill J. did not deal with F.H.'s inconsistency as to the frequency of the inspections inside the supervisors' washroom as identified by Rowles J.A. at para. 75:

> The respondent also told Ms. Stone that the young boys regularly lined up outside the staff washroom, which they referred to as the "examination room", every second week in order to be examined. At trial he testified this lining up only happened the first time he was sexually assaulted. Again, this is a substantial change in the respondent's recounting of events.

Nor did Gill J. specifically address the change in the allegations of attempted anal intercourse and genital fondling in the original statement of claim and the evidence of F.H. at trial of actual penetration. Rowles J.A. stated at para. 76:

> The respondent's original statement of claim only alleged attempted anal intercourse and genital fondling. There was no allegation about the appellant

> actually inserting his finger in F.H.'s anus or having forced anal intercourse. The respondent's evidence at trial was of actual penetration. As the trial judge found, the respondent acknowledged that he had reviewed the statement of claim, including the paragraphs which particularized the alleged assaults, and that he was aware of the difference between actually doing something and attempting to do something.

[page67]

65 However, at paras. 46 and 48 of her reasons, Gill J. had recounted these inconsistencies as raised in cross-examination. Her reasons indicate she was aware of the inconsistencies.

66 As for the inconsistency relating to the frequency of the sexual assaults, Rowles J.A. stated at para. 73:

> At his examination for discovery the respondent said that the sexual assaults took place "weekly", "frequently", and "every ten days or so" over the entire time he was at the School. The respondent admitted at trial that he had said on discovery that he had told the counsellor, Ms. Nellie Stone, that the sexual assaults by the appellant had taken place over the entire time he was at the School, while he was between the ages of eight and fourteen years. At trial, the respondent testified that the sexual assaults occurred on only four occasions over a period of two-and-a-half months. [Emphasis added.]

67 Counsel for F.H. points out that F.H.'s evidence was that he was subjected to physical and sexual abuse while he was at the residential school perpetrated by more than one person, that the question to which he was responding mixed both sexual and physical abuse and that the majority of the Court of Appeal wrongly narrowed F.H.'s statement only to assaults perpetrated by McDougall. Counsel says that F.H. was commenting on all of the physical and sexual abuse he experienced at the school which involved more than McDougall and took place over his six years of attendance.

68 The Court of Appeal appears to have interpreted his evidence on discovery that he was sexually assaulted by McDougall over the entire time he was at the school, while in his evidence at trial it was only four times over two and a half months. Although the evidence is not without doubt, it is open to be interpreted in the way counsel for F.H. asserts and that there was no inconsistency between F.H.'s evidence on discovery and at trial.

69 As to the frequency of the alleged sexual assaults by McDougall, the trial judge did not [page68] ignore inconsistencies in the evidence of F.H. In spite of the inconsistencies, she found him to be credible. At para. 112 of her reasons, she stated:

> There are, however, some inconsistencies in the evidence of F.H. As the defence has also argued, his evidence about the frequency of the abuse has not been consistent and there are differences between what he admittedly told Ms. Stone, what he said at his examination for discovery and his evidence at trial. At trial, he said there were four incidents. On previous occasions, he said that this occurred every two weeks or ten days. That is a difference of significance. However, his evidence about the nature of the assaults, the location and the times they occurred has been consistent. Despite differences about frequency, it is my view that F.H. was a credible witness.

70 The trial judge was not obliged to find that F.H. was not credible or that his evidence at trial was unreliable because of inconsistency between his trial evidence and the evidence he gave on prior occasions. Where a trial judge demonstrates that she is alive to the inconsistencies but still concludes that the witness was nonetheless credible, in the absence of palpable and overriding error, there is no basis for interference by the appellate court.

71 All of this is not to say that the concerns expressed by Rowles J.A. were unfounded. There are troubling aspects of F.H.'s evidence. However, the trial judge was not oblivious to the inconsistencies in his evidence. The events occurred more than 30 years before the trial. Where the trial judge refers to the inconsistencies and deals expressly with a number of them, it must be assumed that she took them into account in assessing the balance of probabilities. Notwithstanding its own misgivings, it was not for the Court of Appeal to second guess the trial judge in the absence of finding a palpable and overriding error.

72 With respect, I cannot interpret the reasons of the majority of the Court of Appeal other than that it disagreed with the trial judge's credibility assessment of F.H. in light of the inconsistencies in his evidence and the lack of support from the surrounding circumstances. Assessing credibility [page69] is clearly in the bailiwick of the trial judge and thus heightened deference must be accorded to the trial judge on matters of credibility. As explained by Bastarache and Abella JJ. in *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17, at para. 20:

> Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in *H.L.*, that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.

73 As stated above, an appellate court is only permitted to intervene when "the trial judge is shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable or unsupported by the evidence" (*H.L.*, at para. 4 (emphasis deleted)). The Court of Appeal made no such finding. With respect, in finding that the trial judge failed to

scrutinize F.H.'s evidence in the manner required by law, it incorrectly substituted its credibility assessment for that of the trial judge.

D. *Palpable and Overriding Error*

74 Notwithstanding that the Court of Appeal made no finding of palpable and overriding error, the Attorney General of Canada submits that the trial judge did indeed make such an error. This argument is based entirely on the inconsistencies in the evidence of F.H. The Attorney General says that in light of these inconsistencies, the trial judge was clearly wrong in finding F.H. credible.

75 I do not minimize the inconsistencies in F.H.'s testimony. They are certainly relevant to an assessment of his credibility. Nonetheless, the trial judge was convinced, despite the inconsistencies, that F.H. was credible and that the four sexual assaults alleged to have been committed by McDougall did occur. From her reasons, it appears that the trial judge's decision on the credibility of the witnesses was made in the context of the evidence as a whole. [page70] She considered the layout of the school and the fact that the manner in which F.H. described the assaults as taking place would have carried with it the risk of detection. She also considered whether F.H.'s evidence about inspections taking place in the supervisors' washroom and the availability of sheets and pyjamas was consistent with evidence of other witnesses. She acknowledged that F.H. had a motive to lie to save his marriage and decided that the circumstances surrounding disclosure were not suggestive of concoction. She also factored into her analysis the demeanor of F.H.: that "[he] was not a witness who gave detailed answers, often responding simply with a yes or no, nor did he volunteer much information" (para. 110), and that "[w]hen [he] testified, he displayed no emotion but it was clear that he had few, if any, good memories of the school" (para. 113).

76 In the end, believing the testimony of one witness and not the other is a matter of judgment. In light of the inconsistencies in F.H.'s testimony with respect to the frequency of the sexual assaults, it is easy to see how another trial judge may not have found F.H. to be a credible witness. However, Gill J. found him to be credible. It is important to bear in mind that the evidence in this case was of matters occurring over 30 years earlier when F.H. was approximately 10 years of age. As a matter of policy, the British Columbia legislature has eliminated the limitation period for claims of sexual assault. This was a policy choice for that legislative assembly. Nonetheless, it must be recognized that the task of trial judges assessing evidence in such cases is very difficult indeed. However, that does not open the door to an appellate court, being removed from the testimony and not seeing the witnesses, to reassess the credibility of the witnesses.

E. *Corroboration*

77 The reasons of the majority of the Court of Appeal may be read as requiring, as a matter of law, that in cases of oath against oath in the context of sexual assault allegations, that a sexual assault victim must provide some independent [page71] corroborating evidence. At para. 77 of her reasons, Rowles J.A. observed:

> There was no corroborative evidence from the witnesses who had been students at the School of other boys having lined up and being examined by McDougall in the supervisor[s'] washroom so as to lend support to [F.H.]'s recollection of events.

At para. 79 she stated:

> No support for [F.H.]'s testimony could be drawn from the surrounding circumstances.

78 In her concurring reasons at para. 106, Southin J.A. stated:

> To choose one over the other in cases of oath against oath requires, in my opinion, an articulated reason founded in evidence other than that of the plaintiff.

79 The impression these passages may leave is that there is a legal requirement of corroboration in civil cases in which sexual assault is alleged. In an abundance of caution and to provide guidance for the future, I make the following comments.

80 Corroborative evidence is always helpful and does strengthen the evidence of the party relying on it as I believe Rowles J.A. was implying in her comments. However, it is not a legal requirement and indeed may not be available, especially where the alleged incidents took place decades earlier. Incidents of sexual assault normally occur in private.

81 Requiring corroboration would elevate the evidentiary requirement in a civil case above that in a criminal case. Modern criminal law has rejected the previous common law and later statutory requirement that allegations of sexual assault be corroborated in order to lead to a conviction (see *Criminal Code*, R.S.C. 1970, c. C-34, s. 139(1), mandating the need for corroboration and its subsequent amendments removing this requirement (*Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c. 125), [page72] as well as the current *Criminal Code*, R.S.C. 1985, c. C-46, s. 274, stipulating that no corroboration is required for convictions in sexual assault cases). Trial judges faced with allegations of sexual assault may find that they are required to make a decision on the basis of whether they believe the plaintiff or the defendant and as difficult as that may be, they are required to assess the evidence and make their determination without imposing a legal requirement for corroboration.

F. *Is W. (D.) Applicable in Civil Cases in Which Credibility Is in Issue?*

82 At paras. 107, 108 and 110 of her reasons, Southin J.A. stated:

> It is not enough for the judge to say that I find the plaintiff credible and since he is credible the defendant must be lying.

> What I have said so far is, to me, no more than an application to civil cases of *R. v. W. (D.)*, [1991] 1 S.C.R. 742 (S.C.C.).
>
> ...
>
> I see no logical reason why the rejection of "either/or" in criminal cases is not applicable in civil cases where the allegation is of crime, albeit that the burden of proof on the proponent is not beyond reasonable doubt but on a balance of probabilities.

83 *W. (D.)* was a decision by this Court in which Cory J., at p. 758, established a three-step charge to the jury to help the jury assess conflicting evidence between the victim and the accused in cases of criminal prosecutions of sexual assaults:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are [page73] convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

84 These charges to the jury are not sacrosanct but were merely put in place as guideposts to the meaning of reasonable doubt, as recently explained by Binnie J. in *R. v. J.H.S.*, [2008] 2 S.C.R. 152, 2008 SCC 30, at paras. 9 and 13:

> Essentially, *W. (D.)* simply unpacks for the benefit of the lay jury what reasonable doubt means in the context of evaluating conflicting testimonial accounts. It alerts the jury to the "credibility contest" error. It teaches that trial judges are required to impress on the jury that the burden never shifts from the Crown to prove every element of the offence beyond a reasonable doubt.
>
> ...
>
> ... In *R. v. Avetysan*, [2000] 2 S.C.R. 745, 2000 SCC 56, Major J. for the majority pointed out that in any case where credibility is important "[t]he question is really whether, in substance, the trial judge's instructions left the jury

> with the impression that it had to choose between the two versions of events" (para. 19). The main point is that lack of credibility on the part of the accused does not equate to proof of his or her guilt beyond a reasonable doubt.

85 The *W. (D.)* steps were developed as an aid to the determination of reasonable doubt in the criminal law context where a jury is faced with conflicting testimonial accounts. Lack of credibility on the part of an accused is not proof of guilt beyond a reasonable doubt.

86 However, in civil cases in which there is conflicting testimony, the judge is deciding whether a fact occurred on a balance of probabilities. In such cases, provided the judge has not ignored evidence, finding the evidence of one party credible may well be conclusive of the result because that evidence is inconsistent with that of the other party. In such cases, believing one party will mean explicitly or implicitly that the other party was not believed on the important issue in the case. That may be especially true where a plaintiff makes allegations that [page74] are altogether denied by the defendant as in this case. *W. (D.)* is not an appropriate tool for evaluating evidence on the balance of probabilities in civil cases.

G. *Did the Trial Judge Ignore the Evidence of McDougall?*

87 In an argument related to *W. (D.)*, the Attorney General of Canada says, at para. 44 of its factum, that "[s]imply believing the testimony of one witness, without assessing the evidence of the other witness, marginalizes that other witness" since he has no way of knowing whether he was disbelieved or simply ignored.

88 The Attorney General bases his argument on the well-known passage in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), which concludes at p. 357:

> ... a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can he tested in the particular case.

89 Thus, the Attorney General contends, at para. 47 of its factum, that:

> In a civil proceeding alleging a sexual assault, if the trier of fact accepts the plaintiff's evidence and simply ignores the defendant's evidence, that conclusion would breach the requirement described in *Faryna*, that every element of the evidence must be considered.

90 I agree that it would be an error for the trial judge to ignore the evidence of the defendant and simply concentrate on the evidence submitted by the plaintiff. But that is not the case here.

91 The trial judge described the testimony given by McDougall with respect to his vocational beliefs, his subsequent marriage, his role at the school, the routine at the school, the laundry

procedure and his denials as to having sexually assaulted either R.C. or F.H. She also dealt with the defence arguments [page75] with respect to the credibility and reliability of the testimony of R.C. and F.H. regarding the sexual assaults. Indeed, she found that R.C. did not prove he was sexually assaulted by McDougall.

92 In determining whether McDougall had ever strapped R.C. or F.H., she summarized McDougall's evidence as follows at para. 131:

> As stated, it was the defendant's evidence that during his years at the school, he administered the strap to only five or six intermediate boys. He did so as punishment for behaviour such as fighting or swearing. It was always to the hand and was always done in the dorm. He denied the evidence of Mr. Jeffries that he had frequently disciplined him for the reasons Mr. Jeffries described. He denied going to his grandmother's home or mocking him about wanting to visit his grandmother. He denied the evidence of F.H.

93 She also highlighted a contradiction in McDougall's testimony at para. 135:

> It is also my view that the defendant minimized his use of the strap as a form of discipline. Further, while he testified that no child was ever strapped in his room, when testifying about one specific incident, he said that he brought the boy "upstairs to my room and I administered the strap three times to his right hand".

Although McDougall later "corrected himself" to say that he had strapped the boy in the dorm and not in his room, it was open to the trial judge to believe his first statement and not his "correction".

94 And as earlier discussed, at para. 106 of her reasons, she pointed out inconsistency between the evidence of McDougall and one of the defence witnesses, Mr. Paul, on the issue of routine physical inspections of the students.

95 At para. 66 of her reasons for the majority of the Court of Appeal, Rowles J.A. stated:

[page76]

> From the reasons the trial judge gave for finding that the appellant had strapped the respondent, one can infer that the judge did not accept the appellant's evidence on that issue. Disbelief of a witness's evidence on one issue may well taint the witness's evidence on other issues but an unfavourable credibility finding against a witness does not, of itself, constitute evidence that

can be used to prove a fact in issue.

96 I agree with Rowles J.A. However, the trial judge's unfavourable credibility findings with respect to McDougall's strapping evidence together with her belief in Paul's evidence in preference to that of McDougall with respect to routine physical inspections, indicates that she did not ignore McDougall's evidence or marginalize him. She simply believed F.H. on essential matters rather than McDougall. H. *Were the Reasons of the Trial Judge Adequate?*

97 The Attorney General alleges that the reasons of the trial judge are inadequate. The same argument was not accepted by the Court of Appeal. At para. 61, Rowles J.A. stated:

> Generally speaking, if a judge's reasons reveal the path the judge took to reach a conclusion on the matter in dispute, the reasons are adequate for the purposes of appellate review. To succeed in an argument that the trial judge did not give adequate reasons, an appellant does not have to demonstrate that there is a flaw in the reasoning that led to the result. In this case, the judge's reasons are adequate to show how she arrived at her conclusion that the respondent had been sexually assaulted.

Where the Court of Appeal expresses itself as being satisfied that it can discern why the trial judge arrived at her conclusion, a party faces a serious obstacle to convince this Court that the reasons are nonetheless inadequate.

98 The meaning of adequacy of reasons is explained in *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26. In *R. v. Walker*, [2008] 2 S.C.R. 245, 2008 SCC 34, Binnie J. summarized the duty to give adequate reasons:

[page77]

(1) To justify and explain the result;
(2) To tell the losing party why he or she lost;
(3) To provide for informed consideration of the grounds of appeal; and
(4) To satisfy the public that justice has been done.

99 However, an appeal court cannot intervene merely because it believes the trial judge did a poor job of expressing herself. Nor, is a failure to give adequate reasons a free standing basis for appeal. At para. 20 of *Walker*, Binnie J. states:

> Equally, however, *Sheppard* holds that "[t]he appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of

> expressing itself" (para. 26). Reasons are sufficient if they are responsive to the case's live issues and the parties' key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue... . The duty to give reasons "should be given a functional and purposeful interpretation" and the failure to live up to the duty does not provide "a free-standing right of appeal" or "in itself confe[r] entitlement to appellate intervention" (para. 53).

100 An unsuccessful party may well be dissatisfied with the reasons of a trial judge, especially where he or she was not believed. Where findings of credibility must be made, it must be recognized that it may be very difficult for the trial judge to put into words the process by which the decision is arrived at (see *Gagnon*). But that does not make the reasons inadequate. In *R. v. R.E.M.*, [2008] 3 S.C.R. 3, 2008 SCC 51, released at the same time as this decision, McLachlin C.J. has explained that credibility findings may involve factors that are difficult to verbalize:

> While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge in saying [page78] unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence in convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization. [para. 49]

Nor are reasons inadequate because in hindsight, it may be possible to say that the reasons were not as clear and comprehensive as they might have been.

101 Rowles J.A. found that the reasons of the trial judge showed why she arrived at her conclusion that F.H. had been sexually assaulted by McDougall. I agree with her that the reasons of the trial judge were adequate.

IV. Conclusion

102 I am of the respectful opinion that the majority of the Court of Appeal erred in reversing the decision of the trial judge. The appeal should be allowed with costs. The decision of the Court of Appeal of British Columbia should be set aside and the decision of the trial judge restored.

Solicitors:

Solicitors for the appellant: Donovan & Company, Vancouver.

Solicitors for the respondent Ian Hugh McDougall: Forstrom Jackson, Vancouver.

Solicitors for the respondent The Order of the Oblates of Mary Immaculate in the Province of British Columbia: Macaulay McColl, Vancouver.

Solicitor for the respondent Her Majesty the Queen in Right of Canada: Attorney General of Canada, Toronto.

cp/ci/e/qllls

**In re NIGERIA CHARTER FLIGHTS CONTRACT LITIGATION,
In re WORLD AIRWAYS LITIGATION**

04 MD 1613(RJD)(MDG), 04 CV 0304 (RJD)(MDG)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

520 F. Supp. 2d 447; 2007 U.S. Dist. LEXIS 79351

**October 25, 2007, Decided
October 25, 2007, Filed**

PRIOR HISTORY: In re Nig. Charter Flights Contract Litig., 233 F.R.D. 297, 2006 U.S. Dist. LEXIS 14579 (E.D.N.Y., 2006)

CASE SUMMARY:

PROCEDURAL POSTURE: Based on defendant airline's failure to operate international flights for which plaintiff passengers purchased tickets, the passengers asserted claims for violation of the Convention for the Unification of Certain Rules for International Carriage by Air, signed at Montreal on May 28, 1999 (reprinted in S. Treaty Doc. No. 106-45) (Montreal Convention), breach of contract, fraud, and negligence. The parties filed cross-motions for summary judgment.

OVERVIEW: The airline supplied charter air transportation to a travel company that sold tickets to the passengers. After the airline warned the travel company that it would not continue to participate in the flight program unless the travel company paid its debt, the airline terminated the flight program. Passengers who had flown the outbound legs of their trips were stranded in airports far from their homes, and other passengers were not flown on the first legs of their round-trip flights. The court held that the Montreal Convention did not preempt the passengers' state law claims. Because the passengers alleged that the airline's failure to transport the passengers constituted nonperformance of a contract, rather than a delay, the passengers' claims did not fall within the scope of the Montreal Convention. Thus, the passengers's claim under the Montreal Convention failed, and the Montreal Convention did not preempt the state law claims. Although the tickets did not create a contract between the airline and the passengers, there were issues of fact as to whether the airline was liable for the travel company's actions. The Airline Deregulation Act of 1978 did not preempt the tort claims.

OUTCOME: The court granted the airline's summary judgment motion as to the passengers' claims

for delay under the Montreal Convention and denied the airline's summary judgment motion as to the passengers' claims for breach of contract, fraud, and negligence. The court denied the passengers' motion for summary judgment and retained jurisdiction over the passengers' state law claims.

CORE TERMS: flight, convention, passenger, ticket, airline's, summary judgment, apparent authority, charter, preempted, carrier, law claims, ratification, transportation, travel, air, nonperformance, stranded, citation omitted, questions of fact, carriage, ratified, preempt, flew, choice of law, freight forwarders, aircraft, internal quotation marks, cargo owner's, tort claims, deposition

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Evidence
Civil Procedure > Summary Judgment > Standards > General Overview
[HN1] Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). Only when no reasonable trier of fact could find in favor of the nonmoving party should summary judgment be granted. The inferences to be drawn from the underlying affidavits, exhibits, interrogatory answers, and depositions must be viewed in the light most favorable to the party opposing the motion.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Nonmovants
[HN2] In opposing a summary judgment motion, the nonmoving party may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible, or upon the mere allegations or denials of the adverse party's pleading. Rather, the party opposing summary judgment must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). If, after drawing all inferences, the court finds that an issue of material fact remains, the motion for summary judgment must be denied.

International Law > Treaty Interpretation > Particular Treaties > Warsaw Convention
Transportation Law > Air Transportation > Warsaw Convention > General Overview
[HN3] The Convention for the Unification of Certain Rules for International Carriage by Air, signed at Montreal on May 28, 1999, art. 19 (reprinted in S. Treaty Doc. No. 106-45) (Convention) governs claims arising from delay in international air transportation. A carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures. Article 29 of the Convention describes the Convention's preemptive effect: In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be

brought subject to the conditions and such limits of liability as are set out in this Convention. As Article 29 suggests, the Convention preempts state law claims falling within its scope.

International Law > Treaty Interpretation > Particular Treaties > Warsaw Convention
Transportation Law > Air Transportation > Warsaw Convention > General Overview
[HN4] The plain language of the Convention for the Unification of Certain Rules for International Carriage by Air, signed at Montreal on May 28, 1999, art. 19 (reprinted in S. Treaty Doc. No. 106-45) (Convention) indicates that it governs claims for delay, not nonperformance. The Convention's preemptive effect on local law extends no further than its own substantive scope.

Civil Procedure > Federal & State Interrelationships > Choice of Law > Significant Relationships
[HN5] A federal court adjudicating state law claims that are pendent to a federal claim must apply the choice of law rules of the forum state. Under New York's rules, the first question to resolve in determining whether to undertake a choice of law analysis is whether there is an actual conflict of laws. Where a conflict has been found to exist, New York courts take a flexible approach whose goal is to apply the law of the jurisdiction with the most significant interest in, or relationship to, the dispute. In the contract law context, New York courts use a center of gravity or grouping of contacts approach, considering a spectrum of significant contacts, including the place of contracting, the places of negotiation and performance, the location of the subject matter, and the domicile or place of business of the contracting parties.

Evidence > Judicial Notice > Laws of Foreign States
[HN6] Fed. R. Civ. P. 44.1 permits parties to present information on foreign law, and the court may make its own determination of foreign law based on its own research, but it is not mandatory that it do so. Though Rule 44.1 establishes that courts may, in their discretion, examine foreign legal sources independently, it does not require them to do so in the absence of any suggestion that such a course will be fruitful or any help from the parties.

Civil Procedure > Federal & State Interrelationships > Choice of Law > General Overview
Evidence > Inferences & Presumptions > Presumptions
Evidence > Judicial Notice > Laws of Foreign States
[HN7] When parties fail to submit evidence on the content of foreign law, courts applying New York choice of law rules have found that the forum's law should be applied based on a rebuttable presumption that no conflict exists. In New York, it is required that a party wishing to apply the law of a foreign state show how that law differs from the forum state's law. Failure to do so results in the application of New York law.

Contracts Law > Types of Contracts > General Overview
Transportation Law > Air Transportation > General Overview
[HN8] In the transportation of passengers, the relevant transportation contract is generally the passenger ticket.

Business & Corporate Law > Agency Relationships > Authority to Act > Contracts & Conveyances > Liability of Principal
Business & Corporate Law > Agency Relationships > Establishment > Definition
[HN9] In New York, agency is defined as a fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. An agent has the power to alter the legal relationship between his principal and third parties in matters within the scope of the agency but cannot be held liable in a disclosed principal's stead. Rather, a principal is liable on contracts entered into on its behalf by an authorized agent.

Business & Corporate Law > Agency Relationships > General Overview
[HN10] A party is not required to be either solely a principal or solely an agent. The same actor may occupy different roles at successive points in an ongoing interaction among the same parties.

Business & Corporate Law > Agency Relationships > Establishment > Proof of Agency > Questions of Fact & Law
[HN11] The existence of an agency relationship is a mixed question of law and fact. Agency is a question of law for the court where the material facts from which it is to be inferred are not in dispute, the question of agency is not open to doubt, and only one reasonable conclusion can be drawn from the facts in the case. Conversely, where the circumstances raise the possibility of a principal-agent relationship, and no written authority for the agency is established, questions as to the existence and scope of the agency must be submitted to the jury.

Business & Corporate Law > Agency Relationships > Establishment > Proof of Agency > General Overview
[HN12] Talismanic language alone does not determine an agency relationship. Instead, courts must look to the substance of the relationship, since agency depends upon the existence of the required factual elements creating a fiduciary relation.

Business & Corporate Law > Agency Relationships > Authority to Act > Contracts & Conveyances > General Overview
Business & Corporate Law > Agency Relationships > Establishment > Elements > Right to Control by Principal
[HN13] While under traditional agency principles, a principal must maintain control over key aspects of an undertaking, control is not a crucial question where the issue is liability for a contract.

Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview
[HN14] A principal, not an agent, ordinarily bears the risk associated with an agency relationship.

Business & Corporate Law > Agency Relationships > Ratification > General Overview
[HN15] Under New York law, for the purpose of prevailing on a ratification theory, it is not necessary that a person acting be the agent of a ratifier.

Business & Corporate Law > Agency Relationships > Authority to Act > Apparent Authority > Elements

[HN16] Apparent authority is that authority which a principal holds an agent out as possessing, or which he permits the agent to represent that he possesses. The doctrine of apparent authority is rooted in that of estoppel; where a third party changes his position in reliance on the reasonable belief that an agent is acting within the scope of his authority, the principal is estopped to deny that the agent's act was not authorized. Apparent authority exists only where words or conduct of the principal, communicated to a third party give rise to the appearance and belief that the agent possesses authority to enter into a transaction. The existence of apparent authority requires, as well, that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal--not the agent. Finally, the third party's reliance on the appearance of authority must have been reasonable.

Business & Corporate Law > Agency Relationships > Authority to Act > Apparent Authority > Proof

Civil Procedure > Summary Judgment > Standards > General Overview

[HN17] While a grant of summary judgment as to apparent authority may be appropriate under some circumstances, the existence of apparent authority is normally a question of fact, and therefore inappropriate for resolution on a motion for summary judgment.

Business & Corporate Law > Agency Relationships > Authority to Act > Apparent Authority > General Overview

[HN18] A principal is estopped from denying the apparent authority of its agent when it remains silent when it had the opportunity of speaking and when it knew or ought to have known that its silence would be relied upon and that action would be taken or omitted which its statement of truth would prevent.

Business & Corporate Law > Agency Relationships > Ratification > Express & Implied Ratification

Business & Corporate Law > Agency Relationships > Ratification > Silence

[HN19] Ratification, under the law of New York, is the affirmance by a party of a prior act that did not bind it at the time but that was done or purportedly done on its account. Like the doctrine of apparent authority, that of ratification is very closely associated with estoppel, though unlike estoppel, ratification does not require a change of conduct by, or prejudice to, the innocent third party. Ratification must be performed with full knowledge of the material facts relating to the transaction, and the assent must be clearly established and may not be inferred from doubtful or equivocal acts or language. But the required intent may be implied from knowledge of a principal coupled with a failure to timely repudiate, where the party seeking a finding of ratification has in some way relied upon the principal's silence or where the effect of the contract depends upon future events.

Business & Corporate Law > Agency Relationships > Ratification > Proof

[HN20] Unless the relevant facts are undisputed, the question of ratification is one for the jury.

Business & Corporate Law > Agency Relationships > Ratification > Scope
[HN21] Having once ratified its agents' acts, a principal cannot afterwards avoid the effect of such ratification by showing that it was not acquainted with all the facts of the transaction ratified, when it was always in a position and was in possession of means of learning them.

Business & Corporate Law > Agency Relationships > Ratification > Silence
[HN22] Affirmance may be inferred from silence when, in the normal course of affairs, one who does not wish to consent would speak out. Ratification can occur through the silence of a principal. When an act is done without authority, under an assumed agency, it is the duty of the principal to disavow and repudiate it in a reasonable time after information of the transaction if he would avoid responsibility thereof. One may, by affirmative acts, and even by silence, ratify the acts of another who has assumed to act as his agent.

Business & Corporate Law > Agency Relationships > Ratification > Illegal Acts
[HN23] It is the settled law of both New York and New Jersey that an illegal act is incapable of being ratified.

Business & Corporate Law > Agency Relationships > Duties & Liabilities > Third Parties
Business & Corporate Law > Agency Relationships > Ratification > Illegal Acts
[HN24] Where an innocent third party, such as a holder in due course, is suing upon an illegal contract, the policy argument against enforcement of the contract is inapplicable because the plaintiff has done no wrong for which it should be penalized. Insofar as it is enforcing the rights of an innocent party, the court does not participate in a wrong when it enforces an illegal contract. Even where an agent procures a contract by means of fraud, New York law permits an innocent third party to invoke the principle of ratification against the principal.

Torts > Procedure > Preemption > Express Preemption
Torts > Transportation Torts > Air Transportation > General Overview
Transportation Law > Air Transportation > Airline Deregulation Act > General Overview
[HN25] The Airline Deregulation Act of 1978 (ADA) provides that no state shall enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under the subpart containing 49 U.S.C.S. § 41713(b)(l). The ADA preempts state enforcement actions having a connection with, or reference to, airline rates, routes, or services. The ADA's preemptive reach is limited. Some state actions may affect airline rates, routes or services in too tenuous, remote or peripheral a manner to have a preemptive effect. The ADA's preemption provision must be applied on a case-by-case basis, and state and local laws must directly affect prices, routes or services to be preempted. The ADA preempts a tort claim only if (1) the activity at issue in the claim is an airline service; (2) the claim affects the airline service directly rather than tenuously, remotely, or peripherally; and (3) the underlying tortious conduct is reasonably necessary to the provision of the service. Where a service

is provided in a manner that falls within a spectrum of reasonable conduct, preemption should occur, but the ADA should not be construed in a manner that insulates air carriers from tort liability for injuries caused by outrageous conduct that goes beyond the scope of normal aircraft operations.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

[HN26] Under 28 U.S.C.S. § 1367(c)(3), a district court may decline to exercise supplemental jurisdiction over a claim if the district court has dismissed all claims over which it has original jurisdiction. If all federal claims are dismissed before trial, the state claims should be dismissed as well. But when the dismissal of the federal claim occurs late in the action, after there has been substantial expenditure in time, effort, and money in preparing the dependent claims, knocking them down with a belated rejection of supplemental jurisdiction may not be fair. Nor is it by any means necessary. The discretion implicit in the word "may" in § 1367(c) permits the district court to weigh and balance several factors, including considerations of judicial economy, convenience, and fairness to litigants.

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JUDGES: RAYMOND J. DEARIE, United States District Judge.

OPINION BY: RAYMOND J. DEARIE

OPINION

[*449] MEMORANDUM & ORDER

DEARIE, Chief Judge.

Plaintiffs allege violations of the Warsaw and Montreal Conventions, as well as breach of contract, fraud, and negligence, arising from the failure of World Airways, Inc. ("World") to operate international flights for which plaintiffs had purchased tickets. On January 30, 2006, this Court certified a class of plaintiffs who purchased tickets prior to January 31, 2004, for travel between Nigeria and the United States, and whom World failed to transport as scheduled due to its discontinuation of flight operations. Both World and plaintiffs have moved for summary judgment. For the reasons explained below, World's motion is granted in part and denied in part, and plaintiffs' motion is denied.

[*450] BACKGROUND

In December 2002, World entered into an agreement with Ritetime Aviation and Travel Services, Inc. ("Ritetime") under which it agreed to supply Ritetime with charter **[**3]** air transportation between New York, Atlanta, and Lagos, Nigeria for sale to the public. See Costello Aff. Ex. 10 (World Airways Charter Aircraft Services Agreement) [hereinafter Charter Agreement]. The Charter Agreement obligated World to provide aircraft and flight support for eighty-three round-trip flights between February 28 and December 30, 2003, for which Ritetime was to pay World approximately $ 300,000 per flight. Id. Annex A. Forty-two of these flights were to operate between Atlanta and Lagos, and the remaining forty-one between New York and Lagos. [1] In a separate agreement, World granted Ritetime limited use of its trademarks for the purpose of marketing the flight program. See id. Ex. 11 (Trademark License Agreement).

1 The record indicates that the flight program also included a Houston-Lagos route, with Atlanta as an intermediate stop, see Costello Aff. Ex. 38 (list of flights operated by World Air for Ritetime between May 28, 2003 and December 31, 2003), but neither the Charter Agreement nor its Annex mentions the Houston flights, and these flights do not appear to figure into the total cost of the contract established by the Charter Agreement.

Although the Charter Agreement **[**4]** provided only for flights in 2003, both parties contemplated that the Nigeria flight program would continue beyond the end of that year. See id. Ex. 46 (October

20, 2003 email from World executive to Ritetime consultant describing proposed schedule and pricing for the period January 1, 2003 to May 31, 2004); Monroe Aff. Ex. 55 (December 2, 2003 email from World ordering 10,000 blank tickets to be delivered to Ritetime Aviation). Ritetime sold tickets for travel in 2004, including those purchased by plaintiffs. At the same time, however, Ritetime fell behind in its payments to World, and by December 31, 2003, it owed World more than $ 2 million. Def.'s Rule 56.1 Stat't P 38.

In late 2003, World warned Ritetime that it would not continue to participate in the Nigeria flight program unless Ritetime paid its debt, see Costello Aff. Ex. 44 (December 5, 2003 letter from World vice president to Ritetime C.E.O.), and declined to sign an amendment to the Charter Agreement extending the program, id. Ex. 43 (amendment). On or about December 28, 2003, World canceled a round-trip flight between New York and Lagos. Then, after operating a final flight on a triangular New York-Lagos-Atlanta route **[**5]** on December 30-31, 2003, Costello Aff. Ex. 38 (list of flights operated), World ceased operations between Nigeria and the United States, effectively terminating the flight program. As a result, hundreds of passengers who had purchased tickets for flights in 2004 were unable to travel. Some passengers, having flown the outbound legs of their round trips already, were stranded in airports far from home. [2]

2 The parties dispute the number of affected passengers. Plaintiffs offer the testimony of James E. Corter, an associate professor of statistics at Columbia University, whose analysis of data provided to him by plaintiffs' attorneys yielded the following estimates: 2,752 passengers who flew from the U.S. and were stranded in Nigeria; 1,999 passengers who flew from Nigeria and were stranded in the U.S.; 692 passengers who purchased flights in the U.S. but never flew; and 374 passengers who purchased flights in Nigeria but never flew. Monroe Aff. Ex. 73 (Corter Report) 1. In response, defendants point to the testimony of Ritetime consultant Jerry Murphy, who expressed the view at his deposition that approximately 500 passengers were stranded in New York, and anywhere from 120 to 600 in **[**6]** Lagos. Costello Aff. Ex. 87 (Murphy Dep.) 42. Defendants also offer the transcript of Professor Corter's deposition, which suggests that his estimates exceed the actual numbers of affected passengers. Id. Ex. 78. Meanwhile, a consent order issued by the U.S. Department of Transportation in the aftermath of World's decision to discontinue service (and discussed below) estimated the numbers of strandees at 1,221 in Lagos and 860 in New York. Id. Ex. 53 (consent order) 2.

[*451] On January 19, 2004, after "considerable discussion" with the DOT's Enforcement Office, World flew 318 passengers who had been stranded in Lagos back to New York. Costello Aff. Ex. 53 (DOT consent order) [hereinafter Consent Order] 3. World claims that it also paid for 20 passengers who were stranded in the United States to return to Lagos, Def.'s Rule 56.1 Stat't P 58, and there is evidence that Ritetime paid to return some stranded passengers, as well, Costello Aff.

Ex. 50 (Ritetime letter to DOT, Feb. 25, 2004). Named class representatives, however, had to arrange their own alternative transportation after being stranded. [3] Other plaintiffs were never flown on the first legs of their round-trip flights. Ultimately, **[**7]** World was assessed civil penalties of $ 350,000 for stranding passengers in violation of numerous federal statutes and regulations. Consent Order 6.

3 Class representatives Dr. Obiora Anyoku, Dr. Azuka Anyoku, Faith Adepoju, Uche Ukwuoma, and Newman Nkwor flew from New York to Lagos in December 2003 and were scheduled to return in January 2004. Class representatives Florence Bolaji Shonaiya, Mabel Inim, and Julia Njoku flew from Lagos to New York in 2003 and were scheduled to return to Lagos on December 28, 2003, January 20, 2004, and March 28, 2004, respectively.

Passengers sued World, Ritetime, and Peter Obafemi, Ritetime's C.E.O., in state and federal courts throughout the country. The Panel on Multidistrict Litigation transferred the cases pending in other federal courts to the Eastern District of New York, where they were consolidated in this Court. Motions for default were granted against Ritetime and Obafemi on January 28 and October 13, 2005, respectively. This Court certified a class of plaintiffs on January 30, 2006. These motions for summary judgment ensued.

DISCUSSION

Plaintiffs allege that World is liable for its failure to transport them under the Warsaw Convention or its **[**8]** successor, the Montreal Convention; [4] they also allege breach of contract, negligence, and fraud. World argues that it is entitled to summary judgment because (1) the Montreal Convention preempts plaintiffs' state law claims, and plaintiffs have not shown liability under the Convention itself; (2) even if plaintiffs' contract claims are not preempted, they should be dismissed since plaintiffs are not in privity with World; (3) even if the Montreal Convention does not preempt plaintiffs' negligence and fraud claims, those claims are preempted by the Airline Deregulation Act; and (4) to the extent that plaintiffs' claims under the Montreal Convention are dismissed, the Court should decline to exercise supplemental jurisdiction over any remaining state law claims. Plaintiffs cross-move for summary judgment on their state law claims or, alternatively, on their claims under the Montreal Convention.

4 Although the parties dispute which Convention should apply, see Def.'s Mem. Supp. Mot. Summ. J. [hereinafter Def.'s Mem] 18 n.24; Pis.' Mem. Opp'n Mot. Summ. J. & Supp. Cross-Mot. Summ J. [hereinafter Pls.' Mem.] 3 n.4, the Court finds for the reasons explained below that the differences between **[**9]** the two conventions are not significant for purposes of these motions, and applies the Montreal Convention.

A. Standard of Review

[HN1] Summary judgment is appropriate only "if the pleadings, depositions, answers to **[*452]** interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "Only when no reasonable trier of fact could find in favor of the nonmoving party should summary judgment be granted." White v. ABCO Eng'g Corp., 221 F.3d 293, 300 (2d Cir. 2000) (quoting Taggart v. Time Inc., 924 F.2d 43, 46 (2d Cir. 1991)). Moreover, "[t]he inferences to be drawn from the underlying affidavits, exhibits, interrogatory answers, and depositions must be viewed in the light most favorable to the party opposing the motion." Cronin v. Aetna Life Ins. Co., 46 F.3d 196, 202 (2d Cir. 1995). However, [HN2] the nonmoving party "may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible, or upon the mere allegations or denials of the adverse party's pleading," Goenaga v. March of Dimes Birth Defects Found., 51 F.3d 14, 18 (2d Cir. 1995) **[**10]** (internal quotation marks and citation omitted). Rather, the party opposing summary judgment must "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). If, after drawing all inferences, the court finds that an issue of material fact remains, the motion for summary judgment must be denied.

B. The Montreal Convention

World argues that the Montreal Convention preempts plaintiffs' state law claims, and that plaintiffs have failed to prove liability under the Convention itself. For the reasons explained below, the Court grants World's motion for summary judgment with respect to plaintiffs' claims under the Montreal Convention, but finds that the Convention does not preempt plaintiffs' state law claims.

The Montreal Convention [5] entered into force in the United States on November 4, 2003, updating and replacing the uniform system of liability for international air carriers previously established by the Warsaw Convention. Ehrlich v. Am. Airlines, Inc., 360 F.3d 366, 371 n.4 (2d Cir. 2004). Whereas the Warsaw Convention sought to encourage the development of commercial aviation by limiting liability, the Montreal Convention reflects an additional consideration: **[**11]** "the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution." Id. (quoting Montreal Convention, pmbl.).

5 The Montreal Convention is formally known as the Convention for the Unification of Certain Rules for International Carriage by Air Done at Montreal on 28 May 1999, reprinted in S. Treaty Doc. No 106-45, 1999 WL 33292734 (2000).

[HN3] Article 19 of the Montreal Convention governs claims arising from delay in international air transportation:

> The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures. [6]

[*453] Article 29 describes the Convention's preemptive effect: "In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and **[**12]** such limits of liability as are set out in this Convention...." As Article 29 suggests, the Montreal Convention preempts state law claims falling within its scope. The Second Circuit has declared of the Warsaw Convention that "all state law claims that fall within the scope of the Convention are preempted.'" Fishman v. Delta Air Lines, Inc., 132 F.3d 138, 141 (2d Cir. 1998). Because the two conventions' preemptive language is substantially similar, [7] they have "substantially the same preemptive effect." Paradis v. Ghana Airways Ltd., 348 F. Supp. 2d 106, 111 (S.D.N.Y. 2004) ("Article 29 of the Montreal Convention simply clarified the language of... Article 24(1) of the Warsaw Convention.").

6 Article 19 of the Warsaw Convention consisted of the first of these two sentences; the Montreal Convention added the second sentence. As will be seen, the Court's disposition of these summary judgment motions turns on the meaning of the term "delay," not on whether World mitigated any damage to plaintiffs, or on whether mitigation would have been impossible. Thus this difference between the two conventions is not significant for present purposes.

7 Article 24(1) of the Warsaw Convention provides that **[**13]** "in the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention."

World characterizes plaintiffs' state law claims as sounding in delay. Def.'s Mem. at 20-21. Such claims, it argues, fall within the scope of Article 19 of the Montreal Convention and therefore are preempted under Article 29. Id. at 19-20. Plaintiffs respond that World's failure to transport them constitutes not delay, but nonperformance of a contract, and that their state law claims therefore are not preempted. Pls.' Mem. at 3-6. As explained below, the Court agrees that plaintiffs allege nonperformance, not delay. Accordingly, it finds that the Montreal Convention does not preempt plaintiffs' state law claims--but it also grants World's motion for summary judgment as to plaintiffs' claims for delay under the Montreal Convention.

As World observes, several courts, when presented with claims based on airlines' refusal to fly passengers, have construed those claims as sounding in delay within the scope of Article 19 of the Warsaw Convention. See Def.'s Mem. at 20-21 (citing, inter alia, Paradis, 348 F. Supp. 2d at

113-14; **[**14]** Minhas v. Biman Bangladesh Airlines, No. 97 Civ. 4920, 1999 U.S. Dist. LEXIS 9849, at *8 (S.D.N.Y. June 30, 1999); Alam v. Pakistan Int'l Airlines Corp., No. 92 Civ. 4356, 1995 U.S. Dist LEXIS 11919, at *6 & n.9 (S.D.N.Y. July 27, 1995); Malik v. Butta, No. 92 Civ. 8703, 1993 U.S. Dist. LEXIS 14472, at *10 & n.11 (S.D.N.Y. Oct. 14, 1993)). However, in each of these cases, as well as in others reaching similar conclusions, circumstances existed which militated in favor of a finding of delay, and are absent here. In some, the defendant airlines ultimately provided plaintiffs with transportation. See, e.g., Ikekpeazu v. Air France, No. 3:04cv0711, 2004 U.S. Dist. LEXIS 24580, at *2 (D. Conn. Dec. 6, 2004); Fields v. BWIA Int'l Airways Ltd., No. 99-CV-2493, 2000 U.S. Dist. LEXIS 9397, at *15 (E.D.N.Y. July 7, 2000); Sassouni v. Olympic Airways, 769 F. Supp. 537, 538 (S.D.N.Y. 1991). In others, plaintiffs either secured alternate transportation without waiting to find out whether the defendant airlines would transport them, see, e.g., Oparaji v. Virgin Atl. Airways, Ltd., No. 04-CV-1554, 2006 U.S. Dist. LEXIS 68636, at *11 (E.D.N.Y. Sept. 25, 2006); Paradis, 348 F. Supp. 2d at 112; or refused **[**15]** an offer of a later flight, see, e.g., Igwe v. Northwest Airlines, Inc., No. H-05-1423, 2007 U.S. Dist. LEXIS 1204, **[*454]** at *4 (S.D. Tex. Jan. 4, 2007). In still others, plaintiffs never actually alleged nonperformance. See, e.g., Minhas, 1999 U.S. Dist. LEXIS 9849, at *8 n.4 (finding plaintiff's claim governed by Article 19 where she did not allege nonperformance); Alam, 1995 U.S. Dist. LEXIS 11919, at *7-8 (denying motion to dismiss plaintiffs' Article 19 claim where they had sufficiently alleged delay); Malik, 1993 U.S. Dist. LEXIS 14472, at *10 (finding plaintiffs' state law claims preempted by Article 19 where they conceded that their claim was for delay).

Here, by contrast, plaintiffs have shown that World simply refused to fly them, without offering alternate transportation. Although World flew more than 300 stranded passengers from Lagos to New York in a single flight on January 19, 2004, and subsequently returned 20 other stranded passengers from the United States to Lagos, World arranged transportation for these individuals only after explicitly disavowing any obligation to do so--indeed, it described the January 19 flight as "a humanitarian gesture of goodwill." Consent Order **[**16]** 3. Moreover, World conducted these flights only after "considerable discussion" with the enforcement division of the United States Department of Transportation. Id. Meanwhile, many other stranded passengers were simply abandoned. That some plaintiffs were flown on the first legs of their flights does not alter the Court's conclusion. See Weiss v. El Al Israel Airlines, Ltd., 433 F. Supp. 2d 361, 367 (S.D.N.Y. 2006) ("[T]hat the airline provided one flight according to contract does not necessarily render the failure to provide carriage on another flight a mere delay rather than a total failure to perform."); see also 9 Arthur Linton Corbin, Contracts § 945 (interim edition 2002) ("A breach of contract may be large or small, total or partial. A debtor may pay nine-tenths of his debt, but fail to pay the other tenth. He has committed a breach of contract.").

Because World simply refused to transport plaintiffs, rather than merely delaying them, the facts of this case are analogous, not to the cases World cites, but to a Seventh Circuit decision relied upon by plaintiffs, Wolgel v. Mexicana Airlines, 821 F.2d 442 (7th Cir. 1987). The plaintiffs in Wolgel were purchasers of round-trip tickets **[**17]** from Chicago to Acapulco on Mexicana Airlines. Id. at 442. They were bumped from their flight but not placed on a later Mexicana flight. Id. at 445.

Observing that the plaintiffs had "never left the airport," the Seventh Circuit construed their claim as sounding in nonperformance, not delay. Id. Next, in order to determine whether the plaintiffs' claims were preempted by the Warsaw Convention, the court looked to the Convention's drafting history, and found that the delegates to the Convention had concluded that "there was no need for remedy in the Convention for total nonperformance of the contract, because in such a case the injured party has a remedy under the law of his or her home country." Id. at 444 (citing Second International Conference on Private Aeronautical Law, Minutes 76-77 (R. Homer & D. Legrez trans. 1975)). Thus the delegates had "agreed that the Convention should not apply to a case of nonperformance of a contract." Id. In view of this history, the court held, the plaintiffs' claims were not preempted.

As World points out, Def.'s Mem. at 21-22 & n.28, at least two district courts of this circuit, relying on El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155, 119 S. Ct. 662, 142 L. Ed. 2d 576 (1999), **[**18]** have questioned Wolgel. See Paradis, 348 F. Supp. 2d at 113 ("Wolgel's distinction **[*455]** between 'bumping' and 'delay' has been undercut by the U.S. Supreme Court's message in Tseng 'that the application of the Convention is not to be accomplished by a miserly parsing of its language.'") (quoting King v. Am. Airlines, 146 F. Supp. 2d 159, 162 (N.D.N.Y. 2001)). This Court does not agree that Tseng "undercuts" Wolgel, at least not for present purposes. At issue in Tseng was whether the plaintiff's state law claim based on psychological harm was preempted by Article 17 of the Warsaw Convention, which made air carriers liable for injuries "sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." Previous to Tseng, the Court had held that claims arising from purely psychological injuries were not actionable under Article 17. Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 553, 111 S. Ct. 1489, 113 L. Ed. 2d 569 (1991). In Tseng, it held that the plaintiff's claim, though not *actionable* under Article 17, nevertheless **[**19]** was within the *scope* of Article 17, which it read to cover "all personal injury cases stemming from occurrences on board an aircraft or in embarking or disembarking." 525 U.S. at 169. On this basis, it held that Article 17 precluded the plaintiff from pursuing her claim under state law. Id. at 176. The Court noted, however, that the plaintiff's state law claim would *not* have been preempted if it had been outside Article 17's scope: "The Convention's preemptive effect on local law extends no further than the Convention's own substantive scope. A carrier, therefore, is indisputably subject to liability under local law for injuries arising outside of that scope: e.g., for injuries occurring before any of the operations of embarking or disembarking." Id. at 171 (internal quotation marks and citations omitted). This qualification describes Wolgel. In Wolgel, the Seventh Circuit held not merely that the plaintiffs' claim for nonperformance was not actionable under Article 19, but also that it was outside Article 19's substantive scope, and therefore not preempted. 821 F.2d at 444 ("We conclude that the Wolgels' claim falls outside the Warsaw Convention . . . .").

The Court finds the reasoning **[**20]** of Wolgel persuasive, and applies it here. [HN4] The plain language of Article 19 of the Montreal Convention indicates that it governs claims for delay, not nonperformance. Moreover, as the Seventh Circuit explained, the drafting history of the Warsaw

Convention's Article 19--whose pertinent language is identical to its Montreal Convention counterpart--indicates that it was not intended to cover claims for nonperformance. As already noted, the Supreme Court has observed of the Warsaw Convention, whose preemptive effect is the same as that of the Montreal Convention, that "[its] preemptive effect on local law extends no further than [its] own substantive scope." Tseng, 525 U.S. at 172. Because plaintiffs' state law claims are grounded in nonperformance, not delay within the substantive scope of Article 19, the Court concludes that Article 19 does not preempt plaintiffs from pursuing those claims. However, by the same logic, the Court also finds that plaintiffs have failed to allege delay under Article 19, grants World's motion for summary judgment with respect to plaintiffs' Montreal Convention claims, and denies plaintiffs' cross-motion for summary judgment on those claims.

Finally, the Court **[**21]** notes that its holding with regard to preemption applies not only to plaintiffs' state law contract claims, but also to their claims of fraud and negligence. Although, as World observes, **[*456]** some courts have found fraud and negligence claims preempted by the Convention, they have done so where those claims arose from injuries within the Convention's substantive scope, e.g., personal injuries resulting from accidents (Article 17), lost or damaged luggage (Article 18), or delay (Article 19). See, e.g., Bloom v. Alaska Airlines, 36 Fed. Appx. 278, 280-81 (9th Cir. 2002) (fraud claim preempted where it "arose from the same discrete event" as plaintiff's claim for intentional infliction of emotional distress, which was not actionable under Article 17 but nevertheless within its scope); Yanovskiy v. Air France, No. 98-9055, 1999 U.S. App. LEXIS 8218 (2d Cir. 1999), at *3 (fraud and misrepresentation claims preempted where they arose from damaged baggage and delay, since "all state law claims allegedly arising from a damaging event covered by the Convention . . . are preempted") (citing Shah v. Pan Am. World Servs., Inc., 148 F.3d 84, 97 (2d Cir. 1998)); Cruz v. Am. Airlines, Inc., 338 U.S. App. D.C. 246, 193 F.3d 526, 530-31 (D.C. Cir. 1999) **[**22]** (claims for fraud and deceit preempted where court concluded that "the 'substantive scope' of Article 18 must extend at least as far as to encompass [plaintiffs'] common law claims") (quoting Tseng, 525 U.S. at 160-61); Shah, 148 F.3d at 97-98 (claims for rescission, negligence, and fraud preempted where "[a]ll of . . . plaintiffs' common law claims are 'within the scope' of Article 17 of the Convention, in that they all seek damages for 'the death or wounding of a passenger or any other bodily injury suffered by a passenger' caused by an 'accident . . . on board [an] aircraft' in international transportation") (citations omitted, third and fourth alterations in original); Shirobokova v. CSA Czech Airlines, Inc., 376 F. Supp. 2d 439, 442 (S.D.N.Y. 2005) (claims for negligence, breach of warranty, and negligent misrepresentation preempted where plaintiff sued "seek[ing] redress for injuries that she suffered during 'an accident . . . within the meaning of Article 17 of the Warsaw Convention' on her flight . . . .") (internal quotation marks and citation omitted). Here, by contrast, the underlying injury from which plaintiffs' tort claims arise--total refusal to fly ticketed passengers--has **[**23]** *not* been shown to be within the scope of Article 19, or any other provision of the Convention. Thus those claims are not preempted.

C. Breach of Contract

World next argues that even if plaintiffs' contract claims are not preempted, those claims nevertheless must be dismissed, since privity of contract never existed between plaintiffs and itself. Plaintiffs respond that the tickets themselves establish privity, or, in the alternative, that World is liable on the basis of apparent authority or ratification. For the reasons explained below, the Court agrees with World that the tickets themselves do not establish a contract between World and plaintiffs. With regard to plaintiffs' other theories of liability, the Court finds that plaintiffs have created an issue of fact as to whether World is liable for Ritetime's actions, precluding summary judgment for World, but also that plaintiffs have presented insufficient evidence to warrant summary judgment in their favor. Thus, with respect to plaintiffs' contract claims, both parties' motions for summary judgment must be denied.

In order to evaluate plaintiffs' state law claims, the Court must identify the jurisdiction whose substantive law properly **[**24]** governs this dispute. In undertaking this task, the Court looks to New York's choice of law rules. Rogers v. Grimaldi, 875 F.2d 994, 1002 (2d Cir. 1989) ([HN5] "A federal court . . . adjudicating state law claims that are pendent to a federal **[*457]** claim must apply the choice of law rules of the forum state.") (citing, inter alia, Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)). Under New York's rules, the "first question to resolve in determining whether to undertake a choice of law analysis is whether there is an actual conflict of laws," Curley v. AMR Corp., 153 F.3d 5, 12 (2d Cir. 1998) (citing Matter of Allstate Ins. Co. & Stolarz, 613 N.E.2d 936, 81 N.Y.2d 219, 223, 597 N.Y.S.2d 904 (1993)). Where a conflict has been found to exist, New York courts take a "flexible approach" whose goal is "to apply the law of the jurisdiction with the most significant interest in, or relationship to, the dispute." Brink's Ltd. v. South African Airways, 93 F.3d 1022, 1030 (2d Cir. 1996) (citing Babcock v. Jackson, 191 N.E.2d 279, 283-84, 12 N.Y.2d 473, 481-82, 240 N.Y.S.2d 743, 749 (1963)). More specifically, in the contract law context, New York courts use a "center of gravity" or "grouping **[**25]** of contacts" approach, considering "a spectrum of significant contacts, including the place of contracting, the places of negotiation and performance, the location of the subject matter, and the domicile or place of business of the contracting parties." Id. at 1030-31 (citing Stolarz, 613 N.E.2d at 940).

In this case, there are three jurisdictions whose law might apply--New York, Georgia, and Nigeria. Without providing detailed briefing on the choice of law question, World suggests that an actual conflict of laws may exist between Nigerian contract law and its domestic counterparts. [8] World notes that "Nigeria is a federal state which, like the U.S., does not have the same law in each jurisdiction," and cites scholarly authority for the proposition that Nigeria exhibits "a multifaceted legal pluralism . . . consisting of English-style laws, Islamic law and a wide variety of customary laws operating against the background of a three-tier federal system." Def.'s Reply 5. But World identifies no specific legal principles upon which Nigeria and the domestic jurisdictions differ. Plaintiffs respond that no conflict exists, since "both Nigerian and United States law are rooted in English **[**26]** common law." Pls.' Mem. 6 n.8. Like World, however, plaintiffs make little effort to describe the substance of relevant Nigerian legal principles, offering only the affidavit of Femi Olubanwo, a Nigerian attorney, who avers that "[u]nder Nigerian law a valid contract is formed upon offer, acceptance, and transfer of consideration," "upon the breach of a contract the injured

party is always entitled to an action for damages against the breaching party," and "recoverable damages upon the breach of a contract are those damages which were reasonably foreseen or contemplated by the parties during their negotiations or at the time the contract was executed." Monroe Aff. Ex. 79 (Olubanwo Aff.) PP 5-7. Meanwhile, neither party argues that the Court should apply the law of any jurisdiction in particular, foreign or domestic. And in their discussions of specific contract and agency principles that might be relevant to this case, both parties rely almost exclusively on citations to the law of New York.

> 8 World also notes that class members reside in "at least 40 states," and criticizes plaintiffs for "appear[ing] to assume that for plaintiffs that are U.S. residents all contract claims would be **[**27]** governed by law identical to New York law," Def.'s Reply Mem. Supp. Summ. J. [hereinafter Def.'s Reply] 5 n.2. But World provides no briefing on specific differences among potentially applicable domestic legal regimes.

By describing Nigerian law as an amalgam of English common law and customary law, World has succeeded in creating **[*458]** some ambiguity about whether, as a general matter, with respect to Nigeria, courts may safely apply "the [traditional] presumption . . . that the common law still prevails there and that it is the same as the common law of New York. . . ." Loebig v. Larucci, 572 F.2d 81, 85 (2d Cir. 1978) (quoting Arams v. Arams, 182 Misc. 328, 45 N.Y.S.2d 251, 254 (Sup. Ct. 1943)). But that is all World has done. By no means has it adduced sufficient evidence to prove that a conflict of laws exists with respect to the legal principles relevant to this case. Far from demonstrating that Nigerian courts take a different view of contract formation, agency, apparent authority, or ratification than do the courts of New York, World has offered no evidence at all about how Nigerian courts would approach these issues. Under these circumstances, the Court is not obliged to undertake **[**28]** its own analysis of Nigerian law to determine whether a conflict exists; nor will it. See id. ([HN6] "Rule 44.1 of the Federal Rules of Civil Procedure permits parties to present information on foreign law, and the court may make its own determination of foreign law based on its own research, but it is not mandatory that it do so."); Bartsch v. Metro-Goldwyn-Mayer, Inc., 391 F.2d 150, 155 n.3 (2d Cir. 1968) ("Though . . . Rule 44.1 establishes that courts may, in their discretion, examine foreign legal sources independently, it does not require them to do so in the absence of any suggestion that such a course will be fruitful or any help from the parties.").

Instead, applying New York choice of law principles for cases involving foreign jurisdictions, the Court finds that New York law properly controls this dispute. See O'Keefe v. Honda Motor Co., Ltd., No. 96 CV 1418, 1998 U.S. Dist. LEXIS 8830, at *19 (E.D.N.Y. Mar. 31, 1998) ([HN7] "When parties have failed to submit evidence on the content of foreign law, courts in this circuit applying New York choice of law rules have found that the forum's law should be applied based on a rebuttable presumption that no conflict exists."); Indep. Order of Foresters v. Donaldson, Lufkin

& Jenrette, Inc., 919 F. Supp. 149, 152 (S.D.N.Y. 1996) **[**29]** ("In New York, it is required that a party wishing to apply the law of a foreign state show how that law differs from the forum state's law. Failure to do so results in the application of New York law."); Argonaut P'ship, L.P. v. Bankers Trustee Co. Ltd., No. 96 Civ. 1970, 1997 U.S. Dist. LEXIS 1092, at *40 (S.D.N.Y. Feb. 4, 1997) ("[W]hen parties have failed to submit evidence on the content of foreign law, courts in this Circuit applying New York choice of law rules have found that the forum's law should fill the gaps.").

Other courts of this circuit, in similar cases, have taken the same approach. See, e.g., Nameh v. Muratex Corp., 34 Fed. Appx. 808, 810 (2d Cir. 2002) (summary order) ("New York law properly governed the agreement because [plaintiff], despite advocating application of Polish law, failed to produce sufficient evidence of Polish contract law to demonstrate that the law of contract formation in Poland conflicted with the law of the forum state."); Wasserstein Perella Emerging Markets Finance, L.P. v. Province of Formosa, No. 97 Civ. 793, 2002 U.S. Dist. LEXIS 12012, at *33 (S.D.N.Y. July 2, 2002) ("Defendant presented no argument or evidence of Argentinean law with **[**30]** respect to any issue other than actual and apparent authority; therefore, the court finds that New York law properly governs all other issues pertinent to this dispute."); Haywin Textile Prods., Inc. v. Int'l Finance Investment & Commerce Bank Ltd., 152 F. Supp. 2d 409, 413-14 (S.D.N.Y. 2001) (applying New York law where defendant "has not demonstrated that Bangladeshi law regarding successor liability is significantly **[*459]** different from New York law"); Nat'l Oil Well Maint. Co. v. Fortune Oil & Gas, Inc., No. 02 CV 7666, 2005 U.S. Dist. LEXIS 8896, at *12-13 (S.D.N.Y. May 11, 2005) (applying New York law because "neither party advocates application of the law of Indonesia, and the Court is under no obligation to make a determination of foreign law based on its own research.").

A final factor counseling in favor of the application of New York law is that the parties have relied almost exclusively on the law of New York in briefing their arguments with respect to the relevant principles of contract and agency law. See In the Matter of the Arbitration Between Tehran-Berkeley Civil and Env't'l Engineers and Tippetts-Abbett-McCarthy-Stratton, 888 F.2d 239, 242 (2d Cir. 1989) ("Iranian law could **[**31]** apply, since the contract was executed and performed in that country. The parties' briefs, however, rely on New York law. Under the principle that implied consent to use a forum's law is sufficient to establish choice of law, we will apply New York law to this case.") (internal citation omitted); Lehman v. Dow Jones & Co., Inc., 783 F.2d 285, 294 (2d Cir. 1986) ("Although [plaintiff] does not concede that New York law would apply, he, like [defendant], cites only New York cases. Under these circumstances we do not feel obliged to undertake an investigation to determine whether there is any difference in the California law and what law a California court would apply if there were.").

Having identified the applicable law, the Court turns to the substance of plaintiffs' contract claim. In response to World's contention that privity of contract never existed between plaintiffs and itself, plaintiffs first argue that the tickets themselves establish privity, and that "the Court's inquiry should begin and end with the ticket." Pl.'s Mem. at 8. The Court disagrees. It is true [HN8] that "[i]n **[**32]** the transportation of passengers, the relevant transportation contract is generally the

passenger ticket." Shen v. Japan Airlines, 918 F. Supp. 686, 688 (S.D.N.Y. 1994). See also In re Air Crash Disaster of Aviateca Flight 901, 29 F. Supp. 2d 1333, 1341 (S.D.N.Y. 1997) ("In determining the parties' intentions, the Court must look to the terms of the contract for transportation, in this case, the airline tickets."); Kelley v. Societe Anonyme Belge d'Exploitation de la Navigation Aerienne, 242 F. Supp. 129, 144 (E.D.N.Y. 1965) (noting that airline ticket "constitutes the contract made by the parties") (internal quotation marks and citation omitted); Rinck v. Deutsche Lufthansa A.G., 57 A.D.2d 370, 371-72, 395 N.Y.S.2d 7, 9-10 (App. Div. 1977) (observing that where carrier sold ticket to passenger, "there was mutuality of obligation and a binding contract of carriage."). It is also true that certain features of the tickets, which were printed in accordance with specifications provided to the printer by World, see Monroe Aff. Ex. 14 (Def.'s Response to Pls.' Requests for Admission) P 30, suggest a direct contract between plaintiffs and World. In particular, although corporate logos for **[**33]** both Ritetime and World appear on the front of the ticket, the Conditions of Contract, on a subsequent page, appear over World's name alone. Costello Aff. Ex. 34 (ticket). However, plaintiffs have not shown that World sold them their tickets. Indeed, the only evidence of a direct purchase is the deposition testimony of plaintiff Florence Bolaji Shonaiya that her daughter bought a ticket at the World Airways office in Lagos. [9] Monroe Aff. Ex. 3 (Shonaiya **[*460]** Dep.) 5. This testimony, standing alone, is insufficient to overcome World's insistence that it did not sell tickets for the Nigeria flights, see id. Ex. 76 (Ellington Dep.) 78 (statement of World's president that "World Airways does not sell the tickets"), or to substantiate plaintiffs' contention that a direct contracting relationship existed between themselves and World. The Court therefore declines to grant summary judgment for plaintiffs on this basis.

9 The record also contains the deposition testimony of one plaintiff that she *collected* her ticket, which another individual had purchased for her in the United States, at the World Airways office in Lagos. Monroe Aff. Ex. 7 (Njoku Dep.) 5.

Plaintiffs next argue that even if the tickets **[**34]** themselves do not establish privity, "World is bound by the acts of its agent, Ritetime, in entering into contracts with passengers on World's behalf, which World breached." Pls.' Mem. 15. World responds Ritetime was not its agent; rather, according to World, it was *Ritetime's* agent. [10] Def.'s Mem. 7-9. The Court declines to grant summary judgment for World on this basis. [HN9] In New York, as elsewhere, agency is defined as "a fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." L. Smirlock Realty Corp. v. Title Guar. Co., 70 A.D.2d 455, 464, 421 N.Y.S.2d 232, 238 (App. Div. 1979). See also Cabrera v. Jakabovitz, 24 F.3d 372, 386 (2d Cir. 1994) ("Agency is a legal concept which depends upon the existence of required factual elements: the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking.") (quoting Restatement 2d of Agency § 1 cmt. b (1958)). An agent has "the power to alter the legal relationship

[35]** between his principal and third parties in matters within the scope of the agency," Smirlock Realty, 70 A.D.2d at 464 (citations omitted), but cannot be held liable in a disclosed principal's stead, Sweeney v. Herman Mgmt., Inc., 85 A.D.2d 34, 36, 447 N.Y.S.2d 164, 166 (App. Div. 1982) ("The principle has long been established that an agent acting on behalf of a disclosed principal will not be personally bound, absent clear and explicit evidence of the agent's intention to substitute or add his personal liability for or to that of his principal."). Rather, "a principal . . . is liable on contracts entered into on its behalf by an authorized agent . . . ." Key Int'l Mfg., Inc. v. Morse/Diesel, Inc., 142 A.D.2d 448, 453, 536 N.Y.S.2d 792, 795 (App. Div. 1988).

10 World actually offers contradictory claims on the question of agency. In one instance, characterizing itself as a vendor of services, it claims that "the relationship between the parties was not intended to be that of principal and agent." Def.'s Mem. 7. Elsewhere, however, it characterizes itself as an agent and Ritetime as the principal. See, e.g., id. at 9; Def.'s Reply 6-7. The Court need not address these theories separately, **[**36]** since both aim at the same target: disproving plaintiffs' claim that Ritetime was World's agent. Moreover, even a finding that World acted as Ritetime's agent for some purposes would not rule out the possibility that Ritetime acted as World's agent for others. See Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 353 (2d Cir. 1999) ("There is no merit in [defendant's] argument, which is based on the mistaken notion that [HN10] a party must be either solely a principal or solely an agent."); Restatement 3d of Agency § 3.14 cmt. c ("The same actor may occupy different roles at successive points in an ongoing interaction among the same parties.").

[HN11] The existence of an agency relationship "is a mixed question of law and fact." Commercial Union Ins. Co. v. Alitalia Airlines, S.p.A., 347 F.3d 448, 462 (2d Cir. 2003). "[A]gency is a question of **[*461]** law for the court where the material facts from which it is to be inferred are not in dispute, the question of agency is not open to doubt, and only one reasonable conclusion can be drawn from the facts in the case." Cabrera, 24 F.3d at 386 n.14 (quoting 3 C.J.S. Agency § 547 (1973)). Conversely, "where the circumstances raise the possibility **[**37]** of a principal-agent relationship, and no written authority for the agency is established, questions as to the existence and scope of the agency must be submitted to the jury." Time Warner City Cable v. Adelphi Univ., 27 A.D.3d 551, 553, 813 N.Y.S.2d 114, 116 (App. Div. 2006). See also Hedeman v. Fairbanks, Morse & Co., 286 N.Y. 240, 248-49, 36 N.E.2d 129, 133 (1941) ("If the question of agency is not open to doubt, it is one for the court. But where no written authority of the agent has been proven, questions of agency and of its nature and scope and of ratification by or estoppel of the principal, if dependent upon contradictory evidence or evidence, though not contradictory or disputed, from which different inferences reasonably may be drawn, are questions of fact to be submitted to the jury under proper instructions by the court."). [HN12] Finally, "[t]alismanic language alone does not determine an agency relationship." In the Matter of Shulman Transport Enters., Inc., 33 B.R. 383,

385 (S.D.N.Y. 1983). Instead, "[c]ourts must look to the substance of the relationship," since agency depends upon "the existence of the required factual elements creating a fiduciary relation." Id.

On the **[**38]** question whether Ritetime was World's agent, or vice versa, the evidence is in conflict. As World points out, Def.'s Mem. 9 n.9, the DOT regulations governing charter flight programs describe the charter operator (the position occupied by Ritetime, World argues) as the "principal," see 14 C.F.R. § 380.32(x). Likewise, certain language of the Charter Agreement supports World's claim to have acted as Ritetime's agent: The Agreement authorizes World to "make such decisions on behalf of [Ritetime] as are necessary" and indicates that Ritetime "ratifies" such decisions in advance. Charter Agreement 5. But while the Charter Agreement expressly stipulates that World acts as Ritetime's agent where it helps to secure ground transportation, hotel reservations, or other "special services," id. at 2, it makes no such stipulation with regard to the core business of the flight program: international air travel. Moreover, "talismanic language" alone is insufficient to prove the existence of an agency relationship--the question is whether the record contains the required factual elements, Shulman, 33 B.R. at 385--and in this regard, World falls short. While it may be that World lacked control over **[**39]** some features of the flight program, including "Ritetime's flight schedule, pricing, [and] marketing to the public, [and] the data that Ritetime collected from passengers," Def.'s Mem. 7, the Charter Agreement plainly empowers World to control other features, e.g., by canceling "all or any flights," by determining the time of boarding and departure of any flight, by refusing to carry passengers and luggage under certain circumstances, by substituting landing facilities or aircraft at its discretion, and by exercising "exclusive control" over all aircraft and crew, Charter Agreement 3-5. Furthermore, [HN13] while World is correct that under traditional agency principles, "the principal must maintain control over key aspects of the undertaking," Commercial Union Ins., 347 F.3d at 462, "[c]ontrol is not a crucial question where the issue is liability for a contract," id. Finally, World is correct that [HN14] the principal, not the agent, ordinarily bears the risk associated with an agency relationship, [11] **[*462]** see Berger v. Iron Workers Reinforced Rodmen Local 201, 269 U.S. App. D.C. 67, 843 F.2d 1395, 1429 n.29 (2d Cir. 1988)--but the facts do not support World's unqualified claim that because the Charter Agreement called for **[**40]** World to be paid "regardless of the number of passengers on board a flight," the program's risk "was intended to be allocated to Ritetime," Def.'s Mem. 8. Under the terms of the Charter Agreement, Ritetime was authorized to cancel any flight provided that it notified World. Charter Agreement 3. If Ritetime did so, and gave timely notice, World stood to collect substantially less than the full charge specified for any cancelled flight. Id. 3-4 (specifying, e.g., that if Ritetime gave at least 120 days' notice when cancelling a flight, it would be required to pay only 20 percent of the agreed-upon charge for that flight). Thus World's claim that it did not act as Ritetime's agent is "dependent upon contradictory evidence or evidence, though not contradictory or disputed, from which different inferences reasonably may be drawn." Hedeman, 36 N.E.2d at 133.

11 The Court notes that the case relied upon by World for the proposition that risk allocation "has been described as the *most* important" factor, Def.'s Mem. 7 (emphasis added), concerns the question whether two parties executed a cooperative mailing, not whether a traditional agency relationship existed, see United States v. Raymond & Whitcomb Co., 53 F. Supp. 2d 436, 441 (S.D.N.Y. 1999).

Nor **[**41]** is the Court persuaded by World's citation to several arguably analogous cases involving freight forwarders. See Def.'s Mem. 8-9 (citing James N. Kirby, Pty Ltd. v. Norfolk S. Rv. Co., 300 F.3d 1300 (11th Cir. 2002); Shulman, 33 B.R. 383; Sail Am. Found, v. M/V T.S. Prosperity, 778 F. Supp. 1282 (S.D.N.Y. 1991); Delta Air Lines, Inc. v. Tie Cargo Corp., 1996 U.S. Dist. LEXIS 22755 (E.D.N.Y. Oct. 17, 1996)). In Kirby, the case relied upon most heavily by World, the Eleventh Circuit found that a freight forwarder acted as a principal, not as a cargo owner's agent, where it "t[ook] on the role of carrier itself, and issue[d] its own bill to the cargo owner listing the cargo owner as the shipper and itself as the carrier," rather than "merely . . . arrang[ing] a contract between the cargo owner and the ocean carrier" under which the ocean carrier would issue a bill of lading to, and be paid directly by, the cargo owner. 300 F.3d at 1305. World suggests that Ritetime, like the freight forwarder in Kirby, is properly characterized as a principal, not an agent. But the question in Kirby, how to characterize the relationship between intermediary and cargo owner, was different from the one **[**42]** at issue here: how to characterize the relationship between intermediary and *carrier.* Also, the facts of this case are distinguishable in at least one critical respect from those of Kirby: Ritetime did not obviously list "itself as the carrier" on the document equivalent in this context to the freight forwarder's bill of lading, since plaintiffs' tickets bore both Ritetime's name and World's. Finally, World has failed to acknowledge that on appeal, the Supreme Court eschewed the Eleventh Circuit's approach, declaring that "reliance on agency law is misplaced here" and treating the freight forwarder as the cargo owner's *agent,* not as a principal. Norfolk S. Rv. Co. v. James N. Kirby, Pty Ltd., 543 U.S. 14, 34, 125 S. Ct. 385, 160 L. Ed. 2d 283 (2004). The Court notes, as well, that courts in other freight forwarding cases have reached divergent results. Although, in the three other cases World cites, courts declined to find that freight forwarders had acted as carriers' agents, see Shulman, 33 B.R. at 384; Sail America Found., 778 F. Supp. at 1287; Delta Air Lines, 1996 U.S. Dist. LEXIS 22755, **[*463]** at *6, the Second Circuit has held more recently that a freight forwarder *was* a carrier's agent. Commercial Union, 347 F.3d at 462 **[**43]** ("[I]t is incontrovertible that [the freight forwarder] was acting as an agent for [the airline], at least for the purpose of entering into a contract for carriage on its behalf.").

Similar diversity appears among other arguably analogous cases, including those in which one carrier issues passenger tickets while another actually provides passage. Compare Grajales-Romero v. Am. Airlines, Inc., 194 F.3d 288, 293-94 (1st Cir. 1999) (finding that, where national airline issued ticket, and regional carrier operated flight, jury reasonably concluded that national airline was principal and regional carrier was agent), with Kapar v. Kuwait Airways Corp., 269 U.S. App. D.C. 355, 845 F.2d 1100, 1103 (D.C. Cir. 1988) (citing "the well-settled principle that an airline that issues a ticket for carriage on another airline acts only as the *agent* for the actual carrier")

(emphasis in original). Diversity of opinion also appears among cases involving travel agents. Compare Al Harby v. Saadeh, 816 F.2d 436, 438-39 (9th Cir. 1987) (travel agent was not airline's agent), and Simpson v. Compagnie Nationale Air France, 42 Ill. 2d 496, 499, 248 N.E.2d 117, 120 (1969) (same), with Rappa v. Am. Airlines, Inc., 87 Misc. 2d 759, 763, 386 N.Y.S.2d 612, 615 (Civ. Ct. Queens County 1976) **[**44]** (travel agent was airline's agent), and Unger v. Travel Arrangements, Inc., 25 A.D.2d 40, 42, 266 N.Y.S.2d 715, 717 (App. Div. 1966) (travel agent was cruise line's agent), with Spiro v. Pence, 149 Misc. 2d 613, 615, 566 N.Y.S.2d 1010, 1012 (City Ct. Albany 1991) (travel agent was an independent contractor, not an agent). In short, the cases provide no hard-and-fast rule of law governing situations such as the Court confronts here. The required determination is one of fact, and the relevant facts are disputed. Summary judgment for World on this point therefore is inappropriate. [12]

12 Moreover, even a finding that Ritetime was not World's agent would not preclude plaintiffs from prevailing on their ratification theory, since [HN15] under New York law, "[i]t is not necessary that the person acting be the agent of the ratifier." J.M. Heinike Assocs., Inc. v. Chili Lumber Co., 83 A.D.2d 751, 752, 443 N.Y.S.2d 512, 513 (App. Div. 1981)).

The Court turns next to plaintiffs' theory of apparent authority. [HN16] Apparent authority is "that authority which the principal holds the agent out as possessing, or which he permits the agent to represent that he possesses . . . ." Roth v. Ducks Hockey Club, 52 Misc. 2d 533, 534, 276 N.Y.S.2d 246, 248 (Dist. Ct. Suffolk County 1966). **[**45]** The doctrine of apparent authority is rooted in that of estoppel; where a third party changes his position in reliance on the reasonable belief that an agent is acting within the scope of his authority, "the principal is estopped to deny that the agent's act was not authorized." Masuda v. Kawasaki Dockyard Co., Ltd., 328 F.2d 662, 665 (2d Cir. 1964). Apparent authority exists only where "words or conduct of the principal, communicated to a third party . . . give rise to the appearance and belief that the agent possesses authority to enter into a transaction." Hallock v. State of New York, 64 N. Y.2d 224, 231, 474 N.E.2d 1178, 1181, 485 N.Y.S.2d 510, 513 (1984). The existence of apparent authority requires, as well, that the third party "relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal--not the agent." Id. (citation omitted). Finally, the third party's reliance on the appearance of authority must have been reasonable. Id. [HN17] While a grant of summary judgment as to apparent authority may be appropriate under some circumstances, see Minskoff v. Am. **[*464]** Express Travel Related Servs. Co., Inc., 98 F.3d 703, 708 (2d Cir. 1996), "[t]he **[**46]** existence of apparent authority is normally a question of fact, and therefore inappropriate for resolution on a motion for summary judgment," id.

The Court declines to grant summary judgment for either party on the question of apparent authority. Plaintiffs claim that because Nigerian passengers are wary of charter programs, "World actively helped Ritetime advertise and market the Nigeria Flight Service Program in such a manner

so as to conceal the charter nature of the flight program." Pls.' Opp'n to Def.'s Stat't of Material Facts P 28. In other words, according to plaintiffs, Ritetime and World together sought to induce passengers to whom Ritetime sold tickets for the Nigeria flight program to believe that they were purchasing tickets for passage on World Airways. On this point, plaintiffs have succeeded in creating a question of fact.

First, the tickets themselves appear likely to have created ambiguity about whether purchasers of tickets for the flight program were contracting with Ritetime, World, or both. World acquiesced in Ritetime's request that the word "charter" not appear on the first page of the tickets, and permitted its own name to appear alone under the "Conditions of **[**47]** Contract" on a subsequent page. See Monroe Aff. Ex. 14 (Def.'s Response to Pls.' Requests for Admission) P 28; Costello Aff. Ex. 34 (ticket). These features appear to have signaled to plaintiffs that their bargain was with World, even though, as World points out, Def.'s Reply 9, the word "charter" appears elsewhere on the ticket. And the Court is unpersuaded by World's objection that because plaintiffs received the tickets only after concluding their purchases, they could not have relied upon any appearance of authority created by the tickets. See Grajales-Romero, 194 F.3d at 293-94 (citing, as evidence of a regional carrier's apparent authority to contract on behalf of a national airline, the appearance of the ticket); Schaeffer v. Cavallero, 29 F. Supp. 2d 184, 186 n.4 (S.D.N.Y. 1998) (finding that a triable issue of fact existed as to whether a regional carrier had actual or apparent authority to contract on behalf of a national airline where, inter alia, the national airline's name appeared on the ticket).

Second, as plaintiffs observe, the record indicates that World was aware that Ritetime and Obafemi "actively misrepresented themselves as World Airways or the fictional entity **[**48]** 'Ritetime-World Airways,'" Pls.' Mem. 10, but did little to halt these deceptive practices. World has admitted that it "became aware that Ritetime had, on occasion, used World's name, logo and other trademarks in a manner inconsistent with the terms of the Trademark License Agreement." Monroe Aff. Ex. 14 (Def.'s Response to Pls.' Requests for Admission) 146. See also Monroe Aff. Ex. 21 (DuBois Dep.) 45 (testimony of World's sales director that he knew Obafemi had "held himself out to be World Airways Nigeria"); id. Ex. 42 (Perry Dep.) 80-81 (testimony of World's vice president for business development that he knew Obafemi had produced and distributed an in-flight magazine describing himself as "the president of Ritetime/World Airways"); id. Ex. 78 (in-flight magazine describing Obafemi as "Chairman, chief Executive, Ritetime World Airways"). Despite learning of Obafemi's misconduct as early as "30, 45 days into the program," id. Ex. 42 (Perry Dep.) at 81, and although it was empowered to terminate its Trademark License Agreement with Ritetime "upon notice and for cause," Costello Aff. Ex. 11 (License Agreement) 3, World responded only by mailing Obafemi a single cease-and-desist letter **[**49]** on May 30, 2003, Monroe Aff. Exs. **[*465]** 14 (Def.'s Response to Pls.' Requests for Admission) P 50, 74 (letter) and by orally cautioning him several times, id. Ex. 21 (DuBois Dep.) 52. World objects that it "did not make any representations that would confer apparent authority on Ritetime," Def.'s Mem. 9, and cites "a dearth of precedent" for the notion that silence may create apparent authority, id. 10 n. 10. But silent acquiescence such as World appears to have exhibited here can indeed create apparent authority. See Trustees of the Am. Fed'n of Musicians & Employers' Pension Fund v. Steven Scott Enters., Inc., 40 F. Supp. 2d

503, 511 (S.D.N.Y. 1999) (quoting Scientific Holding Co. v. Plessey Inc., 510 F.2d 15, 25 (2d Cir. 1974)) ([HN18] "A principal is estopped from denying the apparent authority of its agent when it remains 'silent when [it] had the opportunity of speaking and when [it] knew or ought to have known that [its] silence would be relied upon, and that action would be taken or omitted which [its] statement of truth would prevent . . . .'").

Third, and finally, displays of World's name and logo at the airports involved in the flight program may have contributed to the appearance that **[**50]** Ritetime had authority to contract on World's behalf. See Monroe Aff. Exs. 2 (Adepoju Dep.) 13 (plaintiff's testimony that an agent wearing a World Airways uniform checked her in at the airport in New York), 3 (Shonaiya Dep.) 10-11 (plaintiff's testimony that she checked in at a counter identified by a World Airways sign at the airport in Lagos), 19 (Munson Dep.) 23-24 (testimony of World employee that World displayed signs with the World Airways logo at the airport in Lagos); but see id. at 25 (testimony of World employee that Ritetime maintained a ticket office "on the balcony level right above where we normally did check-in"); id. Ex. 15 (Aktabowski Dep.) 19-20 (testimony of World employee that passengers were met by employees of Ritetime at a "podium prior to the actual checkin counters" before checking in with World); Costello Aff. 22 (Nkwor Dep.) 18 (testimony of plaintiff that he saw no employees of World or Ritetime at the airport in Lagos). Several circuit courts have relied upon similar displays as evidence of apparent authority. Grajales-Romero, 194 F.3d at 293-94 (1st Cir. 1999) (finding reasonable jury's conclusion that apparent authority existed based in part on display **[**51]** of American Airlines logo at check-in counter); Wood v. Holiday Inns, Inc., 508 F.2d 167, 176 (5th Cir. 1975) (finding that question of fact existed as to apparent authority where local inn alleged to be agent of national chain was contractually required to "use the same service marks and trademarks, and exterior and interior decor as the Holiday Inns owned by the parent company."); Gizzi v. Texaco, Inc., 437 F.2d 308, 310 (3d Cir. 1971) (finding that question of fact existed as to apparent authority based in part on local service station's prominent display of Texaco's insignia and slogan).

The evidence supporting plaintiffs' claim of apparent authority is insufficient to justify summary judgment for plaintiffs themselves. For example, plaintiffs have adduced evidence showing that World's logo was displayed in connection with the flight program, but they have not shown that more than a few affected passengers saw or relied upon such displays. Nevertheless, a question of fact exists as to whether World clothed Ritetime with apparent authority to contract on its behalf. The Court therefore declines to grant summary judgment for either party on this point. See Momen v. United States, 946 F. Supp. 196, 203-05 (N.D.N.Y. 1996) **[**52]** (whether regional airline was agent of national airline on basis of apparent authority was "a question of fact for the jury"); Shaw v. Delta Airlines, Inc., 798 F. Supp. 1453, 1459 **[*466]** (D. Nev. 1992) (summary judgment as to whether regional airline was agent of national airline on apparent authority theory was inappropriate where "there [we]re material facts in dispute").

Finally, the Court addresses plaintiffs' claim that even if Ritetime had neither actual nor apparent authority to contract on World's behalf, World ratified Ritetime's sale of plaintiffs' tickets. Pls.'

Mem. 13-15. [HN19] Ratification, under the law of New York, is "the affirmance by a party of a prior act that did not bind it at the time but that was done or purportedly done on its account." Chemical Bank v. Affiliated FM Ins. Co., 169 F.3d 121, 128 (2d Cir. 1999) (citing, inter alia, Heinike, 83 A.D.2d at 752). See also Monarch Ins. Co. of Ohio v. Ins. Co. of Ireland Ltd., 835 F.2d 32, 36 (2d Cir. 1987) ("Ratification requires acceptance by the principal of the benefits of an agent's acts, with full knowledge of the facts, in circumstances indicating an intention to adopt the unauthorized arrangement."). Like the doctrine of **[**53]** apparent authority, that of ratification is "very closely associated with estoppel," though unlike estoppel, ratification does not require "a change of conduct by, or prejudice to, the innocent third party." Holm v. C.M.P. Sheet Metal. Inc., 89 A.D.2d 229, 232-33, 455 N.Y.S.2d 429, 432 (App. Div. 1982). "Ratification 'must be performed with full knowledge of the material facts relating to the transaction, and the assent must be clearly established and may not be inferred from doubtful or equivocal acts or language.'" Chemical Bank, 169 F.3d at 128 (quoting Holm, 89 A.D.2d at 233). But the required intent may be "implied from knowledge of the principal coupled with a failure to timely repudiate, where the party seeking a finding of ratification has in some way relied upon the principal's silence or where the effect of the contract depends upon future events." Id. (quoting Monarch Ins. Co., 835 F.2d at 36). Again, [HN20] unless the relevant facts are undisputed, the question of ratification is one for the jury. Hedeman, 36 N.E.2d at 133. See also Transmarittina Sarda Italnavi Flotte Ruiniti S.p.A. v. Foremost Ins. Co., Inc., 482 F. Supp. 110, 116 (S.D.N.Y. 1979) ("Ordinarily the question whether **[**54]** a principal has ratified by acquiescence for an unreasonable time after being informed of the agent's unauthorized act is a question of fact for the jury.") (quoting Leviten v. Bickley Mandeville & Wimple, Inc., 35 F.2d 825 (2d Cir. 1929)).

As with apparent authority, summary judgment for either party on the question of ratification is inappropriate, since plaintiffs have adduced evidence sufficient to create a question of fact, precluding summary judgment for World, but insufficient to warrant a grant of summary judgment in their own favor. Specifically, a question of fact exists as to whether World knew that Ritetime had sold tickets with 2004 return dates and flew passengers on the outbound legs of those flights in 2003, thus accepting the benefit of Ritetime's actions under circumstances indicating its own intent to adopt them.

World argues that it cannot have ratified Ritetime's sale of tickets for travel in 2004, since it "did not have full knowledge of the facts." Def.'s Mem. 15. It claims that it "did not have access to Ritetime's passenger database and did not even know who the passengers would be on any given flight until the day of the flight." Id. See Costello Aff. Ex. 25 **[**55]** (Munson Dep.) 118 (testimony of World employee that World received passenger manifests on the "same day usually."). Although it is clear that World's contractors collected the tickets of passengers participating in the Nigeria flight program, see Monroe Aff. Exs. 14 **[*467]** (Def.'s Response to Pls.' Requests for Admission) PP 67-70 (acknowledging that the contractors collected the tickets), 51 (Strickland Dep.) 61-62 (explaining that World hired the contractors), World claims there is no evidence to show that these "ticket handlers" were aware that some passengers' tickets bore 2004 return dates, Def.'s Mem. 15 n.18. See Def.'s Reply 19 ("[T]here is no evidence that World's agents

had any responsibility for reviewing flight coupons other than for the flight for which a passenger was checking in . . . ."). Nevertheless, World has admitted that it was aware in "late December 2003" that Ritetime had sold tickets with 2004 dates, Def.'s Mem. 15, and it has not shown that it operated no flights after acquiring this knowledge. Moreover, even if neither World nor its contractors knew that World's passengers held tickets with 2004 return dates, World clearly was in a position to acquire such knowledge. **[**56]** See Harvey v. J.P. Morgan & Co., 166 Misc. 455, 464, 2 N.Y.S.2d 520, 531 (Munic. Ct. Queens 1937) ("[H]aving [HN21] once ratified its agents' acts, [a principal] cannot afterwards avoid the effect of such ratification by showing that it was not acquainted with all the facts of the transaction ratified, when it was always in a position and was in possession of means of learning them.").

World argues further that it "did not receive the benefits of any relevant transactions," since under the terms of the Charter Agreement, it "received fixed payments per-flight from Ritetime, which did not depend on the number of tickets sold." Def.'s Mem. 14. It notes, as well, that Ritetime was behind on its payments to World throughout the flight program. Id. at 15; see also Costello Aff. Ex. 5 (Duarte Dep.) 76 (testimony of World executive that Ritetime was in arrears "for most of the duration of the program."). However, the record suggests that World did indeed benefit from flying passengers whose tickets bore 2004 return dates, since to do otherwise would have meant alerting Obafemi and the public that World meant to halt operations, and such a disclosure likely would have hurt World financially. Alan **[**57]** Fort, World's vice president for passenger sales, acknowledged as much in his deposition testimony: "What we were trying to do was get as much money as we possibly could. Our indication at that point was that the [charter] agreement was not going to be able to be extended, but if we told [Ritetime] that the agreement wasn't going to get extended, then we weren't going to get another cent from [Obafemi]." Costello Aff. Ex. 74 (Fort Dep.) 120. See also Monroe Aff. Ex. 44 (email from Robert DuBois, World's sales director, to the United States ambassador to Nigeria, with handwritten note apparently from Alan Fort stating: "[The ambassador] needs to keep [the planned cessation of flights] confidential at this point--if word leaks we are out significant $$.").

World also contends that its actions did not indicate an "intent to adopt" Ritetime's sale of tickets for travel in 2004. Def.'s Reply 20-21. But World's silence in the face of such sales, especially when coupled with its acceptance of tickets for the outbound legs of those flights, may indeed indicate such an intent. *See Heinike*, 83 A.D.2d at 752 ("[A]ffirmance [HN22] may be inferred from silence when, in the normal course of affairs, one **[**58]** who does not wish to consent would speak out.") See also C.E. Towers Co. v. Trinidad & Tobago (BWIA Int'l) Airways Corp. 903 F. Supp. 515, 526 (S.D.N.Y. 1995) ("[R]atification can occur through the silence of the principal. When an act is done without authority, under an assumed agency, it is the duty of the principal to disavow and repudiate it in a reasonable time after information of the transaction if **[*468]** he would avoid responsibility thereof.") (internal quotation marks and citation omitted)); Harvey, 2 N.Y.S.2d at 531 ("The general doctrine that one may, by affirmative acts, and even by silence, ratify the acts of another who has assumed to act as his agent, is not disputed.") (citation and italics omitted).

World observes finally that because DOT had not authorized Ritetime and World to operate additional Nigeria flights in 2004, Ritetime's sale of tickets for such flights violated DOT regulations. Since Ritetime's actions were illegal, World argues, it cannot have ratified them. Def.'s Reply 7-8,18 (citing Jaclyn, Inc. v. Edison Bros. Stores, Inc., 406 A.2d 474, 487, 170 NJ. Super. 334, 359 (Super. Ct. 1979) ([HN23] "It is the settled law of both New York and New Jersey that an illegal **[**59]** act is incapable of being ratified.") (citing Babcock v. Warner Bros. Theatres, 240 A.D. 466, 270 N.Y.S. 765 (App. Div. 1934); Sirkin v. Fourteenth St. Store, 124 A.D. 384,108 N.Y.S. 830 (App. Div. 1908))). Jaclyn, and the New York cases upon which it relies, concern principals whose agents engaged in bribery, and who invoked the rule relied upon here by World. In Jaclyn, a principal sought to rely on the fact that its agent had procured a contract through bribery, with its knowledge and assent, as a means of escaping liability on that contract--a result the New Jersey court regarded as "unconscionable." 406 A.2d at 487. In Babcock, where the administrator of a principal's estate sought enforcement of a contract on the theory that the decedent had ratified it, a court of the Appellate Division explained that if the contract was secured through bribery, it was incapable of ratification, 240 A.D. at 470-71. And in Sirkin, another Appellate Division court held that a buyer who had bribed a seller's agent without the seller's knowledge or assent could not recover against the seller on a ratification theory. 124 A.D. at 388-91. All three cases are distinguishable, in that the party seeking **[**60]** enforcement here is not a participant in bribery or any other illegal act. Instead, enforcement is sought by innocent third parties: passengers who in good faith purchased tickets Ritetime had no legal authority to sell. More nearly on point, therefore, is Bankers Trust Company v. Litton Systems, Inc., in which the Second Circuit, distinguishing Sirkin, observed: [HN24] "Where an innocent third party, such as a holder in due course, is suing upon an illegal contract, the policy argument [against enforcement of the contract] is inapplicable because the plaintiff has done no wrong for which it should be penalized." 599 F.2d 488,492-93 (2d Cir. 1979). And further: "[I]nsofar as it is enforcing the rights of an innocent party, the court does not . . . participate in a wrong when it enforces an illegal contract." Id. at 493. Even where an agent procures a contract by means of fraud, New York law permits an innocent third party to invoke the principle of ratification against the principal. see also Adler v. Helman, 169 A.D.2d 925, 926, 564 N.Y.S.2d 828, 830 (App. Div. 1991) ("A principal is liable for the fraudulent acts of his agent committed within the scope of his authority, and if the agent **[**61]** acted outside the scope of his authority, the principal is nevertheless liable if he later ratifies the fraudulent acts and retains the benefits derived from them."). The same approach is warranted here. Plaintiffs did no wrong in purchasing tickets for the Nigeria flight program and there is no public policy rationale for penalizing them. Plainly, World was aware that if Ritetime sold tickets for an unauthorized charter, it violated DOT regulations. To the extent that World afterward ratified Ritetime's illegal actions, it may not now avoid liability by pointing out that those actions were illegal.

[*469] In sum, as with apparent authority, the evidence adduced by plaintiffs on the question of ratification is sufficient to permit them to survive World's motion for summary judgment, but insufficient to warrant summary judgment in their favor. The Court therefore declines to grant summary judgment on this issue for either party.

D. The Airline Deregulation Act

World contends that plaintiffs' fraud and negligence claims are preempted not only by the Montreal Convention, but also by [HN25] the Airline Deregulation Act of 1978 (the "ADA"), which provides that no state shall "enact or enforce a law, regulation, **[**62]** or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." 49 U.S.C. § 41713(b)(l). The Supreme Court has interpreted the ADA as preempting "[s]tate enforcement actions having a connection with, or reference to, airline rates, routes, or services." Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992) (internal quotation marks omitted). The Court also has limited the ADA's preemptive reach, however. See id. at 390 ("'[S]ome state actions may affect [airline rates, routes or services] in too tenuous, remote or peripheral a manner' to have a pre-emptive effect.") (quoting Shaw v. Delta Air Lines. Inc., 463 U.S. 85, 100 n.21, 103 S. Ct. 2890, 77 L. Ed. 2d 490 (1983)). Neither the Supreme Court nor the Second Circuit has offered a per se rule with regard to the ADA's preemption of tort claims. See Abdu-Brisson v. Delta Air Lines, Inc., 128 F.3d 77, 81 (2d Cir. 1997) ("The Supreme Court has not drawn any distinct preemption lines for guidance, and that may not be possible."). Rather, the Second Circuit has explained that the ADA's preemption provision must be applied "on a case-by-case basis," and that state **[**63]** and local laws must "directly affect prices, routes or services" to be preempted. Id. at 86.

In Rombom v. United Air Lines, Inc., 867 F. Supp. 214, 221-22 (S.D.N.Y. 1994), a district court of this circuit developed a three-part test for determining whether tort claims are preempted by the ADA. Rombom involved a tort claim by passengers whom the defendant airline alleged had behaved disruptively prior to takeoff. The court held that the ADA would preempt their tort claims only if (1) "the activity at issue in the claim [was] an airline service"; (2) "the claim affect [ed] the airline service directly [rather than] tenuously, remotely, or peripherally"; and (3) "the underlying tortious conduct was reasonably necessary to the provision of the service." Id. Regarding the third prong, the court added that "where [a] service was provided in a manner that falls within a spectrum of reasonable conduct," preemption should occur, but the ADA should not be "construed in a manner that insulates air carriers from tort liability for injuries caused by outrageous conduct that goes beyond the scope of normal aircraft operations." Id. at 222. Applying this analysis, the court found that although the **[**64]** plaintiff's claims based on flight attendants' allegedly rude behavior and on the pilot's decision to return the airplane to the gate, rather than taking off, were preempted, her claim based on the flight crew's decision to have her arrested was not. The decision to remove a passenger might, under some circumstances, be a service, the court said, but because the plaintiff alleged that the decision was motivated by "spite or some unlawful purpose," her claim was "at best tenuously related to an airline service." Id. at 224. Moreover, even if her claim had been directly related to the service, the decision to have her arrested, at least on her version of the **[*470]** facts, did not appear to have been reasonably necessary to protect the safety of the flight. Id. Although the Second Circuit has not explicitly adopted the Rombom approach, numerous district courts of this circuit have done so. See, e.g., Donkor v. British Airways Corp., 62 F. Supp. 2d 963, 972 & n.5 (E.D.N.Y. 1999); Peterson v. Cont'l Airlines, Inc., 970 F. Supp. 246,250-51 (S.D.N.Y. 1997); Galbut v. Am. Airlines, Inc., 27 F. Supp. 2d 146, 152-53 (E.D.N.Y. 1997).

The Court finds the Rombom approach sensible, and applies it here. **[**65]** Plaintiffs' fraud claims are rooted in the allegation that defendants refused to fly ticketed passengers, and their negligence claims in defendants' allegedly negligent supervision of Ritetime. With regard to both types of claims, the Court finds that although the first two prongs of the Rombom test for preemption are satisfied, the third is not. Clearly, the carriage of ticketed passengers on international flights is an "airline service" under the ADA; the same reasonably could be said of contracting with another carrier to operate such flights. Likewise, claims based on an airline's decision to cancel passengers' flights, and claims based on an airline's selection and supervision of contractors, directly implicate the services at issue. See Rombom, 867 F. Supp. at 222 (citing Williams v. Express Airlines I, Inc., 825 F. Supp. 831, 833 (W.D. Term. 1993) (holding that claims stemming from an airline's *refusal* to seat a passenger directly implicate airline services because they 'immediately arise from the denial, or allegedly inadequate provision of, such services.'"). However, neither an airline's total and indefinite refusal to transport ticketed passengers, nor its selection of a **[**66]** contracting carrier that engages in the same conduct, is "reasonably necessary to the provision" of the services just described. Nor does either action fall within "a spectrum of reasonable conduct." Id. at 222. The fraudulent and negligent conduct of which defendants are accused is better described as "outrageous." Id. Thus the ADA does not preempt plaintiffs' state law tort claims.

E. Supplemental Jurisdiction

World's final argument is that if plaintiffs' federal claims are dismissed, the Court should decline to exercise jurisdiction over their state law claims. [HN26] Under 28 U.S.C. § 1367(c)(3), a district court "*may* decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction." (emphasis supplied). The Second Circuit has explained, "as a general proposition, that 'if [all] federal claims are dismissed *before trial* . . ., the state claims should be dismissed as well.'" Motorola Credit Corp. v. Uzan, 388 F.3d 39, 46-47 (2d Cir. 2004), cert. denied, 544 U.S. 1044, 125 S. Ct. 2270, 161 L. Ed. 2d 1080 (2005) (quoting Castellano v. Bd. of Trustees, 937 F.2d 752, 758 (2d Cir. 1991)) (alterations and emphasis in original). But it has **[**67]** also held that "when the dismissal of the federal claim occurs late in the action, after there has been substantial expenditure in time, effort, and money in preparing the dependent claims, knocking them down with a belated rejection of supplemental jurisdiction may not be fair. Nor is it by any means necessary." Id. at 47 (quoting Purgess v. Sharrock, 33 F.3d 134, 138 (2d Cir. 1994)) (internal quotation marks omitted). See also First Capital Asset Mgmt, v. Satinwood, Inc., 385 F.3d 159, 183 (2d Cir. 2004) ("[T]he discretion implicit in the word 'may' in subdivision (c) of [28 U.S.C] § 1367 permits the district court to weigh and balance several factors, including considerations of judicial economy, convenience, and fairness to litigants.") (second alteration in original, citation omitted).

[*471] Here, the parties have been litigating in federal court for several years, and discovery has taken place. A dismissal on jurisdictional grounds at this juncture would frustrate the goals of judicial economy, convenience, and fairness. See Ametex Fabrics, Inc. v. Just In Materials, Inc., 140 F.3d 101, 105 (2d Cir. 1998) (holding that district court did not abuse its discretion in retaining jurisdiction **[**68]** over state law claims where parties had engaged in discovery and held a

settlement conference); Purgess v. Sharrock, 33 F.3d 134, 138-39 (2d Cir. 1994) (holding that district court did not abuse its discretion in retaining jurisdiction over state law claims where federal claims were dismissed after the close of all evidence, noting that "several district courts in this circuit have exercised supplemental jurisdiction under less compelling circumstances," and collecting cases). Thus, although plaintiffs' federal claims are indeed dismissed, the Court retains jurisdiction over plaintiffs' claims under state law.

CONCLUSION

For the foregoing reasons, World's motion for summary judgment is granted as to plaintiffs' claims for delay under the Montreal Convention, denied as to plaintiffs' claims for breach of contract, and denied as to plaintiffs' tort claims. Plaintiffs' cross-motion for summary judgment is denied. The Court retains jurisdiction over plaintiffs' state law claims.

SO ORDERED.

Dated: Brooklyn, New York

October 25, 2007

s/ Judge Raymond J. Dearie

RAYMOND J. DEARIE

United States District Judge

August 8, 2011 File No. M4120-3/09-07441

BY FACSIMILE: 514-422-5839

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Attention: Julianna Fox
Counsel Regulatory and International

Dear Madam/Sir:

Re: Complaint by Gábor Lukács against Air Canada with respect to its International Passenger Rules and Fares Tariff NTA(A) No. 458, in particular, Rules 80, 89 and 91(B).

BACKGROUND

[1] On April 24, 2009, Air Canada filed with the Canadian Transportation Agency ("Agency") certain amendments to its International Passenger Rules and Fares Tariff NTA(A) No. 458 (Tariff).

[2] Chief among these amendments was the addition of Rule 91(2), which provided for additional service standard commitments for passengers.

[3] At that time, the Agency evaluated the Tariff amendments from the perspective of clarity pursuant to section 122 of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR), and raised certain issues with Air Canada. One of the concerns raised by the Agency was that, although Rule 91(2) set out three options to be exercised in the event of overbooking and cancellation, it did not clearly state who, between Air Canada and the passenger, had the discretion to determine which option would be exercised. Air Canada proposed amendments to make the choice of option clear.

[4] In Decision No. 479-A-2009, the Agency made a determination on the clarity of this provision and accepted the amendments proposed by Air Canada. The Agency explicitly stated that it had not assessed the reasonableness of the provisions proposed by Air Canada, but had limited itself to the issue of clarity.

[5] On June 8, 2009, Mr. Lukács filed a complaint with the Agency in which he challenged Rule 91 and Rules 80 and 89 of Air Canada's Tariff.

[6] Mr. Lukács' complaint primarily concerns whether these provisions are consistent with Article 19 of the Convention for the Unification of Certain Rules for International Carriage by Air, commonly known as the Montreal Convention (Convention).

[7] Pursuant to Mr. Lukács' complaint, the Agency must now assess these Tariff provisions from a substantive, rather than a clarity, perspective.

[8] It should be noted that Mr. Lukács filed the same complaint against three carriers, namely Air Canada, WestJet and Air Transat. Separate, although similar, decisions are being issued respecting each carrier.

[9] It should also be noted that Mr. Lukács states that his complaint does not extend to situations outside the control of a carrier. Accordingly, this Decision is related to an assessment of situations which are within the control of a carrier.

APPLICABLE TARIFFS

[10] Since Mr. Lukács filed his complaint, Air Canada has amended its Tariff Rules. Air Canada has changed the numbering of Rule 91(2) to 91(B) and has added a choice of option clarification in Rule 91(B). In all other respects, the provision remains the same and the submissions of the parties remain relevant. As such, the following analysis and findings refer to the Tariff provisions that are currently in effect.

[11] The impugned portions of Rule 80, namely Rules 80(C)(1) and 80(C)(2), have remained substantially unchanged insofar as they continue to indicate that the actions set out in those Rules constitute the passenger's sole remedy. The change in title of the provision from "Involuntary Revised Routings" to "Schedule Irregularity", and the specification of who, between Air Canada and the passenger, has discretion to choose which option will be exercised, are the only changes to those provisions.

[12] Mr. Lukács also refers to Rule 89 on compensation for denied boarding, and challenges the release from liability clause contained in Rule 89(Part 2)(E)(2)(a) and in Part 1 of Rule 89, which contains the "Notice Provided for Passengers" in the event of denied boarding. These impugned sections remain unchanged since the filing of Mr. Lukàcs' complaint.

[13] Appendix A sets out the subject Tariff provisions both at the time of filing of the complaint by Mr. Lukács and as currently in effect.

ISSUES

[14] In addressing Mr. Lukács' complaint the Agency will consider the following issues:

1) Do overbooking and cancellation constitute delay for the purpose of Article 19 of the Convention?

2) Is it reasonable that Air Canada's Tariff Rule 91(B) reprotects passengers only on Air Canada's own aircraft or with other carriers with which it has an interline agreement?

3) Is it reasonable that Air Canada's current Tariff Rule 91(B) only calls for a refund of the unused portion of a ticket?

4) Is it reasonable that Air Canada's current Tariff Rule 91(B) does not state that passengers have rights and remedies outside those named in the Tariff? Is it reasonable that current Tariff Rules 80(C) and 89 refer to a sole remedy available to passengers?

Issue 1: Do overbooking and cancellation constitute delay for the purpose of Article 19 of the convention?

Submissions

[15] Mr. Lukács takes the position that overbooking and cancellation are forms of delay and are captured by Article 19 of the Convention. From the point of view of a passenger, he states, the terminology is irrelevant as the effect is the same: the arrival time at destination is delayed. Mr. Lukács cites a number of cases that stand for this proposition.

[16] Air Canada denies that its Tariff provision is contrary to the Convention. However, Air Canada argues that whether overbooking and cancellation can be characterized as delay under the Montreal or Warsaw Convention is irrelevant to determining the validity of its Tariff Rule. Air Canada argues that the Convention and its Tariff Rule serve two distinct purposes, namely Article 19 of the Convention covers carrier liability in cases of delay, and the Tariff provision sets out terms and conditions under the contract of carriage with respect to overbooking and cancellation. According to Air Canada, Mr. Lukács has confused these two concepts.

[17] Air Canada admits that should overbooking or cancellation cause delay, Article 19 would apply to determine liability and a passenger could pursue remedies under the Convention. However, according to Air Canada, it is still required under the ATR to set out its policy in the case of overbooking and cancellation. Air Canada contends that legislators around the world have legislated overbooking and cancellation separately from delay.

Analysis and findings

[18] By virtue of the *Carriage by Air Act*, R.S.C., 1985, c. C-26, the Convention has the force of law in Canada and governs, among other matters, the liability limitations for delay applicable to international carriage by air for travel to which the Convention applies. The Convention modernizes the liability regime governing international carriage and consolidates the *Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed in Warsaw on 12 October 1929* (Warsaw Convention) and the various instruments comprising the Warsaw system.

[19] Under Article 26 of the Convention, an air carrier may not relieve itself from liability nor fix a lower limit to its liability than that prescribed in the Convention.

[20] The focus of the complaint is Article 19 of the Convention which reads:

> The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

[21] A fundamental question raised by Mr. Lukács in this complaint is whether instances of cancellation and overbooking fall within the scope of "delay" as found in Article 19 of the Convention. Air Canada asserts that its Tariff provision and Article 19 of the Convention serve two distinct purposes and therefore, it argues that the legal characterization of "delay" under the Convention is irrelevant. The Agency disagrees.

[22] Mr. Lukács' complaint, because it relates to the substance of Air Canada's Tariff provisions on overbooking and cancellation, initiates an Agency review and determination as to whether the Tariff provisions are reasonable. The Agency must consider such complaints pursuant to subsection 111(1) of the ATR, and in so doing, must consider whether the Tariff is consistent with applicable provisions of the Convention. The question of whether overbooking and cancellation come within the scope of "delay" under Article 19 of the Convention will determine the Agency's consideration of Article 19 in evaluating the reasonableness of Air Canada's Tariff.

[23] As the term "delay" is not defined and its meaning is not clear from the text of Article 19 or the Convention as a whole, consideration must be given to supplementary sources.

[24] The modern principle of statutory interpretation applicable to international conventions takes a purposive reading of legislation. This approach has been adopted by Canadian courts.[1]

[25] Interpreting Article 19 of the Convention therefore requires an analysis that takes into account the ordinary meaning of the text as well as contextual factors to give effect to the purpose of that Article. To that end, reference may be made to the working papers of both the Warsaw and Montreal Conventions, as well as domestic and international doctrine and jurisprudence.

[26] The principle that emerges from the Minutes of discussions leading up to the adoption of the Convention is that the delegates intended to leave the definition of "delay" open-ended, and subject to a case-by-case assessment by the courts.

[27] Although the Warsaw and Montreal Conventions' working papers show that the scope of Article 19 was not intended to extend to non-performance, the distinction between non-performance and delay was not made entirely clear.

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[1] *Plourde c. Service aérien FBO inc. (Skyservice)*, 2007 QCCA 739; *Connaught Laboratories Ltd.* v. *British Airways*, 61 O.R. (3d) 204 at paras. 44 and 50; *Attorney General of Canada v. Flying Tiger Line, Inc.*, [1987] O.J. No. 914 at para. 7.

[28] Turning to the jurisprudence addressing the legal characterization of delay and the distinction between "delay" and "non-performance", a review of cases reveals that there are contradictions and inconsistencies in reasoning, both domestically and internationally.

[29] The cases of *Weiss v. El Al Israel Airlines*[2] and *Minhas v. Biman Bangladesh*[3] provide an example of the contradictory characterization of "delay" by the courts. In *Weiss*, the District Court for the Southern District of New York considered a case where passengers were "bumped" from a flight from New York to Jerusalem. The plaintiffs, after being placed on stand-by and waiting for two days, eventually purchased a flight on another airline. The plaintiffs received no refund or compensation for bumping from the carrier. The Court asserted that the standard international position on the question of bumping was that it was akin to non-performance.

[30] In *Minhas*, a passenger had been "bumped" from her flight from India to the United States. The plaintiff attempted to secure a flight home with the carrier over a period of 45 days, until she eventually obtained a ticket from another carrier. The same District Court for the Southern District of New York held that her claim constituted "delay" pursuant to Article 19 of the Convention.

[31] Although the facts canvassed in *Weiss* are substantially similar to those in *Minhas*, namely that the passengers in each case were bumped from their original flight and eventually resorted to purchasing tickets with another airline, this was determined to be contractual non-performance in *Weiss* (after two days of waiting) while characterized as delay in *Minhas* (after 45 days of waiting).

[32] There are further examples of contradictory characterizations of "delay". Basing itself in no small part on the working papers of the Warsaw Convention, the U.S. Court of Appeals, Seventh Circuit, in *Wolgel v. Mexicana Airlines*,[4] drew a boundary between damages arising from "delay" under Article 19 of the Warsaw Convention, and damages arising from the act of being "bumped" from a flight.

[33] *Wolgel* was a case of overbooking. The passengers had confirmed reservations on an international flight but, upon arrival at the airport, were informed that they had been bumped. Plaintiffs sued in private law and cited a now-repealed section of the *Federal Aviation Act*. The Court held as follows:

> This case is one of non-performance of a contract. The Wolgels are not attempting to recover for injuries caused by their delay in getting to Acapulco. Rather, their complaint is based on the fact that, as far as the record shows, they never left the airport. Because the Wolgels' claim is for total non-performance of a contract, the Warsaw Convention is inapplicable.

[2] 433 F. Supp. 2d 361 (U.S.D.N.Y. 2006).
[3] 1999 U.S. Dist. LEXIS 9849 (U.S.D.N.Y).
[4] 821 F. 2d 442 (U.S.C.A. 7th Cir. 1987).

[34] In the Canadian case of *Lukács v. United Airlines Inc.*,[5] the plaintiff had been informed by air carrier personnel before arriving at the airport that his flight was cancelled. He went to the airport on the understanding that his ticket would be endorsed by another airline providing a flight that afternoon, but the process took so long that he ultimately decided not to travel at all. After hearing the position of the parties as to whether this event constituted "delay", the Manitoba Court of Queen's Bench ultimately decided that it came within the scope of Article 19 of the Convention.

[35] The facts in *Wolgel* and *Lukács* are similar insofar as the passengers, due to overbooking or cancellation, never left the airport. However, this situation was characterized as non-performance in the former case and delay in the latter.

[36] In recent years, U.S. courts have begun to trace the outline of a principled distinction between delay and non-performance, which (1) recognizes the possibility that the alternative categorizations can coexist, although each is governed by a different legal regime; and (2) makes their characterization dependent on specific factors.

[37] Building on this distinction is the case of *In re Nigeria Charter Flights Contract Litigation*,[6] referred to by Mr. Lukács in his reply submissions, in which the Court attempted to synthesize several key distinctions between delay and contractual non-performance. The Court stated that in the case law, courts tended to find "delay" where one of three conditions is met:

1. The defendant airlines ultimately provided transportation;
2. The plaintiffs secured alternate transportation without waiting to see whether the airline would transport them or they refused an offer of a later flight; or
3. Plaintiffs never alleged non-performance.

[38] The Court held, in that case, that the claim for non-performance was founded because the air carrier simply refused to transport the plaintiffs. As such, the facts of that case were found to resemble those in *Wolgel*.

[39] This points to the conclusion that the legal characterization of an event depends on certain conditions relating to the actions of both parties (the air carrier's willingness to provide transportation on the one hand and the passenger's willingness to accept it on the other).

[40] Although there is contradiction and inconsistency in the meaning to be given the word "delay" as found in Article 19 of the Convention, what is clear is that the intent of Article 19 is to have the meaning of "delay" determined on a case-by-case basis. As is set out above and as submitted by the parties, whether a situation of cancellation or overbooking constitutes delay will depend on the particular circumstances of a case as well as the court's interpretation of the questions of fact and law in issue. Layered on this, however, is that some courts, as illustrated by the *Nigeria* case, are setting out specific criteria for assessing whether a particular fact situation falls within the meaning of "delay" as found in Article 19 of the Convention.

[5] 2009 MBQB 29 (Application for leave to Appeal dismissed: 2009 MBCA 111).
[6] 520 F. Supp. 2d 447 – (E.D.N.Y. 2007).

[41] In all situations, however, one element is clear. At the core of overbooking or cancellation, the affected passenger is not in a position to proceed with their journey in the timeframe originally established. Accordingly, the Agency is of the preliminary opinion that overbooking and cancellation that are within Air Canada's control constitute delay for the purpose of Article 19 of the Convention.

[42] The Agency recognizes, however, in keeping with the *Nigeria* case as set out above, that in limited situations there may be clear facts and circumstances that would evidence the alternative of non-performance of the contract of carriage. As further complaints, with different fact situations, are brought before the Agency, the Agency will be able to clarify the conditions that constitute non-performance.

[43] Air Canada, in its pleadings on this issue, chose to argue that the characterization of overbooking and cancellation as delay is irrelevant in determining the validity of its Tariff Rule. Accordingly, the Agency has based its analysis of this issue primarily on the arguments put forward by Mr. Lukács. Considering that this issue is a key element of the matter before the Agency, this will be the subject of a show cause order as set out at paragraph 120 of this Decision. This will provide the parties with a further opportunity to comment on this issue before a final determination is made.

Issue 2: Is it reasonable that Air Canada's Tariff Rule 91(B) reprotects passengers only on Air Canada's own aircraft or with other carriers with which it has an interline agreement?

Submissions

The obligations of Air Canada in the case of delay

[44] Mr. Lukács is seeking a determination from the Agency concerning the basic obligations of carriers in the case of overbooking or cancellation. Because Mr. Lukács argues that Article 19 of the Convention applies to cases of overbooking and cancellation, he takes the position that, pursuant to that provision, a carrier must prove that it took "all measures that could reasonably be required" to avoid delay.

[45] Mr. Lukács refers to Canadian jurisprudence to determine what constitutes "all reasonable measures". He cites case law stating that a carrier must be aware of the possibility of mechanical failure and offer efficient solutions in such an event.[7] He also cites case law that, he argues, found a carrier had not discharged its burden of proof under Article 19 where, after a flight delay, it refused to provide passengers with seats on another carrier's flight, an act which would have allowed them to catch a departing cruise ship at their destination.[8]

[46] Air Canada argues that the reasonable measures reference in the Convention does not impose a legal obligation on carriers; rather, it is a means of defence that can be raised to rebut the presumption of carrier liability that is created by Article 19.

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[7] *Quesnel c. Voyages Bernard Gendron Inc.* [1997] J.Q. no 5555 (QL)(QCCQ).
[8] *Assaf c. Air Transat A.T. Inc.* [2002] J.Q. no 8391 (QCCQ).

[47] In any event, Air Canada claims that its provisions are not contrary to the Convention because the Tariff acknowledges the Convention's applicability and its primacy over the Tariff Rules.

[48] In his reply, Mr. Lukács claims that the Convention does impose operational obligations upon carriers and establishes a standard of care owed by them to passengers. He argues that the purpose of providing a sole defence to carriers is to encourage carriers to take all reasonable measures to avoid delay.

[49] Mr. Lukács argues that even if Air Canada has incorporated the Convention by reference into its Tariff, the Agency has held that such incorporation cannot save a tariff provision that is inconsistent with the Convention.

Providing carriage by the fastest available route

Under the Montreal Convention

[50] Mr. Lukács considers that carriage to destination by the fastest available route is a measure that could reasonably be required under Article 19. He therefore argues that Air Canada's Tariff provision limiting itself to finding a seat on one of its own flights or that of a carrier with which it has an interline agreement is contrary to the Convention. According to Mr. Lukács, in the event of overbooking or cancellation, Air Canada must search all possible routes and arrange or pay for the route that would get a passenger to his or her destination the soonest, regardless of the identity of the carrier used for rerouting.

[51] Given its position that the reasonable measures reference in Article 19 of the Convention is a defence to liability and not a legal obligation, Air Canada argues that it cannot be compelled, as Mr. Lukács would like, to provide carriage by the fastest available route in the event of overbooking or cancellation.

[52] Moreover, Air Canada states that there is no binding legal obligation on carriers to reprotect passengers in the event of schedule irregularities and that reprotection is a practice that has been developed within the industry.

[53] Mr. Lukács responds that there is indeed a legal obligation to reprotect passengers, and that this obligation stems from the contract of carriage and its promise to transport passengers to their destination. The question centers on the extent of this obligation and according to Mr. Lukács, Article 19 of the Convention sets this out.

Under the reasonableness test

[54] Air Canada states that reprotecting passengers is not as easy as it may seem. Air Canada claims that it would be operationally and commercially unreasonable for it to purchase a ticket on an airline with which it has no interline agreement. Air Canada asserts that this would impose a high financial burden and place Air Canada at a competitive disadvantage. Furthermore, it claims that this type of reprotection might not be necessary to meet the passenger's needs.

[55] Air Canada argues that reprotection on carriers with which it has an interline agreement has several advantages for the passenger; it allows for the orderly transfer of baggage and facilitates the rebooking of tickets. Air Canada maintains that reprotection on interline carriers is the most appropriate reprotection method and is in line with industry standards.

[56] In his reply, Mr. Lukács concedes that what constitutes an industry standard can be a consideration in the Agency's reasonableness test, in addition to the Convention. However, he disagrees that Air Canada's Tariff is in line with industry standards. In support of this, he refers to European and Andean Community practices.

[57] Mr. Lukács argues that, in the case of overbooking and cancellation, *Regulation (EC) No. 261/2004* of the European Community provides passengers with a right to monetary compensation under given circumstances, the right to a refund, rerouting at the earliest opportunity and a right to care. Similar rights are afforded to passengers in the event of delay.

[58] Similarly, Mr. Lukàcs submits that the Andean Community provides "bumped" passengers with the right to care, reimbursement and same-day rerouting on the air carrier's flight or that of another airline at the earliest opportunity, as well as a right to monetary compensation. Mr. Lukács claims that in the event of cancellation, the passenger has a right to be rerouted on the next available flight, a right to care, the right to a full refund, a return flight to the passenger's point of origin and compensation in some cases. A right to a refund and a right to care are provided to delayed passengers.

[59] Mr. Lukács also refers to carriers who do not overbook as a matter of practice, in order to demonstrate that it is neither a regulatory nor a commercial requirement for air carriers.

[60] According to Mr. Lukács, given that carriers of the European Community have the same obligations, Air Canada would not be at a competitive disadvantage in respect of travel between Canada and the European Community. Mr. Lukács acknowledges that the application of the obligation to Air Canada's North American operations would place it in a disadvantageous position, but only if the obligation applied solely to Air Canada. Mr. Lukács submits that if the Agency were to find that the competitive disadvantage caused by requiring Air Canada to apply the "fastest available route" principle on Air Canada's international flights outweighs passengers' interests, then the principle should be applied only to Air Canada's flights from the European Community, where no disadvantage exists.

[61] He submits, in addition, that it is unreasonable to allow carriers to set out standard procedures in their tariff that cause damage to passengers and trigger statutory liability.

Analysis and findings

Tariffs in general

[62] Section 55 of the *Canada Transportation Act*, S.C. 1996, c. 10, as amended (CTA) defines an air carrier's tariff as a "schedule of fares, rates, charges and terms and conditions of carriage." Essentially, a tariff is the contract of carriage between the passenger and the air carrier and is a central feature of carriage by air because it sets out the terms and conditions that will apply to the applicable carriage. However, the carrier's tariff is not the type of contract that is negotiated between two parties. Rather, it is a contract that is unilaterally imposed on the passenger by the carrier. In Decision No. 456-C-A-2009, *Wyant v. Air Canada*, the Agency stated:

> [10] It should be noted that the terms and conditions of carriage are set by an air carrier unilaterally without any input from future passengers. The air carrier sets its terms and conditions of carriage on the basis of its own interests, which may have their basis in statutory or purely commercial requirements. There is no presumption that a tariff is reasonable.

[63] The Agency's authority with respect to tariffs is set out in the CTA and in the ATR. In the international context, carriers are required to file their terms and conditions of carriage with the Agency pursuant to section 110 of the ATR. The Agency's oversight power over a carrier's tariffs allows it, on its own motion or on complaint, to inquire into whether the tariff is clear, just and reasonable and to take such remedial actions as suspending or disallowing tariffs that do not meet regulatory requirements.

ATR requirements respecting international flights

[64] There is a clear and definitive requirement for a carrier, pursuant to paragraph 122(*c*) of the ATR to set out in its tariff its terms and conditions of carriage and, in particular, to clearly state its policy in respect of, among other matters, compensation for denial of boarding as a result of overbooking, passenger rerouting, failure to operate the service and refunds for services purchased but not used.

[65] The requirement for Air Canada pursuant to paragraph 122(*c)* of the ATR to clearly set out its policy on overbooking and cancellation was addressed by the Agency in Decision No. 479-A-2009.

[66] Subsection 110(4) of the ATR requires an air carrier to charge the tolls and apply the terms and conditions of carriage set out in its tariffs while subsection 110(5) requires a carrier to not charge a toll or apply a term and condition of carriage that is not specified in its tariffs.

[67] In addition, a carrier is required to not only clearly set out its policy with respect to overbooking and flight cancellations, but to also ensure that with respect to international flights, its tariff is just and reasonable within the meaning of subsection 111(1) of the ATR and consistent with the applicable conventions.

[68] The Agency has stated in previous decisions that in order to determine whether a term or condition of carriage applied by a carrier is "reasonable" within the meaning of subsection 111(1) of the ATR, a balance must be struck between the rights of passengers to be subject to reasonable terms and conditions of carriage, and the particular air carrier's statutory, commercial and operational obligations.[9]

Application of the Montreal Convention

[69] The Agency, in assessing a carrier's tariff, must have regard to the articles of the Convention and, in this respect, the Agency notes that Article 27 of the Convention sets out a principle that a carrier's tariff must not conflict with the provisions of the Convention.

[70] As set out in Issue 1 above, the Agency is of the preliminary opinion that overbooking and cancellation that are within Air Canada's control constitute delay which falls within the purview of Article 19 of the Convention. Accordingly, when reviewing a carrier's international tariff in the context of overbooking and cancellation, consideration must be given to not only subsection 111(1) of the ATR but also Article 19 which addresses the issue of delay.

[71] A carrier, pursuant to Article 19 of the Convention, is liable for damage occasioned by delay in the carriage of, amongst other matters, passengers, but will not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or it was impossible for them to take such measures.

[72] This provision imposes on a carrier an obligation, namely to transport a passenger as contracted, without delay, failing which there will be a presumption of liability for damage arising from any such delay. With a presumption of liability for delay against a carrier, the Agency is of the preliminary opinion that there is a concomitant obligation for a carrier to mitigate such liability and address the damage which has or may be suffered by a passenger as a result of the delay. Article 19 anticipates this by providing a carrier with a defence to the liability if it can show that it took, or it was impossible to take, all reasonable measures to avoid the damage caused by the delay. This is consistent with an assumption that a carrier, when faced with a presumption of liability, will take whatever action is necessary or possible, within reason, to address an issue which arose as a result of a situation which was within its control. As such, contrary to Air Canada's contention, Article 19 of the Convention cannot be said to impose no legal obligations on Air Canada.

[73] A central component of Mr. Lukács' argument is that Article 19 of the Convention means, in the event of delay, that a carrier must rebook a passenger on the fastest available alternative route in order to satisfy the requirement to take all reasonable measures. However, the Agency notes that Article 19 does not prescribe specific measures for the carrier to take, nor does it state which "reasonable measures" would exonerate it from liability.

[74] As with the issue of the meaning of "delay" as discussed above, there is controversy and inconsistency in the jurisprudence as to what constitutes a carrier taking all measures that could reasonably be required to avoid damage.

[9] See for example *Wyant v. Air Canada,* and *Black v. Air Canada,* Decision No. 746-C-A-2005.

[75] For example, the cases are not consistent as to whether Article 19 extends to booking a passenger on a flight with a carrier for which there is no interline agreement if that is the fastest means for the passenger to arrive at their destination.

[76] In some instances, the courts have been satisfied with reprotection on the carrier's next flight. In others, courts have required that passengers be put on whatever flight will get them to their destination. The term "reprotect" is used here to refer to the act by a carrier of securing a passenger's travel on another flight if, due to overbooking or cancellation, the passenger is prevented from travelling on their original flight as planned. To a large extent, the approach taken depends on the particular facts of the case.

[77] In *Mohammad v. Air Canada*,[10] a case brought against Air Canada and Kuwait Airlines for joint carriage between Canada and Kuwait, the Court of Quebec Small Claims Division held that Air Canada, when faced with a flight cancellation, took all reasonable measures when it put passengers on its next available flight, described as a new flight created by the carrier. However, on a final segment of the same flight itinerary, Kuwait Airlines was found liable under the Convention on the grounds that it should have transferred passengers to another carrier given that its own flights were booked for the next several weeks. The New York City Civil Court has similarly held that reprotection on any other carrier may be reasonable where a carrier's own flights are fully booked.[11] However, the District Court for the Southern District of New York has held that where there are extensive administrative requirements and limited timeframes, reprotection on any other carrier may not be reasonable.[12]

Air Canada's Tariff and the question of reprotection on the fastest available flight

[78] Mr. Lukács' complaint concerns the obligations of carriers in the case of overbooking and cancellation. In the Agency's view, this complaint involves a consideration of the reasonableness of Air Canada's Tariff provisions on overbooking and cancellation which, in turn, involves the Agency considering these provisions pursuant to subsection 111(1) of the ATR, while also taking into account Article 19 and ensuring that the Tariff is consistent with the articles of the Convention.

[79] Air Canada's Tariff Rule 91(B) does not provide for the possibility that a passenger might, in the appropriate circumstances, be reprotected on any carrier regardless of whether Air Canada has an interline agreement with that carrier.

[80] Instead, Tariff Rule 91(B) provides a closed list of actions to be taken by Air Canada following overbooking or cancellation. The purpose of this list is to set out the measures that Air Canada will take in an effort to avoid damage that is occasioned by overbooking or cancellation.

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[10] 2010 QCCQ 6858.
[11] *McMurry v. Capitol Intern. Airways*, 102 Misc. 2d 720 at 722.
[12] *Cohen v. Delta Air Lines Inc.*, 09 Civ. 6709 (S.D.N.Y.) (2010 U.S. Dist. Lexis 118164).

[81] When considering the issue as to whether Tariff Rule 91(B) is reasonable, several factors must be considered and, as noted above at paragraph 68, the Agency must strike a balance between the rights of passengers to be subject to reasonable terms and conditions of carriage and the particular carrier's statutory, commercial and operational obligations.

[82] On the one hand, in reviewing Air Canada's Tariff from the passenger's perspective, the provision does not leave open the possibility of reprotection on another air carrier for which there is no interline agreement in situations of overbooking and cancellation.

[83] This is despite the fact that case law suggests, as set out in paragraph 77, that in the appropriate circumstances, reprotection on a carrier with which no interline agreement exists might be necessary to establish that a carrier has taken all measures that could reasonably be required to avoid the damages caused by delay.

[84] Mr. Lukács provides insight into the passenger's perspective on this question by arguing that the cost of rerouting on the fastest available route should be weighed against the additional revenue that overbooking and cancellation produces for Air Canada. He emphasizes that the only consideration for Air Canada should be mitigating the passenger's delay, which requires finding the fastest available route to destination for the passenger.

[85] The Agency is of the opinion that Mr. Lukács' position is too restrictive and onerous in that it requires Air Canada to always provide the passenger with the fastest possible means of getting to their destination. Mr. Lukács has not shown that in every situation of overbooking or cancellation the fastest possible means for a passenger to get to their destination is reasonable.

[86] While the particular circumstances may call for putting a passenger on a carrier for which no interline agreement exists, it cannot be said that this remedy must always be required.

[87] On the other hand, the balancing test also requires that the air carrier's perspective, namely with regard to its statutory, commercial and operational obligations, be considered. Air Canada, in its submissions, argues that reprotection on any air carrier would not be reasonable from an operational and commercial perspective.

[88] Air Canada maintains that putting a passenger on the flight of a carrier for which it has no interline agreement has significant financial implications and will put Air Canada at a competitive disadvantage. Air Canada argues that, in fact, reprotection of a passenger on another Air Canada flight or a carrier with which it has an interline agreement works to the advantage of the passenger in terms of the movement of baggage and the seamless rebooking of tickets. In addition, Air Canada argues that reprotecting a passenger by the means contemplated by Mr. Lukács might not be necessary to meet the passenger's needs.

[89] The Agency acknowledges that reprotecting the passenger on any carrier, whether an interline agreement exists or not, may not always be necessary. However, Air Canada's current Tariff does not provide an option for those passengers where time is of the essence and reprotection on any other carrier may be the only means of addressing the time factor.

[90] Air Canada's submissions argue against a tariff that would require Air Canada to reprotect a passenger on any carrier in every case. Indeed, this requirement may be too stringent and, as set out above, the Agency is of the opinion that such an approach would be too restrictive and onerous on Air Canada.

[91] However, the Agency is also of the opinion that a provision which outright precludes the possibility of reprotection on a flight with any carrier, except those for which an interline agreement has been established, is likewise overly restrictive and the Agency is of the preliminary opinion that such a provision is unreasonable.

[92] Further, Air Canada has provided limited evidence to counter Mr. Lukács' position which shows the hardship that Air Canada's current policy, as reflected in its Tariff, may have on a passenger affected by a flight overbooking or cancellation. Specifically, Air Canada has provided limited proof of the commercial or operational obligations to justify that reprotection on its own flights or those of a carrier for which an interline agreement exists is the only reasonable solution to get a passenger to their destination in the event of overbooking or cancellation.

[93] Air Canada's approach of putting a passenger only on its own flights or on another carrier where an interline agreement exists is a carrier-focussed approach to remedying the situation of overbooking or flight cancellation. In contrast, the jurisprudence that deals with situations of overbooking and cancellation takes a more circumstance-focussed approach by generally looking to the particular circumstances of a situation in order to determine whether the carrier took all measures that could reasonably be required to avoid the damage. For example, the reasonableness of measures taken has been assessed in light of a passenger's need to get to a work-related conference at a particular time, as in the case of *Lukács v. United Airlines Inc.*[13] Similarly, where a flight delay has prevented a passenger from boarding a cruise ship at a scheduled time and place, the carrier's actions have been evaluated in that particular context.[14] The time-sensitive nature of a passenger's purpose of travel is a factor that has been considered by the courts in these cases.

[94] Based on the above, the Agency is of the preliminary opinion that a circumstance-focussed approach is a reasonable approach to addressing the issue of overbooking and cancellation when the circumstances are made known to Air Canada.

Issue 3: Is it reasonable that Air Canada's Tariff Rule 91(B) which deals with overbooking and cancellation only calls for a refund of the unused portion of a ticket?

Submissions

Under the Montreal Convention

[95] Mr. Lukács submits that Article 19 of the Convention requires carriers to take measures to avoid damage to passengers and bear the cost of these measures. He argues that by refunding the unused portion of a ticket, a carrier may unilaterally cancel the contract of carriage. In his view,

[13] *Supra* note 5.

[14] *Assaf c. Air Transat A.T. Inc., supra* note 8.

providing a partial, or even a full refund falls short of the obligation to take all measures that could reasonably be required under Article 19 of the Convention. Refunding only the unused portion of a ticket, he claims, would allow a carrier to exonerate itself from the liability to which it would otherwise be exposed under the Convention.

[96] Mr. Lukács states that providing a refund of the unused portion of a ticket might result in financial loss to the passenger and that a passenger might not always prefer a refund. Therefore, he requests that the provision of a refund be at the sole discretion of the passenger.

[97] Air Canada contends that a refund is not a "necessary measure" to avoid damage under the Convention, but a pre-emptive measure to compensate the passenger in the event that their itinerary cannot be completed. Furthermore, Air Canada argues that it cannot be held responsible for the purpose of a passenger's trip and it would be unacceptable, as Mr. Lukács appears to argue, for Air Canada to be required to incur additional costs to refund payment for services that it has already rendered.

[98] Air Canada adds that Mr. Lukács' request to give the passenger sole discretion to obtain a refund is moot because of the changes brought to its Tariff provisions as outlined in Decision No. 479-A-2009. In that Decision, Air Canada agreed to state that the availability of a refund would be at the passenger's choosing or, if Air Canada cannot perform options (a) or (b) of the applicable Tariff Rule within a reasonable amount of time, then Air Canada may opt for the refund.

[99] In his reply, Mr. Lukács clarifies that he is not claiming that passengers should be refunded for segments of a trip that have been rendered and continue to serve a purpose for the passenger. He argues that Air Canada's Tariff should state that a refund will be issued not only for the unused portion of the ticket, but also for any portion of a ticket that no longer serves any purpose in relation to the passenger's original travel plan. This, he maintains, is consistent with the standards adopted by the European Community and Andean Community, referred to in the submissions.

Under the reasonableness test

[100] Air Canada also examines the refund argument with a view to reasonableness and applies the Agency's balancing test. From its perspective, refunding the unused portion of a ticket is just and reasonable. It is in line with the operational and commercial obligations of Air Canada and industry practice. Furthermore, Air Canada argues that it would be at a competitive disadvantage if it had to refund more than its competitors.

[101] With respect to the reasonableness test, Mr. Lukács submits that, in striking a balance between the passengers' interests and Air Canada's statutory, commercial and operational obligations, the revenue accrued to Air Canada by overbooking and cancelling flights for economic reasons should be weighed heavily against the significant inconvenience and loss suffered by passengers who are affected by Air Canada's practices.

Analysis and findings

Refunding the unused portion of a ticket

[102] Article 19 of the Convention does not specify exactly what type of damage would be compensated for in the case of delay, but some examples from the jurisprudence include expenses for accommodation and meals or the additional transportation costs that would be incurred as a result of overbooking or cancellation.[15]

[103] There is therefore a possibility that compensation for damages under the Convention would extend beyond a mere refund of the unused portion of the ticket. In fact, it is reasonable to assume that in many situations of overbooking or cancellation a passenger would expect more than a refund for the unused portion of the ticket.

[104] The subject Tariff provision in this case indicates that the Tariff may operate to leave a passenger without a flight to or from their destination and with nothing but a refund for the unused portion of the ticket. In cases where a delay or cancellation occurs at a connecting point during a trip, with the result that a passenger's travel no longer serves the passenger's purpose, the passenger could be required to pay the cost of returning to their point of origin. As Mr. Lukács submits, payment of a partial refund may force a passenger to absorb some of the costs directly associated with their delayed travel. The Agency accepts Mr. Lukács' submission that the actual costs, or damages, incurred by a passenger may exceed the mere refund of the unused ticket.

[105] Accordingly, the Agency is of the preliminary opinion that the part of Tariff Rule 91(B) that allows for a refund of the unused portion of the ticket only is unreasonable. Air Canada has not demonstrated why, given its commercial and operational obligations, it cannot refund the entire ticket cost. Furthermore, Air Canada has not addressed the question of returning a passenger to their point of origin, within a reasonable time and at no extra cost, in cases where delay or cancellation occurs at a connecting point during travel, with the result that a passenger's travel no longer serves the passenger's purpose. As Mr. Lukács argues, many situations can be envisioned in which a passenger could be forced to absorb the cost of a flight that does not meet their needs, nor fulfil their purpose of travel, and does not coincide with the transportation for which the passenger contracted.

The passenger's choice of option to obtain a refund

[106] In 2009, Air Canada was called upon by the Agency to indicate who had the choice of option within Tariff Rule 91 for (a) a seat on another Air Canada flight, (b) a seat with an interline carrier or (c) a refund of the unused portion of the ticket.

[107] In Decision No. 479-A-2009, the Agency accepted Tariff language proposed by Air Canada that would give the choice of option to Air Canada. That Decision explicitly states, however, that the scope of the Agency's ruling related to clarity only, and not to the reasonableness of the proposed Tariff language.

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[15] See for example *Balogun v. Air Canada*, [2010] O.J. No. 663 (S.C.J.); *Luk*ács *v. United Airlines Inc*., *supra* note 5.

[108] Air Canada's Tariff does allow the passenger to opt for a refund of the unused portion of their ticket. However, Air Canada also retains the right to provide a refund if it is unable to fulfill the first two options, consisting of finding alternative transportation on its own aircraft or on a carrier with which Air Canada has an interline agreement, within a reasonable time. This means that the passenger still remains subject to the decision of Air Canada regardless of what might work best for the passenger. In the event that a passenger would not want a refund of the unused portion of their ticket, Air Canada could still opt to provide this instead of securing alternative transportation for the passenger. In other words, Air Canada still retains some discretion over whether the passenger will continue travelling or receive a refund. By retaining some discretion over the selection of the choice of options from its Tariff provision, Air Canada may be limiting or avoiding the actual damage incurred by a passenger as a result of delay. The Agency also notes that with respect to this Issue, Air Canada has not demonstrated to the satisfaction of the Agency why, from an operational and commercial perspective, the choice of option could not lie exclusively with the passenger.

[109] Accordingly, the Agency is of the preliminary opinion that the subject Tariff provision is unreasonable.

Issue 4: Is it reasonable that Air Canada's current Tariff Rule 91(B) does not state that passengers have rights and remedies outside those named in the tariff? Is it reasonable that current Tariff Rules 80(C) and 89 refer to a sole remedy available to passengers?

Submissions

[110] Mr. Lukács claims that the impugned Tariff provisions should clearly state that rerouting or refunding does not affect a passenger's right to seek further compensation or remedies against Air Canada. Mr. Lukács further argues that a tariff provision that sets out a passenger's "sole remedy" in the event of cancellation or denied boarding is invalid.

[111] In its answer, Air Canada points to its Tariff Rules 5(5), 55(3)(A) and 55(5), which incorporate by reference and subject the Tariff to the Warsaw and Montreal Conventions. Air Canada argues, in addition, that it does not have to state that other remedies exist, as access to justice is a fundamental principle and Air Canada is not denying this. Air Canada also claims that "sole remedy" provisions do not prevent a passenger from trying to obtain further compensation. They are an accepted and well-established industry standard and are not unreasonable.

[112] Mr. Lukács responds that references to the passenger's sole remedy should be removed from Rules 80(C)(1) and 80(C)(2) on schedule irregularities because they bar the passenger from pursuing Air Canada and tend to relieve it from liability, contrary to Article 26 of the Convention.

[113] Mr. Lukács points out that the same release from liability applies in the case of Air Canada's denied boarding compensation provisions under Rule 89. He states that this is not part of the industry standard in Europe. He also argues that the International Air Transport Association's practices reflect only airline interests, are inconsistent with European standards and should not be relied upon.

Analysis and findings

[114] The Agency considers that a passenger should be able to fully understand their rights in law simply by reading a tariff and without reviewing specific articles of treaties to discern the terms and conditions that apply to that tariff.

[115] The Agency is of the opinion that a tariff must clearly and plainly set out the rights and remedies of passengers. While Air Canada's Tariff Rules 5(5), 55(3)(A) and 55(5) are still in effect and make reference to the Conventions, Rule 91(B) does not give any indication of which rights and remedies a passenger might have under the applicable provisions of the Conventions in the event of overbooking or cancellation. Nor does it indicate that passengers may have rights and remedies at law outside the Conventions. For example, a claim for non-performance of the contract of carriage would not be limited by the liability provisions of the Conventions. In fact, the wording of the proposed amendment may misrepresent to passengers that their rights and remedies are only determined within the context of the Conventions. Accordingly, the Agency is of the preliminary opinion that Rule 91(B) of Air Canada's tariff is unreasonable.

[116] As to the reasonableness of sole remedy provisions, Rule 80(C) limits the passenger's recourse against Air Canada in the event of a schedule irregularity, which includes, among other things, flight cancellation, failure to operate according to schedule and inability to provide previously confirmed space. The sole remedies available to passengers, as listed in the Tariff, involve Air Canada finding alternate transportation and providing a refund.

[117] For its part, Rule 89 specifies in Parts 1 and 2 the compensation to be paid by Air Canada (ranging from CAD$100 to CAD$500) in the event of denied boarding, and states that acceptance of this compensation relieves Air Canada from any further liability towards the passenger. The Notice Provided to Passengers contained in Rule 89 states that a passenger may decline this compensation and seek to recover damages within 30 days of being denied boarding.

[118] Article 19 of the Convention establishes a carrier's liability for delay. Article 22(1) sets out the limits of liability for damage caused by delay and Article 35 sets a time limit in which to bring an action for damages under the Convention. Articles 22(1) and 35 read as follows:

> 22(1). In the case of damage caused by delay as specified in Article 19 in the carriage of persons, the liability of the carrier for each passenger is limited to 4,150 Special Drawing Rights.
>
> 35(1). The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

[119] The Agency is of the opinion that Rules 80(C) and 89 are inconsistent with the liability provisions set out in Articles 19 and 22(1) of the Convention. The Agency is also of the opinion that the 30-day time limitation on actions contained in Rule 89 is contrary to the time limitations for actions set out in Article 35 of the Convention. Accordingly, the Agency is of the preliminary opinion that those parts of Rules 80(C) and 89 that limit the carrier's liability to the cash or credit voucher amounts therein; relieve Air Canada of liability in the event such compensation is paid; and, impose a 30-day limitation period on legal action, are unreasonable.

Conclusion

[120] Based on the above findings, the Agency provides Air Canada with the opportunity to show cause, within thirty (30) days from the date of this Decision:

With respect to Issue 1:

i) why overbooking and cancellation that are within Air Canada's control should not fall within the meaning of "delay" as found in Article 19 of the Convention.

With respect to Issue 2:

ii) why Air Canada's current Tariff Rule 91(B) should not be found unreasonable as per subsection 111(1) of the ATR for being too restrictive in dealing with issues of overbooking and cancellation and be drafted in a more open manner that allows for reprotection, in certain circumstances, on carriers with which there is no interline agreement.

With respect to Issue 3:

iii) why that part of Air Canada's current Tariff Rule 91(B) that allows for a refund of the unused portion of a passenger's ticket only should not be found unreasonable as per subsection 111(1) of the ATR.

iv) why that part of Air Canada's current Tariff Rule 91(B) that leaves with Air Canada the choice of option for compensation dealing with an overbooking or cancellation situation should not be found unreasonable as per subsection 111(1) of the ATR

With respect to Issue 4:

v) why Air Canada's current Tariff Rule 91(B) should not be found unreasonable as per subsection 111(1) of the ATR for failing to accurately and fully set out a passenger's right to seek further compensation and other remedies against carriers under the Warsaw and Montreal Conventions

vi) why Air Canada's current Tariff Rules 80(C)(1), 80(C)(2) and parts of current Tariff Rule 89 that limit the passenger's recourses, and set a 30-day time limit for taking legal action in the event of denied boarding, should not be found unreasonable

[121] Air Canada's response will be copied, at the same time, to Mr. Lukács who will have 14 days to file comments with the Agency, copied to Air Canada. Air Canada will then have 7 days to file a response with the Agency, copied to Mr. Lukács.

Sincerely,

(signed)

Cathy Murphy
Secretary

BY THE AGENCY:

(signed)
_____
J. Mark MacKeigan
Member

(signed)
_____
John Scott
Member

ERRATUM

September 22, 2011

Erratum to the English version of Decision No. LET-C-A-80-2011 dated August 8, 2011 – Air Canada vs Gábor Lukács.

The word "current" should appear before "Tariff Rule 91(B)" in paragraph 14, and in the subtitles before paragraphs 44 and 95.

In addition, in the subtitle before paragraph 95, delete the words "which deals with overbooking and cancellation".

Cathy Murphy
Secretary

AIR CANADA

Tariff Provisions in effect when complaint was filed

RULE 80(C) INVOLUNTARY REVISED ROUTINGS

(1) In the event carrier cancels a flight, fails to operate according to schedule, fails to stop at a point to which the passenger is destined or is ticketed to stopover, substitutes a different type of equipment or class of service, is unable to provide previously confirmed space, causes a passenger to miss a connecting flight on which he holds a reservation, or the passenger is refused passage or removed in accordance with Rule 25(A) carrier will at its option and as passenger's sole remedy either:
   (a) carry the passenger on another of its passenger aircraft on which space is available without additional charge regardless of the class of service; or
   (b) endorse to another air carrier with which Air Canada has an agreement for such transportation, the unused portion of the ticket for purposes of rerouting; or
   (c) reroute the passenger to the destination named on the ticket or applicable portion thereof by its own or other transportation services; and if the fare for the revised routing or class of service is higher than the refund value of the ticket or applicable portion thereof as determined from Rule 90(D), carrier will require no additional payment from the passenger but will refund the difference if it is lower.
   (d) make involuntary refund in accordance with Rule 90(D).

(2) In the event carrier is a codeshare carrier and the operating carrier cancels a flight, fails to operate according to schedule, fails to stop at a point to which the passenger is destined or is ticketed to stopover, substitutes a different type of equipment or class of service, is unable to provide previously confirmed space, causes a passenger to miss a connecting flight on which he holds a reservation, or the passenger is refused passage or removed in accordance with Rule 25(A) carrier will, as the passenger's sole remedy, if the operating carrier fails to do so:
   (a) carry the passenger on another of its passenger aircraft on which space is available without additional charge regardless of the class of service; or
   (b) endorse to another carrier or other transportation service, the unused portion of the ticket for purposes of rerouting; or
   (c) reroute the passenger to the destination named on the ticket or applicable portion thereof by its own or other transportation services; and if the fare for the revised routing or class of service is higher than the refund value of the ticket or applicable portion thereof as determined from Rule 90(D), carrier will require no additional payment from the passenger but will refund the difference if it is lower.
   (d) make involuntary refund in accordance with Rule 90(D).

RULE 89 DENIED BOARDING COMPENSATION

PART I

Applicable between Canada and points in the Caribbean/Bermuda/Mexico/South America/Central America and North Pacific, from CA to all points in Area 2 and from Argentina to Chile. When AC is unable to provide previously confirmed space due to there being more passengers holding confirmed reservations and tickets than for which there are available seats on a flight, AC shall implement the provisions of this rule.

RULE 89(PART 1)(F) NOTICE PROVIDED TO PASSENGERS

The following written notice shall be provided to all passengers who are involuntarily denied boarding on flights for which they hold confirmed reservations.

[...]

AMOUNT OF DENIED BOARDING COMPENSATION

If you are eligible for denied boarding compensation, you must be offered a cash payment of $200.00 (Canadian currency) or a Credit Voucher good for future travel on AC in the amount of $500.00 (Canadian currency).

EXCEPTION: If you have been denied boarding for flights destined to/from Mexico and are eligible for denied boarding compensation, you must be offered a cash payment of $100 (Canadian currency) or a Credit Voucher good for future travel on Air Canada in the amount of $200 (Canadian currency). Refer to section (E), paragraph (2) of Air Canada General Rule No. 89 for a complete list of exceptions.

[...]

PASSENGER'S OPTIONS

Acceptance of the compensation (by endorsing the check or draft or not returning Credit Voucher to AC within 30 days) relieves AC from any further liability caused by our failure to honour your confirmed and ticketed reservations. However, you may decline the payment and seek to recover damages in a court of law or in some other manner within thirty (30) days from the date on which the denied boarding occurred.

PART 2

Applicable from points in the United States served by AC to points in Canada and points in Areas 2/3 served by AC.

RULE 89(PART 2)(E)(2) AMOUNT OF COMPENSATION PAYABLE

(a) Subject to the provisions of paragraph (E)(1) of this rule, carrier will tender liquidated damages in the amount of 200 percent of the sum of the values of the passenger's remaining flight coupons of the ticket to the passenger's next stopover (see Rule 135), or if none, to his destination, but not more than USD 400.00 or CAD 484.00, if the carrier arranges for comparable air transportation, or for other transportation accepted, i.e. used by

the passenger which, at the time, either such arrangement is made, is planned to arrive at the airport of the passenger's next stopover, or if none, at the airport of the passenger's destination not later than four hours after the planned arrival at the airport of the passenger's next point of stopover, or if there is no next point of stopover, at the airport of the passenger's destination, of the flight on which the passenger holds a confirmed reservation. If the offer of compensation is made by the carrier and accepted by the passenger, such payment shall constitute full compensation for all actual or anticipatory damages incurred or to be incurred by the passenger as a result of the carrier's failure to provide passenger with confirmed reserved space.

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

RULE 89(PART 2)(F)

Carrier shall furnish all passengers who are denied boarding involuntarily from flights on which they hold confirmed reserved space a copy of the following written statement:

[...]

AMOUNT OF DENIED BOARDING COMPENSATION

If you have been denied boarding for flights from Israel to North America and have not been given alternative flight immediately thereafter or within six hours and are eligible for denied boarding compensation, the compensation will equal the equivalent of USD $200.00 cash or USD $300.00 credit voucher good for future travel on Air Canada.

Passengers who are eligible for denied boarding compensation must be offered a payment equal to the sum of the face values of their ticket coupons, with a USD 200.00 maximum. However, if the airline cannot arrange "alternate transportation" (see below) for the passenger, the compensation is doubled (USD 400.00 one way maximum). The "value" of a ticket coupon is the one way fare for the flight shown on the coupon, including any surcharge and air transportation tax, minus any applicable discount. All flight coupons, including connecting flights, to the passenger's destination or first 4-hour stopover are used to compute the compensation.

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

[…]

PASSENGER'S OPTIONS

Acceptance of the compensation (by endorsing the check or draft within 30 days) relieves Air Canada from any further liability to the passenger caused by its failure to honor the confirmed reservation. However, the passenger may decline the payment and seek to recover damages in a court of law or in some other manner within thirty (30) days from the date on which the denied boarding occurred.

Tariff provisions currently in effect

RULE 80(C) SCHEDULE IRREGULARITY

(1) In the event carrier cancels a flight, fails to operate according to schedule, fails to stop at a point to which the passenger is destined or is ticketed to stopover, substitutes a different type of equipment or class of service, is unable to provide previously confirmed space, causes a passenger to miss a connecting flight on which he holds a reservation, or the passenger is refused passage or removed in accordance with Rule 25(A) carrier will at its option and as passenger's sole remedy either:
   (a) carry the passenger on another of its passenger aircraft on which space is available without additional charge regardless of the class of service; or at carrier's option;
   (b) endorse to another air carrier with which Air Canada has an agreement for such transportation, the unused portion of the ticket for purposes or rerouting; or at carrier's option;
   (c) reroute the passenger to the destination named on the ticket or applicable portion thereof by its own or other transportation services; and if the fare for the revised routing or class of service is higher than the refund value of the ticket or applicable portion thereof as determined from Rule 90(D), carrier will require no additional payment from the passenger but will refund the difference if it is lower or;
   (d) at passenger's option or if carrier is unable to perform the option stated in (A), (B) or (C) above within a reasonable amount of time, make involuntary refund in accordance with Rule 90(D).

(2) In the event carrier is a codeshare carrier and the operating carrier cancels a flight, fails to operate according to schedule, fails to stop at a point to which the passenger is destined or is ticketed to stopover, substitutes a different type of equipment or class of service, is unable to provide previously confirmed space, causes a passenger to miss a connecting flight on which he holds a reservation, or the passenger is refused passage or removed in accordance with Rule 25(A) carrier will, as the passenger's sole remedy, if the operating carrier fails to do so:
   (a) carry the passenger on another of its passenger aircraft on which space is available without additional charge regardless of the class of service; or at carrier's option
   (b) endorse to another carrier or other transportation service, the unused portion of the ticket for purposes of rerouting; or at carrier's option
   (c) reroute the passenger to the destination named on the ticket or applicable portion thereof by its own or other transportation services; and if the fare for the revised routing or class of service is higher than the refund value of the ticket or applicable portion thereof as determined from Rule 90(D), carrier will require no additional payment from the passenger but will refund the difference if it is lower at carrier's option.

(d) or, at carrier's option or if carrier is unable to perform the option stated in (A) (B) or (C) above within a reasonable amount of time, make involuntary refund in accordance with Rule 90(D).

RULE 89-DENIED BOARDING COMPENSATION
PART 1

Applicable between Canada and points in the Caribbean/Bermuda/Mexico/South America/Central America and North Pacific, from CA to all points in Area 2 and from Argentina to Chile. When AC is unable to provide previously confirmed space due to there being more passengers holding confirmed reservations and tickets than for which there are available seats on a flight, AC shall implement the provisions of this rule.

RULE 89(PART I)(F) NOTICE PROVIDED TO PASSENGERS

The following written notice shall be provided to all passengers who are involuntarily denied boarding on flights for which they hold confirmed reservations.

[...]

AMOUNT OF DENIED BOARDING COMPENSATION

If you are eligible for denied boarding compensation, you must be offered a cash payment of $200.00 (Canadian currency) or a Credit Voucher good for future travel on AC in the amount of $500.00 (Canadian currency).

EXCEPTION: If you have been denied boarding for flights destined to/from Mexico and are eligible for denied boarding compensation, you must be offered a cash payment of $100 (Canadian currency) or a Credit Voucher good for future travel on Air Canada in the amount of $200 (Canadian currency). Refer to section (E), paragraph (2) of Air Canada General Rule No. 89 for a complete list of exceptions.

[...]

PASSENGER'S OPTIONS

Acceptance of the compensation (by endorsing the check or draft or not returning Credit Voucher to AC within 30 days) relieves AC from any further liability caused by our failure to honour your confirmed and ticketed reservations. However, you may decline the payment and seek to recover damages in a court of law or in some other manner within thirty (30) days from the date on which the denied boarding occurred.

PART 2

(Applicable from points in the United States served by AC to points in Canada and points in Areas 2/3 served by AC.)

RULE 89(PART 2)(E)(2) AMOUNT OF COMPENSATION PAYABLE

(a) Subject to the provisions of paragraph (E)(1) of this rule, carrier will tender liquidated damages in the amount of 200 percent of the sum of the values of the passenger's remaining flight coupons of the ticket to the passenger's next stopover (see Rule 135), or if none, to his destination, but not more than USD 400.00 or CAD 484.00, if the carrier arranges for comparable air transportation, or for other transportation accepted, i.e. used by the passenger which, at the time, either such arrangement is made, is planned to arrive at the airport of the passenger's next stopover, or if none, at the airport of the passenger's destination not later than four hours after the planned arrival at the airport of the passenger's next point of stopover, or if there is no next point of stopover, at the airport of the passenger's destination, of the flight on which the passenger holds a confirmed reservation. If the offer of compensation is made by the carrier and accepted by the passenger, such payment shall constitute full compensation for all actual or anticipatory damages incurred or to be incurred by the passenger as a result of the carrier's failure to provide passenger with confirmed reserved space.

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

RULE 89(PART 2)(F)

Carrier shall furnish all passengers who are denied boarding involuntarily from flights on which they hold confirmed reserved space a copy of the following written statement:

[...]

AMOUNT OF DENIED BOARDING COMPENSATION

Passengers who are eligible for denied boarding compensation must be offered a payment equal to the sum of the face values of their ticket coupons, with a USD 200.00 maximum. However, if the airline cannot arrange "alternate transportation" (see below) for the passenger, the compensation is doubled (USD 400.00 one way maximum). The "value" of a ticket coupon is the one way fare for the flight shown on the coupon, including any surcharge and air transportation tax, minus any applicable discount. All flight coupons, including connecting flights, to the passenger's destination or first 4-hour stopover are used to compute the compensation.

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

[…]

PASSENGER'S OPTIONS

Acceptance of the compensation (by endorsing the check or draft within 30 days) relieves AC from any further liability to the passenger caused by its failure to honor the confirmed reservation. However, the passenger may decline the payment and seek to recover damages in a court of law or in some other manner.

COURT OF QUEBEC

« Small claims court »

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
« Civil division »

N° : 500-32-110189-083

DATE: June 2, 2010

IN THE PRESENCE OF THE HONOURABLE MARIE MICHELLE LAVIGNE, J.C.Q.

SAIEF MOHAMMAD
and SALMAN MOHAMMAD
and HEEBA MOHAMMAD
and MOONA MOHAMMAD

Plaintiffs

c.

AIR CANADA
and
KUWAIT AIRWAYS

Defendants

JUDGMENT

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[1] Saief Mohammad, Salman Mohammad, Heeba Mohammad and Moona Mohammad (the "passengers") claim from the defendants, Air Canada and Kuwait Airways an amount of $3,500 representing airfare expenses and $3,000 in damages. Mr Saief Mohammad represents all of the plaintiffs[1]. Mr. Mohammad alleges that the

[1] From a letter dated February 2nd, 2010.

Defendants breached their contract by failing to provide his family and himself with passage on a flight from Kuwait City to Dhaka on June 26th 2007, and from Kuwait City to London on August 21st 2007.

[2] Air Canada contests the claim and pleads that the passengers should claim compensation from Kuwait Airways only. Kuwait Airways denies its liability and contends that Air Canada's inability to transport the passengers to destination on time caused them to miss their connection with the Kuwait Airways flight. Since the passengers did not board the KU 104 flight for which they had reservations, the Central Reservation System (the CRS) automatically cancelled the remaining portion of their itinerary as well as their return flight reservations.

FACTS

[3] Sometime in June 2007, the passengers made plans to travel to Dhaka, Bangladesh. They purchased four round-trip tickets from Kuwait Airways on the following flights:

	Date	Carrier	Flight no.	From/to
Going to Dhaka	June 20th 2007	Air Canada	AC 864	Montreal to London
	June 21st 2007	Kuwait Airways	KU 104	London to Kuwait City
	June 26th 2007	Kuwait Airways	KU 283	Kuwait City to Dhaka
Return to Montreal	August 21st 2007	Kuwait Airways	KU 282	Dhaka to Kuwait City
	August 25th 2007	Kuwait Airways	KU 107	Kuwait City to London
	August 25th 2007	Air Canada	AC 859	London to Toronto
	August 26th 2007	Air Canada	AC 482	Toronto to Montreal

[4] The first part of the itinerary, AC864 from Montreal to London, was scheduled to leave on June 20th, 2007. A mechanical failure[2] forced Air Canada to delay the flight for three hours, then, to cancel it because of airport curfew hours. Mr. Mohammad and his siblings were rebooked on a different Air Canada flight, departing on June 21st. Kuwait Airways was advised of the cancellation of the AC864 flight through the CRS.

[2] Exhibit D-8.

[5] When the passengers arrived in London, Kuwait Airways managed to book them on flight KU 102 leaving on June 22nd, 2007. Once in Kuwait City, Mr. Mohammad found out that his seat and his family's seats on flight KU283 to Dhaka on June 26th had been cancelled. They tried in vain to obtain another flight from Kuwait Airways. They were each obliged to pay 30 dinars for an upgrade in order to continue their journey to Bangladesh on a Kuwait Airways flight departing on July 3rd 2007[3].

[6] On August 21st 2007, Mr. Mohammad and his family were returning to Montreal. They left Dhaka for Kuwait City on flight KU 282 and did not encounter any problem. On August 25th 2007, they were to travel from Kuwait City to London on flight KU 107. They were informed that their reservations had been cancelled and that there were no other seats available on that flight.

[7] Following numerous complaints at all levels of Kuwait Airways, the company informed Mr. Mohammad that he and his family could not be booked on a London flight before September 9th, 2007, as a result of a shortage of seats during the high season. Kuwait Airways only has 2 airplanes.

[8] Mr. Mohammad and his family could not wait 2 weeks in Kuwait. They purchased tickets with British Airways, at additional cost. Fortunately, they arrived in London in time to board the AC859 flight to Toronto. The last portion of the trip on the AC842 flight was uneventful.

[9] Upon his return to Montreal, Mr. Mohammad, claimed compensation for their travel misadventures on behalf on his family and himself. On September 12th 2007, Air Canada offered each of them a $100.00 in compensation. On September 19th, Air Canada increased the offer to $250.00. On February 14th, 2008, Mr. Mohammad sent Air Canada a formal demand requesting $6,500.00 in compensation. He later amended his claim to add Kuwait Airways as a defendant.

THE QUESTIONS AT ISSUE

[10] [10] Are Air Canada and/or Kuwait Airways liable for the extra ticket expenses and the damages caused to Mr. Mohammad and his family? To what amount of damages are the passengers entitled ?

LEGAL BACKGROUND

[11] The Montreal Convention applies to this situation. The plaintiffs' journey began and ended in Canada. Since Canada and Kuwait are signatory state to the Convention[4], both Kuwait Airways and Air Canada are governed by its rules and regulations. They also rely upon identical Conditions regarding Contracts and Tariffs.

---

[3] Exhibit P-5.
[4] Onglet 5 dans le cahier des autorités

[12] Section 39 of the Montreal Convention defines the "contracting carrier" and the "actual carrier" as follows:

> *Article 39 - Contracting Carrier - Actual Carrier*
>
> *The provisions of this Chapter apply when a person (hereinafter referred to as "the contracting carrier") as a principal makes a contract of carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person (hereinafter referred to as "the actual carrier") performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary.*

[13] Section 40 of the Montreal Convention stipulates that the *actual carrier* is only liable for the carriage which it performs:

> *Article 40 — Respective Liability of Contracting and Actual Carriers*
>
> *If an actual carrier performs the whole or part of carriage which, according to the contract referred to in Article 39, is governed by this Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in this Chapter, be subject to the rules of this Convention, the former for the whole of the carriage contemplated in the contract, the latter solely for the carriage which it performs.*

[14] Air Canada's representative, Mrs. Manon Gagnon, explained to the Court that Kuwait Airways entered into the contract of carriage with Mr. Mohammad. Therefore, Kuwait Airways is the *contracting carrier*. Kuwait Airways retained the services of Air Canada to perform part of the itinerary. Air Canada is the *actual carrier* for the portion of the trip it performed.

[15] Air Canada is of the opinion that since Kuwait Airways issued the plaintiffs' tickets, it is their primarily responsibility to transport the passengers to destination. Air Canada can only be responsible for the specific segments of the original itinerary it performed.

[16] Moreover, Air Canada added that, although its airplane encountered mechanical problems, it took all possible measures to carry the plaintiffs to their destination according to article 19 of the Convention, which states:

> *Article 19 – Delay*
>
> *The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took*

all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

[17] Air Canada's and Kuwait Airways rights and obligations are also determined by the terms and conditions of their contract of carriage, especially in the *Conditions of Contract* printed on the back of the tickets and the Rules of their *Tariff* [5] which state:

Conditions of Contract

9. Carrier undertakes to use its best efforts to carry the passenger and baggage with reasonable dispatch. Times shown in timetables or elsewhere are not guaranteed and form no part of this contract. Carrier may without notice substitute alternate carriers or aircraft, and may alter or omit stopping places shown on the ticket in case of necessity. Schedules are subject to change without notice. Carrier assumes no responsibility for making connections.

Tariff

Rule 55AC LIABILITY OF CARRIERS

(C) LIMITATION OF LIABILITY

(10) Carrier shall not be liable for consequential, special, punitive or exemplary damages arising from or connected in any way with any act or omission by the carrier, its employees or agents, whether or not such act or omission was negligent and whether or not the carrier had knowledge that such damages might be incurred.

RULE 80AC REVISED ROUTINGS, FAILURE TO CARRY AND MISSED CONNECTIONS

(C) INVOULUNTARY REVISED ROUTINGS

(1) In the event carrier cancels a flight, fails to operate according to the schedule, fails to stop at a point to which the passenger is destined of is ticketed to stopover, substitutes a different type of equipments or class or service, is unable to provide previously confirmed space, causes a passenger to miss a connecting flight on which he holds a reservation, or the passenger is refused passage or removed in accordance with Rule 25(A) carrier will as passenger's sole remedy either :

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

[5] Condition 3 of Conditions of Contract : *To the extent not in conflict with the foregoing carriage and other services performed by each carrier are subject to : (1) provisions contained in this ticket, (ii) applicable tariffs,…*

b) endorse to another carrier or other transportation service, unused portion of the ticket for purposes of rerouting; or

(…)

RULE 85AC CANCELLATION OF RESERVATIONS

(B)

(2) Carrier may, without notice, cancel, terminate, divert, postpone, or delay any flight or the further right of carriage or reservation of traffic accommodations and determine if any departure or landing should be made, without any liability except to refund in accordance with its tariffs the fare and baggage charges for any unused portion of the ticket, when it would be advisable to do so:

a) because of any fact beyond its control (including, but without limitation, meteorological conditions, acts of God, force majeure, strikes, riots, civil commotions, embargoes, wars, hostilities, disturbances or unsettled international conditions), actual, threatened or reported or because of any delay, demand, condition, circumstances or requirement due, directly or indirectly, to such fact;

ANALYSIS

[18] A mechanical problem led to the cancellation of flight AC 864 and was the cause of the initial delay. Air Canada considers this to be an event of *force majeure* and consequently, claims that is it not liable for damages, as stated in Rule 85AC of the Tariffs.

[19] The Court does not consider a mechanical failure to be an event of *force majeure.* A *force majeure* is defined as follows in article 1470 of the Civil Code of Quebec :

1470. A person may free himself from his liability for injury caused to another by proving that the injury results from superior force, unless he has undertaken to make reparation for it.

A superior force (force majeure) is an unforeseeable and irresistible event, including external causes with the same characteristics.

[20] In the case of *Lambert c. Minerve Canada et Les Vacances Multitour International Inc.*[6] the Quebec Court of Appeal confirmed that air carriers have an obligation of result. Unless the air carrier demonstrates an event of *force majeure* or the

[6] *Lambert c. Minerve Canada et Les Vacances Multitour International Inc.*, C.A. 500-09-000557-934, decision of the Court of Appeal of 16th of June 1998.

act of a third person, it shall be liable for the non-performance of the obligation to transport passengers to their destination.

[21] In *Droit du tourisme au Québec*, 2000, Professor Louis Jolin addresses the question of the air carrier's exemption from liability, as follows:

> *« Pour se dégager de sa responsabilité, le transporteur aérien doit prouver qu'il a pris, lui ou ses préposés, "toutes les mesures nécessaires pour éviter le dommage ou qu'il leur était impossible de les prendre" (article 19 de la C.V.). Ce n'est donc pas une obligation de moyens, mais bien une obligation de résultat dont le transporteur ne peut s'exonérer, à toutes fins pratiques, qu'en prouvant la force majeure. Dans l'appréciation de la force majeure, il faut analyser les faits de chaque cause, mais les juges ont tendance à restreindre la portée de ce moyen d'exonération: les bris mécaniques ne sont généralement pas considérés comme une force majeure, mais les conditions climatiques peuvent l'être ainsi qu'une grève d'employés. »*

[22] Since the airlines have an obligation to maintain their airplanes in good condition, a mechanical failure cannot qualify as an event over which Air Canada has no control. Air Canada therefore cannot allege an event of *force majeure*.

[23] Mrs. Gagnon stated that Air Canada "*took all measures that could reasonably be required to avoid causing damages"* to Mr. Mohammad and his family. According to Rule 80AC, it booked the passengers on the next operational flight. Air Canada created a new flight to enable Mr. Mohammad, his family and the other passengers to reach London as quickly as possible. In that regard, Air Canada has fulfilled its contract with Mr. Mohammad and his family.

[24] When the mechanical failure was detected, Air Canada recorded the information in the Personal Name Record (PNR)[7]. This record traces the itinerary of all passengers and is consulted by all airlines for the purpose of re-routing passengers. The PNR contains the following message:

> *ATTN LHR ARPRT PAX WERE MISHANDLED IN YUL DUE TO MTC ON AC864 20JUN HAVE ADVD KUWAIT AIRLINES PAX NN TO BE REBOOKED FOR 23JUN HAVE NO TIME FLIGHT NOW DEP AT 1830 AND ITS 1730 HAVE ADVD TO GO TO LHR AND HAVE TKT REISSUED AND AC WILL PAY FOR HOTEL IN LHR DUE TO MTC PROBLEM YULI4GS21JUN*
>
> *….*
>
> *AC264QY 21JUN YULLHR HK 3 1830 0615*
>
> *KU0102 B 22JUN LHRKWI HL 3 1130 1925*

[7] Exhibit D-7.

[25] The PNR system indicates that Kuwait Airways was advised of mechanical problems by Air Canada and of the obligation to rebook passengers on June 23rd.. Mrs. Gagnon testified that Air Canada booked the passengers on flight KU102 leaving on June 22nd but could not confirm any other portion of the trip since it was not the contracting carrier and it did not have access to the Kuwait Airways system. She also explained the problems encountered by the passengers during their return. Since they did not board the originally scheduled flights, their return tickets were automatically cancelled by the Saber system[8]. Kuwait Airways should have made the changes manually in its reservation system in order to avoid the cancellations. It is their failure to do so that caused the automatic cancellation of the remaining portion of the passengers' itinerary and of their return flights.

[26] Kuwait Airways responded by stating that it was not possible to make the manual changes in its reservation system since all of the seats on its airplanes were fully booked until mid-September. Again, Kuwait Airways only has 2 airplanes.

[27] The fact that Kuwait Airways airplanes were fully booked does not in anyway, limit its obligation to transport the passengers to their destination. Kuwait Airways should have transferred the unused portion of the passengers' tickets to another carrier and rerouted them to their final destination. It was obliged to do so according to sections 19 and 40 of the Montreal Convention.

[28] Kuwait Airways also added that the Plaintiffs were negligent and should have promptly advised Kuwait Airways Office in Canada or their travel agent within reasonable time to avoid the cancellations. The evidence shows that Kuwait Airways was advised by Air Canada. Kuwait Airways also transported the passengers from London to Kuwait on June 22nd 2007 and should have been aware that this leg of the trip represented only a portion of the itinerary. Kuwait Airways did not explain why the portion of the return trip from Dhaka to Kuwait City was not cancelled as was the rest of the itinerary.

[29] Air Canada took all the appropriate measures that could have reasonably been taken in the circumstances. It advised Kuwait Airways of the mechanical problem, the delay as well as the obligation to reschedule the passengers' flights. Air Canada transported the passengers to London on the next available flight. Kuwait Airways transported the passengers from London to Kuwait City. It was their responsibility to rearrange the remaining portion of their journey and to reserve their seats on the return flights.

[30] Kuwait Airways is also subject to the obligations of article 19 of the Montreal Convention. Kuwait Airways did not take all the preventative measures that could reasonably be expected to have been taken to avoid any damage. It is therefore liable for the damages suffered by Mr. Mohammad and his family.

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[8] A global reservation system used by travel agencies and travel companies.

Damages

[31] M. Mohammad, acting on behalf of Salman Mohammad, Heeba Mohammad and Moona Mohammad claims the sum of $6,500.00, $3,500.00 of which applies to travel expenses and the $3,000.00 remainder, for damages.

[32] According to Section 22 of the Montreal Convention the liability of the carrier, for each passenger, is limited to $4,150.00 Special Drawing Rights (SDR):

> "22. (1) In the case of damage caused by delay as specified in Article 19 in the carriage of persons, the liability of the carrier for each passenger is limited to 4 150 Special Drawing Rights.
>
> (….)"

[33] Article 23 explains the conversion of special drawing rights into monetary units:

> "(…)
>
> 23.(1) The sums mentioned in terms of Special Drawing Right in this Convention shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgement. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judgement, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that State."

[34] Proof of the damages is supported only by exhibit P-5. The following expenses are documented:

> For Saief Mohammed:
>
> - 30 KWD for an upgrade on flight from Kuwait to Bangladesh on August 25, 2007,
>
> - 474,450 KWD for 3 flights from Kuwait to London; and
>
> - 60 KWD for 3 upgrade on these flights from Kuwait to London;
>
> For Moona Mohammed:

- 30 KWD for an upgrade on the flight from Kuwait to Bangladesh on August 25, 2007;

For Heeba Mohammad:

-30 KWD for an upgrade on the flight from Kuwait to Bangladesh on August 25, 2007;

[35] The Court does not have the evidence on any expenses related to Salman Mohammad and does not have the proof that he traveled with the other plaintiffs.

[36] These amounts, translated into Canadian dollars in accordance with the method described in article 23 of the Montreal Convention are:

-Saief Mohammad:

30 KWD = 69.87 SDR = **108,14$ CAD**

474,450KWD = 1103 SDR = **1708,68 $ CAD**

60 KWD = 139,94 SDR = **216,28 CAD**

Moona Mohammad:

30 KWD = 69.87 SDR = **108,14$ CAD**

Heeba Mohammad:

30 KWD = 69.87 SDR = **108,14$ CAD**

[37] As for damages claimed for inconveniences, the passengers' journey was hectic and difficult. They finally arrived in Montreal on the expected date but not without experiencing anxiety and trouble. The Court therefore grants each passenger that has traveled back to Montreal on August 25th 2007, the sum of $**150 each**.

WHEREFORE, THE TRIBUNAL HEREBY:

GRANTS the action;

CONDEMNS the defendant Kuwait Airways to pay to Saief Mohammad the sum of $ $2183.31 plus interest at the legal rate and the additional indemnity of section 1619 of the Civil Code of Quebec, from February 14th 2008, plus the judicial fees of $151;

CONDEMNS the defendant Kuwait Airways to pay to Moona Mohammad the sum of $258.14 plus interest at the legal rate and the additional indemnity of section 1619 of the Civil Code of Quebec, from February 14th 2008;

CONDEMNS the defendant Kuwait Airways to pay to Heeba Mohammad the sum of $258.14 plus interest at the legal rate and the additional indemnity of section 1619 of the Civil Code of Quebec, from February 14th 2008;

DISMISSES the claim of Salman Mohammad, without legal cost.

_____

MARIE MICHELLE LAVIGNE, J.C.Q.

Audition date : February, 2nd 2010

Case Name:

Noorhassan v. Canada (Minister of Citizenship and Immigration)

Between
Bibi Aisha Noorhassan, Applicant, and
The Minister of Citizenship and Immigration, Respondent

[2008] F.C.J. No. 117

2008 FC 97

164 A.C.W.S. (3d) 689

Docket IMM-862-07

Federal Court
Toronto, Ontario

Campbell J.

Heard: January 22, 2008.
Judgment: January 24, 2008.

(4 paras.)

Counsel:

Alesha A. Green for the Applicant.

Judy Michaely for the Respondent.

REASONS FOR ORDER AND ORDER

1 CAMPBELL J.:-- The Applicant seeks judicial review of the decision of the Immigration and

Appeals Division of the Immigration and Refugee Board (IAD), dated February 2, 2007 (the Decision), which disallowed the appeal of the Applicant's sponsorship application for a permanent resident's visa for her spouse. The refusal of the Applicant's spouse's visa application was made by a visa officer under s. 4 of the *Immigration and Refugee Protection Regulations* SOR/2002-227, because he found that the marriage is not genuine and was engaged in primarily for the Applicant to gain the status of a permanent resident in Canada.

2 The first finding made in the Decision is with respect to the Applicant's first marriage and how it resulted in the Applicant, the appellant at the IAD hearing, gaining permanent residence status in Canada:

> The appellant testified at the appeal hearing. She is a permanent resident in Canada. She came to Canada in 1999 to visit her sister. At the time, her first husband, Lahindra Mauth Mohit, was renting a room in her sister and brother-in-law's apartment. He was a Canadian citizen, having immigrated to Canada years before as a dependent son of his parents. The appellant married Mr. Mohit and he sponsored her in September 1999. On December 5, 2001, the appellant was landed in Canada. Less than six months later, she separated from her first husband in May 2002. She testified that she had found him to be abusive and violent when he drank alcohol so she did not wish to stay with him. She also testified that she had considered the possibility that her sister and her first husband were having an extramarital affair with each other. The Minister's counsel suggested to the appellant in cross-examination that she married her first husband only to gain her permanent resident's status in Canada. The appellant denied this. Nevertheless, the panel notes that the actual marriage did not long survive after the appellant received her status in Canada based on it.
>
> [Emphasis added]
>
> (IAD Decision, p.1)

3 The "note" made by the IAD is essentially a finding that the Applicant's first marriage was not genuine and, therefore, her evidence with respect to the genuineness of her current marriage should not be believed. It is agreed that this conclusion is stated in the next paragraph of the Decision, which begins with the sentence "[t]he panel did not find the appellant to be a credible witness". As to the impact of this finding, Counsel for the Respondent makes this argument:

> The Appeal Division found that because the Applicant's first marriage was also a marriage of convenience it impacted negatively on her credibility. The fact that the Applicant engaged in a previous marriage of convenience to facilitate her own immigrations status is highly relevant and must be considered in the context

of this second attempt to be involved in the same act.

(Respondent's Memorandum of Argument, p. 6)

4 When an applicant swears to tell the truth, there is a presumption that his or her evidence is truthful (*Maldonado* v. *M.E.I.*, [1980] 2 F.C 302 (C.A.)). Failure to give clear reasons for a negative credibility finding renders the finding as patently unreasonable (*Hilo v. Canada*, (1991) 130 N.R. 236 (CA) *Valtchev v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 1131). In the present case, because the IAD failed to clearly state how the extraneous fact it "notes" provides an evidentiary basis for the negative credibility finding made, and because the IAD failed to provide any clear reasons for rejecting the Applicant's sworn evidence, I find that the negative credibility finding is patently unreasonable. As this finding had the effect of driving the rejection of the Applicant's appeal, I find that the IAD's decision is made in reviewable error.

ORDER

Accordingly, I set aside the IAD's decision and refer the matter back to a differently constituted panel for re-determination.

CAMPBELL J.

cp/e/qlklc/qllkb/qlcam

Indexed as:

Smith v. Smith

Arvid Smith (petitioner), appellant; and
Ellen Sofia Smith (respondent), respondent; and
John Smedman (co-respondent), co-respondent.

[1952] 2 S.C.R. 312

Supreme Court of Canada

1952: February 19, 20 / 1952: May 12.

Present: Rinfret C.J., Kerwin, Taschereau, Rand, Locke, Cartwright and Fauteux JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Divorce -- Evidence -- British Columbia Divorce Proceedings -- Standard of Proof Standard of Proof Adultery required -- The Divorce and Matrimonial Causes Act 1857 (Imp.) c. 85 as amended by c. 108, R.S.B.C. 1948, c. 97 -- English Law Act R.S.B.C. 1948, c. 111.

Proceedings in divorce under the Divorce and Matrimonial Causes Act in British Columbia are civil and not criminal in their nature and the standard of proof of the commission of a marital offence, where no question affecting the legitimacy of offspring arises, is the same as in other civil actions. The rule as stated in Cooper v. Slade (1858) 6 H.L.C. 746 and in Clark v. The King (1921) 61 Can. S.C.R. 608 at 616, applies.

Cases Cited

Mordaunt v. Moncreiffe (1874) L.R. 2 Sc. & Div. 374; Branford v. Branford (1879) L.R. 4 P. 72 at 73; Redfern v. Redfern (1891) p. 139 at 145 and Doe dem Devine v. Wilson (1855) 10 Moo. P.C. 502 at 532, referred to.

APPEAL by the petitioner from the judgment of the Court of Appeal for British Columbia (O'Halloran J. dissenting), dismissing an appeal from the trial judgment dismissing the petition.

I. Shulman for the appellant. The trial judge erred in that he failed to make findings of fact and credibility and in applying the case of Stuart v. Stuart [[1948] 1 W.W.R. 669.]. That case can have no application as it deals with the law in cases where inferences are required to be drawn from circumstantial evidence; and the evidence herein was direct evidence. That case holds that "The same strict proof is required in the case of a matrimonial offence as is required in connection with criminal offences properly so-called." It is wrong. It follows De Voin v. De Voin [[1946] 2 W.W.R. 304.], a unanimous decision based solely upon the dictum of Lord Merriman in Churchman v. Churchman [[1945] P. 44.]. It is quoted three times and referred to a fourth in Stuart v. Stuart, leaving no doubt that the Court of Appeal in this case held that the criminal standard of proof is required in order to prove adultery in a matrimonial cause.

The words "evidence which clearly satisfies me beyond a reasonable doubt of the guilt of the respondent and co-respondent", used by the trial judge clearly imply, at least in this country, that he was applying the criminal standard of proof; a fortiori when these words are connected with and therefore explained by the reference to the onus required by Stuart v. Stuart.

It is wrong in law to require the criminal standard of proof in order to prove adultery in a matrimonial cause; that is, it is not correct to say that "The same strict standard of proof is required in the case of a matrimonial offence as is required in connection with criminal offences properly so-called."

(a) Adultery is not a crime. The criminal standard should not apply in a criminal proceeding.
(b) A fortiori the criminal standard should not apply on the grounds that it is a quasi-criminal offence.
(c) The word "satisfied" is used in the Act. It would have been easy to add the words "beyond all reasonable doubt" if that is what was in the "mind" of Parliament. There is no justification for adding such a distinctly qualifying phrase.
(d) The criminal standard of proof is neither required or justifiable as a matter of public policy to protect the interests of the State, society or the individual.
(e) The criminal rule was formulated out of the high regard which the law has for the liberty of the individual. The same is not called for in divorce suits where the court is concerned, not to punish anyone, but to give statutory relief from a marriage which has broken down.
(f) The authority of Ginesi v. Ginesi [[1948] 1 All E.R. 373.] upon which Stuart v. Stuart leans, in part, has been doubted in England.
(g) In Ontario and Saskatchewan, at least, of the Provinces in Canada, the civil standards has been clearly held to be sufficient: and this is the view preferred in Australia and in the United States Briginshaw v. Briginshaw [[1938] 60 C.L.R. 336.].

In order to determine the principles regulating the standard of proof in the divorce court, it is necessary to go to the provisions of the statute, which in this case is the Marriage Act 1928. S. 80 is as follows: "Upon any petition for dissolution of marriage, it shall be the duty of the court to satisfy itself, so far as it reasonably can, as to the facts alleged and also to inquire into any counter-charge which may be made against the petitioner."

S. 86 "Subject to the provisions of this Act, the court, if it is satisfied that the case of the petitioner is established, shall pronounce a decree nisi for dissolution of marriage." The phrase "it shall be the duty of the court to satisfy itself, so far as it reasonably can" is also used in s. 81. The sections directly relevant are ss. 80 and 86. S. 80 is a governing section applying to all the facts alleged as grounds for a petition for divorce -- adultery, desertion etc. So far from the legislature having used the phrase "satisfy itself beyond a reasonable doubt" or any similar phrase, the legislature has simply used the word "satisfy". It can be assumed that the legislature was aware of the difference between the civil standard of proof and the criminal standard of proof. It would not be a reasonable interpretation of s. 80 to hold that the words "satisfy itself" meant "satisfy itself beyond a reasonable doubt". But the actual phrase is not merely "satisfy itself" but "satisfy itself so far as it reasonably can". The addition of the words "so far as it reasonably can" strongly supports the view that the legislature did not intend the court to reach that degree of moral certainty which is required in the proof of a criminal charge. The words are apt and suitable for applying in the new jurisdiction the civil standard of proof, but they are not apt words of description for the criminal standard of proof. In s. 86 the words are "The court, if it is satisfied that the case of the petitioner is established, shall pronounce a degree nisi". These words, like those in s. 80, are applicable to all the grounds upon which a petition can be presented. If they require the criminal standard of proof in the case of adultery, they also require that standard of proof in the case of desertion -- a proposition which has no authority to support it. The result is that the ordinary standard of proof in civil matters must be applied to the proof of adultery in divorce proceedings, subject only to the rule of prudence that any tribunal should act with much care and caution before finding that a serious allegation such as that of adultery is established. Dearman v. Dearman [(1908) 7 C.L.R. 549.]; Wright v. Wright [(1948) 77 C.L.R. 191.]; George v. George and Logie [[1951] 1 D.L.R. 278.].

P. Murphy for the respondent. The trial judge dismissed the petition on the basis that the petitioner had not discharged the onus of proof cast upon him by the decision in Stuart v. Stuart [[1948] 1 W.W.R. 669.] i.e. that the petitioner had not laid before the trial judge evidence which satisfied him beyond a reasonable doubt. The Court of Appeal sustained the decision and dismissed the appeal. The Chief Justice interpreted the reasons of the trial judge to mean that because of the conflict of evidence the trial judge was unable to find as a fact that the petitioner had discharged the onus of proof upon him to prove the adultery alleged beyond a reasonable doubt and that in that sense the trial judge had properly relied upon Stuart v. Stuart. The Chief Justice further stated that he could not say that the conclusion of fact of the trial judge based as it was upon the evidence before him and the advantage of the view he had and the demeanour of the witnesses, in a word the surrounding circumstances, was so clearly erroneous that the Court of Appeal should interfere. Mr. Justice Robertson concurred. Mr. Justice O'Halloran dissented in part holding that Stuart v. Stuart did not

apply except in cases where the adultery was to be inferred from the circumstances, and would have directed a new trial so that the trial judge could make proper judicial findings on credibility which he found were lacking.

In De Voin v. De Voin [[1946] 2 W.W.R. 304.] the Court of Appeal followed the law as laid down in Churchman v. Churchman [[1945] P. 44.] by Lord Merriman P. who said "The same strict proof is required in the case of a matrimonial offence as is required in connection with criminal offences properly so called". The same Court had occasion to review this aspect of the law in Stuart v. Stuart where a number of authorities bearing on the issue were considered -- Loveden v. Loveden [(1810) 161 E.R. at 648, 649.]; Allen v. Allen and Bell [[1894] P. 248.]; FitzRandolph v. FitzRandolph [(1918) 41 D.L.R. 739.]; L. v. L. and K. [[1922] 1 W.W.R. 224 at 227.]; Churchman v. Churchman, supra; Ginesi v. Ginesi [[1947] 2 All E.R. 438.].

In Davis v. Davis [[1950] 1 All E.R. 376.] the principle in Churchman v. Churchman seems to be adopted by the Court of Appeal in England.

In Fairman v. Fairman [[1949] 1 All E.R. 938.] Lord Merriman giving judgment for himself and Ormerod J. stated that in Ginesi v. Ginesi [[1947] 2 All E.R. 438.] the Court of Appeal unreservedly approved the observation made by him in Churchman v. Churchman in relation to a charge of adultery, including as Wrottesley L.J. expressly said, connivance, while leaving open the question whether the current generality of the observation applied to other matrimonial offences. Here again, insofar as adultery is concerned, that principle is laid down as the standard of proof required. It must be noted that this was a case where direct evidence of adultery was involved. This case seems to be in harmony with the decision of the Court of Appeal, at bar, to the extent that in applying the principles, no distinction is to be drawn, whether or not the evidence of adultery is direct or circumstantial.

The latest decision on the point is Preston-Jones v. Preston-Jones [[1951] 1 All E.R. 124.] in which the House of Lords seemed to accept and enunciate the principle that where it was sought to prove adultery the law demanded that the same be established beyond all reasonable doubt. In Gower v. Gower [[1950] 1 All E.R. 804.] Denning L.J. by way of obiter dicta seems to cast some doubt on the principles set out in the Ginesi case. Ontario formerly adopted the standard laid down in Churchman v. Churchman; DeFalco v. DeFalco [[1950] 3 D.L.R. 770.]; Jones v. Jones [[1948] O.R. 22.]. In Robertson v. Robertson [[1951] 1 D.L.R. 498.] the view of Hogg J.A. seemed to be that adultery could not be regarded as criminal or quasi-criminal, but that a high standard of proof is required in divorce cases. In George v. George [[1950] O.R. 787.], Roach J.A. giving judgment for the Court, reviewed all the authorities and said "the standard of proof is not that imposed upon the Crown in a criminal prosecution, but is the standard required in a civil action only. The judicial mind must be 'satisfied' that the alleged act of adultery was in fact committed, but it need not be satisfied to the extent of a moral certainty as in a criminal case. Evidence that creates only suspicion, surmise or conjecture is, of course insufficient. It is necessary that the quality and quantity of the evidence must be such as leads the tribunal -- be it judge or jury -- acting with care

and caution, to the fair and reasonable conclusion that the act was committed." In Bruce v. Bruce [[1947] O.R. 688.] the Court of Appeal in Ontario decided that where adultery was to be inferred from circumstances, it was not correct to say that the circumstances adduced in evidence not only must be consistent with the commission of the act of adultery, but must be inconsistent with any other rational conclusion.

It is submitted, therefore that the test applied by the trial judge that the allegations of adultery should be proved beyond a reasonable doubt was not misdirection, but that he directed himself properly in accordance with the law that is in effect in Canada, and that the appeal should therefore be dismissed.

I. Shulman in reply.

I Shulman, for the appellant. P. Murphy, for the respondent.
A.E. Branca, for the co-respondent.

Solicitors for the Petitioner: Shulman, Fouks & Tupper. Solicitor for the Co-Respondent: A.E. Branca. Solicitor for the Respondent: H.P. Wyness.

The judgment of the Chief Justice, Kerwin, Taschereau, Locke and Fauteux, JJ. was delivered by

LOCKE J.:-- This is an appeal by the petitioner in a divorce action from a judgment of the Court of Appeal for British Columbia [[1951] 4 D.L.R. 593.], dismissing his appeal from the judgment of Wilson J. which dismissed his petition: O'Halloran J.A. dissented and would have directed a new trial.

By the petition the appellant asserted that his wife had at various times committed adultery with the co-respondent and claimed a dissolution. These allegations were put in issue by the pleadings filed by the respondent and the co-respondent. It is sufficient to say of the evidence adduced at the trial that there was, what must be exceedingly rare in actions of this nature, direct evidence of the commission of the marital offence given by the petitioner and another eye witness and in addition evidence of other circumstances from which adultery might have been inferred. The direct evidence was denied by the respondent and the co-respondent as was the fact that they had at any of the times complained of been guilty of adultery.

In dismissing the petition Mr. Justice Wilson said that the petitioner had not brought forward evidence which satisfied him beyond reasonable doubt of the guilt of the respondent and

co-respondent and, considering himself to be bound by the decision of the Court of Appeal of British Columbia in Stuart v. Stuart [[1948] 1 W.W.R. 669.], the action failed.

In the Court of Appeal the Chief Justice of British Columbia, with whom Mr. Justice Robertson agreed, considered that, in view of the reasons delivered by the learned trial judge, the matter was governed by the decision in Stuart's case. Mr. Justice O'Halloran was of the opinion that the decision in that case did not apply where there was, as in the present case, direct evidence of the commission of the marital offence, while in Stuart's case and earlier case of De Voin v. De Voin [[1946] 2 W.W.R. 304.], where the Court had arrived at the same conclusion on a point of law, the evidence was circumstantial.

By the English Law Act (R.S.B.C. 1948, c. 111) the civil and criminal laws of England, as the same existed on the 19th day of November 1858 and so far as the same are not from local circumstances inapplicable, are in force in the Province of British Columbia, save to the extent that such laws shall be held to have been modified or altered by legislation having the force of law in the province or in any former colony comprised within the geographical limits thereof. The statute conferring jurisdiction upon the Supreme Court of British Columbia in divorce and matrimonial causes is The Divorce and Matrimonial Causes Act 1857 (Imp.) (20-21 Vict. c. 85) as amended by 21-22 Vict. c. 108 and it was under the terms of that statute that the proceedings in the present action were taken. The latter statute provides that in all suits and proceedings other than proceedings to dissolve any marriage the court should proceed and act and give relief on principles and rules which, in the opinion of the court, should be, as nearly as may be conformable to the principles and rules on which the ecclesiastical courts had theretofore acted and given relief, subject, however, to the provisions of the Act and rules or orders made under it. The ecclesiastical courts, while empowered to grant divorce à mensâ et thoro were without jurisdiction to dissolve a marriage, relief which could in England be obtained only by an Act of Parliament. The Act of 1857 declared, inter alia, that it should be lawful for any husband to present a petition for the dissolution of the marriage on the ground that his wife had since the celebration thereof been guilty of adultery and provided that:

> In case the Court shall be satisfied on the evidence that the case of the petitioner has been proved, and shall not find that the petitioner has been in any manner accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then the Court shall pronounce a decree declaring such marriage to be dissolved.

The question to be determined is whether, in order to find that the case of the petitioner has been proven, the court must be satisfied beyond a reasonable doubt that adultery has been committed, or whether, as in the case of other civil proceedings, the Court may act on what Willes J. described in Cooper v. Slade [(1858) 6 H.L.C. 746.], as the "preponderance of probability" or, as expressed by Duff J. (as he then was) in Clark v. The King [(1921) 61 Can. S.C.R. 608 at 616.], "on

such a preponderance of evidence as to shew that the conclusion the party seeks to establish is substantially the most probable of the possible view of the facts."

The decision of the Court of Appeal in De Voin v. De Voin supra, adopted as an accurate statement of the law a passage from the judgment of Lord Merriman P. speaking for the Court in Churchman v. Churchman [[1945] P. 44 at 51.], reading:

> The same strict proof is required in the case of a matrimonial offence as is required in connection with criminal offences properly so called.

In the interval between this decision and that in Stuart's case a divisional court in England had adopted and followed Lord Merriman's statement of the law in the case of Ginesi v. Ginesi [[1947] 2 All E.R. 438.], a judgment later affirmed by the Court of Appeal [[1948] P. 179.].

While in Allen v. Allen [[1894] P. 248.], Lopes L.J., delivering the judgment of the Court of Appeal in a case where the evidence was circumstantial, had said in part (p. 252):

> A jury in a case like the present ought to exercise their judgment with caution, applying their knowledge of the world and of human nature to all the circumstances relied on in proof of adultery, and then determine whether those circumstances are capable of any other reasonable solution than that of the guilt of the party sought to be implicated.

I have been unable to find any decision either in England or in Canada where, prior to the judgment in Churchman's case, it has been said that the standard of proof required in the case of a matrimonial offence was that required in criminal cases, this irrespective of the nature of the matrimonial offence or whether the evidence was circumstantial or direct.

It is of importance to note that the point which Lord Merriman was considering in Churchman's case was as to whether there was evidence of connivance between the parties to the action and that, in so far as his statement of the law related to or could be related to other matrimonial offences such as adultery, it was simply obiter. The passage referred to must be read with its context: after discussing the question as to whether the burden of proof in relation to connivance had been shifted by some recent statutory enactments in England, Lord Merriman said (p. 51):

> But it is not necessary to express any final opinion on the question where the burden of proof lay under the earlier Acts or on the reasons for the change in the wording. Assuming that the present Act deliberately imposes a new burden on the petitioner this cannot in our opinion mean that there is now a presumption of law that he has been guilty of connivance. The same strict proof is required in the case of a matrimonial offence as is required in connection with criminal offences properly so called. Connivance implies that the husband has been

> accessory to the very offence on which his petition is founded, or at the least has corruptly acquiesced in its commission, and the presumption of law has always been against connivance.

While support for the view that some higher degree of proof was necessary on the issue of connivance might have been found in the judgment of Dr. Lushington in Turton v. Turton [(1830) 3 Hag. Ecc. 339.], in my humble opinion the application of the principle to the marital offence of adultery is not supported by authority.

The appeal in Ginesi v. Ginesi was first heard before a divisional court consisting of Hodson and Barnard, JJ. The trial had been before the Bradford justices and the proceedings are not reported. A separation order obtained by the wife by reason of her husband's wilful neglect to maintain her was discharged on the ground that she had committed adultery. After saying that the justices had apparently not been alive to the standard of proof requisite in a case of that class, Hodson J. said in part (p. 438):

> It is a matter of history that in matrimonial cases, adultery having been described as a quasi-criminal offence, the standard of proof is a high one, and if authority is required it is to be found in the language used by Lord Merriman, P., in Churchman v. Churchman.

and quoted the statement which had been adopted in the De Voin and Stuart cases: he then proceeded to say that the error made by the justices was in thinking that the standard of proof required was that in an ordinary civil case where merely the "preponderance of evidence, or even the balance of probability" might be applied. Barnard, J. agreed that this was error. On the appeal to the Court of Appeal, counsel for the husband apparently conceded the correctness of the rule as stated by Lord Merriman, as applied to the charge of adultery. Tucker, L.J., however, considered some of the early authorities such as Rix v. Rix [(1777) 3 Hag. Ecc. 74.]; Williams v. Williams [(1798) 1 Hag. Con. 299.] and Loveden v. Loveden [(1810) 2 Hag. Con. 1, 3.], which I will refer to later, and certain remarks of Lord Buckmaster and Lord Atkin in Ross v. Ross [[1930] A.C. 17.], and decided that Hodson J. was correct in saying that adultery must be proved with the same degree of strictness as is required for the proof of a criminal offence. Wrottesley L.J. agreed that the rule applied to cases of adultery, leaving it to other occasions to decide whether it was equally applicable to other matrimonial offences "in addition, of course, to connivance, the offence which Lord Merriman P. must have had in mind in Churchman v. Churchman." Vaisey J. expressed his complete agreement with the other members of the Court and said (p. 186):

> The close similarity of the offence of adultery to acts which are properly to be described as criminal today is beyond question.

In Fairman v. Fairman [[1949] 1 All E. R. 938.], Lord Merriman, P., dealing with a case where the offence charged was adultery, after noting that what he had said in Churchman's case had been adopted and followed in the Divisional Court and in the Court of Appeal in Ginesi's case, said

that he would like to add that he had always directed himself and directed juries that adultery is a quasi-criminal offence and that, therefore, the same principles should be applied as in the case of criminal offences properly so called but that, in relation to offences such as desertion, cruelty or wilful neglect to provide reasonable maintenance, he had never charged that the same strictness applied.

In Preston-Jones v. Preston-Jones [[1951] 1 All E.R. 124.], an action for divorce which would result, if successful, in bastardising a child, the judgment of the Court of Appeal in Ginesi v. Ginesi was referred to by Lord Morton and Lord MacDermott. Certain statements made in other judgments delivered in the matter are also to be noted. Lord Simonds who did not refer to Ginesi's case said in part (p. 127):

> A question was raised as to the standard of proof. The result of a finding of adultery in such a case as this is in effect to bastardise the child. That is a matter in which from time out of mind strict proof has been required. That does not mean, however, that a degree of proof is demanded such as in a scientific inquiry would justify the conclusion that such and such an event is impossible. In this context at least no higher proof of a fact is demanded than that it is established beyond all reasonable doubt.

and referred to Head v. Head [(1823) Turn. & R. 138; 37 E.R. 1049.]. Lord Oaksey, after referring to the nature of the proceedings, said (p. 133):

> In such circumstances the law, as I understand it, has always been that the onus on the husband in a divorce petition for adultery is as heavy as the onus which rests on the prosecution in criminal cases. That onus is generally described as being a duty to prove guilt beyond reasonable doubt, but what is reasonable doubt is always difficult to decide and varies in practice according to the nature of the case and the punishment which may be awarded. The principle on which this rule of proof depends is that it is better that many criminals should be acquitted than that one innocent person should be convicted. The onus in such a case as the present, however, is founded, not solely on such considerations, but on the interest of the child and the interest of the State in matters of legitimacy since the decision involves not only the wife's chastity and status but in effect the legitimacy of her child: see Russell v. Russell [[1924] A.C. 687.].

Lord Morton said that (p. 135):

> In Ginesi v. Ginesi [[1947] 2 All E.R. 438; [1948] 1 All E.R. 373.] the Court of Appeal, after a survey of the authorities, held that a petitioner must prove adultery "beyond reasonable doubt." In my view, the burden of proof is

> certainly no heavier than this, and counsel for the husband did not contend that it was any lighter.

Lord MacDermott, after saying that for the wife it was contended that as the finding of adultery would in effect bastardise the child and that it was conceded that the adultery alleged had to be proved beyond reasonable doubt, expressed views which, it appears to me, went beyond the issues involved in the appeal. Section 4 of the Matrimonial Causes Act 1937 requires the Court, on hearing of a petition for divorce, to pronounce a decree if "satisfied on the evidence" that the cause for the petition has been proved. Lord MacDermott, after referring to a passage in the judgment of Viscount Birkenhead, L.C. in Gaskill v. Gaskill [[1921] P. 425.], a case involving legitimacy, where it was said that there should be a decree only if the court comes to the conclusion that it was impossible that the petitioner should be the father of the child, and stating his disagreement with that view said (p. 138):

> The evidence must, no doubt, be clear and satisfactory, beyond a mere balance of probabilities, and conclusive in the sense that it will satisfy what Sir William Scott described in Loveden v. Loveden [(1810) 161 E.R. 648.] as "the guarded discretion of a reasonable and just man," but these desiderata appear to me entirely consistent with the acceptance of proof beyond reasonable doubt as the standard required. Such, in my opinion, is the standard required by the statute. If a judge is satisfied beyond reasonable doubt as to the commission of the matrimonial offence relied upon by a petitioner as ground for divorce, he must surely be "satisfied" within the meaning of the enactment, and no less so in cases of adultery where the circumstances are such as to involve the paternity of a child.

While the subject Lord MacDermott was considering was the nature of the proof required in proceedings involving legitimacy, the latter part of the passage quoted goes beyond such an issue and that he intended to do so appears from what follows. The succeeding paragraph reads (p. 138):

> On the other hand, I am unable to subscribe to the view which, though not propounded here, has had its adherents, namely, that on its true construction the word "satisfied" is capable of connoting something less than proof beyond reasonable doubt. The jurisdiction in divorce involves the status of the parties and the public interest requires that the marriage bond shall not be set aside lightly or without strict inquiry. The terms of the statute recognize this plainly, and I think it would be quite out of keeping with the anxious nature of its provisions to hold that the court might be "satisfied," in respect of a ground for dissolution, with something less than proof beyond reasonable doubt. I should, perhaps, add that I do not base my conclusions as to the appropriate standard of proof on any analogy drawn from the criminal law. I do not think it is possible to say, at any rate since the decision of this House in Mordaunt v. Moncreiffe

> [(1874) L.R. 2 Sc. & Div. 374.], that the two jurisdictions are other than distinct. The true reason, as it seems to me, why both accept the same general standard -- proof beyond reasonable doubt -- lies not in any analogy, but in the gravity and public importance of the issues with which each is concerned.

The decisive point is the meaning to be assigned to the language of section 15 and 16 of the Act as it appears in c. 97, R.S.B.C. 1948. The law as thus declared has not been modified or altered by any legislation of the nature referred to in section 2 of the English Law Act. Proceedings under the Act are civil and not criminal in their nature. By the Evidence Act (c. 113, R.S.B.C. 1948), the Legislature has dealt generally with the matter of evidence in all proceedings respecting which it has jurisdiction. Section 8 provides that no plaintiff in any action for breach of promise of marriage shall recover a verdict, unless his or her testimony is corroborated by some other material evidence in support of such promise: section 11 provides that in claims against the heirs, executors, administrators or assigns of a deceased person, the plaintiff shall not obtain a verdict on his own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence. Subsection 2 of section 8 provides that, notwithstanding any rule to the contrary, a husband or wife may in any proceeding in any court give evidence that he or she did not have sexual intercourse with the other party to the marriage at any time or within any period of time before or during the marriage. Sections 27 to 50 prescribe the manner in which various matters may be proven. The Act contains nothing to differentiate the nature of the proof required or permitted in divorce as distinguished from other civil proceedings. Divorce rules regulating the procedure in the Supreme Court of British Columbia in divorce proceedings have been adopted and the matter with which we are concerned is not dealt with.

In Mordaunt v. Moncreiffe [(1874) L.R. 2 Sc. & Div. 374.], where proceedings for divorce were taken under the Act of 1857, Lord Chelmsford said in part (p. 384):

> In confining our attention strictly and exclusively to the Act, it becomes unnecessary to consider (as some of the learned judges have done) whether proceedings for a divorce are of a civil, or criminal, or quasi-criminal nature. No aid to its construction can be obtained by determining the exact character of the proceedings, nor from analogies derived from considerations applicable to cases of these different descriptions respectively. It is only necessary to bear in mind that the Act gives a right not previously existing to obtain the dissolution of marriage for adultery, by the decree of a newly-created Court of Law, and from its provisions alone we must learn the conditions upon which the jurisdiction is to be exercised.

Since, however, some of the decisions in England, above mentioned, refer to cases decided prior to 1857 as an aid to the interpretation of the Act, it may be helpful to determine the principle upon which the ecclesiastical courts proceeded in granting decrees à mensâ et thoro. In Rix v. Rix [(1777) 3 Hag. Ecc. 74.], where a decree was sought by reason of the wife's adultery, Sir George

Hay said that if the fact was proved either directly, or presumptively (which was the general case), the court was bound to grant its sentence and said (p. 74):

> Ocular proof is seldom expected; but the proof should be strict, satisfactory and conclusive.

In Williams v. Williams [(1798) 1 Hag. Con. 299.], Sir William Scott, afterwards Lord Stowell, said (pp. 299, 300):

> It is undoubtedly true, that direct evidence of the fact is not required, as it would render the relief of the husband almost impracticable; but I take the rule to be that there must be such proximate circumstances proved, as by former decisions, or on their own nature and tendency, satisfy the legal conviction of the Court, that the criminal act has been committed.

and that the Court (p. 303):

> must recollect that more is necessary, and * * * * must be convinced, in its legal judgment, that the woman has transgressed not only the bounds of delicacy, but also of duty.

In Loveden v. Loveden [(1810) 2 Hag. Con. 1.], referred to in the judgment of Tucker L.J. on the appeal in Ginesi's case and by Lord MacDermott in the case of Preston-Jones, Sir William Scott employed the language so constantly referred to on the subject (pp. 2, 3):

> It is a fundamental rule, that it is not necessary to prove the direct fact of adultery; because, if it were otherwise, there is not one case in a hundred in which that proof would be attainable: it is very rarely indeed that the parties are surprised in the direct fact of adultery. In every case almost the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion; and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights. What are the circumstances which lead to such a conclusion cannot be laid down universally, though many of them, of a more obvious nature and of more frequent occurrence, are to be found in the ancient books: at the same time it is impossible to indicate them universally; because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances apparently slight and delicate in themselves, but which may have most important bearings in decisions upon the particular case. The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion; for it is not to lead a rash and intemperate judgment, moving upon appearances that are equally capable of two interpretations -- neither is it to be a matter of artificial

> reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man.

In Turton v. Turton [(1830) 3 Hag. Ecc. 339.], where the wife sought a separation on the ground of the husband's adultery and there were pleas of condonation and it was argued further that there had been connivance, Doctor Lushington (p. 351) said that as connivance necessarily involves criminality on the part of the individual who connives and as the blame sought to be imputed is the more serious, so ought the evidence in support of such a charge to be "the more grave and conclusive." In Grant v. Grant [(1838) 2 Curt. 16.], in the Court of Arches, Sir H. Jenner said (p. 57):

> The principle applicable to cases of this description, where there is no direct and positive evidence of an act of adultery, at any particular time or place, is laid down in a variety of cases, to which it is not necessary for the Court to advert. It is not necessary to prove an act of adultery at any one particular time or place; but the Court must look at all the circumstances together, and form its own opinion whether they lead to a fair and natural conclusion that an act of adultery has taken place between the parties at some time or other.

A note to the report of this case in 163 E.R. at p. 340 says that the judgment was affirmed by the Judicial Committee of the Privy Council on February 24, 1840, but I have been unable to find any other report of this.

In Shelford's work on the Law of Marriage and Divorce published in 1841, after referring to the fact that adultery can hardly be proved by any direct means, the learned author adopts the language employed by Lord Stowell in Williams v. Williams (supra) and Loveden v. Loveden (supra) as stating the general rule applicable as to proof of the fact. In Ernst on Marriage and Divorce published in 1879, the language of Lord Stowell in Loveden's case as to the general rule is adopted as stating the law that was applied in the ecclesiastical courts.

Lord Merriman did not refer to any authority in Churchman's case in support of the proposition that the same strict proof is required in the case of a matrimonial offence as is required in prosecutions for criminal offences. The reason for his conclusion, however, appears from what he subsequently said in Fairman's case [[1949] 1 All E.R. 938 at 939.]. It does not appear from the reports that his attention was drawn to what had been said on this subject in the House of Lords in Mordaunt v. Moncreiffe above referred to, or by Sir James Hannen in Branford v. Branford [(1878) L.R. 4 P. 72 at 73.], or by Lord Lindley in Redfern v. Redfern [(1891) P. 139 at 145.]. In Mordaunt v. Moncreiffe, the action was for a divorce under the provisions of the Act of 1857. Owing to the insanity of the wife, the respondent in the action, the court, on insanity being found, appointed a guardian ad litem and suspended the proceedings; the husband appealed to the House of Lords insisting that her insanity ought not to bar the investigation of the charge of adultery brought against her. The House of Lords took the opinion of five of the judges: of these, Keating, J. was of the

opinion that the proceedings in the Divorce Court were criminal in their nature and, therefore, could not be proceeded with: Lord Chief Baron Kelly, however, with whom Denman, J. and Pollock, B. agreed said in dealing with the contention that the suit was analogous to a criminal proceeding, (p. 381):

> I am not aware of any species of suit or action known to the law, of which the incidents are to be determined by its analogy to criminal or civil proceedings. This proceeding is either a criminal prosecution or a civil suit. If a criminal prosecution, it can neither be instituted nor carried on while the accused is lunatic. If it be a civil suit, lunacy is no bar.

and, after considering the same sections of the statute as those with which we are concerned in the present matter, expressed the view that the court was obligated, if satisfied that adultery had been committed, to grant the decree. Lord Chelmsford, having said, as above noted, that the rights of the parties must be determined by interpreting the statute, said that, while great stress has been laid on the argument upon the judgments of Sir Cresswell in the case of Bawden v. Bawden [(1862) 2 Sw. & Tr. 417.], and of Lord Penzance in Mordaunt's case and on the fact that these learned judges were particularly conversant with the procedure of the Divorce Court, since the question was simply one of statutory construction this gave them no peculiar advantage. Lord Hatherley, who agreed with Lord Chemsford that the appeal must be allowed, dealt with the argument that the suit was in the nature of a criminal proceeding and said in part (p. 393):

> Much has been said, both in the Court below and before your Lordships, as to the analogy of the suit for a divorce to a criminal proceeding, and it has been inferred, that inasmuch as every step in the proceedings against a criminal is arrested by his or her becoming lunatic, so by parity of reasoning lunacy should bar all procedure against a Respondent in a divorce case. But the procedure in divorce is not a criminal procedure. It is true that the consequences of a divorce may be far more severe than those in any merely civil suit, but it is consequentially only that this result takes place. The divorce bills in Parliament were not bills of pains and penalties. They proceeded on the ground of relieving the petitioner for the bill from his unhappy position, that of indissoluble union with one who had herself, as far as was in her power, broken the marriage tie. The remedy applied was simply dissolution of the tie. No ordinary Divorce Act punished the adulterous party personally, or inflicted any pecuniary penalty. They usually, indeed, debarred the woman of dower and thirds, but that consequentially, because she ceased to be the wife; and, on the same grounds, they usually required the husband to give up his marital rights in the wife's property. The new Court was instituted to administer the same relief in the same manner.

In Branford v. Branford, Sir James Hannen referred to the judgement in Mordaunt v.

Moncreiffe, saying in part (p. 73):

> I think the point taken by the Queen's proctor is concluded by the decision in the House of Lords that proceedings of this kind are not criminal, and if not criminal then they must be civil, for there cannot be quasi-civil or quasi-criminal cases.

In Redfern v. Redfern, Lindley L.J., after referring to the decision in the House of Lords, said that (p. 145):

> The cases there cited shew clearly that no indictment lies at common law for adultery: see 2 Salk., p. 552; neither is there any statute making it punishable.

In Fairman's case Lord Merriman's expression is that adultery is a "quasi-criminal" offence. It is true that in many of the proceedings before the ecclesiastical courts reference is made to the "crime" of adultery, this, I must assume to be, due to the fact that adultery was an ecclesiastical offence but, as pointed out by Lindley L.J., it was not an offence at common law and it was not a criminal offence in England and is not in the Province of British Columbia. The principle stated by Lord Merriman and adopted by the Court of Appeal in Ginesi's case, while accepted as correctly stating the law in British Columbia and in Manitoba in the case of Battersby v. Battersby [[1948] 2 W.W.R. 623.], was rejected by the Court of Appeal of Ontario in George v. George [[1950] O.R. 787.]. In that case Roach, J. pointed out that in Gower v. Gower [[1950] 1 All E.R. 804.], Denning L.J. said that he did not think that the Court of Appeal was irrevocably committed to the view that a charge of adultery must be regarded as a criminal charge to be proved beyond all reasonable doubt, and indicated his own doubts that Ginesi v. Ginesi had been correctly decided, pointing out that the question had not been fully argued since counsel had conceded that the standard of proof of adultery was the same as in a criminal case and, further, that the decision in Mordaunt v. Moncreiffe had not been cited. In Briginshaw v. Briginshaw [(1938) 60 C.L.R. 336.], the High Court of Australia in a proceeding for the dissolution of marriage where the statute giving jurisdiction required the Court "to satisfy itself, so far as it reasonably can, as to the facts alleged" and to pronounce a decree nisi if "it is satisfied that the case of the petitioner is established," held that the standard of proof was not that of proof beyond reasonable doubt which obtains in respect of issues to be proved by the prosecution in criminal proceedings. The matter was again dealt with by that Court in Wright v. Wright [[1948] 77 C.L.R. 191.], where the Court considered the decision of the Court of Appeal in Ginesi v. Ginesi and declined to follow it, preferring their own decision in Briginshaw's case.

If the statement of Lord Merriman adopted by the Court of Appeal was intended as a statement of the law of England, as it was at the time the Divorce and Matrimonial Causes Act of 1857 was enacted, in my opinion, it is not supported by authority. If it was intended as the proper construction to be placed upon the requirement of the statute that the court shall "be satisfied on the evidence that the case of the petitioner has been proved," I think it is inaccurate and should not be followed. In Doe D. Devine v. Wilson [(1865) 10 Moo. P.C. 501 at 532.], Sir John Patteson,

delivering the judgment of the Judicial Committee in an appeal from New South Wales, where in civil proceedings the genuineness of a deed was question, said that while it had been the practice to direct the jury in criminal cases that if they have a reasonable doubt the accused is to have the benefit of that doubt, whether on motives of public policy or from tenderness to life and liberty, or from any other reason, but that none of these reasons apply to a civil case.

The question we are to determine in the present matter is restricted to the standard of proof required in divorce proceedings in British Columbia, where the issue is as to whether adultery has been committed. No question affecting the legitimacy of offspring arises. The nature of the proof required is, in my opinion, the same as it is in other civil actions. If the court is not "satisfied" in any civil action of the plaintiff's right to recover, the action should fail. The rule as stated in Cooper v. Slade is, in my opinion, applicable.

I would allow this appeal, set aside the judgments of the Court of Appeal and of Wilson, J. except to the extent that they award costs to the respondent and direct that there be a new trial. The appellant should have his costs in this Court and in the Court of Appeal as against the co-respondent. There should be no costs as between the petitioner and the respondent of the proceedings in this Court. The costs of the first trial as between the petitioner and the co-respondent and the costs of all parties of the new trial to be in the discretion of the trial judge before whom the same is heard.

RAND J.:-- I agree with the reasoning and conclusion of my brother Locke that in an action for divorce on the ground of adultery the standard of proof is that required in a civil proceeding and I have only one observation to add. There is not, in civil cases, as in criminal prosecutions, a precise formula of such a standard; proof "beyond a reasonable doubt", itself, in fact, an admonition and a warning of the serious nature of the proceeding which society is undertaking, has no prescribed civil counterpart; and we are not called upon to attempt any such formulation. But I should say that the analysis of persuasion made by Dixon J. in the High Court of Australia, in part quoted by my brother Cartwright, is of value to judges as illuminating what is implicit in the workings of the mind in reaching findings of fact. No formula of direction is here involved; instructions to juries are left exactly where they were; but it is at all times desirable to have these elusive processes progressively made more explicit.

CARTWRIGHT J.:-- I agree with the conclusion of my brother Locke that in divorce proceedings in British Columbia the standard of proof in determining the issue whether adultery has been committed is the standard required in civil actions only.

It is usual to say that civil cases may be proved by a preponderance of evidence or that a finding in such cases may be made upon the basis of a preponderance of probability and I do not propose to attempt a more precise statement of the rule. I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and that whether or not it will be so satisfied must depend

upon the totality of the circumstances on which its judgment is formed including the gravity of the consequences of the finding.

I would like to adopt the following passage from the judgment of Dixon J. in Briginshaw v. Briginshaw [(1938) 60 C.L.R. 336.].:

> The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency.

and the following from the judgment of Roach J.A. in George v. George and Logie [[1951] 1 D.L.R. 278.]:

> The judicial mind must be "satisfied" that the alleged act of adultery was in fact committed, but it need not be satisfied to the extent of a moral certainty as in a criminal case. Evidence that creates only suspicion, surmise or conjecture is, of course, insufficient. It is necessary that the quality and quantity of the evidence must be such as leads the tribunal -- be it judge or jury -- acting with care and caution, to the fair and reasonable conclusion that the act was committed.

There is, I think, no difference between the law of British Columbia and that of Ontario in this matter.

In my opinion the tribunal of fact deciding an issue of adultery in a proceeding for divorce

should be instructed in the sense of the above quoted passages, not because the standard of proof required differs from that in other civil actions but because the consideration entering into the formation of judgment which Dixon J. describes by the words "the gravity of the consequences flowing from a particular finding" assumes great importance in such a case.

I would dispose of the appeal as proposed by my brother Locke.

Appeal allowed and new trial directed.

Case Name:

Stemijon Investments Ltd. v. Canada (Attorney General); Canwest Communications Corp. v. Canada (Attorney General); Canwest Direction Ltd. v. Canada (Attorney General); Leonard Asper Holdings Inc. v. Canada (Attorney General); Lenvest Enterprises Inc. v. Canada (Attorney General); Sensible Shoes Ltd. v. Canada (Attorney General)

Between
Stemijon Investments Ltd., Appellant, and
The Attorney General of Canada, Respondent
And between
Canwest Communications Corporation, Appellant, and
The Attorney General of Canada, Respondent
And between
Canwest Direction Ltd., Appellant, and
The Attorney General of Canada, Respondent
And between
Leonard Asper Holdings Inc., Appellant, and
The Attorney General of Canada, Respondent
And between
Lenvest Enterprises Inc., Appellant, and
The Attorney General of Canada, Respondent
And between
Sensible Shoes Ltd., Appellant, and
The Attorney General of Canada, Respondent

[2011] F.C.J. No. 1503

[2011] A.C.F. no 1503

2011 FCA 299

2011 D.T.C. 5169

[2012] 1 C.T.C. 207

425 N.R. 341

341 D.L.R. (4th) 710

209 A.C.W.S. (3d) 721

Dockets A-376-10, A-374-10, A-375-10, A-377-10, A-378-10,

A-382-10

Federal Court of Appeal
Ottawa, Ontario

Noël, Trudel and Stratas JJ.A.

Heard: October 11, 2011.
Judgment: October 26, 2011.

(62 paras.)

Taxation -- Federal income tax -- Administration and enforcement -- Information returns -- Penalties and interest -- Penalties -- Taxpayer relief -- Judicial review -- Appeals -- Federal Courts -- Appeals -- Practice and procedure -- Appeal by six taxpayers from dismissal of applications for judicial review dismissed -- Appellants shared financial representative who unilaterally decided that filing of required form regarding foreign property holdings was unnecessary -- Upon notification by Canada Revenue, appellants filed required forms late -- Minister's refusal to grant relief from penalties and interest was unreasonable, as refusal was made with exclusive regard to information circular's specific scenarios for relief rather than with regard to statutory source of authority for relief -- Court exercised its discretion to refuse relief, as appellants' explanations and stated basis for relief were devoid of merit -- Income Tax Act, s. 220(3.1).

Consolidated appeal by six taxpayers from dismissal of separate applications for judicial review of decisions by the Minister of National Revenue refusing relief from penalties and interest. Form T1135 was required to be filed by taxpayers who owned specified foreign property over $100,000. Each of the appellants was late in filing Form T1135 for the 2000 to 2003 taxation years and each was assessed penalties and interest accordingly. The appellants shared a common financial representative who made all tax filings on their behalf. The representative had previously made the filings within time, but formed the view in 2000 that it was unnecessary to file the Forms due to the fact that the relevant information was conveyed in other filings made by the appellants' investment managers. The appellants filed the Forms upon notification of the failure by the Canada Revenue Agency. The appellants sought Ministerial relief from the penalties and interest pursuant to s. 220(3.1) of the Income Tax Act on the basis that the late filing was an innocent mistake and that it would be unfair to levy penalties and interest in the amounts assessed. The request was denied at the

first administrative level on the basis that the appellants did not fall within the specific scenarios for taxpayer relief delineated in the relevant information circular. The second level request for relief to a Ministerial delegate resulted in partial relief reducing interest charged during the six-month delay in the Agency's replying to the appellants. The applications for judicial review of the Minister's decision were dismissed, as the reviewing court concluded that the Minister had not improperly fettered his discretion and reached a conclusion that withstood the reasonableness standard of review. The appellants appealed.

HELD: Appeal dismissed. In refusing relief, the Minister did not draw upon the law that was the source of his authority, s. 220(3.1) of the Income Tax Act. Instead, the Minister improperly fettered his discretion by having exclusive regard to the three scenarios for taxpayer relief set out in the relevant information circular. The proper record shed no light on the basis for the decision beyond the Minister's decision letter. The Minister's decision fell outside the range of defensibility and acceptability and was thus unreasonable. However, no practical end would be accomplished by setting aside the Minister's decision and returning it for re-determination, as the excuses and justifications offered for the delay in filing and the grounds in support of relief from penalties had no merit due to the conscious choice of non-compliance with the filing requirements by the appellants' representative. Compliance was fully within the appellants' control. The Minister could not reasonably grant relief on the available facts. The Court thus exercised its discretion to refuse relief on appeal. Given the finding of unreasonableness, the Minister was denied costs.

Statutes, Regulations and Rules Cited:

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 220(3.1), s. 233.3(3)

Appeal From:

Appeal from Orders of the Honourable Justice Mandamin dated September 10, 2010, [2010] F.C.J. No. 1172; [2010] F.C.J. No. 1173; [2010] F.C.J. No. 1174; [2010] F.C.J. No. 1175; [2010] F.C.J. No. 1177; [2010] F.C.J. No. 1178.

Counsel:

Ian S. MacGregor and Peter MacDonald, for the Appellants.

Josée Tremblay and Julian Malone, for the Respondent.

The judgment of the Court was delivered by

STRATAS J.A.:--

A. Introduction

1 Before this Court are six appeals from six judgments of the Federal Court (*per* Justice Mandamin): 2010 FC 892, 2010 FC 893, 2010 FC 894, 2010 FC 895, 2010 FC 897, 2010 FC 898. In each, the Federal Court dismissed an application for judicial review brought by the taxpayer concerning a decision by the Minister of National Revenue. In each, for identical reasons, the Minister refused the taxpayer relief from penalties and interest under subsection 220(3.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

2 Since the facts and the law are substantially the same in each matter, this Court consolidated the appeals, the appeal in file A-376-10 being designated as the lead appeal. A copy of these reasons for judgment will be filed in each of files A-374-10, A-375-10, A-376-10, A-377-10, A-378-10 and A-382-10, and shall serve as this Court's reasons for judgment in each appeal. Given the identical nature of the appellant's submissions, the Minister's decision for each appellant, and the Federal Court's decision, these reasons will speak of one decision, one decision letter and one Federal Court decision.

3 In my view, for the reasons set out below, the Minister's decision falls outside the range of defensibility and acceptability and, thus, is unreasonable. However, the relief is discretionary. In these particular circumstances, no practical end would be accomplished by setting aside the Minister's decision and returning the matter back to him for redetermination: the Minister could not reasonably grant relief on these facts. Therefore, I would dismiss the appeals.

B. The basic facts

(1) Background information

4 The Act requires persons to file certain forms in certain circumstances. These forms convey information to the Canada Revenue Agency. The Canada Revenue Agency uses this information to discharge its responsibilities under the Act.

5 Form T1135 is one such form. This form must be filed by taxpayers who own specified foreign property, the total cost amount of which is over $100,000: subsection 233.3(3) of the Act.

6 The appellants were obligated to file this form for each of the 2000 to 2003 taxation years. They did so, but were late. Due to their lateness, the Minister assessed penalties and interest against the appellants.

7 The appellants sought relief from the penalties and interest from the Minister. The Minister can grant such relief under subsection 220(3.1) of the Act. Broadly speaking, the appellants alleged that they had made an innocent mistake and that it would be unfair to levy penalties and interest in the amounts assessed.

(2) How the late filings happened

8 The appellants employed a common financial representative to make all tax filings on their behalf.

9 For the 1998 and 1999 taxation years, the appellants' representative filed the appellants' Forms T1135 on time. However, for the 2000 to 2003 taxation years, the appellants' representative formed the view, contrary to the wording of subsection 233.3(3) of the Act, that it was unnecessary to file the forms. The appellants' representative felt that the Canada Revenue Agency was getting all the information it needed from other filings made by the appellants' Canadian investment managers.

10 Specifically, the appellants' representative believed that Form T1135 did not need to be filed where a foreign investment portfolio was managed by a Canadian investment manager subject to Canadian tax reporting requirements. In his view, that was the case with each of the appellants. However, as the appellants' representative conceded in a letter dated June 2, 2005, that logic did not apply to the appellant Canwest Communications Corporation, which had U.S. investments administered by U.S. fund managers.

11 Somewhat later, the Canada Revenue Agency alerted the appellants to the fact that they had not filed their forms for some time. The appellants complied, filing their forms late and explaining their misunderstanding.

(3) The appellants' request for relief from interest and penalties and the first level administrative decision

12 The appellants' financial representative wrote on behalf of the appellants to the Fairness Committee of the Canada Revenue Agency, requesting relief under subsection 220(3.1) of the Act against the penalties and interest assessed against the appellants for their late filings of the forms. The representative conceded that the delay in filing was "a conscious decision" but was done in the mistaken belief, described above, that the forms did not need to be filed. The representative explained that it was guilty of "administrative oversight."

13 In its first level administrative decision, the Canada Revenue Agency denied the appellants' request for relief. It found that the appellants did not fall within one of the three specific scenarios set out in Information Circular (IC) 07-01 ("Taxpayer Relief Provisions"), a policy statement issued by the Minister. These three specific scenarios are extraordinary circumstances beyond the taxpayer's control, actions of the Canada Revenue Agency, and inability to pay. The Canada Revenue Agency also denied the appellants' request for relief under a "one chance policy" that existed at the time. The appellants failed to qualify under that policy because they filed the forms only as a result of an inquiry made by the Canada Revenue Agency.

(4) The appellants' further request for relief from interest and penalties and the Minister's decision

14 Dissatisfied, the appellants made a second level request for relief to a delegate of the Minister (hereafter, the "Minister"). They explained that their representative had engaged in an "administrative oversight." They enclosed their previous correspondence that explained that the representative believed that the forms did not need to be filed because the Canada Revenue Agency was getting information about the appellants' foreign holdings from other filings. They suggested that the delay of the Canada Revenue Agency should result in some relaxation in the interest charges. Finally, they also argued that there was an "error of omission common to all entities" and so the penalty, levied for each of the six appellants, should be substantially reduced.

15 The Minister set out his reasons in a decision letter. In his decision letter, the Minister partly granted the appellants' request for relief. He was prepared to reduce the interest charged during six months due to the Canada Revenue Agency's delay in replying to the appellants. The Minister denied the remainder of the appellants' request for relief.

(5) The applications to the Federal Court for judicial review

16 The appellants applied to the Federal Court for judicial review of the Minister's denial of relief.

17 In the Federal Court, and also in this Court, the appellants focused on the reasons set out in the Minister's decision letter. They submitted that the Minister improperly narrowed the scope of discretion permitted to him under subsection 220(3.1) of the Act. In their view, the Minister had regard only to the three scenarios of relief specifically set out in the Information Circular rather than the general concept of fairness under subsection 220(3.1) of the Act. In other words, the Minister improperly fettered his discretion.

18 The appellants also submitted that the Minister's refusals of relief on the facts of this case could not be sustained under the standard of review of reasonableness.

(6) The Federal Court's decision

19 The Federal Court rejected the appellants' submissions. It found that the Minister had not fettered his discretion. Instead, he was aware of the full extent of his discretion and decided against granting relief. The Federal Court based this conclusion on the fact that the Minister had before him an array of material that went beyond the three scenarios set out in the Information Circular, such as the submissions of the appellant and a wide-ranging Taxpayer Relief Report. The Federal Court also found that the Minister fully addressed the appellants' requests for relief and reached a conclusion that passed muster under the standard of review of reasonableness.

C. Analysis

(1) The standard of review to be applied

20 The Federal Court held that the standard of review of the Minister's decision is reasonableness. In this Court, the parties accept this. This Court can interfere only if the Minister reached an outcome that is indefensible and unacceptable on the facts and the law: *Canada Revenue Agency v. Telfer*, 2009 FCA 23 at paragraphs 24-28; *Canada Revenue Agency v. Slau Ltd.*, 2009 FCA 270 at paragraph 27; *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 47, [2008] 1 S.C.R. 190.

21 The appellants' submissions, while based on reasonableness, seem to articulate "fettering of discretion" outside of the *Dunsmuir* reasonableness analysis. They seem to suggest that "fettering of discretion" is an automatic ground for setting aside administrative decisions and we need not engage in a *Dunsmuir*-type reasonableness review.

22 On this, there is authority on the appellants' side. For many decades now, "fettering of discretion" has been an automatic or nominate ground for setting aside administrative decision-making: see, for example, *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2 at page 6. The reasoning goes like this. Decision-makers must follow the law. If the law gives them discretion of a certain scope, they cannot, in a binding way, cut down that scope. To allow that is to allow them to rewrite the law. Only Parliament or its validly authorized delegates can write or rewrite law.

23 This sits uncomfortably with *Dunsmuir*, in which the Supreme Court's stated aim was to simplify judicial review of the substance of decision-making by encouraging courts to conduct one, single methodology of review using only two standards of review, correctness and reasonableness. In *Dunsmuir*, the Supreme Court did not discuss how automatic or nominate grounds for setting aside the substance of decision-making, such as "fettering of discretion," fit into the scheme of things. Might the automatic or nominate grounds now be subsumed within the rubric of reasonableness review? On this question, this Court recently had a difference of opinion: *Kane v. Canada (Attorney General)*, 2011 FCA 19. But, in my view, this debate is of no moment where we are dealing with decisions that are the product of "fettered discretions." The result is the same.

24 *Dunsmuir* reaffirms a longstanding, cardinal principle: "all exercises of public authority must find their source in law" (paragraphs 27-28). Any decision that draws upon something other than the law - for example a decision based solely upon an informal policy statement without regard or cognizance of law, cannot fall within the range of what is acceptable and defensible and, thus, be reasonable as that is defined in *Dunsmuir* at paragraph 47. A decision that is the product of a fettered discretion must *per se* be unreasonable.

25 In the circumstances of this case, if the Minister did not draw upon the law that was the source of his authority, namely subsection 220(3.1) of the Act, and instead fettered his discretion by having regard only to the three specific scenarios set out in the Information Circular, his decisions cannot be regarded as reasonable under *Dunsmuir*.

(2) Subsection 220(3.1) of the Act

26 Subsection 220(3.1) of the Act provides that if an application for relief is made in time, the Minister has discretion to grant relief against penalties and interest. Subsection 220(3.1) reads as follows:

> **220.** (3.1) The Minister may, on or before the day that is ten calendar years after the end of a taxation year of a taxpayer (or in the case of a partnership, a fiscal period of the partnership) or on application by the taxpayer or partnership on or before that day, waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by the taxpayer or partnership in respect of that taxation year or fiscal period, and notwithstanding subsections 152(4) to (5), any assessment of the interest and penalties payable by the taxpayer or partnership shall be made that is necessary to take into account the cancellation of the penalty or interest.
>
> * * *
>
> **220.** (3.1) Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin de l'année d'imposition d'un contribuable ou de l'exercice d'une société de personnes ou sur demande du contribuable ou de la société de personnes faite au plus tard ce jour-là, renoncer à tout ou partie d'un montant de pénalité ou d'intérêts payable par ailleurs par le contribuable ou la société de personnes en application de la présente loi pour cette année d'imposition ou cet exercice, ou l'annuler en tout ou en partie. Malgré les paragraphes 152(4) à (5), le ministre établit les cotisations voulues concernant les intérêts et pénalités payables par le contribuable ou la société de personnes pour tenir compte de pareille annulation.

27 The scope of the Minister's discretion under this subsection is determined, like any other matters of statutory interpretation, by examining the statutory words setting out the discretion (here unqualified), the other sections of the Act which may provide context, and the purposes underlying the section and the Act itself. When that examination is conducted, it is fair to say that the scope of the Minister's discretion is broader than the three specific scenarios set out in the Information Circular.

> **(3) Does the Minister's decision pass muster under the standard of review of reasonableness?**

28 In my view, the Minister fettered his discretion, and thereby made an unreasonable decision. He did not draw upon subsection 220(3.1) of the Act to guide his discretion. He looked exclusively to the Information Circular. This is seen from the Minister's reasons for decision.

> **(a) The Minister's reasons for decision, as evidenced by his decision letter**

29 In his decision letter, the Minister sets out reasons for his decision. At the beginning of the decision letter, the Minister mentions that his decision falls under "Taxpayer Relief Legislation." He explains that this legislation "gives the Minister the discretion to waive or cancel all or part of any penalty or interest payable." At this point, he says nothing about the scope of his discretion under this legislation. He never does.

30 In the next sentence in his decision letter, the Minister defines the scope of his discretion, limiting it somewhat. He does this by reference to the Information Circular, not subsection 220(3.1). Specifically, he states that his discretion is to be guided by "whether the penalty or interest resulted from extraordinary circumstances, is due mainly to actions of the Canada Revenue Agency (CRA), or...[is due to an] inability to pay." As we have seen in paragraph 13 above, these are the three specific scenarios set out in the Information Circular for the granting of relief. These words show that the Minister was limiting his consideration to the three circumstances set out in the Information Circular, and was not considering the broad terms of subsection 220(3.1) of the Act.

31 Alone, reference to a policy statement, such as the Information Circular, is not necessarily a cause for concern. Often administrative decision-makers use policy statements to guide their decision-making. As I mention at the end of these reasons, such use is acceptable and helpful, within limits. But many administrative decision-makers are careful to note those limits - policy statements can only be a guide, and, in the end, it is the governing law that must be interpreted and applied. In his decision letter, however, the Minister did not note any limits on his use of the Information Circular.

32 In the next portion of his decision letter, the Minister stated that the appellants sought relief on the basis of "administrative oversight." This was incomplete: as mentioned in paragraph 14, above, the appellants offered other explanations and justifications. The Minister never addressed these in his decision letter. The Minister responded to the appellants' explanation of "administrative oversight" by reminding them about their responsibility to determine and follow the deadlines set out in the Act.

33 Next, the Minister turned to the appellants' request for interest relief due to the Canada Revenue Agency's delay. Here, as mentioned in paragraph 15 above, he granted limited relief. In granting that relief, the Minister did not refer to the Information Circular. However, delay by the Canada Revenue Agency does fit within the second scenario set out in the Information Circular for the granting of relief, namely conduct by the Agency.

34 At the end of his decision letter, the Minister refused the rest of the relief sought by the appellants. In support of this, he offered the following explanation:

> While I can sympathize with your position, the Taxpayer Relief Provisions do not allow for cancellation of penalties and interest when a Taxpayer, or their representative, lacks knowledge or fails to meet filing deadlines. I trust this explains the Agency's position in this matter.

35 This passage offers further evidence that the Minister was restricting his consideration to the three scenarios set out in the Information Circular and was not drawing upon subsection 220(3.1) of the Act as the source of his decision-making power. This is seen from the Minister's reference to the "Taxpayer Relief Provisions" - the title of the Information Circular - as the source of his decision-making power, not subsection 220(3.1) of the Act. On a fair reading of this passage, the Minister denied the appellants relief because their claims for relief did not fit within the scenarios set out in the Information Circular.

(b) Does the record before the Minister shed any further light on the Minister's decision?

36 The respondent urges us to go beyond the stated reasons in the Minister's decision letter. It points to the record that was placed before the Minister, and an affidavit filed with the Federal Court. The respondent submits that these materials demonstrate that the Minister drew upon more than the Information Circular as the source of his authority.

37 I agree that the reasons in a decision letter should not be examined in isolation. Reasons can sometimes be understood by appreciating the record that was placed before the administrative decision-maker: *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158 at paragraph 17.

38 But sometimes the record is of no assistance. That is the case here. While the Minister had a broad record before him, his decision letter shows no awareness that he could go beyond the Information Circular. To the contrary, his decision letter shows an understanding - faulty - that he was governed exclusively by the Information Circular. Further, as explained in paragraph 32, above, the Minister did not seem to have full and accurate regard to key portions of the record before him, namely the explanations and justifications in letters sent by the appellants. In such circumstances, resort to the record to explain why the Minister decided in the way that he did is not possible.

39 The Federal Court was willing to assume that the Minister considered the record before him. In my view, that assumption was not open to it given the reasons in the preceding paragraph.

(c) Does an affidavit filed in the Federal Court shed any further light on the Minister's decision?

40 During argument of this appeal, the respondent referred us to an affidavit that was filed with the Federal Court. The affidavit is from the delegate of the Minister who made the decision that is the subject of judicial review in these proceedings. In that affidavit, and also in cross-examination on that affidavit, the delegate testified that he relied on other matters when he made his decision, including "the relevant sections of the *Income Tax Act*." The respondent points to this affidavit as evidence that the Minister had regard to the full extent of his discretion under subsection 220(3.1) of the Act and drew upon that section as the source of his authority.

41 The Federal Court appears to have placed no weight on this evidence. I also place no weight on it. This sort of evidence is not admissible on judicial review: *Keeprite Workers' Independent Workers Union et al. and Keeprite Products Ltd.* (1980), 114 D.L.R. (3d) 162 (Ont. C.A.). The decision-maker had made his decision and he was *functus*: *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848. After that time, he had no right, especially after a judicial review challenging his decision had been brought, to file an affidavit that supplements the bases for decision set out in the decision letter. His affidavit smacks of an after-the-fact attempt to bootstrap his decision, something that is not permitted: *United Brotherhood of Carpenters and Joiners of America v. Bransen Construction Ltd.*, 2002 NBCA 27 at paragraph 33. As a matter of common sense, any new reasons offered by a decision-maker after a challenge to a decision has been launched must be viewed with deep suspicion: *R. v. Teskey*, 2007 SCC 25, [2007] 2 S.C.R. 267.

42 In this case, the Minister was obligated to disclose the full and true bases for his decision at the time of decision. The decision letter, viewed alongside the proper record of the case, is where the bases for decision must be found. In this case, the proper record sheds no light on the bases for the Minister's decision, and so the bases set out in the Minister's decision letter must speak for themselves.

(d) Conclusion: the Minister's decision was unreasonable

43 I conclude that in making his decision the Minister did not draw upon the law that was the source of his authority, namely subsection 220(3.1) of the Act. Instead, he drew upon the Information Circular, and nothing else. His decision thereby became unreasonable.

(4) Should the decision be set aside and the matter returned to the Minister for redetermination?

44 Just because a decision is unreasonable does not mean that it must automatically be set aside and returned to the decision-maker for redetermination. Relief on an application for judicial review is discretionary.

45 In particular, this Court may decline to grant relief for an unreasonable decision where, for example, there is no substantial miscarriage of justice or the granting of relief would serve no practical end: *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6; *Community Panel of the Adams Lake Indian Band v. Adams Lake Band*, 2011 FCA 37.

46 In this case, there would be no practical end served in setting aside the Minister's decision and returning the matter to him for redetermination. The excuses and justifications offered by the appellants for the delay in filing and the grounds offered in support of relief have no merit. The Minister could not reasonably accept them and grant relief under subsection 230(3.1) of the Act. Returning the matter back to the Minister would be an exercise in futility.

47 The appellants say that their financial representative had a reasonable but mistaken belief that

filing the form was not obligatory. This is belied by the fact that it did file the forms for the 1998 and 1999 taxation years. It knew that the Act required that the forms be filed and filed them.

48 After the 1999 taxation year, the appellants' representative consciously chose not to comply with the Act. It did so on the basis that the Canada Revenue Agency was getting information from other sources, such as the appellants' Canadian money managers. As it turned out, this basis did not apply to the appellant Canwest Communications Corporation.

49 Even if the Canada Revenue Agency was getting the information from other sources, this cannot be an acceptable excuse or mitigating factor for non-compliance in the circumstances of this case, especially where we are dealing with the appellants' representative, a professional firm that deals with tax matters. It is notorious that in various provisions of the Act, the Canada Revenue Agency is allowed to obtain the same type of information from different sources. This allows it to verify compliance with the Act. For example, an employer is obligated to file T-4 slips reporting the income it has paid to its employees. At the same time, the employees disclose their income from employment. The employers' and employees' figures should match. What if the employer, after filing T-4 forms for a period of years, consciously declined to file the T-4 slips and then argued that it should avoid penalties because the Canada Revenue Agency would get information about the employees' income from the employees? In those circumstances, would there be any case for relief? Of course not.

50 In this case, compliance was fully within the appellants' control. Compliance happened in the 1998 and 1999 taxation years and there were no new extenuating circumstances that might explain the later non-compliance. These facts fall outside of what this Court has identified as being a focus of subsection 220(3.1), namely the granting of relief where there are extenuating circumstances beyond the control of the person seeking relief: *Bozzer v. Canada*, 2011 FCA 186 at paragraph 22.

51 The appellants also argued that it is unfair for the Minister to levy six separate, sizeable penalties against the six appellants when there was really only one mistake made by their one common representative. The appellants contended that the penalties should be substantially reduced for that reason. This argument, smacking of a plea for a "volume discount," has no merit. Each of the appellants is a separate legal entity and a separate taxpayer, potentially subject to penalties and interest for its own non-compliance. Each is capable of independent decision-making concerning the forms that are to be filed. Each, accepting the risk, chose instead to have a representative look after the filings. That risk materialized: their representative made a conscious decision not to file the forms, a decision made without reasonable excuse or justification, as explained above. Granting relief under subsection 220(3.1) on the basis of this argument would be an unreasonable exercise of discretion.

52 I accept that the normal remedy for an unreasonable decision is to set it aside and return the matter back to the decision-maker for redetermination. I also accept that this Court should be reluctant to wade into the merits of administrative decision-making. But there are cases, perhaps

rare, where no practical end would be served by returning the matter back to the decision-maker. This is just such a case.

53 In these circumstances, the appellants' explanations and justifications are entirely without merit. The appellants could not succeed on them if we returned the matter to the Minister for redetermination. Similar to what happened in *MiningWatch Canada*, *supra*, the Minister made an unreasonable decision but no practical end would be served in returning the matter back to him for redetermination. Therefore, in this case, I would decline to do so.

D. Postscript

54 So that these reasons provide proper guidance and are not misunderstood and misapplied in future cases, I wish to make three brief observations.

- I -

55 Portions of the language used in the decision letter in this case are identical to that used in other decision letters: see, for example, *Spence v. Canada Revenue Agency*, 2010 FC 52. In itself, there is nothing wrong with using form letters or stock language taken from other decision letters. The reasons offered in one case can be appropriate for other cases, and the repeat use of those reasons is efficient. However, as this case shows, a blind use of form letters or stock language can sometimes lead to trouble.

56 Whether the reasons are cut and pasted from a previous letter, are slightly modified from a previous letter or have to be drafted from scratch, the final product issued to the applicant for relief under subsection 220(3.1) of the Act should show an awareness of the scope of the available discretion under the Act, offer brief reasons why relief could or could not be given in the particular circumstances, and meaningfully address the arguments made that have a chance of success. If the reasons do not deal with one or more of these matters - something that can happen through careless or unthinking use of a form letter or stock language - the decision may not pass muster under the standard of review of reasonableness.

- II -

57 The foregoing comment and these reasons should not be taken to impose onerous new reasons-giving requirements upon the Minister. In this case, all that was required was perhaps a few additional lines in a letter that was just 33 lines long: *Vancouver International Airport Authority*, *supra* at paragraphs 16 and 17.

- III -

58 Finally, these reasons should not be taken to cast any doubt on the ability of administrative decision-makers, such as the Minister, to use policy statements, such as the Information Circular in

this case, as an aid or guide to their decision-making.

59 Policy statements play a useful and important role in administration: *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, [2008] 1 F.C.R. 385. For example, by encouraging the application of consistent principle in decisions, policy statements allow those subject to administrative decision-making to understand how discretions are likely to be exercised. With that understanding, they can better plan their affairs.

60 However, as explained in paragraphs 20-25 above, decision-makers who have a broad discretion under a law cannot fetter the exercise of their discretion by relying exclusively on an administrative policy: *Thamotharem*, *supra* at paragraph 59; *Maple Lodge Farms*, *supra* at page 6; *Dunsmuir*, *supra* (as explained in paragraph 24 above). An administrative policy is not law. It cannot cut down the discretion that the law gives to a decision-maker. It cannot amend the legislator's law. A policy can aid or guide the exercise of discretion under a law, but it cannot dictate in a binding way how that discretion is to be exercised.

61 In this case, the Minister ran afoul of these principles. Fortunately for him, however, he reached the only reasonable outcome on these facts. **E. Proposed disposition**

62 For the foregoing reasons, I would dismiss the appeals. However, in light of the unreasonableness of the Minister's decisions, I would not award the respondent in each appeal its costs of the appeal.

STRATAS J.A.
NOËL J.A.:-- I agree.
TRUDEL J.A.:-- I agree.

cp/e/ln/qlaim/qlmll/qlgpr/qlecl/qlhcs/qlgpr/qlcas/qlhcs

Indexed as:

Vancouver International Airport Authority v. Public Service Alliance of Canada

Vancouver International Airport Authority and YVR Project Management Ltd. (Applicants)

v.

Public Service Alliance of Canada (Respondent)

[2011] 4 F.C.R. 425

[2011] 4 R.C.F. 425

[2010] F.C.J. No. 809

[2010] A.C.F. no 809

2010 FCA 158

Nos. A-277-09, A-318-09

Federal Court of Appeal

Létourneau, Pelletier and Stratas JJ.A.

Heard: Vancouver, June 2, 2010;
Judgment: Ottawa, June 12, 2010.

(32 paras.)

Catchwords:

Labour Relations -- Judicial review of Canada Industrial Relations Board rulings on whether job positions falling within bargaining unit -- Applicants submitting that Board's reasons inadequate -- Reasons of administrative decision maker having to fulfil fundamental purposes -- Court having to bear in mind certain principles in assessing such reasons -- Board's reasons herein inadequate when measured against fundamental purposes, principles -- Presence of factors influencing Court's assessment of adequacy of reasons not reducing to naught Board's obligation to write adequate reasons, address fundamental purposes -- Purposes underlying requirement of adequate reasons

could have been met without difficulty by Board -- Evidentiary record not helping to supply rationale for Board's decision -- Open to Board to adopt portions of record as basis for its conclusions, but not doing so -- Applications allowed.

Summary:

These were consolidated applications for judicial review of the Canada Industrial Relations Board's rulings on whether new job positions created by the applicants fell within the bargaining unit represented by the respondent.

The applicants submitted that the Board gave inadequate reasons in support of including a certain number of jobs in the bargaining unit. The respondent replied that the parties knew the relevant principles and that the Board had issued [page426] a detailed investigation report setting out principles and factual findings.

At issue was whether the Board's reasons were adequate.

Held, the applications should be allowed.

The reasons of an administrative decision maker must fulfil, at a minimum, the following four fundamental purposes: (1) substantive, (2) procedural, (3) accountability, and (4) justification, transparency and intelligibility. In assessing whether these purposes have been met, courts must also bear in mind the relevancy of extraneous material, the adequacy of the reasons, the relevance of Parliamentary intention and the administrative context, and judicial restraint. In the present case, the Board's reasons were inadequate when measured against these fundamental purposes and principles. The Court was unable to conduct any meaningful supervisory role, and there is no transparency, justification or intelligibility in the senses set out in the Board's reasons. The fact that the Board employs principles that are well developed and understood by the parties, and that care must be taken not to affect the Board's ability to operate efficiently are factors that can influence a court's assessment of the adequacy of the Board's reasons. However, the fundamental purposes underlying the adequacy of reasons must still be addressed. The Board's obligation to write adequate reasons and address fundamental purposes cannot be reduced to naught. The purposes underlying the requirement of adequate reasons could have been met without any difficulty, consistent with the Board's practical realities. As for extraneous material, it was impossible to see anything in the evidentiary record, including the investigation report, as helping to supply a rationale for the Board's decision. It was open to the Board to adopt portions of the record as a basis for its conclusions, but it did not do this.

Cases Cited

Considered:

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, (1999), 174 D.L.R. (4th) 193, 14 Admin. L.R. (3d) 173; *VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25, (2000), 193 D.L.R. (4th) 357, 26 Admin. L.R. (3d) 1 (C.A.); *Canadian Assn. of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada*, 2006 FCA 337, 54 C.P.R. (4th) 15, 354 N.R. 310; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, [page427] 329 N.B.R. (2d) 1, 291 D.L.R. (4th) 577; *Lake v. Canada (Attorney General)*, 2008 SCC 23, [2008] 1 S.C.R. 761, 292 D.L.R. (4th) 193, 72 Admin. L.R. (4th) 30.

Referred to:

Knight v. Indian Head School Division No. 19, [1990] 1 S.C.R. 653, (1990), 69 D.L.R. (4th) 489, [1990] 3 W.W.R. 289; *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392, 263 D.L.R. (4th) 113, 44 Admin. L.R. (4th) 4; *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, 211 Nfld. & P.E.I.R. 50, 210 D.L.R. (4th) 608; *R. v. Braich*, 2002 SCC 27, [2002] 1 S.C.R. 903, 210 D.L.R. (4th) 635, 162 C.C.C. (3d) 324; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, 297 D.L.R. (4th) 577, [2008] 11 W.W.R. 383; *Crevier v. Attorney General of Quebec et al.*, [1981] 2 S.C.R. 220, (1981) 127 D.L.R. (3d) 1, 38 N.R. 541; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, 285 D.L.R. (4th) 620, 64 Admin. L.R. (4th) 163; *Clifford v. Ontario (Attorney General)*, 2009 ONCA 670, 98 O.R. (3d) 210, 312 D.L.R. (4th) 70.

Authors Cited

Ombudsman Saskatchewan. *Practice Essentials for Administrative Tribunals*, Saskatchewan: Ministry of Justice and Attorney General, 2009, online: <http: //www.ombudsman.sk.ca/uploads/document/files/omb-tribunal-guid e_web-en-1.pdf>.

History and Disposition:

APPLICATIONS for judicial review of the Canada Industrial Relations Board's rulings (*Vancouver International Airport Authority*, 2009 CIRB LD 2148; *Vancouver International Airport Authority*, 2009 CIRB LD 2172) on whether certain new job positions created by the applicants fell within the bargaining unit represented by the respondent. Applications allowed.

Appearances:

R. Paul Fairweather for applicants.

Edith Bramwell for respondent.

Solicitors of record:

Harris & Company LLP, Vancouver, for applicants.

Public Service Alliance of Canada, Ottawa, for respondent.

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The following are the reasons for judgment rendered in English by

1 **STRATAS J.A.**:-- The applicant employers' main submission is that the Canada Industrial Relations Board [Board] has given inadequate reasons in support of certain rulings against them. These rulings appear in two Board decisions: a decision dated June 3, 2009 (2009 CIRB LD 2148; file A-277-09 in this Court) and a further decision dated July 24, 2009 (2009 CIRB LD 2172; file A-318-09 in this Court). For the reasons below, I agree with the applicants' main submission. The reasons of the Board are inadequate.

2 The Board was dealing with the issue whether certain new job positions created by the applicant employers fell within the bargaining unit that the respondent union is certified to represent. In its two decisions, the Board ruled upon 66 job positions. It ruled that 43 job positions should be excluded from the bargaining unit and 23 job positions should be included into the bargaining unit.

3 In this Court, the applicants brought two applications for judicial review against the two decisions. Their applications challenged the 23 inclusions. The respondent did not seek judicial review of any of the Board's rulings. Therefore, only the Board's rulings on the 23 inclusions are before this Court.

4 Before this matter arrived in this Court, the applicants asked the Board to reconsider its decisions. The Board declined to do so. In this Court, the parties agreed that the Board's two decisions remained in place, completely unaffected by the reconsideration. They agreed that this Court should hear and determine the applications for judicial review, which have now been consolidated.

[page429]

A. *The parties' submissions*

5 At the outset of the parties' submissions, there was some common ground. The parties agreed that the Board was obligated to give reasons in support of its rulings in this case.

6 I agree. On the matters before it, the Board was obligated to provide the parties with procedural fairness. The Board adjudicated legal and factual issues of significance for the affected parties, namely whether certain positions were included or excluded from the bargaining unit.

7 Nothing in these reasons for judgment should be taken as suggesting that all administrative decision makers must give reasons in all circumstances. It depends. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraph 43, the Supreme Court regarded the common law obligation to provide reasons as a subset of the duty to afford procedural fairness to the parties. In that case, the Supreme Court held that a Minister deciding a refugee claim owed the claimant a duty of procedural fairness and, due to the importance of the decision to the claimant, the claimant needed to know why her claim was dismissed. *Baker* emphasizes, at paragraphs 23 to 28, that the level of procedural fairness to be afforded depends upon the circumstances and may vary from no obligation whatsoever, to a high obligation. Finally, there are some administrative decision makers that are not obligated to afford procedural fairness at all: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at page 670.

8 On the central issue of adequacy of reasons, the applicants submitted that after reading the Board's reasons, they do not know why 23 job positions were included in the bargaining unit. For many of the positions, the Board offered only a single, curt conclusion, nothing more.

9 The respondent disagreed. While the reasons were brief, the parties could understand why the Board ruled [page430] in the way it did. The parties knew the relevant principles, there had been a lengthy back and forth over the years on these issues, and a Board officer had released a very detailed report setting out principles and factual findings. That report should be regarded as part of the Board's rationale for its decision, says the respondent, citing this Court's decision in *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392.

10 An assumption underlies the respondent's submissions: whether reasons are adequate depends on whether they fulfil, in a minimal way, certain purposes and functions. Distilling the respondent's submissions to their essence, the respondent says that the main purpose of reasons is to ensure that the parties know why the Board decided in the way that it did.

B. *Analysis*

(1) *Introduction*

11 I agree that the adequacy of reasons is to be assessed against the purposes that underlie the giving of reasons. Put another way, "adequate reasons are those that serve the functions for which the duty to provide them was imposed": *VIA Rail Canada Inc. v. National Transportation Agency*,

[2001] 2 F.C. 25 (C.A.), at paragraph 21. This has been the consistent approach of the Supreme Court and this Court: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869; *R. v. Braich*, 2002 SCC 27, [2002] 1 S.C.R. 903; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3; *Canadian Assn. of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada*, 2006 FCA 337, 54 C.P.R. (4th) 15.

12 However, as will be seen, I do not agree with the respondent that the reasons of administrative decision makers are adequate just because the parties know why they won or lost. The reasons of administrative decision makers also must fulfil other purposes. In this case, the Board's reasons are inadequate because they do not fulfil, even at a minimum, many of these purposes.

[page431]

(2) *The purposes underlying the giving of reasons in the administrative law context*

13 The Supreme Court has identified some of the purposes underlying the giving of reasons in the administrative law context, albeit in only three cases, and only briefly. These purposes include "fairness to the parties" and "justification, transparency and intelligibility": *Baker*, above, at paragraph 43; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 47. In the area of ministerial discretion in the extradition context, the Supreme Court in *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761, at paragraph 46, has emphasized that the reasons must inform the parties why the result was reached. They must also make it possible for the supervising court to review the decision.

14 Our Court has held that reasons in the administrative law context must provide an assurance to the parties that their submissions have been considered, enable the reviewing court to conduct a meaningful review, and be transparent so that regulatees can receive guidance: *Canadian Assn. of Broadcasters*, above, at paragraph 11; *VIA Rail Canada Inc.*, above, at paragraphs 17 to 22.

15 In the area of criminal law, the Supreme Court has more fully developed the purposes underlying the giving of reasons. These should not be imported uncritically into the administrative law area, as the two areas have important differences. Nevertheless, there is some overlap with the purposes and functions identified above. Enough information must be given so parties can assess whether or not to exercise their rights of review, the supervising court can review what has been done, and the public can scrutinize what has happened: *Sheppard*, above, at paragraphs 15 and 24; *R.E.M.*, above.

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16 Where, as here, an administrative decision maker, acting under a procedural duty to receive and consider full submissions, is adjudicating on a matter of significance, what sort of reasons must it give? From the above authorities, and bearing in mind a number of fundamental principles in the administrative law context, the adequacy of the decision maker's reasons in situations such as this must be evaluated with four fundamental purposes in mind:

(a) *The substantive purpose*. At least in a minimal way, the substance of the decision must be understood, along with why the administrative decision maker ruled in the way that it did.

(b) *The procedural purpose*. The parties must be able to decide whether or not to invoke their rights to have the decision reviewed by a supervising court. This is an aspect of procedural fairness in administrative law. If the bases underlying the decision are withheld, a party cannot assess whether the bases give rise to a ground for review.

(c) *The accountability purpose*. There must be enough information about the decision and its bases so that the supervising court can assess, meaningfully, whether the decision maker met minimum standards of legality. This role of supervising courts is an important aspect of the rule of law and must be respected: *Crevier v. Attorney General of Quebec et al.*, [1981] 2 S.C.R. 220; *Dunsmuir*, above, at paragraphs 27 to 31. In cases where the standard of review is reasonableness, the supervising court must assess "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, above, at paragraph 47. If the supervising court has been prevented from assessing this because too little information has been provided, the reasons are inadequate: see, e.g., *Canadian Assn. of Broadcasters*, above, at paragraph 11.

(d) *The "justification, transparency and intelligibility" purpose*: *Dunsmuir*, above, at paragraph 47. This purpose overlaps, to some extent, with the substantive [page433] purpose. Justification and intelligibility are present when a basis for a decision has been given, and the basis is understandable, with some discernable rationality and logic. Transparency speaks to the ability of observers to scrutinize and understand what an administrative decision maker has decided and why. In this case, this would include the parties to the proceeding, the employees whose positions were in issue, and employees, employ-ers, unions and businesses that may face similar issues in the future. Transparency, though, is not just limited to observers who have a specific interest in the decision. The broader public also has an interest in transparency: in this case, the Board is a public institution of government and part of our democratic governance structure.

17 The reasons of administrative decision makers in situations such as this must fulfil these purposes at a minimum. As courts assess whether these purposes have been fulfilled, there are a number of important principles, established by the authorities, to be kept firmly in mind:

(a) *The relevancy of extraneous material.* The respondent emphasized that information about why an administrative decision maker ruled in the way that it did can sometimes be found in the record of the case and the surrounding context. I agree. Reasons form part of a broader context. Information that fulfils the above purposes can come from various sources. For example, there may be oral or written reasons of the decision maker and those reasons may be amplified or clarified by extraneous material, such as notes in the decision maker's file and other matters in the record. Even where no reasons have been given, extraneous material may suffice when it can be taken to express the basis for the decision. *Baker*, above, provides us with a good example of this, where the Supreme Court found that notes in the administrative file adequately expressed the basis for the decision. See also *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at paragraph 101 for the role of extraneous materials in the assessment of adequacy of reasons.

[page434]

(b) *The adequacy of reasons is not measured by the pound.* The task is not to count the number of words or weigh the amount of ink spilled on the page. Instead, the task is to ask whether reasons, with an eye to their context and the evidentiary record, satisfy, in a minimal way, the fundamental purposes, above. Often, a handful of well-chosen words can suffice. In this regard, the respondent emphasized that very brief reasons with short form expressions can be adequate. That is true, as long as the fundamental purposes, above, are met at a minimum. In this regard, the respondent cited the example of the Board sometimes issuing orders without reasons. Whether such orders are adequate depends on the facts of a specific case, but the methodology for assessing adequacy is clear: the preambles, recitals and provisions of the orders, when viewed with an eye to their context and the evidentiary record, must satisfy, in a minimal way, the fundamental purposes, above.

(c) *The relevance of Parliamentary intention and the administrative context.* Judge-made rulings on adequacy of reasons must not be allowed to frustrate Parliament's intention to remit subject-matters to specialized administrative decision makers. In many cases, Parliament has set out procedures or has given them the power to develop procedures suitable to their specialization, aimed at achieving cost-effective, timely justice. In assessing the adequacy of reasons, courts should make allowances for the "day to day realities" of administrative tribunals, a number of which are staffed by non-lawyers: *Baker*, above, at paragraph 44; *Clifford v. Ontario (Attorney General)*, 2009 ONCA 670, 98 O.R.

> (3d) 210, at paragraph 27. Allowance should also be given for short form modes of expression that are rooted in the expertise of the administrative decision maker. However, these allowances must not be allowed to whittle down the standards too far. Reasons must address fundamental purposes-purposes that, as we have seen, are founded on such fundamental principles as accountability, the rule of law, procedural fairness, and transparency.

[page435]

> (d) *Judicial restraint.* The court's assessment of reasons is aimed only at ensuring that legal minimums are met; it is not an exercise in editorial control or literary criticism. See *Sheppard*, above, at paragraph 26.

18 In the above statement of purposes and principles, nothing should be taken to encourage administrative decision makers to aim only for the legal minimums, and no higher. Administrative decision makers should strive to follow best practices so that the public gets the service it deserves, including providing exemplary reasons of high standard: for an example of one authority's helpful view of best practices, see Ombudsman Saskatchewan, *Practice Essentials for Administrative Tribunals*, Saskatchewan: Ministry of Justice and Attorney General, 2009, online: <http: //www.ombudsman.sk.ca/uploads/document/files/omb-tribunal-guid e_web-en-1.pdf>.

(3) *Application of these principles to this case*

19 Measured against the fundamental concerns and principles, set out above, the Board's reasons fall well short of the mark. They are inadequate.

20 In 13 of the 23 positions found to be in the bargaining unit, the Board simply wrote that "there is no basis to exclude given the job duties", "there is no basis in the information supplied to exclude the position from the unit", or "job duties do not require exclusion". Did the Board apply any principles in these rulings? If so, what are the principles? It is a mystery. The applicants have no idea why they lost, they cannot meaningfully assess whether a judicial review is warranted or formulate any grounds for it in the case of these 13 positions, this Court is unable to conduct any meaningful supervisory role, and there is no transparency, justification or intelligibility in the senses set out above. [page436] All we have are conclusions, laudably definitive, but frustratingly opaque.

21 In effect, for these 13 positions, the Board is telling the parties, this Court, and all others, "Trust us, we got it right." In this regard, this case is strikingly similar to *Canadian Assn. of Broadcasters*, above, where the administrative decision maker asserted a bottom-line conclusion with no supporting information, in effect immunizing itself from review and accountability.

22 In 6 of the 23 positions found to be in the bargaining unit, the Board offered slightly more than a bare conclusion in support of its ruling. On these occasions, the Board included a position in the bargaining unit because it was "at the same level on the organizational chart" or because it was similar, for some undisclosed reason, to a position in the bargaining unit. What was it about the level on the organizational chart or the particular position that led to this conclusion? It is a mystery. In effect, the Board is saying: "Trust us, but here is a hint". But the hint does not shed light on the bases for its decision.

23 The respondent gamely attempted to support the reasons of the Board, sparse as they are. It emphasized that the principles that the Board normally employs in cases such as this one are fairly well developed and understood by many employers, unions and observers of this area of law. Further, a fairly large number of positions, 66, were in issue, each involving highly specific facts. The respondent stressed that care must be taken not to impose too high an obligation to provide reasons on the Board, affecting its ability to operate efficiently.

24 I accept that these factors can influence the Court's assessment of the adequacy of the Board's reasons. These factors speak to the issue of whether some allowance should be given to reflect the practical, [page437] daily realities that this administrative decision maker must face. But the fundamental purposes underlying the adequacy of reasons, such as the transparency concern and the supervisory concern, must still be addressed at a minimum. The Board's obligation to write adequate reasons and address fundamental purposes cannot be reduced to naught.

25 In this case, the purposes underlying the requirement of adequate reasons could have been met without any difficulty, consistent with the practical realities facing the Board. With just a handful of words-"Throughout this decision, we apply the principles in [case name]"-the Board could have shown that it was following some principle. From there, the Board might have written a sentence or two to identify how the principle applies to each position, or to groups of positions that raise similar considerations. A sentence or two, sitting alongside the record in this case, might have disclosed exactly why the Board ruled in the way it did, and might have addressed all of the fundamental concerns underlying the provision of adequate reasons.

26 So far, I have dealt with 19 of the 23 positions that the Board included into the bargaining unit. In the case of the remaining four positions, "payroll assistant", "human resource advisor", "contracts manager", and "project manager", the Board did write a sentence or two. But the bases identified in those sentences seem to conflict with the bases provided for exclusion of other positions: sometimes one factor is determinative, other times an entirely different factor seems determinative. The salient concern here is intelligibility. A single paragraph, perhaps at the start of the reasons could have set out the operative principles to be followed along with governing authority. Then the Board's "sentence or two" approach might have been perfectly adequate. It might have met any intelligibility concerns by eliminating any apparent inconsistency in principle.

27 As for extraneous material, it is of no assistance in understanding the Board's reasons. In the

[page438] circumstances of this case and given the sparseness of the Board's reasons, it is impossible to see anything in the evidentiary record, including the investigation report, as helping to supply a rationale for the Board's decision. It was open to the Board to adopt, through express language or by implication, portions of the record as a basis for its conclusions (see *Sketchley*, above, at paragraph 37), but the Board did not do this.

(4) *Other grounds of review*

28 The applicants raised other grounds of review of the Board's decision. These arose primarily as a result of the Board's reference to positions on an organizational chart in support of some of its rulings. This led the applicants to note that a position on an organizational chart, by itself, cannot lead in principle to a conclusion that a position should be included in the bargaining unit. To the applicants, this gave rise to two legitimate grounds of judicial review: the taking into account of an irrelevant consideration and the failure to take into account relevant considerations.

29 We simply cannot assess these grounds of judicial review because of the absence of adequate reasons. Quite simply, the considerations and principles that the Board took into account, relevant or irrelevant, are not adequately apparent. In any event, it is unnecessary to deal with these other grounds of review in this case.

C. *Conclusion*

30 The Board's decisions to include 23 positions into the bargaining unit should be quashed, because its reasons are inadequate.

31 The applicants asked that the matter be remitted to a differently constituted panel of the Board. I would remit the matter back to the Board, but there is no reason why the matter must be sent to a differently constituted panel. Such a requirement is imposed when there are concerns about the capacity, capability, fairness or [page439] propriety of the original panel to rule on a matter if it were to be sent back to them. As best as we can assess from the Board's truncated reasons and the parties' submissions, no such concerns exist here.

32 Therefore, I would allow both applications for judicial review, with costs in file A-318-09 up to the date of consolidation (September 19, 2009) and costs throughout in A-277-09. I would quash the decisions of the Board (2009 CIRB LD 2148 and 2009 CIRB LD 2172) with respect to the 23 positions that the Board decided were included in the bargaining unit. I would remit these 23 inclusions back to the Board for redetermination.

LÉTOURNEAU J.A.:-- I agree.
PELLETIER J.A.:-- I agree.

cp/e/qlaim

Indexed as:

Via Rail Canada Inc. v. Lemonde

IN THE MATTER OF subsection 63.3(1) of the National Transportation Act, 1987, R.S.C. 1985, C. 28 (3rd Supp.)
AND IN THE MATTER OF National Transportation Agency Order No. 1995-R-491 and Decision No. 791-R-1995, both dated November 28, 1995
Between
Via Rail Canada Inc., applicant, and
National Transportation Agency and Jean Lemonde, respondents

[2000] F.C.J. No. 1685

[2000] A.C.F. no 1685

[2001] 2 F.C. 25

[2001] 2 C.F. 25

193 D.L.R. (4th) 357

261 N.R. 184

2000 CanLII 16275

26 Admin. L.R. (3d) 1

100 A.C.W.S. (3d) 705

Docket A-507-96

Federal Court of Appeal
Toronto, Ontario

Linden, Sexton and Evans JJ.

Heard: September 25, 2000.

Judgment: October 10, 2000.

(46 paras.)

Counsel:

John Campion and Yvonne Chisholm, for the applicant.
Elizabeth C. Barker, for the respondent.

The judgment of the Court was delivered by

1 **SEXTON J.**:-- This is an appeal from a decision[1] of the National Transportation Agency (the "Agency") dated November 28, 1995 that held that a portion of VIA Rail's Special and Joint Passenger Tariff (the "tariff") constitutes an undue obstacle to the mobility of persons with disabilities.

Facts

2 In December 1993, a team of wheelchair basketball athletes travelled from Saint-Hyacinthe to Toronto using VIA Rail. Eight members of the group were physically disabled persons travelling in wheelchairs. Each was accompanied by an attendant to assist them with their basic needs during the trip. In accordance with the provisions of the tariff, the attendants travelled for free. The group encountered a number of difficulties related to the accessibility of VIA's services to the disabled passengers.

3 Upon application by M. Jean Lemonde, the party's leader for the trip, the Agency conducted an investigation into a number of specific complaints. The Agency concluded that certain actions and practices of VIA constituted obstacles to the mobility of the persons with disabilities in the party and that those obstacles "were undue because they could have easily been avoided by the carrier." In a decision communicated by letter dated November 4, 1994, it ordered VIA to take a number of corrective measures. VIA subsequently complied with those orders to the satisfaction of the Agency.[2]

4 In the same November, 1994 decision, the Agency called attention to Section 13-D of VIA's Special and Joint Passenger Tariff 1, NTA 1, the relevant portions of which are reproduced below:

Section 13-D DISABLED PERSON AND ATTENDANT

> 1. CONDITIONS
>
> A ticket may be sold for the transportation of a disabled person and one adult attendant (at the fare authorized in 3) upon [a list of conditions follows]
>
> ...
>
> The attendant must be capable of assisting the disabled person to get on and off trains and of attending to his/her personal needs throughout the trip.
>
> ...
>
> 3. FARE BASIS
>
> One fare (any fare which the disabled person would pay if travelling alone) will apply for the transportation of both passengers

5 Thus, the tariff provides that an attendant who is capable of providing assistance to a disabled person who is unable to travel alone is entitled to travel for free.

6 With respect to the provisions of the tariff, the Agency made the following statements:

> The Agency specifies that the presence of an attendant is no excuse not to provide assistance to a person during boarding and deboarding.
>
> The Agency supports the principle pursuant to which the attendant must be capable of meeting the basic needs of the person s/he is accompanying and of offering the services which are not usually offered by a carrier. However, providing assistance during boarding and deboarding is the carrier's responsibility. Consequently, this assistance should not be imposed on the attendant. The obligation imposed on the latter to board and deboard a disabled person constitutes an obstacle to the mobility of the person and the Agency believes that disabled persons are entitled to receive the same level of service whether they are travelling alone or with an escort.

7 As a result of this finding, the Agency required VIA to show cause that the Agency should not find the obstacle "undue" and order VIA to remove the requirement from its tariff.

Decision Appealed From

8 Following the receipt of VIA's submissions, the Agency issued a further order and decision on November 28, 1995. It ordered that the words "The attendant must be capable of assisting the disabled person to get on and off trains" be struck from the tariff and that a provision be added to clearly indicate VIA's responsibility to board and deboard all of its passengers. It indicated that VIA could add to the amended tariff a proviso allowing it to inquire, at the time of booking, whether the passenger's attendant would be able to assist VIA personnel, if necessary. It also ordered VIA to issue a bulletin to its employees informing them of the changes and to make consequential amendments to various printed materials.

9 The Agency's main finding with respect to the tariff was reported as follows:

> The Agency remains of the opinion that it is the responsibility of VIA to board and deboard its passengers. Under normal conditions and with sufficient advance notice, the carrier should be in a position to control the quality and level of services - both personnel and equipment - to accommodate the boarding and deboarding needs of passengers with disabilities. As a general principle, attendants are there to provide assistance of a personal nature to the person during the trip. To put the onus on the attendant that "the attendant must be capable of assisting the disabled person to get on or off trains..." as found in VIA's Special Local and Joint Passenger tariff, is an undue obstacle to the mobility of persons with disabilities.

10 This Court granted VIA Rail leave to appeal the decision by order dated June 3, 1996. The Agency opposes the appeal. The initial complainant, M. Lemonde, did not appear.

Relevant Legislation

11 The legislation relevant to this appeal is found in the National Transportation Act, 1987:[3]

> 3. (1) It is hereby declared that a safe, economic, efficient and adequate network of viable and effective transportation services accessible to persons with disabilities and making the best use of all available modes of transportation at the lowest total cost is essential to serve the transportation needs of shippers and travellers, including persons with disabilities, and to maintain the economic well- being and growth of Canada and its regions and that those objectives are most likely to be achieved when all carriers are able to compete, both within and among the various modes of transportation, under conditions ensuring that, having due regard to national policy and to legal and constitutional requirements,
>
> ...

> (g) each carrier or mode of transportation, so far as practicable, carries traffic to or from any point in Canada under fares, rates and conditions that do not constitute
>
> ...
>
> (ii) an undue obstacle to the mobility of persons, including those persons who are disabled,

(emphasis added)

> 63.3 (1) The Agency may, of its own motion or on application, inquire into a matter in relation to which a regulation could be made under subsection 63.1(1),[4] regardless of whether such a regulation has been made, in order to determine whether there is an undue obstacle to the mobility of disabled persons.

12 Also relevant is the following provision of the National Transportation Agency General Rules:[5]

> 39. The Agency shall, in any proceeding where it does not grant the requested relief or where an opposition has been expressed, give orally or in writing the reasons for its order, decision, ruling, direction, leave, sanction or approval.

Issues

13 The written submissions of the parties were primarily directed toward the Agency's interpretation and use of the term "undue obstacle" and the standard of review. During oral argument, counsel for both parties agreed that the appropriate standard of review was reasonableness. As it is unnecessary for us to do so, I do not propose to consider this matter. Also during oral argument, it became clear that the adequacy of the Agency's reasons was a major issue. In particular, VIA argued that in determining whether or not an "undue obstacle" existed, the Agency was required to undertake a balancing of interests as between the disabled person and the carrier and that the Agency had failed to indicate in its reasons why it had struck the balance as it did.

14 It is necessary, therefore, to deal with the questions of whether or not the Agency erred in law

by failing to articulate adequate reasons for:

1. Its finding that s. 13-D of the tariff constituted an obstacle to the mobility of disabled persons; and
2. Its finding that such obstacle is "undue".

15 For the reasons which appear below, I believe that the reasons given by the Agency were inadequate.

Analysis

The Duty to Give Reasons

16 Although the Act itself imposes no duty on the Agency to give reasons, s. 39 of the National Transportation Agency General Rules does impose such a duty. In this case, the Agency chose to provide its reasons in writing.

17 The duty to provide reasons is a salutary one. Reasons serve a number of beneficial purposes including that of focussing the decision-maker on the relevant factors and evidence. In the words of the Supreme Court of Canada: Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision.[6]

18 Reasons also provide the parties with the assurance that their representations have been considered.

19 In addition, reasons allow the parties to effectuate any right of appeal or judicial review that they might have. They provide a basis for an assessment of possible grounds for appeal or review. They allow the appellate or reviewing body to determine whether the decision-maker erred and thereby render him or her accountable to that body. This is particularly important when the decision is subject to a deferential standard of review.

20 Finally, in the case of a regulated industry, the regulator's reasons for making a particular decision provide guidance to others who are subject to the regulator's jurisdiction. They provide a standard by which future activities of those affected by the decision can be measured.

21 The duty to give reasons is only fulfilled if the reasons provided are adequate. What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case. However, as a general rule, adequate reasons are those that serve the functions for which the duty to provide them was imposed. In the words of my learned colleague Evans J.A., "[a]ny attempt to formulate a standard of adequacy that must be met before a tribunal can be said to have discharged its duty to give reasons must ultimately reflect the purposes served by a duty to give reasons."[7]

22 The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion.[8] Rather, the decision-maker must set out its findings of fact and the principal evidence upon which those findings were based.[9] The reasons must address the major points in issue. The reasoning process followed by the decision-maker must be set out[10] and must reflect consideration of the main relevant factors.[11]

23 In my view, the general propositions stated above are all applicable in the circumstances of the case at bar. However, in this case, I believe that the adequacy of the Agency's reasons must be measured with particular reference to the extent to which they provide VIA with sufficient guidance to formulate their tariff without running afoul of the Agency and to the extent to which they give effect to VIA's right of appeal by providing this Court with sufficient insight into the Agency's reasoning process and the factors that it considered.

24 Therefore, I believe that for this Court to hold that the Agency's reasons are adequate, we must find that those reasons set out the basis upon which the Agency found that the existence of the tariff constituted an obstacle, that they reflect the reasoning process by which the Agency determined that the obstacle was undue and include a consideration of the main factors relevant to such a determination.

25 I now turn to the questions posed above.

Issue 1: Did the Agency provide adequate reasons for its finding that Section 13-D of the tariff constitutes an obstacle to the mobility of passengers with disabilities?

26 In the words of the tariff, did the Agency's reasons provide sufficient indication of the reasoning process by which it determined that it is an obstacle to the mobility of a disabled passenger to require that an attendant, travelling on the same ticket as the passenger, be capable of assisting the passenger in getting on and off the train?

27 The Agency determined that the tariff was an obstacle in its November, 1994 decision. The decision under appeal treats this earlier finding as a given. The only portion of the 1994 decision dealing with the reasons for the Agency's determination is reproduced in paragraph 6 above. It is worth noting that the tariff was not a subject of the original complaint filed by Mr. Lemonde. Its provisions seem to have come before the Agency only as a result of VIA's reference to it in its submission responding to the complaint.

28 In my view, the conclusion that the tariff was an obstacle is not supported by sufficient indication of the reasoning process engaged in by the Agency. The reasons provide no intimation of what constitutes an obstacle to the mobility of a disabled passenger nor are they sufficiently clear.

29 The Concise Oxford Dictionary[12] defines obstacle as a "thing that obstructs progress". Not only has the Agency failed to articulate any definition but it also does not appear to have engaged in any reasoned consideration of the tariff provisions. How does the requirement that an attendant be

capable of assisting the disabled person with whom they are travelling to board and deboard a train constitute an obstacle to the mobility of the disabled person? This is a question which the Agency did not answer and hence it erred in law.

30 There are a number of other inconsistencies on the face of the reasons that provide support for my view that the reasons with respect to the finding that the tariff was an obstacle were inadequate. In both its 1994 and 1995 decisions, the Agency accepted that an attendant must be capable of meeting the basic needs of the person he or she is accompanying and of offering services which are not usually offered by the carrier. One example of this would be in assisting the disabled passenger to travel to and from the washroom. Presumably, therefore, the attendant would be required to be capable of providing such assistance. This activity, like boarding or deboarding a train, involves physically assisting the disabled person in moving from one place to another and potentially into and out of a wheelchair. The Agency does not explain why the obligation of the attendant in respect of personal needs on-board the train does not constitute an obstacle while any obligation in respect of being capable of providing help in boarding or deboarding does.

31 Another inconsistency is apparent in relation to an error made by the Agency in describing the condition imposed by the tariff. In the 1994 decision, it said: "The obligation imposed on the [attendant] to board and deboard a disabled person constitutes an obstacle to the mobility of the person ..." This is not the obligation imposed by the tariff. The tariff merely provides that the attendant be capable of providing such assistance. While it implies the possibility that an attendant might be requested by VIA to provide physical assistance in boarding and deboarding disabled passengers, the condition does not impose a general obligation that the attendant do so in all circumstances. Indeed, the Agency accepted in its 1995 decision that, in general, VIA did provide such assistance to disabled passengers.

32 The Agency did use the proper wording when requiring VIA to show cause why the condition should not be removed and again in its 1995 decision. However, both of these references were made in contexts that arose after the Agency had reached the conclusion that the tariff was an obstacle.

33 I conclude, therefore, that the Agency erred in law by failing to provide adequate reasons for its decision that the tariff was an obstacle. Its reasons did not provide sufficient insight into the reasoning process followed. Moreover, they were not sufficiently clear with respect to the conclusion that is in issue.

Issue 2: Did the Agency err in law by failing to provide adequate reasons for its conclusion that any obstacle posed by the tariff was "undue"?

34 While there seems to be no jurisprudence dealing with what constitutes an undue obstacle to the mobility of disabled persons, the Courts have had ample opportunity to consider the use and interpretation of the term "undue" in other legislative contexts.[13]

35 While "undue" is a word of common usage which does not have a precise technical meaning

the Supreme Court has variously defined "undue" to mean "improper, inordinate, excessive or oppressive"[14] or to express "a notion of seriousness or significance."[15] To this list of synonyms, the Concise Oxford Dictionary adds "disproportionate."

36 What is clear from all of these terms is that "undue-ness" is a relative concept. I agree with the position expressed by Cartwright J, as he then was:

> "Undue" and "unduly" are not absolute terms whose meaning is self-evident. Their use presupposes the existence of a rule or standard defining what is "due". Their interpretation does not appear to me to be assisted by substituting the adjectives "improper", "inordinate", "excessive", "oppressive" or "wrong", or the corresponding adverbs, in the absence of a statement as to what, in this connection, is proper, ordinate, permissible or right.[16]

The proper approach to determining if something is "undue", then, is a contextual one. Undue-ness must be defined in light of the aim of the relevant enactment.[17] It can be useful to assess the consequences or effect if the undue thing is allowed to remain in place.[18]

37 The Supreme Court has also recognized that the term implies a requirement to balance the interests of the various parties. In a case dealing with whether an employer had accommodated an employee's right to exercise his religious beliefs up to the point of undue hardship, Wilson J., writing for the majority, found it helpful to list some of the factors relevant to such an appraisal. She concluded by stating: "This list is not intended be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free of discrimination will necessarily vary from case to case."[19]

38 In the case at bar, the Agency's reasons do not reveal sufficient indicators of the reasoning process it followed in interpreting the term "undue". They include no definition of the term undue or any indication of a "rule or standard defining what is 'due'." In its submissions to this Court, the Agency argued that the definition that it had applied was that articulated in its November 1994 reasons: "...the obstacles ... were undue because they could have easily been avoided by the carrier." Even if this could be said to be true, the statement can only lead me to conclude that the Agency undertook no contextual analysis of the issue. It looked only to its perception of VIA's ability to avoid the obstacle. In my opinion, this was not sufficient.

39 In determining whether the obstacle was undue, the Agency should have first considered the aim of the National Transportation Act. This is found in s. 3(1), which provides that the nation's transportation network should be, inter alia, economic, efficient, viable and effective. The network must serve the needs of all travellers, including those with disabilities. In my opinion, the possibility that the economic and commercial objectives of the Act, the needs of non-disabled passengers and those of disabled passengers might be inconsistent in some circumstances was contemplated by Parliament and addressed by subs. 3(1)(g). This provision provides that each carrier, so far as practicable, should conduct its business under conditions which do not constitute an undue obstacle

to the mobility of disabled persons. The use of the words "so far as practicable", in addition to the use of the term "undue" provides further support for my view that the Agency was required to undertake a balancing of interests such that the satisfaction of one interest does not create disproportionate hardship affecting the other interest.

40 In its decision the Agency made no mention of s. 3 of the Act. I am forced to conclude that it did not have regard to it. Nor do the reasons indicate that the Agency engaged in any consideration of the impact upon VIA and all of its passengers of leaving the tariff in place as compared to removing it.

41 The Agency was required to consider all of the relevant factors and to balance them against each other. With respect to the interests of the disabled passengers the following factors might be relevant:

1. The difficulty of providing an escort who is capable of assisting the disabled person in boarding the train;
2. The difficulty of providing an escort who is willing to assist the disabled person in boarding the train;
3. The importance to the dignity of the individual that they be able to travel with as much independence as possible and their right to accessible travel.

42 With respect to VIA, the relevant factors may be collectively termed operational factors and commercial or economic factors. They might include the following:

1. The reasonable availability of personnel and equipment to assist in the boarding and disembarkation from train;
2. The time required for providing assistance in boarding and deboarding;
3. The effect on scheduling of trains which are required to spend time boarding disabled persons in excess of that scheduled;
4. The impact of delays incurred as a result of boarding disabled persons on all passengers;
5. The impact of unscheduled delays on passenger confidence and the continued viability of VIA's passenger rail service;
6. VIA's ability to contract occasional workers to assist in boarding and deboarding, having regard to any collective bargaining agreements to which VIA is a party;
7. The requirement that such occasional workers be properly trained and insured to carry out their duties; and
8. The expense of providing additional personnel for boarding disabled persons, especially at small station where only a modest complement of staff is available.

43 I note that the Agency did refer to some of the factors impacting upon VIA's operational

requirements and its commercial viability. It did so mainly in the context of simply reciting VIA's submissions. The Agency agreed with VIA's position that it had an obligation to provide a timely and effective service to all of its passengers and accepted that, in general, VIA does provide assistance in boarding and deboarding to all of its passengers, whether disabled or not. It also recognized that scheduling constraints, large numbers of disabled passengers and insufficient personnel at some stations might impact upon VIA's ability to provide services to disabled passengers. Unfortunately, rather than dealing with those submissions in a reasoned manner, it simply expressed the belief that with sufficient advance notice and consultation between VIA and disabled passengers, problems of accessibility could be avoided.

44 In summary, the Agency failed to provide sufficient insight into the reasoning process that it followed or the factors that considered in determining that any obstacle provided by the tariff was undue. In so doing, it erred in law.

Conclusion

45 In my opinion, the reasons provided by the Agency in its 1994 and 1995 decisions with respect to whether the tariff constituted an undue obstacle to the mobility of disabled persons were inadequate. Specifically, they fail to provide sufficient indication of the reasoning process which the Agency might have followed or of what factors the Agency might have considered relevant.

46 The decision of the National Transportation Agency with respect to Section 13-D of the tariff is set aside. The matter is referred back to a differently constituted panel of the Agency to conduct a new inquiry with respect to the tariff in accordance with these reasons. The Agency is required to provide the parties an opportunity to lead evidence and make submissions on the issue.

SEXTON J.
LINDEN J.:-- I agree.
EVANS J.:-- I agree.

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1 Order No. 1995-R-491, Decision No. 791-R-1995. Orders and Decisions of the Agency are available at the Canadian Transportation Agency's website, online: http://www.cta-otc.gc.ca/eng/toc.htm.

2 Ibid.

3 R.S.C. 1985, c. 28 (3d. Supp.) as amended.

4 The matters falling under subs. 63.1(1) include:

> ... (c) tariffs, rates, fares, charges and terms and conditions of carriage applicable in respect of the transportation of disabled persons or services incidental thereto;

5 SOR/88-23. The rules are made pursuant to s. 22(1)(b) of the NTA which provides:

> 22. (1) The Agency may, with the approval of the Governor in Council, make rules respecting
>
> ...
>
> (b) the manner of and procedures for dealing with matters and business before the Agency, including the circumstances in which in camera hearings may be held;

6 Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 at 845.

7 J.M. Evans et al., Administrative Law (4th ed.), (Toronto: Emond Montgomery, 1995) at 507.

8 Northwestern Utilities Ltd. v. Edmonton (City), [1979] 1 S.C.R. 684 at 706.

9 Desai v. Brantford General Hospital (1991), 87 D.L.R. (4th) 140 at 148 (Ont. Div. Ct.).

10 Northwestern Utilities, supra note 8 at 707.

11 Suresh v. Canada (Minister of Citizenship and Immigration), [2000] 2 F.C. 592 at 637 and 687-688.

12 (7th ed.) (Oxford: Clarendon Press, 1983).

13 These include undue prevention or lessening of competition (Combines Act, now the Competition Act), undue exploitation of sex (the Criminal Code), undue delay in movement of freight (Lord's Day Act) and undue hardship (human rights legislation).

14 Weidman v. Shragge (1912), 46 S.C.R. 1 at 42-43.

15 R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606 at 647.

16 R. v. Howard Smith Paper Mills Ltd., [1957] S.C.R. 403 at 425. The statement was made in the context of minority, concurring reasons but was approved of by the majority in R. v. Aetna Insurance Co., [1978] 1 S.C.R. 731 at 746.

17 Container Materials Ltd. v. The King, [1942] S.C.R. 147 at 152 per Duff C.J.C. The judgment of the majority expressed the same principle in other words. See R. v. Howard Smith Paper Mills Ltd, supra per Kellock J (for the majority) at 409.

18 R. v. Aetna Insurance Co., supra at 747-748. Ontario (Minister of Transportation and Communications) v. Canada (Canadian Transportation Commission), [1974] 2 F.C. 164 (C.A.).

19 Central Alberta Dairy Pool v. Alberta (Human Rights Commission), [1990] 2 S.C.R. 489 at 521.